

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

January 4, 2010

No. 07-60630
Summary Calendar

Charles R. Fulbruge III
Clerk

ROGER JOHNSON

Plaintiff-Appellant

v.

OFFICER DELANIO SANDERS;
SHERIFF MALCOLM E. MCMILLIN

Defendants-Appellee

Appeal from the United States District Court
for the Southern District of Mississippi, Jackson Division
Cause No. 3:04cv393HTW-JCS

Before DAVIS, SMITH and DENNIS, Circuit Judges.

PER CURIAM:*

Pretrial detainee Roger Johnson appeals the dismissal of his suit under 42 U.S.C. § 1983 against various prison officials alleging that they failed to protect him from attack from other inmates. The magistrate judge conducted a hearing to determine if dismissal under 28 U.S.C. § 1915(e)(2) was appropriate. After the hearing, the magistrate judge entered a Report and Recommendation that

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Johnson's case be dismissed as frivolous. The district court adopted the Report and Recommendation and dismissed the case with prejudice.

Our review of the record leads us to conclude that the complaint is not subject to dismissal under § 1915 for the following reasons. First, the magistrate judge appears to have relied on the fact that Johnson did not identify the particular inmate who posed a threat to his safety. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court made it clear that such was not required. "Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* at 843. Second, we disagree with the conclusion in the Report and Recommendation that "the evidence indicates that Plaintiff never made a formal request for protective custody until the day of the attack and that this request was granted." Contrary to the magistrate judge's report, the record includes evidence that the plaintiff and his mother advised prison officials that they were concerned about plaintiff's safety prior to the attack because he testified against several inmates in the same facility or their fellow gang members. This report was verified by a deputy who escorted Johnson within the prison and heard other inmates identify Johnson. In addition, because the defendants were not required to respond to Johnson's discovery requests and because an evidentiary hearing was not held, the record may not present a complete picture of Johnson's grievance complaints and requests for protective custody.

For the foregoing reasons, we vacate the dismissal of Johnson's case as frivolous and remand to the district court.

VACATED and REMANDED.