

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50532
Summary Calendar

ELISHA SHABAZZ AZIZ WADUD MUHAMMAD
a/k/a Roland 7x Rudd,

Plaintiff-Appellant,

versus

CARL D. NESS, et al,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-90-CA-229)

(February 2, 1995)

Before JOHNSON, KING, and DeMOSS, Circuit Judges.

JOHNSON, Circuit Judge:¹

Elisha Shabazz Aziz Wadud Muhammad a/k/a Roland 7x Rudd ("Muhammad") filed suit against several Texas Department of Criminal Justice Institutional Division ("TDCJ-ID") employees pursuant to 42 U.S.C. § 1983. Following a jury verdict for the defendants and a judgment entered in accordance with that verdict, Muhammad appeals. Because we do not find that the trial court

¹Local 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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

committed any reversible error, we affirm.

I. Facts and Procedural History

On May 28, 1990, the defendants—prison officers on a use-of-force team—were dispatched to Muhammad's cell after receiving a complaint that Muhammad had been throwing liquid on other correction officers. The defendant officers removed Muhammad from his cell while it was searched for containers. After being handcuffed and removed, Muhammad began resisting. In response to his resistance, the defendant officers restrained Muhammad by placing him on the floor. After the officers secured Muhammad in leg irons, they immediately escorted him to the infirmary where a medical exam was conducted. No injuries were found.

Muhammad then filed this suit pursuant to 42 U.S.C. § 1983, alleging that the officers used excessive force against him during this incident. The district court granted the officers' motion for summary judgment on qualified immunity grounds. The court determined that Muhammad had failed to state a claim that a constitutional violation occurred. The court reasoned that the use of force was provoked by Muhammad and no cognizable injury had occurred.

This Court, upon appeal from that summary judgment, determined that Muhammad's declaration made under the penalty of perjury raised factual issues precluding summary judgment and that Muhammad had met the requisite test for a trial by jury. Therefore, this Court remanded this case to the district court for a full jury trial on the merits. Muhammad's trial proceeded, and the jury

found in favor of the defendant prison officials. The district court entered judgment against Muhammad in accordance with the jury's findings. Muhammad now appeals on various procedural grounds.

II. Discussion

Because this is an appeal grounded on several procedural defects, each alleged defect will be individually analyzed and discussed.

A. Denial of Motion to Subpoena Witnesses

First, Muhammad claims that the district court abused its discretion by denying his motion to subpoena character witnesses who could testify on his behalf. Muhammad sought subpoenas for five female prison guards who Muhammad stated were "necessary to establish motive, the character and reputation of Defendants and the plaintiff." The district court denied Muhammad's motion because Muhammad had shown neither the relevancy of the witnesses' testimony nor the unwillingness of the witnesses to testify on their own volition.

This Court reviews a district court's refusal to issue a subpoena for abuse of discretion. *Gibbs v. King*, 779 F.2d 1040, 1047 (5th Cir.), *cert. denied*, 476 U.S. 1117 (1986). The litigant must demonstrate a substantial need for the witness' trial testimony before the Court will find that the district court abused its discretion by refusing to issue a subpoena. *See id.*; *see also Cupit v. Jones*, 835 F.2d 82, 86-87 (5th Cir. 1987). Although this Court reviews pro se briefs liberally, the pro se appellant still

must demonstrate to the Court the grounds on which the appeal is brought. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

Muhammad has not demonstrated the need for the witnesses he wanted subpoenaed. Neither has he shown that the witnesses would not have voluntarily testified in the absence of such subpoenas. Additionally, Muhammad has not articulated how the district court's refusal to subpoena the witnesses constituted an abuse of discretion. Under circumstances as these where there is absolutely nothing in the record to show *how* the plaintiff was prejudiced by the district court's refusal to subpoena witnesses, this Court cannot reverse the district court.

B. Denial of Motion for Subpoena Duces Tecum

As his next ground of appeal, Muhammad contends that the district court abused its discretion by refusing to issue a subpoena duces tecum to obtain: all of Muhammad's TDCJ-ID medical records; his entire central and until file; and all grievances, writs, letters, I-60 forms, and affidavits he had filed in 1990. Although the district court denied Muhammad's request for a subpoena duces tecum, the court ordered that the defendants have all of the requested information available at trial. The defendants then filed a motion for reconsideration stating that they had already provided Muhammad with all relevant medical records, that the other evidence sought was irrelevant, and that Muhammad's request was overly broad and burdensome. The district court then ordered the defendants to provide Muhammad with any

additional information beyond that which had been provided. Muhammad complains only that no information was provided to him during the bench trial. He does not cite to the record, show the relevance of the information sought, nor demonstrate prejudice caused by the denial of the subpoena duces tecum.

The district court's refusal to issue a subpoena duces tecum is reviewed for an abuse of discretion. See *Cupit*, 835 F.2d at 87. A district court may limit discovery if the information sought is duplicative, unreasonably cumulative, or when the burden of discovery outweighs the likely benefit of the information sought. FED. R. CIV. P. 26(b)(2).

In this case, the district court clearly found that the subpoena duces tecum request was unnecessarily duplicative and burdensome. Muhammad again provides no basis to refute the district court's findings other than by simply pointing out that the information was not available to him. Without a showing of either relevancy of the information or prejudice due to the information's absence, this Court cannot find that refusal to issue a subpoena duces tecum constitutes an abuse of discretion by the district court.

C. Disallowance of Evidence Showing
Retaliation Against Writ Writers

The third argument made by Muhammad on appeal is that the district court abused its discretion when the court would not allow him to read aloud from *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980). The *Ruiz* court found that the Texas prison system had

practiced cruel and unusual punishment against the writ writers in that particular case. *Id.* at 1299. Muhammad argues that the *Ruiz* decision was admissible against the prison system as impeachment evidence.

By introducing evidence of prior cases involving section 1983 violations against the TDCJ-ID, Muhammad was trying to demonstrate that the department and its employees had a proclivity to engage in the behavior he was alleging in his own suit.² Rule 404 of the Federal Rules of Evidence clearly prohibits the introduction of prior bad acts of a defendant to show proclivity of that defendant to engage in similar acts. *See* FED. R. CIV. EVID. 404. Muhammad seeks to reach even further by introducing evidence of the prior bad acts of an institutional non-defendant to show proclivity of an individual actual defendant. The activities of the *TDCJ-ID* in the past are wholly irrelevant to the claims against *individual employees* in their individual capacities such as the one at bar. Therefore the district court did not err in refusing to allow Muhammad to read to the jury from the *Ruiz* case.

D. Jury Instructions

Muhammad's fourth argument on appeal is that the district court's jury instruction was faulty and prejudicial. First, Muhammad claims that the instructions were faulty because they allowed the jury to believe that TDCJ-ID was permitted to use

²In Muhammad's brief to this Court he specifically states that he was attempting to "submit evidence that TDCJ has a history of retaliating, harassing, and punishing writ writers because of their legal activities." (Blue Brief at 4.)

corporal punishment for disciplinary actions. Secondly, Muhammad complains that the use of the word "linchpin" in the jury instructions denied him a fair trial because of its easy association with the word "lynchpin." Muhammad's argument is that because he is black the sound of the word "linchpin" is so closely associated with the plight of black people and the history of slavery in the United States that its use in the jury instructions improperly prejudiced him.

Reversal based on jury instructions is appropriate only when the charge, taken as a whole, leaves a "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993). Muhammad has failed to demonstrate any reversible error in the jury instructions.³ The district court made no direct reference to corporal punishment so as to mislead the jury in any way. Additionally, the "linchpin" argument lacks any reasonable basis in the record and is wholly without merit.

E. Denial of Court-Appointed Attorney

Finally, Muhammad argues that the district court abused its discretion by denying his motion to appoint counsel because Muhammad's health was so bad as to mandate counsel's assistance.⁴

³Muhammad has failed to present this Court with the transcript of the district court proceedings so it is likely that the jury instruction issue has not even been preserved for appeal.

⁴Muhammad expressly complains that his health was so bad as to result in the trial being cut short by one day due to his experiencing severe chest pains. However, neither the docket sheet nor any other part of the record reveals that the trial was shortened in any way.

In denying Muhammad's motion, the district court noted that Muhammad's case presented no exceptional circumstances meriting the appointment of counsel.⁵ Muhammad has not provided this Court with a transcript of the trial, nor has he moved this Court for the production of a trial transcript.

Counsel is appointed in civil cases only in exceptional circumstances. *Richardson v. Henry*, 902 F.2d 414, 417 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). Refusal by the district court to appoint counsel will be reviewed for an abuse of discretion only. *Jackson v. Cain*, 864 F.2d 1235, 1242 (5th Cir. 1989).

There is simply nothing in the record to indicate that Muhammad lacked the ability to represent himself in this action. In fact, quite to the contrary, Muhammad is an experienced writ writer and is himself claiming that status to be the basis of any abuses aimed toward him. Under these circumstances, the district court did not abuse its discretion by refusing to appoint counsel for Muhammad.

III. Conclusion

Muhammad has failed to demonstrate error or prejudice due to the actions of the district court in his section 1983 action. Therefore, this Court affirms the judgment of the district court in all respects.

⁵It is noteworthy that Muhammad is challenging much of the officers' behavior on the grounds that they were retaliating against him for his being a writ writer in the prison. Muhammad's status as a writ writer would seem to indicate that he was among the more knowledgeable prisoner as to legal matters.

AFFIRMED.