

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

BENJAMIN DAVID IRVIN §
v. § CIVIL ACTION NO. 9:07cv254
JERRY GRISSOM, ET AL. §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Plaintiff Benjamin Irvin, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights during his confinement in the IAH Adult Detention Center in Livingston, Texas. 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. As Defendants, Irvin named a number of officers at the Detention Center, including Jerry Grissom, Greg Bogany, Raymond Lipscomb, Shawata Lyons, and an individual named Moore.

Irvin complained of an alleged use of force which occurred on April 11, 2007. The Magistrate Judge conducted an evidentiary hearing and ordered the Defendants to answer the lawsuit. All of the named Defendants except for Bogany and Moore, upon whom service of process could not be effected, have answered the lawsuit and have filed a motion for summary judgment.

The summary judgment evidence offered by the Defendants included a video tape of the use of force incident forming the basis of the lawsuit. After review of the evidence, including the video tape, the Magistrate Judge issued a Report recommending that the motion for summary judgment be granted and that the lawsuit be dismissed with prejudice. The Magistrate Judge observed that although two defendants did not answer the lawsuit, parties not joining in a successful motion for summary judgment are nonetheless entitled to benefit from that motion. Lewis v. Lynn, 236 F.2d

766, 768 (5th Cir. 2001); thus, the lawsuit could be dismissed as to Moore and Bogany as well as the moving defendants.

A copy of the Magistrate Judge's Report was sent to Irvin at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause as well as the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the Defendants' motion to dismiss or for summary judgment (docket no. 31) is GRANTED and that the above-styled civil action be and hereby is DISMISSED with prejudice. It is further

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So **ORDERED** and **SIGNED** this **9** day of **February, 2010**.



Ron Clark, United States District Judge