

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-6732

ADRIAN MCCRAY, a/k/a Adrian Miscell McCray,

Plaintiff - Appellant,

v.

WARDEN SCOTT LEWIS; SGT. BUTLER; WARDEN CARTLEDGE;
DIRECTOR BRIAN STERLING,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Florence.
Timothy M. Cain, District Judge. (4:19-cv-00151-TMC)

Submitted: August 25, 2020

Decided: August 28, 2020

Before KING and AGEE, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Adrian Miscell McCray, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Adrian McCray appeals the district court's order dismissing his 42 U.S.C. § 1983 complaint. The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge recommended dismissing the complaint for failure to prosecute and advised McCray that failure to file timely, specific objections to this recommendation could waive appellate review of a district court order based upon the recommendation.

The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance. *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017); *Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985); see also *Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). McCray has waived appellate review by failing to file objections to the magistrate judge's recommendation after receiving proper notice. Accordingly, we affirm the judgment of the district court.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

ADRIAN McCRAY, #319977,
a/k/a Adrian Miscell McCray,

Plaintiff,

-vs-

SGT. BUTLER, WARDEN CARTLEDGE,
DIRECTOR BRIAN STERLING, and
WARDEN SCOTT LEWIS,

Defendants.

Civil Action No. 4:19-cv-0151-TMC-TER

REPORT AND RECOMMENDATION

I. INTRODUCTION

Plaintiff, who is proceeding pro se, brings this action pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his constitutional rights while housed at the McCormick Correctional Institution and the Perry Correctional Institution. Presently before the court is Defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment (ECF No. 48). Because Plaintiff is proceeding pro se, he was advised pursuant to Roseboro v. Garrison, 528 F.3d 309 (4th Cir. 1975), that a failure to respond to Defendants' motion could result in dismissal of his case. Plaintiff has not filed a response to the motion or requested an extension of time to do so. All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(e), DSC. This report and recommendation is entered for review by the district judge.

II. RULE 41(b) DISMISSAL

"The Federal Rules of Civil Procedure recognize that courts must have the authority to control litigation before them, and this authority includes the power to order dismissal of an action for failure to comply with court orders. Fed.R.Civ.P. 41(b)." Ballard v. Carlson, 882 F.2d 93, 95

(4th Cir.1989).

The Fourth Circuit, in Davis v. Williams, 588 F.2d 69, 70 (4th Cir. 1978), recognizing that dismissal with prejudice is a harsh sanction which should not be invoked lightly, set forth four considerations in determining whether Rule 41(b) dismissal is appropriate: (1) the degree of personal responsibility on the part of the plaintiff; (2) the amount of prejudice to the defendant caused by the delay; (3) the presence or absence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. Id. at 70.

Subsequently, however, the Fourth Circuit noted that “the four factors ... are not a rigid four-pronged test.” Ballard, 882 F.2d at 95. “Here, we think the Magistrate’s explicit warning that a recommendation of dismissal would result from failure to obey his order is a critical fact that distinguishes this case from those cited by appellant. . . . In view of the warning, the district court had little alternative to dismissal. Any other course would have placed the credibility of the court in doubt and invited abuse.” Id. at 95-96.

In the present case, Plaintiff is proceeding pro se and, thus, is entirely responsible for his actions. He was advised that a failure to respond to Defendants’ motion could result in dismissal of his case. Nevertheless, Plaintiff failed to respond. It is solely through Plaintiff’s neglect, and not that of an attorney, that Plaintiff has failed to prosecute this case. Defendants cannot come to a resolution of this matter if Plaintiff fails to prosecute it. Accordingly, the undersigned concludes that Plaintiff has abandoned his claims against Defendants.

However, Plaintiff filed a letter dated September 12, 2019, after Defendants’ motion was filed, in which he states “please have my case transfer[ed] to a Tort Claims under South Carolina Tort Claims Act, § 15-78-30.” ECF No. 51. To the extent Plaintiff’s letter could be construed as a response to Defendants’ motion, the arguments raised in the motion are addressed below.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Adrian McCray,

Plaintiff,

v.

Sgt. Butler, Warden Cartledge,

Director Brian Sterling,

Warden Scott Lewis,

Defendants.

Civil Action No. 4:19-cv-00151-TMC

ORDER

Plaintiff, a state prisoner proceeding *pro se* and *in forma pauperis*, filed this action pursuant to 42 U.S.C. § 1983 alleging violations of his constitutional rights. (ECF No. 1). In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02, D.S.C., this matter was referred to a magistrate judge for pretrial handling. Before the court is the magistrate judge's Report and Recommendation ("Report"), recommending that the court dismiss this case for failure to prosecute pursuant to Fed. R. Civ. P. 41(b). (ECF No. 57). Plaintiff was advised of his right to file objections to the Report. (ECF No. 57-1). However, Plaintiff filed no objections to the Report, and the time to do so has now run.

The Report has no presumptive weight and the responsibility to make a final determination in this matter remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). In the absence of objections, this court is not required to provide an explanation for adopting the Report. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Rather, "in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the

recommendation.” *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

After a careful and thorough review of the record under the appropriate standards, as set forth above, the court adopts the magistrate judge’s Report (ECF No. 57), which is incorporated herein by reference. Accordingly, the case is **DISMISSED with prejudice***.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

Anderson, South Carolina
May 8, 2020

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this order pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

* The court concludes that dismissal with prejudice is appropriate, as Plaintiff has failed to respond to both the motion to dismiss and the Report and Recommendation despite being warned that failure to respond could result in his case being dismissed. See (ECF Nos. 49, 57-1).