IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1717
(Summary Calendar)

DARRYL ROBERTS,

Plaintiff-Appellee,

versus

KENNETH WITT, Officer, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas

(4:92-CV-290-Y)

(May 19, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellee Darryl Roberts, a pretrial detainee in a Texas county jail, sued Defendants-Appellants, Kenneth Witt, Richard Tanner, James A. Carrigan and Danny M. Fairbanks, county

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

officers (collectively, the Officers), claiming that they violated his civil rights by use of excessive force in a jail cell incident. The Officers appealed the district court's denial of their motion for summary judgment on grounds of qualified immunity. Agreeing that the summary judgment motion should be denied, we affirm.

I

FACTS AND PROCEEDINGS

Roberts filed a 42 U.S.C. § 1983 claim against the Officers, alleging that his civil rights were violated on November 28, 1991, when the Officers used excessive force against him while they were conducting a search of his cell. In his complaint, Roberts stated that he was ordered out of his cell by Officer Tanner so that another officer could conduct a search. Officer Witt allegedly entered the cell and began to search it. He purportedly grabbed a piece of Roberts' legal work, balled it up, and threw it on the floor. Roberts states that he told the Officers that the legal papers were important to him and then leaned over to pick up the balled-up piece. According to Roberts, he was attacked by Witt and Tanner who knocked Roberts to his bunk, pulled him to the floor, then carried him out of the cell by his legs. Roberts alleges that he "put up no resistance once outside of the cell."

Roberts states that the four defendants then held him down outside the cell; and that he did not resist, but yelled out to a fellow inmate to contact his family. Witt told Roberts to "shut up," then punched him in the face, causing a profuse nosebleed. Roberts insists that he was then turned on his side by the Officers

so that he would not choke to death on his own blood. Roberts states that he was then hog tied, picked up by the handcuffs behind his back, and carried to a holdover cell; and that he was returned to his cell five or six hours later at which time the handcuffs were removed.

Not surprisingly, the Officers' version of the incident is quite different. Essentially, they aver a good faith attempt to conduct the cell search and to impose order when Roberts resisted. The Officers attached official records, containing their statements, and the statements of another guard and the jail nurse. The Officers essentially contend that, after Roberts exited his cell, Officer Witt entered the cell to conduct a "shakedown" search; that Roberts then yelled to Witt, "You have no right to be in my house," and tried to push Tanner aside and re-enter the cell. They allege that Roberts ducked under Tanner's arm, entered the cell, pushed Tanner down on the bunk, and knocked some items from Officer Carrigan's hands; that Witt grabbed Roberts and "took him down" to his bunk; and that Roberts grabbed Witt's name tag and struck him in the face when Witt tried to put restraints on Roberts. He was then handcuffed and leg irons were applied, after which he was placed on a mattress, then moved to a holdover cell. The jail nurse reported a slight bleeding of the right nostril and "slight swelling" on the bridge of his nose. Roberts complained about his back, but the nurse noted no bruises.

The Officers filed a motion to dismiss or for summary judgment, alleging that Roberts stated no significant injury, that

there was no issue of material fact, and that they were entitled to qualified immunity. Roberts filed a "Reply to Defendants' Motion to Dismiss" in which he essentially repeated allegations set forth in his complaint, except for his statement that Witt struck him repeatedly while he was on the floor and that the search was a pretext for staging a "pre-planned assault" on him. Roberts noted that the Officers conducted another pre-planned assault on a different inmate shortly after Roberts was attacked. He noted his "significant injury," characterized the Officers' conduct as "excessive and unwarranted use of force" in violation of the Due Process Clause, and asserted that their conduct "recklessly crossed the constitutional line," stripping them of qualified immunity.

The defendants' motion was denied by the district court which ruled that it could not hold, as a matter of law, that there were no issues of material fact or that Roberts' claim was frivolous. The defendants filed a timely notice of appeal.

II

ANALYSIS

A. Summary Judgment

The district court's denial of a party's motion for summary judgment based on qualified immunity is generally appealable as a final decision, even in the absence of a final judgment. Enlow v. Tishomingo County, 962 F.2d 501, 508 (5th Cir. 1992). The Officers argue that the summary judgment evidence demonstrated that no excessive force was used and that the district court improperly premised its ruling upon Roberts' unsworn allegations, citing

Fed.R.Civ.P. 56(e).

Although there is "no express or implied requirement in [Fed.R.Civ.P. 56] that the moving party supports its motion with affidavits or other similar materials negating the opponent's claim," the moving party must have shown that no genuine issue of material fact remains in order to mandate a granting of the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To defeat a motion for summary judgment, Fed.R.Civ.P. 56 requires the non-moving party to set forth specific facts sufficient to establish that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

While a mere allegation of the existence of a dispute over material facts will not be sufficient, if the evidence shows that a reasonable jury could return a verdict for the non-moving party, the dispute is genuine. Anderson, 477 U.S. at 247-48.

In making its determination, the court must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mutual Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). We apply the same standard as the district court when reviewing its disposition of a motion for summary judgment. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989).

The Officers' argument that Roberts failed properly to oppose their motion for summary judgment is meritless. Roberts' reply to the Officers' motion for summary judgment stated material issues of

fact based on his complaint made under penalty of perjury. Such statements are sufficient to defeat a motion for summary judgment under Rule 56. See 28 U.S.C. § 1746.

B. Qualified Immunity

The Officers argue that, as Roberts fails to allege the infliction of a serious injury, the complaint failed to state a claim of excessive force as defined by constitutional law at the time of the incident. Both parties appear to assume that the excessive force claim is under the Fourth Amendment, even though Roberts refers to Due Process.

After the Officers' brief was filed, however, we held that the Fourth Amendment does not "provide[] an appropriate constitutional basis for protecting against deliberate uses of force occurring ... after the plaintiff has been in detention awaiting trial for a significant period of time." See Valencia v. Wiggins, 981 F.2d 1440, 1443-45 (5th Cir. 1993). The Due Process Clause under the Fifth or the Fourteenth Amendment is the appropriate basis for a pretrial detainee's excessive force claim. Id. at 1446.

In qualified immunity cases, the plaintiff must initially "allege a violation of a clearly established constitutional right" under current law, then must defeat qualified immunity under "clearly established law" at the time of the incident. Mouille v. City of Live Oak, 977 F.2d 924, 927-28 (5th Cir. 1992). The rationale of the "clearly established law" requirement is based on the principle that "newly created legal standards" should not be applied retroactively to define what is objectively reasonable

conduct by a state officer. See id. at 928 (citation omitted); see Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (requirement of objective reasonableness).

Roberts' argument contending that we should apply new law governing the objective reasonableness of an officer's use of force is thus unavailing. It constitutes a request to apply new law retroactively. See Mouille, 977 F.2d at 928.

Although the Officers correctly state that the district court did not really address qualified immunity in its order, we may address the issue on appeal to determine whether the Officers could assert qualified immunity. See Valencia, 981 F.2d at 1447-49 (applying qualified immunity analysis when district court held it was not appropriate).

As to a pretrial detainee, the excessive force inquiry in the qualified immunity context is essentially two-fold and involves a determination (1) whether the force used was so excessive that it constituted punishment rather than an effort to restore order or maintain discipline, and (2) whether the Officers' actions were so objectively unreasonable in light of existing law that the officials are not entitled to qualified immunity. Valencia, 981 F.2d at 1445-49.

As the current law governing excessive force claims only requires an allegation that force was used maliciously and sadistically, see id. at 1447, and Roberts claims that the force applied was malicious, the first prong set forth in Mouille is

satisfied.[1]

The more difficult inquiry is under Mouille's second prong, i.e., whether the force exerted violated "clearly established law" at the time of the incident.

Roberts argues that, based on the broader protection provided by the Fourth Amendment, "[r]easonable officers would not have seized [p]laintiffs legal papers and converted them into trash." This argument lacks merit. Roberts fails to show how this argument is relevant to the qualified immunity issue.

In Johnson v. Morel, 876 F.2d 477, 479-80 (5th Cir. 1989) (en banc), a Fourth Amendment case, a "significant injury" was required. The significant injury requirement was applied in an Eighth Amendment context in Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990). In Hudson, decided in 1992, the Supreme Court deleted the significant injury requirement in the Eighth Amendment context, holding that a prisoner need not show a significant injury when prison officials maliciously and sadistically use force to cause harm. See Hudson, 112 S.Ct. at 998-1000. In Valencia, decided in 1993, we held that Hudson's no-injury requirement applies when determining excessive force claims for pretrial detainees (Fourteenth Amendment) or convicted prisoners (Eighth Amendment). See Valencia, 981 F.2d at 1445-47.

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[1] The Court indicated in Valencia that "whether the measure taken inflicted unnecessary and wanton pain and suffering depends on `whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.'" Valencia, 981 F.2d at 1446 (citing Hudson v. McMillian, _____ U.S. _____, 112 S.Ct. 995, 998-1000, 117 L.Ed.2d 156 (1992)).

Therefore, at the critical time in November 1991, it was unclear whether there would be a separate Fourteenth Amendment requirement for pretrial detainees. There was at least a likelihood that any governing standard would have a significant injury requirement. See Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981) ("severe injury" under the Due Process Clause)[2]; Oliver v. Collins, 914 F.2d 56, 59 (5th Cir. 1990) ("significant" may be less than "severe" under the Eighth Amendment).

In Valencia, we relied on Shillingford as the operative "substantive due process" case for purposes of determining "clearly established law." See Valencia, 981 F.2d 1447-48. Under Shillingford, the plaintiff must prove that the force used "caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice ... so that it amounted to an abuse of official power that shocks the conscience." See Shillingford, 634 F.2d at 265.

In Valencia, the inmate, a pretrial detainee, alleged that his head was repeatedly "bashed" against the cell bars. Valencia, 981 F.2d at 1442. After the altercation, the inmate was observed having "bruises on his face and scratches and cuts on his throat," although he apparently did not need immediate medical attention. Id. at 1442, 1448. The inmate also claimed that he lost

[2] In light of Graham v. Conner, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), Shillingford should have been a Fourth Amendment case because Shillingford was an arrestee. See id. at 395. The analysis in Shillingford was also rejected in Johnson, decided after Graham. See Johnson, 876 F.2d at 480 (applying "significant injury," rather than "severe injury" in a three-prong test).

consciousness from the application of a choke hold and that, consequently, his voice was permanently damaged. Id. at 1442. When the inmate filed a § 1983 complaint against the jailer, alleging excessive force and "severe" injury, the jailer asserted qualified immunity as a defense in a motion for summary judgment. Id. at 1447. The district court denied the jailer's motion, and after trial, found that the inmate's injuries were severe and that the jailer's actions were not objectively reasonable in light of existing law at the time the inmate was injured. Id. at 1448-49. We upheld that finding under the "clearly erroneous" standard. Id. at 1448-49 & n.42.

In the instant case, the district court observed in its order denying the Officers' summary judgment motion that Roberts claimed he was "choked" and received a bloody nose. This was, in one respect, an erroneous reading of the record. Although the record reflects that Roberts had a bloody nose and that he was in peril of choking on his blood, it does not show that Roberts was "choked" by external force. That error does not, however, undermine the appropriateness of the court's denial of appellants' summary judgment motion.

Whether Roberts' bloody nose was a significant injury is a close questionSQone which becomes even closer if a severe injury is required. In making our determination, we shall view the incident in a light most favorable to Roberts, drawing all inferences in his favor. See Pfannstiel v. City of Marrion, 918 F.2d 1178, 1183 (5th Cir. 1990) (applying Reid). Although the law was somewhat unclear

at the time, in light of prior interpretations of "severe" or "significant" injury, including cases holding that minor injuries may still be "severe" or "significant," see Valencia, 981 F.2d at 1447-49, Roberts' alleged bloody nose and the beating that allegedly produced it satisfy the pleading requirement for purposes of denial of the Officers' motion for summary judgment.

AFFIRMED.