

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-5312

(Summary Calendar)

BOBBY MICHAEL DENNIS, ET AL.,

Plaintiffs,

BOBBY MICHAEL DENNIS,

Plaintiff-Appellant,

versus

JAMES UPSHAW ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(92-CV-31)

(November 24, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

In this civil rights action under 42 U.S.C. § 1983, plaintiff Bobby Michael Dennis appeals the dismissal of his complaint alleging that a prison guard subjected him to excessive force in violation of the Eighth Amendment. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Dennis, an inmate in the Texas Department of Criminal Justice Institutional Division, proceeding *pro se* and *in forma pauperis*, filed a § 1983 complaint alleging that prison guard Robert Trevino inflicted cruel and unusual punishment upon him, in violation of his Eighth Amendment rights. The parties consented to try the case before a magistrate judge. At trial, Dennis testified that Trevino attacked him because he intended to file a grievance against Trevino as a result of an earlier, non-physical confrontation between them. Two inmates called as witnesses by Dennis testified that Trevino started the incident by pushing Dennis, although neither saw who threw the first punch. Trevino, on the other hand, testified that Dennis struck the first blow and he punched Dennis only in self-defense. Four other prison officers generally corroborated Trevino's testimony. After hearing the testimony, the magistrate found that Dennis initiated the altercation by striking Trevino, thereby causing a struggle during which Dennis and Trevino hit each other several times. The magistrate then concluded that Trevino did not use excessive force in light of the circumstances. Dennis now appeals.

II

Dennis initially contends that the district court erred in concluding that Trevino's use of excessive force violated his Eighth Amendment rights. We review the district court's factual findings for clear error. *Hudson v. McMillian*, 962 F.2d 522, 523 (5th Cir. 1992) (*Hudson II*). In doing so, we must give due regard to the

court's assessment of the credibility of the witnesses. *Id.* However, we review questions of law de novo. *Palmco Corp. v. American Airlines, Inc.*, 983 F.2d 681, 684 (5th Cir. 1993).

To state an Eighth Amendment excessive force claim, a prisoner must demonstrate that prison officials applied force "maliciously and sadistically to cause harm," and not "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, ___ U.S. ___, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156 (1992) (*Hudson I*). We consider the following factors in determining whether prison officials unnecessarily and wantonly inflicted pain upon a prisoner in violation of his eighth amendment rights: (1) the extent of the injury suffered; (2) the need for application of force; (3) the relationship between the need and amount of force used; (4) the threat reasonably perceived by the responsible officials; (5) any efforts made to temper the severity of a forceful response. *Hudson II*, 962 F.2d at 523 (citing *Hudson I*, ___ U.S. at ___, 112 S. Ct. at 999).

The record amply supports the magistrate's findings that Dennis initiated the altercation and Trevino used only that force necessary to maintain and restore discipline in light of Dennis's attack. Several witnesses testified both that Dennis struck Trevino without provocation and that Trevino did not use excessive force at any time during the encounter. Indeed, Lieutenant Michael Upshaw and Officer Richard Bouman testified that Dennis most likely "got the best" of Trevino during the altercation. Accordingly, the magistrate's finding that Trevino's use of force did not amount to

an unnecessary and wanton infliction of pain upon Dennis is not clearly erroneous. We therefore affirm the judgment for Trevino.

III

Dennis next contends that the magistrate judge should have appointed counsel to represent him. "Counsel will be 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, 111 S. Ct. 789, 112 L. Ed. 2d 852 (1991). "Among the factors considered when deciding whether counsel should be appointed are the complexities of the issues and whether the party is capable of representing himself." *Id.* The pleadings, briefs, and trial transcript demonstrate that the issues in this case are not overly complex and that Dennis adequately represented himself during the proceedings below. Consequently, the magistrate did not abuse her discretion by refusing to appoint counsel to represent Dennis. *Id.*; see also *Cooper v. Sheriff, Lubbock County*, 929 F.2d 1078, 1084 (5th Cir. 1991).¹

IV

For the foregoing reasons, we AFFIRM the judgment of the district court.

¹ The magistrate judge also found that Dennis sued defendants Shaw (the warden), Figueroa (an assistant warden), and Strain (a captain) in their supervisory capacities and therefore dismissed the claims against them. Because a civil rights claim under § 1983 cannot rest on vicarious or respondeat superior liability, see *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S. Ct. 445, 453-54, 70 L. Ed. 2d 509 (1981); *Williams v. Luna*, 909 F.2d 121, 123 (5th Cir. 1990), we affirm this portion of the district court's order. The magistrate also severed and dismissed without prejudice Dennis's claim that prison officials wrongly disciplined him for the altercation with Trevino. See *Caldwell v. Line*, 679 F.2d 494, 496 (5th Cir. 1982). Dennis does not appeal this decision. Furthermore, we have reviewed all other claims of error raised by Dennis on appeal and find them to be without merit.