

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

FIDEL DAVIS

§

v.

§

CIVIL ACTION NO. 5:15cv138

T. EVANS, ET AL.

§

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
ON DISMISSAL OF DEFENDANT JON BRAUN

The Plaintiff Fidel Davis, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights in the Texas Department of Criminal Justice, Correctional Institutions Division. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Plaintiff named a fellow inmate, Jon Braun, as a defendant in the lawsuit, stating Braun sexually assaulted him while he slept. The Magistrate Judge issued a Report recommending the claims against Braun be dismissed because Braun did not act under color of state law and thus is not amenable to suit under §1983.

In his objections, Davis does not address the issue of state action; instead, he cites an Eighth Circuit case called Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981), but that case dealt with the liability of prison officials, not the liability of a prisoner. He also refers to the Fifth Circuit decision in Alexander v. Ieyoub, 62 F.3d 709 (5th Cir. 1995), which involved the owner of a seized car bringing suit against district attorneys and assistant district attorneys for denial of due process in the course of forfeiture proceedings, but fails to show how this decision applies in the present case. The Magistrate Judge correctly determined Braun was not a state actor and therefore not subject to suit under §1983. Johnson v. Dallas Independent School District, 38 F.3d 198, 199 (5th Cir. 1994);

Gamez-Abrego v. Orleans Parish Jail, civil action no. 10-1595, 2010 U.S. Dist. LEXIS 91046 (E.D.La., July 19, 2010), *Report adopted at* 2010 U.S. Dist. LEXIS 91051 (E.D.La., September 1, 2010) (an inmate involved in a prison fight is not a person acting under color of state law as required for liability under §1983). Plaintiff's objections are without merit.

The Court has conducted a careful *de novo* review of those portions of the Magistrate Judge's proposed findings and recommendations to which the Plaintiff objected. *See* 28 U.S.C. §636(b)(1) (district judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.") Upon such *de novo* review, the Court has determined that the Report of the Magistrate Judge is correct and the Plaintiff's objections are without merit. It is accordingly

ORDERED the Plaintiff's objections are overruled and the Report of the Magistrate Judge regarding defendant Jon Braun (docket no. 9) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED the Plaintiff's claims against the Defendant Jon Braun are **DISMISSED WITH PREJUDICE** for purposes of proceeding *in forma pauperis* as frivolous and for failure to state a claim upon which relief may be granted. The dismissal of these claims shall not affect the remaining claims in the lawsuit.

SIGNED this 20th day of July, 2016.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE