

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60569
Summary Calendar

MILTON JAMES WHITE

Plaintiff-Appellant,

versus

ALBERT WALKER, Sheriff, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the
Southern District of Mississippi
(4:92-CV-82)

(September 27, 1995)

Before JOHNSON, JOLLY, and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:¹

Prisoner civil rights plaintiff Milton White ("White") appeals the district court's judgment in favor of the defendant sheriff's department personnel in his 28 U.S.C. § 1983 suit. Because we believe that the district court did not in any way err during the proceedings of the bench trial, we affirm.

I. Facts and Procedural History

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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

White was arrested in August of 1991 and charged with breaking and entering into an occupied dwelling as well as with aggravated assault. While the charges were pending, White was incarcerated in the Noxubee County, Mississippi jail. On August 31, 1991, White and two other inmates escaped from the jail. Noxubee County Sheriff's deputies recaptured White the following morning. Initially, White was charged with escape; however, pursuant to a plea agreement, White pleaded guilty to charges of escape and false pretenses in exchange for the dropping of the breaking and entering and assault charges. White was sentenced to a term at the Mississippi State Penitentiary at Parchman, where he is currently serving out his sentence.

On August 3, 1992, White filed a complaint pursuant to 42 U.S.C. § 1983, alleging that Noxubee County Sheriff Albert Walker, deputies Ernest Eichelberger and Vernon Permenter, and the Noxubee County Sheriff's Department (collectively referred to as the "Sheriff's Department") had subjected him to excessive force and racial discrimination while he had been incarcerated in the Noxubee County jail. During the subsequent bench trial, White also complained about the denial of access to medical treatment and about the conditions of confinement at the jail--specifically, the faulty plumbing, the poor lighting, and the lack of mattresses for the prisoners.

During the trial White's wife was called as a witness by the Sheriff's Department. White objected at trial to his wife's being allowed to testify in the proceeding because the two had been "on

bad terms." (Record 2, 228). The court overruled the objection, stating that if White established that his wife maintained enough animosity toward him to prejudice her testimony the court would consider that in weighing her credibility. The court stated that any such animosity, however, did not by itself disqualify her from testifying. White's wife testified about her visits to the Noxubee County jail, her observations of White's physical condition during those visits, and White's reputation for dishonesty. She stated that she did not remember seeing him in leg shackles during her visits and that she never observed any cuts or bruises on White's face. Mrs. White also testified that during her visits White told her that he was being discriminated against on the basis of his race and that he was being mistreated by the defendants. She stated, however, that she did not believe White's statements and that White never complained to her that he was being denied access to medical care.²

The district court determined that White's testimony that the defendants beat him and that they were deliberately indifferent to his medical needs was not credible. The court noted that none of White's own witnesses had testified that they ever saw him beaten, that they observed any effects of his being beaten, nor that White had ever mentioned to them that he had been beaten. Deputies Eichelberger and Permenter testified that they never struck or

²There was nothing in the record to indicate whether these particular conversations about race discrimination, mistreatment, or lack of medical treatment took place in private or within the presence of third parties.

pushed White, nor did they witness any other defendant do so. Eichelberger testified that he observed cuts and bruises on White's body on two occasions: after White was recaptured after his escape and immediately following a fight with another inmate. Both Eichelberger and Permenter also testified that they visited the jail almost every day and that they had no doubt that the inmates were given the medication which had been prescribed for them, that the inmates were fed three meals a day, that they slept either on mattresses or foam pads, and that White was never forced to sleep in shackles.

At the conclusion of the bench trial, the district court considered the evidence and then entered judgment in favor of the defendants. White now appeals.

II. Discussion

Because White bases his appeal on three distinct grounds, each will be discussed separately.³

A. Appointment of Counsel Due to Pro Se Status

White contends that the district court failed to hold him to the less stringent standard of litigation due a pro se plaintiff.

³White also asserts several additional arguments for the first time on appeal--such as that the Noxubee County Sheriff's office failed to implement policies or procedures to protect him from the harms he alleges. Such arguments raised for the first time on appeal need not be addressed by this Court and do not merit address in the case at bar. See *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

Additionally, White failed to brief on appeal his district court contention that the Sheriff's Department discriminated against him on the basis of his race. Because issues not briefed on appeal are deemed abandoned by this Court, this issue will also not be addressed. See *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

He claims that he did not have the skills necessary to present his case in the district court and, thus, the district court should have granted his motion for appointment of counsel. The problem is that after White's motion for appointment of counsel had been presented to and rejected by the magistrate judge, White did not appeal the magistrate's denial to the district court. Since this Court is without jurisdiction to hear appeals directly from federal magistrates, this Court cannot address the appointment of counsel issue. See *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 379 (5th Cir. 1989).

B. Spousal Communications Privilege

White asserts that the district court erred by allowing his wife to testify against him over his objection. When the spousal communications privilege is invoked by a party, one spouse may not testify about private conversations which occurred between the spouses. See *United States v. Koehler*, 790 F.2d 1256, 1258 (5th Cir. 1986).

The spousal communication privilege was not violated in the district court. White's wife testified about her visits to the Noxubee County jail, her observations, and White's general reputation. None of this type of testimony even implicates the spousal privilege because such testimony is not based on private *communications* between the spouses. Additionally, White did not properly preserve a spousal communication privilege objection for appeal because he objected at trial on the basis of the animus that existed between the spouses instead of on the basis of the

privileged nature of spousal communications. Regardless of the improper objections, however, any error by the district court in admitting Mrs. White's testimony was harmless because her testimony was cumulative of other testimony at trial. See *United States v. Pineda-Ortuno*, 952 F.2d 98, 106 (5th Cir.), cert. denied, 112 S. Ct. 1990 (1992).

C. Clearly Erroneous Findings

White's final contention is that the district court's decision should be reversed because the decision was based on clearly erroneous findings of fact. White essentially argues that the district court erred by rejected his testimony and accepting the Sheriff Department's version of events.

This Court reviews factual findings under the clearly erroneous standard. *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986). A district court's findings of fact are not clearly erroneous if they are "plausible in light of the record viewed in its entirety[.]" *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). Moreover, credibility determinations are peculiarly within the province of the district court when, as here, the district court sits as trier of fact. *Kendall v. Block*, 821 F.2d 1142, 1146 (5th Cir. 1987). This Court will declare testimony incredible as a matter of law only when such testimony is so unbelievable on its face that it defies physical laws. *United States v. Casteneda*, 951 F.2d 44, 48 (5th Cir. 1992).

The district court chose to believe the Sheriff Department's explanation of events and chose to credit their testimony over

White's. As the Sheriff Department's testimony did not defy physical laws and the record amply supports the district court's factual findings, those findings are not clearly erroneous.

III. Conclusion

Given that all of White's appellate bases are groundless, the district court's decision is affirmed in full.

AFFIRMED.