UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7249
Summary Calendar

JOHN D. MILLSAP,

Plaintiff-Appellant,

VERSUS

WALTER BOOKER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
(CA-4:91-77-S-D)

(February 28, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

John D. Millsap, an inmate at the Mississippi State Penitentiary at Parchman, appeals, *pro se*, the dismissal of his § 1983 action against several prison officials. We **AFFIRM.**

I.

Millsap was attacked by several other inmates in the exercise yard at Parchman in June 1989. Despite Parchman's policies to the contrary, not all inmates in the maximum security unit where Millsap was incarcerated were thoroughly searched before being

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

allowed into the exercise yard. Also contrary to policy, no guard was stationed in the tower which overlooks the yard, at the time of the attack.

Several officers, including one of the defendants, were able to see the events taking place in the yard from their stations elsewhere. In particular, defendant Officer Willie Gooden, who was supervising non-contact visitation from the guard shack nearby, could see what was happening. Gooden immediately called for assistance, and then went to the exercise yard when he saw the fight start. Millsap alleges that the fight lasted for some time before the guards stopped it; and that at least one defendant, Officer Larry Mitchell, knew in advance that the fight would occur. Millsap was stabbed and, he alleges, allowed to lie in the yard until an ambulance arrived.

After this incident, Millsap brought an action challenging the conditions of his confinement under 42 U.S.C. § 1983. Millsap sued six prison officers: Mississippi Department of Corrections (MDC) Commissioner Lee Roy Black, Assistant Superintendent Walter Booker, MDC Colonel Robert Armstrong, Captain Tommy Ross, and Officers Gooden and Mitchell.

After a ***Spears*** hearing, *see* ***Spears v. McCotter***, 766 F.2d 179 (5th Cir. 1985), the magistrate judge recommended that Millsap's claims against all defendants except Gooden and Mitchell be dismissed. Millsap did not file objections to the magistrate judge's report and recommendation, and it was adopted by the district court.

A bench trial for Gooden was held before the magistrate judge on August 14, 1992; as of that time, Mitchell had still not been served with process.[2] Gooden moved for a judgment at the close of Millsap's case, and the magistrate judge recommended that it be granted. After an independent review of the record, the district court adopted the magistrate judge's report and recommendation, granted judgment as a matter of law, and dismissed the case.

II.

A.

The majority of Millsap's numerous contentions concern his allegations that prison officials failed adequately to protect him from being injured. He claims that the defendants' failure to protect him violated his Eighth Amendment right to be free from cruel and unusual punishment, and also his Fourteenth Amendment right to due process. A prison guard may violate this Eighth Amendment right of a prisoner if the guard is deliberately indifferent to the prisoner's need to be protected from other inmates. ***Wilson v. Seiter***, __ U.S. __, __, __, 111 S. Ct. 2321, 2323, 2326-27 (1991). But, on the other hand, a prison guard's simple negligence in failing to protect an inmate from harm does not amount to a constitutional violation. ***Davidson v. Cannon***, 474 U.S. 344, 347-48 (1986), *quoted in* ***Johnston v. Lucas***, 786 F.2d

[2] An order to show cause why Mitchell should not be dismissed for failure to serve him with process was entered March 31, 1992. It provided that Mitchell should be dismissed pursuant to Fed. R. Civ. P. 4(j), unless Millsap could, within 20 days, show good cause why service was not made. Mitchell requested that service be attempted again; it was, and the summons was returned unexecuted on August 28, 1992.

1254, 1259-60 (5th Cir. 1986) ("[T]he protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials."). To be liable under § 1983, a guard must demonstrate "reckless or callous indifference to the federally protected rights of others," or be "motivated by evil motive or intent". ***Smith v. Wade***, 461 U.S. 30, 56 (1983); *accord*, ***Brown v. Byer***, 870 F.2d 975, 982 (5th Cir. 1989); ***Johnston***, 786 F.2d at 1259-60.

1.

Millsap challenges the district court's dismissal of the case as to Gooden (judgment as a matter of law under Fed. R. Civ. P. 52(c)).[3]

A dismissal under Rule 52(c) "is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding [of fact] is reversible only if the appellate court finds it to be `clearly erroneous.'" Fed. R. Civ. P. 52(c), Notes of Advisory Committee, 1991 Amendment, *quoted in* ***Southern Travel Club, Inc. v. Carnival Air Lines, Inc.***, 986 F.2d 125, 128 (5th Cir.

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[3] Rule 52(c) states:

> **Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim... that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule [requiring separate findings of fact and conclusions of law].

1993). "That is, we will not set aside the district court's finding in this regard unless, based upon the entire record, we are `left with the definite and firm conviction that a mistake has been committed.'" ***Southern Travel Club***, 986 F.2d at 128 (quoting ***Anderson v. City of Bessemer City***, 470 U.S. 564, 573 (1985)). Of course, issues of law are freely reviewed.

The record provides ample evidence that Gooden did not act with reckless or callous indifference to Millsap's rights. Indeed, Millsap concedes in his reply brief that he did not prove that Gooden had prior knowledge that the attack was going to occur. In essence, Millsap's claim against Gooden is that he took too long to call for help in stopping the fight.

In the incident report of the altercation in which Millsap was stabbed,[4] Gooden reported that he observed inmates Danny Wafford, Marvin Hoover, Willie Redd, and two unidentified inmates moving toward Millsap at approximately 1:20 p.m. Gooden testified that at first, he did not realize that the inmates were threatening Millsap; as soon as he realized, however, that Millsap was being attacked, he called for help. In the incident report, Gooden timed his call for help at 1:33 p.m. He testified that he immediately went to the yard, although his duties were to supervise non-contact visitation at a location 30 to 40 feet from the exercise yard. Aside from carrying a can of mace, Gooden was unarmed, and did not have a key to the exercise yard. In any case, prison policy

[4] The incident report was part of the evidence at trial.

provides that solitary guards should call for assistance before intervening in altercations between large numbers of inmates.

Although several witnesses testified that the attack on Millsap lasted from 15 to 45 minutes, the inmate who stabbed Millsap testified that the stabbing took less than one minute, and that it could not have been prevented by anyone outside the yard. The district court, adopting the magistrate judge's findings of fact, found that the altercation lasted only a few minutes.

The district court also found that the inmates had been inadequately searched prior to entering the yard, and that the guard tower from which the yard is monitored was vacant at the time of the attack. While the court found that these facts may have resulted from negligence on the part of some officials, Gooden was not at fault, especially because he was assigned to other duties at the time the attack occurred. The district court specifically found that as soon as Gooden observed the attack beginning, he called for assistance and went to the yard. Accordingly, it found that Millsap had failed to show that Gooden had acted with deliberate or callous indifference to Millsap's need for protection from the other inmates. These findings are not clearly erroneous.

2.

Millsap also contends that defendants Booker, Black, Armstrong, and Ross failed to follow prison procedures of searching inmates before allowing them into the exercise yard, and monitoring the yard from the guard tower. As well, he contends that some or all of the defendants have caused the prison to become increasingly

unsafe because they have allowed gangs to proliferate. Millsap does not argue, however, that the dismissal of defendants Booker, Black, Armstrong, and Ross, pursuant to 28 U.S.C. § 1915(d), was erroneous.

In any event, the record does not indicate that any of the officers, even had they not been dismissed from the suit, would have been liable under § 1983. As stated, such liability requires showing that the defendants acted with "reckless or callous indifference", or that they were "motivated by evil motive or intent" when they disregarded plaintiff's constitutional rights. ***Smith v. Wade***, 461 U.S. at 56 (1983), and cases cited *supra*. At most, the magistrate judge found that "there *may* have been *some negligence* by not fully searching the inmates ... and ... in leaving the tower unoccupied" (emphasis added).[5] Of course, this does not rise to the level of a constitutional violation.[6]

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[5] The only allegation that any defendant was more than negligent is Millsap's statement that defendant Mitchell knew in advance that there would be a fight in the exercise yard. This testimony was inconsistent with that of other witnesses, however. Both defendant Gooden and Danny Wofford (the inmate who stabbed Millsap, and who testified on Millsap's behalf) stated that the guards did not have prior knowledge of the fight. In any case, the allegation that Mitchell may have acted with deliberate indifference pertains only to Millsap's suit against him; and, as stated, defendant Mitchell was never served with process.

[6] Millsap also contends that the inmates who attacked him have not been prosecuted, and that the failure to prosecute them also violates his constitutional rights. This point is meritless. Millsap has no constitutional right to have another person prosecuted. ***Oliver v. Collins***, 914 F.2d 56, 60 (5th Cir. 1990).

B.

Millsap also asserts that his case was improperly referred for trial to a magistrate judge. Although cases involving jury trials may not be referred to a magistrate judge without the prisoner's consent, ***Ford v. Estelle***, 740 F.2d 374, 380 (5th Cir. 1984), Millsap requested, and was granted, a non-jury trial. And, 28 U.S.C. § 636 expressly authorizes the referral of non-jury-trial prisoner petitions to a magistrate judge.[7] "Section 636(b)(1)(B) authorizes the nonconsensual reference to a magistrate of a prisoner petition challenging the conditions of confinement so that the magistrate may conduct hearings and submit proposed findings of fact and recommendations for disposition to the district court." ***Archie v. Christian***, 808 F.2d 1132, 1135 (5th Cir. 1987) (*en banc*). In conformity with § 636(b)(1)(B), the magistrate judge conducted a hearing, then submitted his report and recommendation to the district court for independent review. In sum, Millsap's consent was not required.

C.

Millsap also maintains that he was unable to either conduct an adequate investigation or serve Mitchell with process, because the district court did not appoint counsel to represent him. We review

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[7] That section provides:

> [A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition ... of prisoner petitions challenging conditions of confinement.

the denial of a motion to appoint counsel only for abuse of discretion. ***Ulmer v. Chancellor***, 691 F.2d 209, 212 (5th Cir. 1982). The district court was not required to appoint counsel for Millsap, an indigent plaintiff, for a § 1983 claim, absent exceptional circumstances. ***Hulsey v. Texas***, 929 F.2d 168, 172-73 (5th Cir. 1991) (citing ***Freeze v. Griffith***, 849 F.2d 172, 175 (5th Cir. 1988); ***Ulmer***, 691 F.2d at 212). And, the district court has the discretion to appoint counsel for *pro se* plaintiffs if doing so would advance the proper administration of justice. 28 U.S.C. § 1915(d).

In deciding whether to appoint counsel because of exceptional circumstances, the district court should consider: (1) the type and complexity of the case; (2) whether the indigent is capable of presenting the case adequately; (3) whether the indigent can investigate the case sufficiently; and (4) whether the evidence consists in large part of conflicting testimony that requires skill in presenting evidence and in cross-examination. ***Ulmer***, 691 F.2d at 213.

The facts in this case are not complex. By the time Millsap filed his motion for appointment of counsel, he had demonstrated his ability to represent himself by filing pleadings, discovery requests, and motions. Also, he had represented himself at the ***Spears*** hearing.[8] Millsap does not suggest what additional information an attorney would have uncovered through further investigation; and it is not clear that an attorney would have had

[8] A transcript of the ***Spears*** hearing has not been prepared.

any more success than did Millsap in securing service of process on Mitchell. Millsap was capable of presenting his evidence adequately at trial; and he vigorously cross-examined witnesses. Our review of the record does not reveal exceptional circumstances; the district court did not abuse its discretion.[9]

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[9] Millsap also has moved this court for appointment of counsel for his appeal. For the reasons stated *supra*, appointment of counsel is inappropriate in this court, as it was in the district court. Mitchell has demonstrated amply that he is able to represent himself in this appeal, which presents no complex legal questions. Accordingly, his motion for appointment of appellate counsel is **DENIED**.

Mitchell has also moved for production of a trial transcript. Although he also requested a transcript in the district court, in connection with his motion for new trial, that motion was denied as meritless. The present motion for production of a transcript was filed after Mitchell's reply brief was filed; it is therefore untimely. And, in any case, Mitchell has not shown why he needs a trial transcript at this late date. Accordingly, his motion for production of a transcript is **DENIED.**

Finally, Mitchell has filed several motions for injunctive relief because of fears for his safety. In one, he states that defendant Gooden was transferred to his cell block for the purpose of intimidating him; in another, that he may be moved from protective custody, and, if so, that he may be attacked by gang members. Pursuant to the All-Writs Act, we may issue all writs necessary or appropriate in aid of our jurisdiction and agreeable to the usages and principles of law. 28 U.S.C. § 1651. And, a writ granting injunctive relief of the type Millsap requests could arguably be granted pending an appeal, if Millsap showed exceptional circumstances. *See* ***NAACP v. Thompson***, 321 F.2d 199, 200 (5th Cir. 1963). Millsap has not demonstrated them. His motions for injunctive relief are therefore **DENIED**.