IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5053

Summary Calendar

JOHN DAVIS COLQUITT,

Plaintiff-Appellant,

versus

JOHN FRATUS,
J. R. OAKES,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
90 CV 2659

March 24, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

John Davis Colquitt brought this action against John Fratus, Claiborne Deputy Sheriff, and J. R. Oakes, Claiborne Parish Sheriff, alleging that he was subjected to excessive force and denied medical treatment in violation of his civil rights while housed in the Claiborne Parish Jail. The district court granted

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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 Pursuant to that rule, we have determined that this opinion should not be published.

summary judgment in favor of the defendants, and Colquitt appeals from that judgment. Finding that Colquitt has failed to raise a genuine issue of material fact, we affirm.

I. BACKGROUND

A. Facts

The alleged incident at issue in this case took place on October 21, 1990, while Colquitt and other prisoners incarcerated in the Claiborne Parish Jail were being escorted by Fratus back to their cells from the visiting room. According to Colquitt, when he and Fratus reached the entrance to his cell, he asked Fratus if he would deliver his wallet to his mother. Fratus then "shoved [Colquitt] two times and he told [him] to get on in the cell and [Colquitt] went in and began to write [Oakes] a letter about what happened . . . ." Colquitt alleges that, as a result of his having been shoved by Fratus, his right knee began to swell that evening, at which time he included a request for medical attention in his letter to Oakes.

According to Colquitt, the following morning, he informed Fratus that he needed to see a doctor for his knee. Colquitt claims that Fratus told him that he would be permitted to see a doctor only after being transferred to the Department of Corrections. Fratus asserts that he evaluated all of Colquitt's medical complaints during his incarceration at the Claiborne Jail and referred him to the proper medical personnel for all significant and serious medical needs. Fratus also contends that no such referral was necessary from the time of the alleged

incident until Colquitt was transferred to the Department of Corrections.

Colquitt was transferred to the Department of Corrections on October 29, and he requested medical attention the following day. Colquitt merely requested and was given blood pressure medication; he did not mention any problem with his right knee. Colquitt first complained about weakness in his knee while undergoing a physical examination on October 31. However, rather than mentioning any recent injury to his knee at that time, Colquitt told the attending physician that he had injured his knee in 1983 and that he had fractured his lower leg playing football in 1970. The attending physician noted no abnormal noise from Colquitt's knee and indicated that Colquitt's walk was stable. He prescribed no medication or treatment.

Colquitt made his first complaint about significant pain in his right knee on November 5--more than two weeks following the alleged shoving incident in the Claiborne Parish jail. Specifically, Colquitt claimed that his knee was "out of socket." Again, Colquitt made no mention of any recent injury to his knee, and the medical personnel determined that no treatment was necessary. Similarly, Colquitt attended an inmate sick call on November 12 and complained about his knee; Colquitt made no mention of any recent injury to his knee, and the medical personnel determined that no treatment was necessary.[1]

[1] In his amended complaint and the brief he has submitted to this court, Colquitt claims that he did not see a doctor for his knee from the time of the alleged incident until November 12,

On November 14, Colquitt went to sick call and complained about leg cramps. The attending physician prescribed an analgesic for the cramps and ordered that an x-ray be taken. The doctor noted no swelling or fluid build up in Colquitt's right knee, and Colquitt did not mention any recent injury to his knee. The x-ray was performed on November 27, and it did not reveal any fracture or other bone abnormality. Moreover, the doctor found that Colquitt's soft tissues were "unremarkable" and made a "normal" notation in Colquitt's records.

B. Proceedings

Colquitt brought this action on December 6, 1990 pursuant to 42 U.S.C. § 1983, seeking monetary damages in the amount of $100,000. In his complaint, Colquitt asserts that (1) Fratus shoved him twice on October 21, 1990, thereby exerting excessive force which resulted in an injury to his right knee, and (2) both Fratus and Oakes denied him medical treatment for the alleged injury to his knee from October 21 to November 12, 1990.

Fratus and Oakes (together "defendants") filed a motion for summary judgment on January 27, 1992, asserting that Colquitt failed to show that he was subjected to excessive force. In their motion, the defendants assert that (1) Colquitt did not allege--and there is no evidence--that they in any way acted maliciously or sadistically, (2) Colquitt was only in their custody for eight days following the alleged incident and, during

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1990. As has been discussed above, Colquitt saw doctors on October 30, October 31, and November 5.

that time, he was treated on several occasions without any finding of a problem with his knee, and (3) he never mentioned a recent knee injury to those treating him during those examinations.

The matter was referred to a magistrate judge, who rendered a report recommending that the defendants' motion for summary judgment be granted. The magistrate judge found that, because Oakes' only connection with the alleged denial of medical attention was the letter Colquitt claims he wrote to Oakes, Colquitt had failed to allege a sufficient factual basis to raise a question of material fact concerning Oakes' liability. The magistrate judge also found that, even assuming that Colquitt's allegations of pushing were true, those allegations do not amount to an unnecessary and wanton infliction of pain by Fratus. The magistrate also determined that Colquitt had not established that Fratus was deliberately indifferent to Colquitt's serious medical needs. Colquitt responded by filing his own motion for summary judgment, wherein he reiterated the pushing incident, complaints of knee pain, and his alleged requests for medical treatment. Colquitt offered no evidence in the form of affidavits or otherwise, however, to support his claims.

Based upon the magistrate's report, the district court granted the defendants' motion for summary judgment. Colquitt now appeals from that judgment.

II. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S. Ct. 82 (1992). Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S. Ct. 2548 (1986). If the moving party meets the initial burden of establishing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or set forth specific facts showing the existing of a genuine issue for trial. Id.; see FED. R. CIV. P. 56(e). The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505 (1986).

III. DISCUSSION

Colquitt has raised two issues on appeal: (**a**) whether the district court erred in granting summary judgment in favor of the defendants on Colquitt's claim of excessive force; and (**b**) whether the district court erred in granting summary judgment in favor of the defendants on Colquitt's claim that he was denied medical care.

A. Excessive Force Claim

The Supreme Court recently clarified the appropriate legal standard for claims of excessive force brought under the Eighth Amendment. See Hudson v. McMillian, ___ U.S. ___, 112 S. Ct. 995, 999 (1992). When addressing such claims, our inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Id., citing Whitley v. Albers, 475 U.S. 312, 320-21, 106 S.Ct. 1078 (1986). In Hudson, the Court was careful to add that not "every malevolent touch by a prison guard, though, gives rise to an Eighth Amendment claim." Hudson, 112 S. Ct. at 999. Furthermore, the Court cautioned that de minimis uses of force do not rise to the level of a constitutional violation. Id. at 1000. The Court also identified several factors for us to consider in determining whether a particular use of force was wanton and unnecessary. Id. at 999. Specifically, in assessing whether Fratus' alleged shoving inflicted unnecessary and wanton pain on Colquitt in violation of the Eighth Amendment, we consider: (1) the extent of the injuries 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 a forceful response. Id.; see also Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992).

According to the record before us, Colquitt has failed to establish that he suffered an injury as a result of being pushed

into his cell by Fratus. In Colquitt's motion for summary judgment, which was filed in response to the defendants' motion, Colquitt attempted to substantiate his significant injury claim by: (1) denying that his knee was injured prior to the alleged shoving incident; (2) stating that he told the Wade Correction Center physician that his knee was injured when he was pushed by Fratus; and (3) alleging that he had asked to see an orthopedic specialist to obtain a report.[2]

Beyond the fact that these allegations are contained in an unsworn pleading which does not constitute competent summary judgment evidence, Larry v. White, 929 F.2d 206, 211 n.12 (5th Cir. 1991), they are allegations disproved by the record before us. Specifically, on September 19, 1990--approximately one month before the alleged incident--Colquitt sought treatment from Dr. D. K. Haynes for "pain in the right knee from old football injury." At that time, Dr. Haynes noted a "tender right knee." As discussed above in Part I.A, Colquitt made his first post-incident complaint of significant pain in his right knee on November 5--more than two weeks following the alleged shoving incident in the Claiborne Parish jail--which was followed by similar complaints and examinations on November 12 and 14. On none of these occasions did Colquitt mention any recent injury to his knee. Moreover, on all of these occasions, the attending medical personnel found no significant problem with Colquitt's

[2] In this same motion, Colquitt also alleges the existence of eyewitnesses, whom he fails to identify.

knee. In fact, Colquitt's knee was x-rayed on November 27, and that x-ray failed to reveal any fracture or other bone abnormality and any significant tissue inflammation.

Moreover, there is no evidence in the record indicating that the defendants acted maliciously and sadistically to cause Colquitt harm. According to the record, the alleged incident occurred while Fratus was escorting several prisoners to their cells. Rather than going into his cell as instructed, Colquitt requested that Fratus do him a personal favor, at which time Fratus said "get on in the cell" and pushed Fratus twice in that direction. We conclude that Colquitt has depicted nothing more than a de minimis use of force applied "in a good-faith effort to maintain or restore discipline . . . ." Hudson, __ U.S. at __, 112 S. Ct. at 999.

In sum, when the defendants moved for summary judgment and supported that motion as provided under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifted to Colquitt to, "by affidavits or as otherwise provided in this rule, . . . set forth specific facts showing that there is a genuine issue for trial." Colquitt never offered such evidence, in the form of affidavits or otherwise, to support his position. We conclude, therefore, that Colquitt has failed to meet his summary judgment burden on the issue of excessive force.

B. Deliberate Indifference Claim

Colquitt also claims that his Eighth Amendment rights were violated by a failure on the part of Fratus and Oakes to provide him with adequate medical care. We disagree.

To substantiate this claim, Colquitt would have had to establish that Fratus and Oakes committed a denial of medical care "sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285 (1976). Deliberate indifference encompasses only unnecessary and wanton infliction of pain "repugnant to the conscience of mankind." Id. at 105-06 (internal quotations and citations omitted). The facts underlying a claim of deliberate indifference must clearly evince the medical need in question and the alleged official dereliction. Woodall v. Foti, 648 F.2d 268, 273 (5th Cir. 1981). Thus, a legal finding of "deliberate indifference" must rest on facts which clearly evince "wanton" actions by the defendants. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985).

The only evidence in the record regarding Colquitt's medical care are his medical records and Fratus' affidavit, which alleges that Colquitt was not deprived of needed medical attention from the date of the incident through the time he was transferred to the Wade Correctional Center. Fratus also alleges that he evaluated Colquitt's medical complaints to the best of his ability, and that he referred Colquitt to medical authorities for any serious or significant medical needs. As discussed in Part I.A above, Colquitt's medical records and the other evidence in

the record support Fratus' allegations, and Colquitt has introduced no competent evidence to the contrary. As for Oakes, his only connection to Colquitt's claim of deliberate indifference is Colquitt's letter, which, stated quite simply, is not enough evidence to substantiate Colquitt's claim for the purposes of summary judgment. See FED. R. CIV. P. 56; supra Part II.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of the defendants.