

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

REGINALD NELSON,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:10-cv-00112-IPJ-PWG
)	
OFFICER GARY SHIRKEY,)	
)	
Defendant.)	

MEMORANDUM OF OPINION

The complaint in this matter asserts an excessive force claim by an Alabama prisoner against an officer employed by the Alabama Department of Corrections. On September 7, 2011, the defendant’s motion for summary judgment was denied and this matter was referred to the magistrate judge for purposes of conducting an evidentiary hearing on the plaintiff’s claim.¹ The magistrate judge conducted a hearing on November 7, 2011, which included the testimony of the plaintiff, the defendant, and three witnesses. On September 24, 2012, the magistrate judge entered a written report finding, *inter alia*, that the testimony of the plaintiff and the plaintiff’s witness was not credible and recommending that judgment be entered in favor of the defendant. This matter is now before the court on the magistrate judge’s September 24, 2012, Finding and Recommendation (Doc. #42).

¹ Pursuant to 28 U.S.C. 636(b)(1)(B), a District Judge may designate a magistrate judge to conduct evidentiary hearings on prisoner petitions challenging conditions of confinement, including claims of excessive force. *See McCarthy v. Bronson*, 500 U.S. 136 (1991).

The plaintiff filed objections to the magistrate judge's findings and recommendation on October 3, 2012. He contends the testimony showed that there are disputed issues of fact which should be decided by a jury. However, the existence of genuine issues of fact is relevant only for purposes of summary judgment, which was decided in an earlier phase of this litigation. In this instance, after observing the demeanor of the witnesses, the magistrate judge properly made determinations of credibility, weighed the testimony, and determined that the preponderance of the credible evidence favored the defendant. It is not appropriate for a District Judge, who did not observe and hear the witnesses, to reject a magistrate judge's finding of credibility, absent the "rare case" in which there exists an "articulable basis" for such rejection in the record. *U. S. v. Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001). No such basis exists in this action.

Therefore, having carefully reviewed and considered *de novo* the entire record, the court is of the opinion that the magistrate judge's findings are due to be and hereby are **ADOPTED** and the recommendation is **ACCEPTED**. The plaintiff's objections are **OVERRULED** and the court **EXPRESSLY FINDS** that the defendant is entitled to judgment as a matter of law, and that this action is due to be **DISMISSED WITH PREJUDICE**. A Final Judgment will be entered.

Based upon the foregoing, the plaintiff's pending motion for production of documents (Doc. #40) and motion to appoint counsel (Doc. #41) are **DENIED** as moot.

Done and ORDERED this 29th day of November 2012.



INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE