

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 97-40166  
Conference Calendar

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WILLIAM EARL CUNNINGHAM,

Plaintiff-Appellant,

versus

CINO DE LA VAGA ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 9:96-CV-386  
- - - - -

October 31, 1997

Before POLITZ, Chief Judge, and WIENER and DENNIS, Circuit Judges.

PER CURIAM:\*

William Earl Cunningham, Texas prisoner #643591, appeals from the dismissal of his civil rights action as frivolous. Cunningham contends that the defendants were deliberately indifferent to his safety; that the defendants deprived him of the right to an investigation of attacks against him; and that the defendants conspired to cover up the attacks against him by failing to investigate them.

Cunningham failed to object to the magistrate judge's report

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and the district court did not review his claims *de novo*. We therefore review Cunningham's appellate contentions for plain error. *Douglass v. United Servs. Auto. Assn.*, 79 F.3d 1415, 1428-29 (5th Cir. 1996)(en banc).

Cunningham alleges for the first time on appeal that excessive force was used against him in July 1994 and July 1996. Whether force was used against Cunningham on those dates is a factual issue; Cunningham cannot show plain error because the district court did not consider that factual issue or any legal contentions related to it. *Robertson v. Plano City of Texas*, 70 F.3d 21, 23 (5th Cir. 1995).

It was not plainly erroneous for the district court not to consider Cunningham's contention that the defendants were deliberately indifferent to his safety regarding an attack by inmate John Kirven. Cunningham alleged no facts in his complaint that gave rise to any inference of deliberate indifference. See *Neals v. Norwood*, 59 F.3d 530, 533 (5th Cir. 1995).

Regarding Cunningham's contention that the defendants deprived him of the right to have the attack by Kirven investigated, we find the contention frivolous for essentially the same reasons relied upon by the district court. *Cunningham v. de la Vaga*, No. 9:96-CV-386 (E.D. Tex. Oct. 16, 1996).

Regarding Cunningham's contention that the defendants conspired to cover up the attack by Kirven, Cunningham has not shown that the defendants violated any constitutionally protected right.

*Farrar v. Cain*, 756 F.2d 1148, 1151 (5th Cir. 1988).

Cunningham's appeal is frivolous and therefore is dismissed.

APPEAL DISMISSED. 5TH CIR. R. 42.2.