IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50474

SYNNACHIA MCQUEEN,

Plaintiff-Appellant,

v.

ALLEN L. EVANS, CO III Officer,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CV-17)

(October 11, 1995)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant Synnachia McQueen ("McQueen"), a Texas

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

prisoner, brought suit pursuant to 42 U.S.C. § 1983 for alleged violations of his rights and immunities under the United States Constitution. After a jury returned a verdict in favor of the defendants, the United States District Court for the Western District of Texas dismissed his claims with prejudice on June 13, 1994. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

McQueen, an inmate at the Hughes Unit of the Texas department of Criminal Justice--Institutional Division ("TDCJ-ID") at the time of the incidents forming the basis of this appeal, filed suit pursuant to 42 U.S.C. § 1983, alleging that Defendant Allen Evans filed a false and retaliatory case against him because McQueen expressed his intent to file a prison grievance or a civil suit against Evans.[1] In addition, McQueen

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[1] Specifically, McQueen describes the following story: On September 26, 1992, McQueen, while engaged in a conversation with Evans, told Evans that he intended to sue him for filing a unrelated, allegedly fabricated disciplinary charge against him. Evans was apparently assigned that day to the duty of "feeding chow" to inmates, such as McQueen, who were housed in administrative segregation. While handing McQueen his tray of food, Evans told McQueen, "Here you go, I made this tray especially for you." McQueen interpreted those words as an insinuation that Evans had contaminated McQueen's food. He informed Evans that he was going to file a grievance with the warden, complaining that Evans had suggested that he had placed something in his food, and that he was going to "fight the case to the bitter end."

That evening, McQueen's recreation period allegedly was denied at 5:30 P.M.. When McQueen inquired as to the denial of his recreation period, he was allegedly told that his recreation and shower times were being denied because he had threatened an officer. On October 1, 1992, McQueen was served with a disciplinary charge, alleging that McQueen had threatened Officer Evans with harm at 6:15 P.M. on September 26, 1992. Evans

claimed that the resulting hearing on the allegedly false disciplinary action denied him due process. In addition to Evans, McQueen also named as defendants the disciplinary hearing officer, Raul Mata, and Warden Jack Garner. Even though this case constituted the ninth civil rights action he had filed in the Western District of Texas since his incarceration in the Hughes Unit in 1990[2], the court granted McQueen, proceeding pro se, leave to file in forma pauperis.

All parties agreed to have the case proceed for all purposes before a magistrate judge, and, on March 31, 1993, the magistrate held a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), to determine the viability of McQueen's claims under 18 U.S.C. § 1915(d). Following the hearing, the magistrate judge issued a report and recommendation suggesting that McQueen's complaint be dismissed for failure to state a claim because McQueen failed to allege any facts from which it could be inferred that the named defendants violated his federally protected rights. McQueen filed written objections to the magistrate's report and recommendation.

Upon de novo review of the magistrate judge's findings and

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charged that McQueen had stated at that time on that date, "I'm next for the Dayroom and I'm going to take care of you when I get close enough." McQueen testified on his own behalf, and called a witness, at the disciplinary hearing. He was found guilty as charged, and the decision was upheld on administrative appeal.

2 In addition to his nine cases filed in the Western District of Texas, McQueen had filed five civil actions in the Southern District of Texas while he was incarcerated in several TDCJ-ID units within that district.

recommendations, the district court adopted the report and recommendation as it applied to defendants Mata and Garner and dismissed those two named defendants for failure to state a claim against them. As to defendant Evans, the district court concluded that McQueen had stated sufficient facts in his complaint to state a claim under 42 U.S.C. § 1983 based upon his claim that Evans filed a false disciplinary charge against him in retaliation for McQueen's threats to file grievances or a lawsuit against him. After Evans was served and he answered, and both parties consented to allow final judgment to be entered by a magistrate judge, the case proceeded to trial before a jury on June 13, 1994.

At trial, McQueen served as his own counsel, and testified, called witnesses, presented evidence, and cross-examined the defendant and his witnesses. After receiving instructions, and deliberating, the jury returned a unanimous verdict in favor of Evans. Following the jury verdict, the court entered final judgment dismissing all of McQueen’s claims against Evans with prejudice and taxing costs against McQueen. It is from the jury’s verdict, the order taxing costs against him, and the district court’s order dismissing the claims against defendants Mata and Garner that McQueen now appeals.

II. DISCUSSION

A. The district court properly dismissed named defendants Raul Mata and Jack Garner

First, McQueen contends that the district court erred by dismissing his claims against Mata and Garner for failure to state a claim. McQueen did not raise his contention in his motion for leave to proceed in forma pauperis ("IFP"). Federal Rule of Appellate Procedure 24(a) requires that the IFP applicant provide "a statement of the issues which he intends to present on appeal," and failure to address an issue in an IFP motion constitutes its abandonment. Van Cleave v. United States, 854 F.2d 82, 84 - 85 (5th Cir. 1988). Accordingly, by failing to raise the issue in his IFP motion, McQueen has abandoned this argument.

Even if not abandoned, however, McQueen's first claim lacks merit. We review a judgment rendered by a magistrate pursuant to 28 U.S.C. § 636(c) as we would a judgment rendered by a district judge. Thus, we review issues of law de novo and findings of fact under the clearly erroneous standard. Laker v. Vallette (In re Toyota of Jefferon, Inc.), 14 F.3d 1088, 1090 (5th Cir. 1994). We review a dismissal for failure to state a claim under the same standard used by the district court: a claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to

relief. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); Carney v. RTC, 19 F.3d 950, 954 (5th Cir. 1994). Although we construe briefs and papers of pro se litigants more permissively than those filed by counsel, Securities and Exch. Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993), we cannot construe into a complaint factual allegations which simply are not present.

The magistrate found, and the district court affirmed, that McQueen's claims against Mata and Garner lacked any factual basis. At no time did McQueen provide any support beyond his conclusory allegations that these two defendants somehow violated his constitutional rights. McQueen's contentions that Mata was biased and utilized false testimony when he found McQueen to be guilty as charged after McQueen's disciplinary hearing, and that Garner improperly affirmed McQueen's disciplinary conviction upon appeal, do not rise to actionable claims pursuant to § 1983. It is clear from the record that McQueen received all of the due process to which he was entitled. Wolff v. McDonnell, 418 U.S. 539 (1974). McQueen concedes that he testified at a hearing, called witnesses, presented evidence, and cross-examined his accusers. He has alleged no facts to support any allegations of bias on the part of Mata and no facts to support any impropriety with Garner's affirmance of the disciplinary proceeding.[3]

[3] In fact, even in his appellant's brief, McQueen alleges no wrongdoing on the part of Garner, and continues to insist that "the fact that Mata presided over these tainted [disciplinary] hearings with false statements [allegedly made by Evans] as the only supporting evidence in his finding of guilt, attaches

Accordingly, his claims against Mata and Garner failed to state a federal cause of action and were properly dismissed.

B. The trial court did not abuse its discretion by denying McQueen's motion in limine.

McQueen next contends that the magistrate judge erred by denying his motion in limine to exclude evidence of his aggravated-rape conviction pursuant to Federal Rules of Evidence 609(b), 403 and 404. While testifying on his own behalf, McQueen raised a general objection to the defendant's question, "you're currently serving a 40-year sentence for aggravated rape; is that correct?"[4] After the magistrate overruled the objection, McQueen answered the question affirmatively.

Specifically, McQueen alleges two errors with regard to the admission of this evidence. First, McQueen argues that the conviction was too stale to qualify for admissible impeachment evidence under Federal Rule of Evidence 609(b). Second, he argues that the magistrate committed error by failing to conduct an on-the-record balancing test of the probativeness and prejudice of evidence of conviction. McQueen argues that the admission of this evidence was designed "for the purpose of allowing the jury too [sic] hear highly inflammatory and

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liability to the Defendant." McQueen does not, and can not, cite any precedent for this meritless assertion.

[4] Although McQueen did not state the grounds for his objection in court, it is clear from the context that he was objecting to the admission of evidence regarding his conviction. Fed. R. Evid. 103(a)(1).

prejudicial testimony to induce a purely emotional decision."

We will not reverse a district court's evidentiary rulings unless they are erroneous, and substantial prejudice results. The burden of proving substantial prejudice lies with the party asserting error. FDIC v. Mijalis, 15 F.3d 1314, 1318-19 (5th Cir. 1994). McQueen did not meet this burden, and his legal contentions regarding purported errors made by the magistrate are erroneous.

First, McQueen is incorrect that the conviction is too "stale" to be admissible pursuant to rule 609 of the Federal Rules of Evidence. Rule 609(b) permits the admission of evidence of a prior conviction for impeachment purposes provided that the conviction is for a crime punishable by death or imprisonment for more than one year, and if the probative value of the evidence outweighs its prejudicial effect. Fed. R. Evid. 609(b). The rule also provides that a conviction is not admissible "if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date." Id. Because McQueen is presently incarcerated, serving a 40-year sentence for the same conviction to which he referred at trial, ten years has not passed since the date of his release from the confinement imposed for the prior conviction. Thus his conviction was not stale under Rule 609(b).

Second, McQueen's argument that the trial court committed error by failing to conduct a balancing test on the record

regarding the admissibility of his conviction also lacks merit. Neither Rule 609 nor Rule 403 explicitly directs trial courts to conduct an on-the-record balancing of probativeness and prejudice.[5] And, McQueen explicitly admits in his appellate brief that the magistrate judge heard his arguments regarding suppression as well as the defendant's arguments regarding admission of the evidence prior to trial, and, after considering the arguments of both parties, chose to admit it.

Finally, not only did McQueen not demonstrate the existence of an error made by the trial court, but he also cannot demonstrate that any alleged error substantially prejudiced the outcome of the trial. At the close of the cross-examination of McQueen the magistrate judge gave the following limiting instruction:

> Ladies and gentlemen of the jury, I am going to instruct you to disregard some testimony that you've heard. I want you to disregard what Mr. McQueen is in prison for. You can consider the fact that he has been convicted of a felony and he is confined at a prison in the United States or here in the State of Texas and he is confined in administrative segregation in the Hughes Unit and has been there for almost 15 years, but the actual offense to which he is confined for, I instruct you to disregard that at this time.

Thus, because the magistrate judge gave this instruction, which "restrict[ed] the prior conviction to impeachment and

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[5] Even if the rules of evidence did contain such requirement, a litigant who seeks an on-the-record balancing pursuant to Rule 403 must request it at trial, which McQueen did not do. United States v. Maceo, 947 F.2d 1191, 1199 n.4 (5th Cir. 1991).

distinguish[ed] this evidence from substantive evidence of guilt," the magistrate did not commit prejudicial error. United States v. Turner, 960 F.2d 461, 465 (5th Cir. 1992).

Thus, McQueen's argument that the magistrate judge abused his discretion by denying McQueen's motion in limine regarding evidence of his conviction lacks merit.

C. The trial court did not err by instructing the jury about Evans's entitlement to qualified immunity.

Third, McQueen argues that the trial court erred by instructing the jury regarding qualified immunity. Specifically, Evans contests the following jury instruction:

> You are hereby instructed that if, after considering the scope of discretion and responsibility generally given to correctional officers in the performance of their duties, and after considering all of the surrounding circumstances of the case as they would have reasonably appeared at the time of the incident, you find from a preponderance of the evidence that the Defendant had a reasonable and good faith belief that his actions did not violate[] the constitutional rights of the Plaintiff, then you cannot find him liable even if the Plaintiff's rights were in fact violated as a result of the Defendant's good faith action.

McQueen contests this instruction for two reasons. First, he argues, the fact that the district court previously had denied Evans's motion to dismiss based on qualified immunity precludes the jury from considering this question, which, he contends, was already answered by the district court. Second, McQueen contends that qualified immunity is a question of law to be decided by the court rather than a question of fact to be decided by the jury.

The trial court is afforded great deference in instructing the jury. A party that wishes to complain on appeal of the district court's refusal to give a proffered jury instruction must show as a threshold matter that the proposed instruction correctly stated the law. FDIC v. Mijalis, 15 F.3d 1314, 1318 (5th Cir. 1994). In order to complain of erroneous jury instructions, the challenger must first demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations. Id. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case. Id.

Evaluated pursuant to this standard, McQueen's argument fails. First, McQueen is wrong that the court decided the question of qualified immunity when it denied Evans's motion to dismiss. In denying Evans's motion filed under Federal Rule of Civil Procedure 12(b)(6), the court held that, if the court took all of the facts alleged in McQueen's complaint as true, McQueen stated a federal claim. It did not, however, abrogate McQueen's burden to prove those facts by a preponderance of the evidence in order to recover.

Second, McQueen is incorrect that the question was wrongly submitted to the jury. The instruction properly reflected the law of qualified immunity in this circuit. To determine whether a defendant official is entitled to qualified immunity, a court

must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right. Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). If the plaintiff has asserted the violation of a constitutional right, the court must then determine whether that right had been clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. Id. The questions of fact governing these determinations are the province of the jury when a jury trial is requested. See, e.g., Fontenot v. Cormer, 56 F.3d 669, 672 - 73 (5th Cir. 1995) (discussing jury findings).

Finally, McQueen has not shown that he suffered any prejudice due to the challenged jury instruction. In the special interrogatories submitted to the jury, the jury was told to answer the question of whether it found "from a preponderance of the evidence that the Defendant had a reasonable and good faith belief that his actions did not violate the constitutional rights of the Plaintiff" only if it answered affirmatively the question of whether it found that "the Defendant, Allen L. Evans deprived the Plaintiff, Synnachia McQueen, of his constitutional right to free speech". Because the jury found that Evans did not deprive McQueen of his constitutional right to free speech, the jury did not even consider the question of qualified immunity. Thus, no prejudice could possibly have been caused by the content of -- or even the existence of -- the instruction regarding qualified immunity.

D. The district court did not err by denying McQueen's request to play the tape recording of his disciplinary hearing during trial.

Fourth, McQueen contends that the magistrate judge erred by denying his request to play the tape recording of his disciplinary hearing during trial. He also contends that the magistrate judge should have allowed into evidence his written interrogatories to Evans and his written deposition questions to Lamb and Jackson. McQueen's contentions are unavailing.

As discussed in Part IIB, supra, we will not reverse a district court's evidentiary rulings unless they are erroneous and substantial prejudice results. The burden of proving substantial prejudice lies with the party asserting error. FDIC v. Mijalis, 15 F.3d 1314, 1318-19 (5th Cir. 1994). McQueen did not meet this burden, and his legal contentions regarding purported errors made by the magistrate judge are erroneous.

McQueen requested the tape in a subpoena duces tecum motion, and also requested that the tape be put on file with the court in case of trial. The magistrate denied McQueen's motion. In a subsequent discovery motion, McQueen requested that Evans provide a copy of the tape, as well as equipment, in order to play the tape at trial. Evans responded that he had given McQueen an opportunity to listen to the tape, and that was sufficient to fulfill his discovery obligations. The court agreed with Evans and denied McQueen's discovery motion. During cross-examination of Mata, McQueen and the magistrate judge engaged in the

following dialogue:

> Q. Well, it's unfortunate, Mr. Mata, that we don't have the proper instruments so the ladies and gentlemen of the jury can hear the disciplinary --
>
> THE COURT: Mr. McQueen, you're the one that filed this lawsuit. You indicated an audio tape, but you did not request anything about having a tape player here.
>
> MR. McQUEEN: Yes. I requested it with the Defendant's counsel in discovery.
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> THE COURT: Well, you didn't request it to the Court.
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> MR. McQUEEN: Well, I did make a motion to the Court, but it was denied at that time.

McQueen never requested in the motions in which he requested the tape that the district court provide a tape player, and thus, the magistrate judge was not obligated to arrange for equipment to play the tape to the jury.

Further, McQueen has shown no prejudice due to his inability to play the tape at trial. At trial, he questioned Evans and Jackson about evident contradictions between their trial testimony and written answers to interrogatories. He did not question Lamb about any written answers. McQueen put before the jury evidence of evident contradictions between the written answers and trial testimony. Because, at trial, McQueen had the opportunity to testify, present evidence, and cross-examine Evans and his witnesses, and, in particular, had the opportunity to cross-examine the persons present at the disciplinary hearing, the disciplinary tape would have been duplicative of the testimony McQueen could elicit form the witnesses available at trial.

Thus, the magistrate judge committed no error and did not abuse his discretion by denying McQueen's evidentiary motion.

E. The jury verdict was not contrary to the evidence.

Fifth, McQueen challenges the sufficiency of the evidence to support the jury's verdict. McQueen "readily admits" that he did not move for a directed verdict or a judgment notwithstanding the verdict.

Because McQueen failed to preserve the issue of sufficiency of the evidence for appellate review by moving for judgment as a matter of law in the trial court, our inquiry is limited to whether there was any evidence to support the jury's verdict, irrespective of its sufficiency. Great Plains Equip., Inc. v. Koch Gathering Sys., Inc., 45 F.3d 962, 968 (5th Cir. 1995). In this case, the testimony of Evans, Jackson, and Lamb indicates that McQueen threatened Evans and was denied recreation because he refused to follow prison procedure, and thus supports the jury's conclusion that Evans did not retaliate against McQueen.

In sum, McQueen's sufficiency argument consists wholly of an attack on the credibility of Evans's witnesses. Credibility decisions are the province of the jury, and "`[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'" Spurlin v. General Motors Corp., 528 F.2d 612, 620 (5th Cir. 1979) (quoting Tennant v. Peoria & Pekin Union Ry., 321

U.S. 29, 35 (1944)).

Thus, McQueen's sufficiency of the evidence claim is meritless.

F. The court did not abuse its discretion by sanctioning McQueen with payment of costs.

Finally, McQueen contends that the magistrate judge abused his discretion by taxing costs to him. McQueen argues that the magistrate judge erred because his case was not frivolous. He claims that the magistrate judge imposed costs in retaliation for McQueen's complaints to the district court and this court about the magistrate judge's allegedly ex parte communications with prison officials.

The district courts have broad discretion in taxing costs of court, and we will reverse only upon a clear showing of abuse of discretion. Sidag Aktiengesellschaft v. Smoked Foods Prods. Co., 854 F.2d 799, 801-02 (5th Cir. 1988).

In this case, in a lengthy opinion, the magistrate judge imposed costs against McQueen pursuant to 28 U.S.C. § 1915(e). That statute provides that in cases in which a plaintiff is proceeding in forma pauperis, "[j]udgment may be rendered for costs at the conclusion of the suit or action as in other cases[.]" 28 U.S.C. § 1915(e). As we do with the case of sanctions taxed pursuant to other statutes, we review decisions of district courts pursuant to § 1915(e) under the abuse-of-discretion standard. Moore v. McDonald, 30 F.3d 616, 621 (5th

Cir. 1994).

A case need not be frivolous to merit imposition of costs. Freeze v. Griffith, 849 F.2d 172, 176 (5th Cir. 1988); Lay v. Anderson, 837 F.2d 231, 232 (5th Cir. 1988). Thus, McQueen's argument that the magistrate judge erred by imposing costs due to frivolity fails. Further, we need not address McQueen's accusation of retribution on the part of the magistrate judge because McQueen is raising that argument for the first time on appeal, and the review of that claim would thus require us to make factual findings. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

In addition to taxing McQueen the costs of court, the magistrate judge also ordered that McQueen not be allowed to file further actions in the district court until he pays the sum in full. McQueen appears to suggest that the costs imposed are excessive because he will never be able to raise $273, thereby severely limiting his ability to bring civil actions. Cf. Coats v. Pierre, 890 F.2d 728, 734 (5th Cir. 1989) (reducing sanctions levied pursuant to Rule 11 of the Federal Rules of Civil Procedure as excessive). Nonetheless, as the magistrate judge pointed out in his opinion, lesser sanctions in the past have failed to dissuade McQueen from pursuing frivolous litigation. See, e.g., McQueen v. Mata, No. 95-50020, slip op. at 3 (5th Cir. Mar 17, 1995)(unpublished); McQueen v. Mata, No. 94-50296, slip op. at 6 (5th Cir. Nov. 2, 1994)(unpublished)($25 monetary sanction affirmed).

Having dismissed three of McQueen's previous appeals as frivolous, McQueen v. Mata, No. 95-50020, slip op. at 3; McQueen v. Mata, No. 94-50296, slip op. at 6; McQueen v. Pollard, No. 92-8481, slip op. at 6 (5th Cir. Apr. 16, 1993), we have warned McQueen that frivolous appeals may result in sanctions against him. McQueen v. Mata, No. 94-50296, slip op. at 6. Additionally, McQueen appears to have at least three other appeals currently pending in this court.[6] We urge McQueen to review his cases and withdraw any frivolous appeals.

In total, McQueen has filed at least fourteen unsuccessful civil actions in the United States District Courts, several of which he appealed. Because stern measures are necessary to curb McQueen's abusive litigation habits, we affirm the imposition of costs against McQueen, along with the restriction disallowing McQueen to file additional actions until the costs are paid, in its entirety.

IV. CONCLUSION

For the reasons stated above, we

AFFIRM.

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[6] McQueen v. Turner, No. 95-50241 (5th Cir. Jul. 7, 1995); McQueen v. Mata, No. 95-50239 (5th Cir. Jul. 7, 1995); McQueen v. Vance, No. 95-50486.