

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50238
Summary Calendar

EARL ANTHONY JOSEPH,

Plaintiff-Appellant,

VERSUS

DEPUTY BARTLETT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-94-CA-132)

(September 30, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

This civil rights action by Earl Anthony Joseph arises out of his incarceration at the Travis County Correctional Center (the Center). Pursuant to 28 U.S.C. §1915(d), the district court dismissed Joseph's complaint. Because we hold that the court did not abuse its discretion in so doing, we **AFFIRM**.

I.

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Proceeding *pro se* and *in forma pauperis* (IFP), Joseph filed his complaint in March 1994, apparently attempting to state claims arising from his arrest and approximate two-month incarceration in late 1993 to early 1994 at the Center, in Del Valle, Texas.² Neither Joseph's description of the events that transpired then, nor his claim for relief, is clear. But, in determining whether the district court abused its discretion in dismissing Joseph's complaint, we construe the allegations liberally. ***Macias v. Raul A. (Unknown), Badge No. 153***, 23 F.3d 94, 96 (5th Cir. 1994).

In his complaint against Travis County Deputy Sheriffs Bartlett and Gebert, Joseph alleged the following: 1) an unidentified person told Bartlett and Gebert in front of other inmates that "Earl" was a homosexual and a murderer; 2) he got into a fight with his cellmate; 3) unnamed officers and inmates subjected him to a mock trial; 4) when he filed a complaint regarding the mock trial, "they got really crazy, by `exposing' themselves to inmates as well as officers, or while officers observed"; and 5) unnamed officers continued their "procedures" following his release from the Center. As relief, Joseph requested that the deputies and their "conspirators" be punished; and that the court grant such other relief as it deemed appropriate.

After his complaint was filed, Joseph completed a questionnaire provided by the magistrate judge to clarify his

² Apparently, on November 12, 1993, Joseph was arrested and charged with cocaine possession. He was incarcerated at the Center while awaiting a preliminary hearing. On January 19, 1994, the charges were dismissed for lack of probable cause. Joseph was released from custody the following day.

allegations. The questionnaire requested Joseph to "[d]escribe in detail the facts and circumstances which substantiate the allegations" in the complaint. Joseph responded with additional, non-specific allegations, including: 1) he was subjected to great mental stress because "police officers ... have access to opening mail and using such information" and that the officers "have access to infomation [sic] from clerks"; 2) that the deputies told other inmates things about him, both true and untrue; 3) that the deputies went to talk with his girlfriend; and 4) that a man with a crew cut interferred when Joseph approached a woman and that he has had a difficult time "approaching females" as a result.

In response to the request to specifically state "exactly what it is that [Bartlett] either did or failed to do that you believe gives you the right to recover judgment against him," Joseph stated:

Deputy Bartlett as stated in [the complaint] took part in the allegations which were all false. As did other deputies that I would give just about anything to be provided the opportunity to go there and get their names.

Joseph continued on, discussing another unidentified deputy and his need for an attorney. And, in response to the request to state what Deputy Gebert did or did not do, Joseph stated:

Deputy Gebert also took part in the false allegations as stated in [the complaint]. As did Bartlett. This deputy even had the nerve to ask me where my humor was? I didn't and don't find this matter funny or fun.

When requested to describe the harm and damages he sustained, Joseph stated:

... I lost a 1980 Seville and personal items therein. Tools, tape cassettes. I suffer[ed] the agony [sic] of my approach to females and I am under great mentall [sic] stress because of it. I am constantly on edge of fighting with people who I don't know and who don't know me. I now live a very very restrained life, due to this stress. Which is why I ask this court to grant me the appropriate [sic] and necessary relief and the return of the property I lost.

Joseph stated, however, that the damages he sought were not the result of a policy, practice, or custom of Travis County.³

The magistrate judge recommended dismissal pursuant to 28 U.S.C. §1915(d), concluding that the defendants were entitled to qualified immunity, and that Joseph had failed to assert that the named defendants violated any of his constitutional rights, much less any "clearly established" constitutional right. Liberally construing Joseph's complaint, the magistrate judge stated that even if the mock trial and the statements about Joseph being a homosexual and murderer were defamatory, they do not implicate any constitutional concerns. Additionally, the recommendation concluded that Joseph failed to establish that the defendants had any involvement in Joseph's fight with his cellmate.

Joseph filed objections to the magistrate judge's report and recommendation in a document captioned "Notice of Appeal, Objections, and Amended Complaint". In this document, Joseph added

³ Throughout the magistrate judge's questionnaire, questions refer to "Bexar County" rather than "Travis County." However, it is obvious that Joseph clearly understood the county in question to be Travis, not Bexar. In fact, on two occasions, when the questionnaire referred to "Bexar County", Joseph crossed out "Bexar" and wrote "Travis".

allegations that: 1) the arrest which resulted in his incarceration was made without probable cause; 2) because of the arrest, his car was impounded and he lost the car, its contents, and his prepaid insurance fees; and 3) the defendants were responsible for the fight that he had with his cellmate. Apparently, Joseph sought also to include additional defendants. He asserted that Officers Hayward and Manno of the Austin Police Department were responsible for his arrest and the subsequent loss of his car and personal property. Additionally, he added Travis County Deputy Sheriffs Martinez and Murray to the long litany of activities occurring at the Center. After a *de novo* review, the district court adopted the recommendation, and dismissed the complaint without prejudice.

II.

Dismissal of an IFP petition under § 1915(d) is appropriate if the petition lacks an arguable basis in law or in fact. ***Denton v. Hernandez***, ___ U.S. ___, ___, 112 S. Ct. 1728, 1733 (1992); ***Macias***, 23 F.3d at 97. We review a § 1915(d) dismissal only for abuse of discretion. ***Denton***, ___ U.S. at ___, 112 S. Ct. at 1734; ***Graves v. Hampton***, 1 F.3d 315, 317 (5th Cir. 1993).

A.

As noted, Joseph alleges that the deputies and inmates engaged in a conversation about him, referring to him as "their homosexual" and a murderer; and that the deputies staged a "kangaroo trial", with one deputy acting as a prosecutor. Although Joseph's argument is not clear, he suggests in his brief that the deputies should not have conducted the "trial" without the prior consent of his

attorney, and that the defendants threatened him "with confiscation of property and a stiff Jail sentence if [he] did not cooperate."

"A viable cause of action under § 1983 alleges the violation of a federally protected right at the hands of one acting under color of state law." **Barnes v. Lehman**, 861 F.2d 1383, 1385 (5th Cir. 1988). Insofar as Joseph alleges defamation by the deputies, invasion of an interest in reputation alone is insufficient to establish § 1983 liability because a damaged reputation, apart from injury to a more tangible interest, does not implicate any "liberty" or "property" rights sufficient to invoke due process. **Paul v. Davis**, 424 U.S. 693, 711 (1976); **Geter v. Fortenberry**, 849 F.2d 1550, 1556 (5th Cir. 1988). As for the allegation of a due process violation with regard to the "kangaroo trial", Joseph must assert a recognized liberty or property interest within the purview of the Fourteenth Amendment. **Griffith v. Johnston**, 899 F.2d 1427, 1435 (5th Cir. 1990), *cert. denied* 498 U.S. 1040 (1991). He fails to do so.

B.

Joseph maintains that his cellmate attacked him from behind in the presence of one of the deputies. He insinuates that the deputies caused the attack, stating that the cellmate attacked him after he returned from "somewhere". Although a prison official may have a duty under the Fourteenth Amendment to protect a pretrial detainee from deliberate exposure to violence, **Mataker v. Herr**, 748 F.2d 1142, 1150 (7th Cir. 1984), claimants in a § 1983 action are still required to state specific facts and not mere

conclusional allegations. *Brinkmann v. Johnston*, 793 F.2d 111, 113 (5th Cir. 1986).

Although courts construe IFP complaints liberally, particularly in the context of a § 1915(d) dismissal, they are still bound by the allegations in the complaint; courts may not speculate that the plaintiff may be able to state a viable claim if given another opportunity to add more facts to the complaint. As this court noted in *Macias*:

... if an IFP plaintiff, in "amending" his complaint through a response to a questionnaire, alleges in that response that he received inadequate medical care while incarcerated, we should not reverse the dismissal of the complaint on the basis that the plaintiff could possibly add facts that would demonstrate that he was treated with deliberate indifference in the medical care that he received. As another example, if an IFP prisoner asserts in the questionnaire response that he has been denied recreation time, we should not reverse dismissal on the ground that he might also be able to assert a claim that the denial was in retaliation for his having filed a grievance.

Macias, 23 F.3d at 97. Joseph provides no facts in support of his speculation that the deputies were responsible for the attack; therefore, his contention fails.

C.

In Joseph's complaint, the identity of who "exposed" themselves "to inmates as well as officers, or while officers observed" is unclear. In his brief, Joseph apparently clarifies this event by stating that the "inmates started exposing themselves while the deputies observed." Regardless, Joseph's assertion does not intimate the violation of a federal right. Abusive language

and gestures by prison guards, even if violent or threatening, do not amount to constitutional violations. **McFadden v. Lucas**, 713 F.2d 143, 146 (5th Cir.), *cert. denied*, 464 U.S. 998 (1983). Accordingly, the contention is without merit.

D.

Finally, Joseph claims that he was arrested without probable cause. He asserts that the officers who arrested him were aware that no probable cause existed to arrest him and that "if [the deputies] were aware of the fact that [he] was being held without probable cause, then those deputies would be liable under the Fourth Amendment...." (Emphasis added.)

Joseph first raised the lack of probable cause in his objections to the magistrate judge's report and recommendation. The district court did not directly address this argument. Issues raised for the first time in objections to the magistrate judge's report and recommendation are not properly before the district court and need not be addressed by this court. See **Cupit v. Whitley**, 28 F.3d 532, 535 n.5 (5th Cir. 1994). Even if this court construes Joseph's allegation as a motion to amend his complaint, see **Sherman v. Hallbauer**, 455 F.2d 1236, 1242 (5th Cir. 1972) (leave to amend pleading out-of-time should be given freely when justice so requires), the district court did not abuse its discretion by denying it, because the allegation was unrelated to the original complaint and was directed to parties who were not defendants. See **Ashe v. Corley**, 992 F.2d 540, 542 (5th Cir. 1993). Joseph's contention that the defendants knew about his allegedly

illegal incarceration is conclusional.⁴ **Brinkmann**, 793 F.2d at 113. Furthermore, the district court's dismissal was without prejudice; Joseph is not prejudiced by the district court's refusal to consider the claim. See **Graves**, 1 F.3d at 318.⁵

III.

For the foregoing reasons, the judgment is

AFFIRMED.

⁴ Joseph filed a "Motion of Supporting Evidence" in which he submitted a letter from his attorney discussing possession-of-cocaine charges. Joseph contends that the letter, which states that the State must either indict him or hold a preliminary hearing, proves that the deputies "were informed of the illegal arrest". This assertion is without merit.

⁵ Joseph has filed a motion for the appointment of counsel on appeal. This court may appoint counsel to represent a § 1983 plaintiff in "exceptional circumstances", such as the presentation of new or complex issues. **Cooper v. Sheriff, Lubbock County, Tex.**, 929 F.2d 1078, 1084 (5th Cir. 1991). Joseph's allegations do not raise complex or novel issues which satisfy the "exceptional circumstances" requirement; appointment of counsel is **DENIED**.