UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60272
Summary Calendar

JACK E. SMITH,

Plaintiff-Appellant,

versus

LAKE LINDSEY, Superintendent, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi (93-CV-782)

(May 18, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Jack E. Smith, *pro se* and *in forma pauperis*, appeals the dismissal of his 42 U.S.C. § 1983 civil rights action against Mississippi prison officials. We **AFFIRM**.

I.

In December 1993, Smith, an inmate at the Rankin County Correctional Facility, filed a civil rights action alleging that prison officials violated his constitutional rights by (1) housing

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

him in a room with inadequate ventilation; (2) subjecting him to "lock down" without a valid reason; (3) denying him adequate access to the law library and religious services; (4) denying him a state-created liberty interest in his custody status; and (5) denying him adequate opportunity for exercise and access to a security officer. In an amended complaint, Smith added the prison law library director as a defendant, and asserted that the denial of adequate and timely access to the law library constituted sex discrimination because he is assigned to a women's correctional facility and does not have the same privileges as the female inmates. And, in a supplemental complaint, Smith added an employee of the inmate canteen as a defendant; he alleged that his constitutional rights were violated by (1) the canteen's practice of charging double sales tax on his purchases, (2) inadequate access to the law library during December 1993 and January 1994, and (3) transportation of inmates to the hospital because the van was overcrowded and did not have seatbelts or liability insurance. The defendants were served with process and answered, asserting *res judicata* as an affirmative defense.

At an omnibus hearing in March 1994, the parties agreed to proceed before a magistrate judge. Smith conceded at the hearing that, with the exception of his sales tax and sex discrimination claims, he had litigated all of the claims raised in the instant action in a prior state court action which had been dismissed as frivolous; he informed the magistrate judge that he did not appeal

because he could not afford the $100 filing fee.[2] At the conclusion of the hearing, the defendants moved for dismissal of the action on *res judicata* grounds.

In a memorandum opinion, the magistrate judge granted the defendants' motion to dismiss the claims which Smith conceded had been previously litigated in state court, and dismissed Smith's sales tax and sex discrimination claims pursuant to 28 U.S.C. § 1915(d), because those claims "do not rise to the level of a constitutional nature and do not have a basis in law or fact".

II.

Smith contends that his consent to proceed before the magistrate judge is invalid, and that the magistrate judge erred by dismissing his claims.

A.

Smith asserts that he was induced into agreeing to allow a magistrate judge to conduct the proceedings based on the magistrate judge's promise that another hearing would be conducted so that Smith might develop his case further through testimony from witnesses; he asks "to withdraw his agreement with [the magistrate judge] so the Chief Justice can handle the case".

"Upon the consent of the parties, a full-time United States magistrate judge ... may conduct any or all proceedings in a jury

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[2] The order setting the omnibus hearing stated that it would operate as a ***Spears*** hearing (*see* ***Spears v. McCotter***, 766 F.2d 179 (5th Cir. 1985)), and/or a scheduling, discovery, status, or pretrial conference. The order stated further that the court would consider outstanding motions at the hearing, and that any motion not then brought before the court would be deemed abandoned.

or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1); ***Mendes Junior Int'l Co. v. M/V SOKAI MARU***, 978 F.2d 920, 922 (5th Cir. 1992). "[C]onsent to trial before a magistrate [judge] waives the right to trial before an article III judge". ***Carter v. Sea Land Servs., Inc.***, 816 F.2d 1018, 1021 (5th Cir. 1987).

The court must "take positive steps to ensure that the parties understand their right to consent, and to protect the voluntariness of that consent". ***Id***. at 1020. "[W]hen the magistrate [judge] enters judgment pursuant to 28 U.S.C. § 636(c)(1), absence of the appropriate consent and reference (or special designation) order results in a lack of jurisdiction (or at least fundamental error that may be complained of for the first time on appeal)". ***Mendes***, 978 F.2d at 924.

The hearing transcript does not support Smith's claim that his consent was involuntary or coerced, or that the magistrate judge promised him another opportunity to present witnesses to develop his case:

> [THE COURT]: The Magistrate Judges can try your case if you and [the defendants] consent to it .... If you consent to the Magistrates trying it, you['ve] got nine potential judges instead of six, which gives you a chance to get it heard a little quicker usually. Are you interested in consenting to it being tried by any one of these nine judges including the three Magistrates?
>
> [SMITH]: I don't care who tries it. All I want is to be fair. It doesn't make any difference.
>
> ....

> [THE COURT]: You're satisfied with consenting to the case being tried by one of the three Magistrate Judges as well as the six District Judges. I need you to sign right there?
>
> [SMITH]: Anybody. Anybody can try it.

Smith's misunderstanding of the court's authority to dismiss his complaint without conducting another hearing does not demonstrate that his consent was involuntary. Accordingly, there is no basis for his request to withdraw it.

B.

Smith contends that the magistrate judge erred by using *res judicata* as a basis for dismissing his complaint, asserting that his state and federal claims are not identical. The application of *res judicata* is an issue of law which we review *de novo*. *E.g.*, ***Schmueser v. Burkburnett Bank***, 937 F.2d 1025, 1031 (5th Cir. 1991). "[T]he Full Faith and Credit Act, 28 U.S.C. § 1738, requires us to accord a state court judgment the preclusive effect which it would have under state law". ***Schuster v. Martin***, 861 F.2d 1369, 1371 (5th Cir. 1988). Under Mississippi law, "res judicata precludes all claims that were or could have been brought in the underlying action". ***McIntosh v. Johnson***, 649 So. 2d 190, 192 (Miss. 1995).

The magistrate judge determined that "[o]n the face of the complaint, confirmed by his sworn testimony at the omnibus hearing, [Smith] concedes that he has previously sued these defendants in [state court in Mississippi] complaining of all the issues alleged herein, except for the claims regarding sales tax and sexual discrimination"; that the state court determined that all of the claims were frivolous; and that Smith did not appeal that judgment

to the Mississippi Supreme Court. Smith cannot now, for the first time on appeal, contradict his sworn admission at the hearing that his current claims against the defendants are the same as those asserted in the prior state court action. Accordingly, the magistrate judge correctly applied *res judicata*.

C.

Smith contends that the magistrate judge abused his discretion by dismissing his sex discrimination and sales tax claims as frivolous. Under 28 U.S.C. § 1915(d), a court may dismiss a complaint filed *in forma pauperis* "if satisfied that the action is frivolous or malicious". 28 U.S.C. § 1915(d). "A claim is frivolous under § 1915(d) only if it lacks an arguable basis either in law or in fact." ***Parker v. Fort Worth Police Dep't***, 980 F.2d 1023, 1024 (5th Cir. 1993) (internal quotation marks and citation omitted). We review § 1915(d) dismissals for abuse of discretion. ***Denton v. Hernandez***, 504 U.S. 25, 112 S. Ct. 1728, 1734 (1992).

At the hearing, Smith testified that the basis for his sex discrimination claim is that the female inmates are allowed to go to the "big [grassy] outside yard", but the male inmates have only a "little [concrete] cubicle about half as big as a basketball court" for recreation and exercise. In his appellate brief, Smith mentions this claim in a single sentence, unsupported by any citation to the record or any legal authorities.[3] His sales tax

[3] Smith reasserts two additional sex discrimination claims stated in his complaint, based on inadequate access to the law library and prison officials' denial of equal opportunities to male inmates housed at the women's facility. Because he did not present these claims at the hearing, they need not be addressed. *See* ***Riley***

claim is similarly unsupported. Although "we construe *pro se* [briefs] liberally, *pro se* litigants ... must abide by the Federal Rules of Appellate Procedure". *See* ***United States v. Wilkes***, 20 F.3d 651, 653 (5th Cir. 1994). Those rules require "that the appellant's argument contain the reasons he deserves the requested relief with citation to the authorities, statutes and parts of the record relied on". ***Yohey v. Collins***, 985 F.2d 222, 225 (5th Cir. 1993) (internal quotation marks and citation omitted). By failing to brief adequately his sex discrimination and sales tax claims, Smith has abandoned them.[4] ***Id***. at 224-25.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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v. Collins, 828 F.2d 306, 307 (5th Cir. 1987) (claims asserted at a ***Spears*** hearing supersede those made in complaint).

Smith asserts further that these same acts constitute racial discrimination. Because Smith did not raise these issues in the district court, we decline to exercise our discretion to consider them for the first time on appeal. *See* ***Highlands Ins. Co. v. National Union Fire Ins. Co.***, 27 F.3d 1027, 1031-32 (5th Cir. 1994) (applying, in civil case, plain error analysis of ***United States v. Olano***, ___ U.S. ___, 113 S. Ct. 1770 (1993)), *cert. denied*, ___ U.S. ___, 115 S. Ct. 903 (1995).

[4] Smith's motion to expedite the appeal is denied as moot.