

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3904

(Summary Calendar)

LEE BRADY,

Plaintiff-Appellee,

versus

STATE OF LOUISIANA, ET AL.

Defendants,

JIMMY JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Louisiana
CA 89 792 B M 1

July 12, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

Jimmy Johnson, a correctional officer at the Louisiana State Penitentiary at Angola ("LSP"), appeals the district court's award of actual and punitive damages, on inmate Lee Brady's Eighth Amendment claim of excessive force. Finding neither clear error,

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

nor abuse of discretion in the district court's judgment, we affirm.

I

Lee Brady, an inmate at LSP, was causing a disturbance in his cell by yelling and arguing with a guard.¹ The guard called two of his supervisors, Johnson and Gary Dubroc, to Brady's cell. After conferring with the guard, Johnson sprayed a large amount of irritant dust, or mace, into Brady's cell and closed the solid booth door. Brady continued to yell and curse, so Johnson repeated the spraying.² Brady then allowed the officers to restrain him and take him to the shower where he was to rinse off, receive a fresh jumpsuit, and go to the hospital for an examination, pursuant to LSP policy after the use of irritant dust. After his shower, Brady was restrained once again (this time with shackles and handcuffs known as "the Black Box") while continuing to exchange verbal remarks with the officers. In response to Brady's continued verbal tirade, Johnson, apparently out of sheer frustration, hit Brady in the face.³ After Brady spit at Johnson, Johnson hit him again, causing Brady to fall and strike his head on the ground. Because

¹ Johnson claims that Brady was arguing with other inmates. See Record on Appeal, vol. 2, at 231.

² Johnson claims he only sprayed a single, two-second burst of irritant dust into the cell (after Brady refused orders to keep quiet and come to the bars to be restrained), and could not remember whether he shut the door. See *id.* at 232-33. Brady, on the other hand, claims that he was not ordered to come to the bars, and that two entire cans of irritant dust were used. See *id.* at 155-57.

³ Johnson claims that he hit Brady because Brady attempted to bite Dubroc. See *id.* at 237.

of facial and head injuries, Brady was then taken to a hospital, where he stayed for approximately two months.

Brady filed a claim pursuant to 42 U.S.C. § 1983 (1988), alleging that Johnson used excessive force, in violation of the Eighth Amendment's proscription of cruel and unusual punishment. After hearing testimony from Brady, Brady's fellow inmates, Brady's doctors, and certain correctional officers at LSP, the magistrate judge recommended that Brady be awarded actual damages in the amount of \$15,000.00, and punitive damages in the amount of \$10,000.00. The district court subsequently adopted the magistrate's report and recommendation, and entered judgment for Brady. Johnson appeals, contending that the district court erred in (a) concluding that he used excessive force in violation of Brady's rights under the Eighth Amendment and (b) awarding punitive damages to Brady.

II

A

Johnson first contends that the district court erred in finding that he used excessive force, in violation of Brady's Eighth Amendment rights. See Brief for Johnson at 17-31. We review issues of law de novo. *Palmco Corp. v. American Airlines, Inc.*, 983 F.2d 681, 684 (5th Cir. 1993). However, we will not disturb a district court's factual findings absent clear error. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-75, 105 S. Ct. 1504, 1511-12, 84 L. Ed. 2d 518 (1985). "If the district court's account of the evidence is plausible in light of the record

viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574, 105 S. Ct. at 1511.

In reviewing the merits of Brady's Eighth Amendment claim of excessive force, we focus on whether Johnson's actions amounted to "the unnecessary and wanton infliction of pain." *Hudson v. McMillian*, ___ U.S. ___, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156 (1992). The following factors are relevant to this determination: (1) the extent of the injury suffered; (2) the need for the application of force; (3) the relationship between the need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of the forceful response. *Id.*

Regarding each of these factors, the record shows: (1) that Brady suffered significant injuries to his head and face, as a result of two blows inflicted by Johnson, see Record on Appeal, vol. 2, at 163-82; vol. 3, at 27-30; (2) that no need existed for the two blows since Brady offered no physical resistance,⁴ see *id.*, vol. 2, at 138; (3) that the first blow was unnecessary because Brady offered no physical resistance, see *id.*, and the second blow was equally unnecessary because it was intended to stop Brady from

⁴ The testimony of Johnson and his three fellow officers))that Brady had physically resisted by attempting to bite Dubroc))was expressly found to be "unbelievable" by the magistrate judge, who focused on the fact that Brady had not up to that time offered any physical resistance. See Record Excerpts tab. 6, at 28. As this finding turns on the credibility of witness testimony, we find no clear error. See Fed. R. Civ. P. 52(a) (stating that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"); *Anderson*, 470 U.S. at 574, 105 S. Ct. at 1512.

spitting, see *id.*, vol. 3, at 28; (4) that there was no threat to be reasonably perceived by Johnson or the other officers, because Brady was already being restrained by the Black Box, see *id.*, vol. 2, at 9, 138-39, and there was no concern that any other inmate would become involved in the incident; and (5) that Johnson made no effort to temper the severity of the blows, evidenced in part by the severity of Brady's injuries. See *id.*, vol. 2, at 163-82.

Because the record plausibly supports the conclusion that Johnson's use of force amounted to an unnecessary and wanton infliction of pain, pursuant to the standard set forth in *Hudson*, we find no clear error in the court's determination of Johnson's excessive force claim.

B

Johnson also contends that the district court erred in awarding Brady punitive damages. See Brief for Johnson at 32-34. We review a punitive damages award for abuse of discretion. *Thompkins v. Belt*, 828 F. 2d 298, 302 (5th Cir. 1987). Punitive damages may be awarded in a § 1983 action only if the defendant's conduct is "motivated by evil intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632 (1983). Based upon the district court's findings of fact, which we have not found to be clearly erroneous, there is sufficient evidence to support the court's finding of reckless disregard for Brady's rights. See *Thomas v. City of New Orleans*, 687 F.2d 80, 84 (5th Cir. 1982) (finding no abuse of discretion in

award of punitive damages where sufficient evidence supported finding of reckless disregard). Moreover, the court expressly found that a punitive damages award "will send a message to other correctional officers . . . to be on guard against becoming so accustomed to the use of force that the distinction between reasonable and excessive force disappears." Record Excerpts tab. 6, at 34; see *Smith*, 461 U.S. at 54, 103 S. Ct. at 1639 (stating that the purpose of a punitive damages award is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." (alteration in original) (quoting Restatement (Second) of Torts § 908(1) (1979))). Accordingly, we find no abuse of discretion in the court's decision to award punitive damages.⁵

III

For the foregoing reasons, we **AFFIRM**.

⁵ We find no merit to Johnson's claim that the district court's judgment was not a final decision, pursuant to 28 U.S.C. § 1291 (1988). See Record on Appeal, vol. 1, at 261-62, 268.