UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7745
Summary Calendar

ARTHUR NICKENS, ET AL.,

Plaintiffs,

ARTHUR NICKENS,

Plaintiff-Appellant,

VERSUS

LARRY BROOKS, ET AL.,

Defendants,

ANDERSON BRADFORD,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
(CA GC89-99-B-O)

(January 27, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Arthur Nickens challenges the judgment rendered against him after a jury trial of his § 1983 action. We **AFFIRM**.

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[1] 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Nickens, a Mississippi prisoner, filed an action, pursuant to 42 U.S.C. § 1983, claiming that corrections officer Anderson Bradford employed excessive force in violation of the Eighth and Fourteenth Amendments. He alleged in his complaint that, on June 27, 1988, an Emergency Response Team removed him and all other inmates from housing unit 27 at the state penitentiary; that the team forced them to lie face down while handcuffed in an enclosed exercise yard; that after complaining that his handcuffs were too tight, Bradford struck Nickens' right elbow with a baton, causing a large knot on his elbow that can be removed only by surgery; and that the baton blow was unprovoked.

In November 1992, a jury heard the case. Nickens' testimony mirrored the above allegations, but he stated that he did not seek medical care for his elbow until July 15, 1988, several weeks after the incident. Also, Nickens admitted during cross-examination that he filed a grievance about the incident on June 28, 1988, in which he failed to mention the baton blow.

Officer Bradford, on the other hand, testified that he: 1) did not remember a shake-down such as the one described by Nickens; 2) was not a member of the Emergency Response Team; 3) does not carry a baton; and 4) never struck Nickens. In addition, he testified that, in preparation for trial, he failed to find any record of a shake-down at unit 27 or of his having been at unit 27. According to Bradford, he was not even logged in as having been present on the day of the alleged incident.

A prisoner testified that he saw Bradford in the unit at the time of the alleged beating. Another testified that he saw Bradford strike Nickens. But, the prison physician testified that Nickens' medical record disclosed no complaints of an elbow injury.

As noted, the jury found for Bradford.

II.

A.

Nickens urges that the district court erred in refusing to instruct the jury in conformity with ***Hudson v. McMillian***, ___ U.S. ___, 112 S. Ct. 995, 1000 (1992), which held that a prisoner's Eighth Amendment excessive force claim does not depend upon whether "significant" injury resulted from the use of force. ***Hudson*** was decided after the alleged beating in the instant case, but before trial. Because ***Hudson*** was not the law in effect at the time of the beating, the district court, over Nickens' protests, did not apply ***Hudson***.[2] Rather, it instructed the jury that Nickens could prevail only if he proved a "severe injury".[3]

Bradford urges that the instruction given was correct, because at the time of the alleged beating, ***Shillingford***, rather than ***Hudson***, controlled. Bradford asserts that to apply ***Hudson*** would be

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[2] Much of the discussion between the parties and the district court regarding the proper instruction to be given turned on the issue of qualified immunity, an issue discussed *infra*.

[3] This "severe injury" standard, adopted from ***Shillingford v. Holmes***, 634 F.2d 263, 265 (5th Cir. 1981), governed Eighth Amendment excessive force claims in this Circuit at the time of the alleged beating. *See generally* ***Rankin v. Klevenhagen*** 5 F.3d 103, 108 (5th Cir. 1993) ("our standard for Eighth Amendment excessive force claims was ***Shillingford***").

to give it improper retroactive effect. We have rejected this contention; ***Hudson*** is the correct standard governing the viability of the excessive force claim. ***Rankin***, 5 F.3d at 106-08. The district court erred in instructing the jury that a "severe injury" had to be proven in order for a prisoner to prevail on an excessive force claim. ***Bender v. Brumley***, 1 F.3d 271, 276-79 (5th Cir. 1993). As discussed below, however, different considerations applied for qualified immunity *vel non*.

A finding of error "is only one-half of the inquiry. Even though error may have occurred, we will not reverse if we find, based upon the record, that the challenged instruction could not have affected the outcome of the case." ***Id.*** at 276-77 (internal quotations and citations omitted). The error was harmless. The jury either found that the alleged baton blow never occurred -- in which case the issue of severity would be irrelevant -- or found that it did occur, but that the injury suffered was not severe. If the jury made the latter finding, the failure to properly instruct the jury would still be harmless, because Bradford would be entitled to qualified immunity.

Our court recently described the "bifurcated analysis" employed in assessing qualified immunity claims in excessive force cases. *See* ***Rankin***, 5 F.3d at 105. The first step in this analysis is to "determine whether the plaintiff has `allege[d] the violation of a clearly constitutional right.'" ***Id.*** (quoting ***Siegert v. Gilley***, 500 U.S. 226 (1991)). This determination must be governed by "*currently* applicable constitutional standards", namely, ***Hudson***.

Rankin, 5 F.3d at 106-08 (emphasis added). The second step is to "decide if the defendant's conduct was objectively reasonable, because even if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable." ***Id.*** at 105 (internal quotations and citations omitted). This decision must be made "with reference to the law as it existed at the time of the conduct in question", namely, ***Shillingford***. ***Id.*** at 108 (internal quotation and citation omitted).

Because ***Shillingford*** controls this second step in our inquiry, Bradford is entitled to qualified immunity. The jury, if it found that the event alleged by Nickens occurred, obviously did not find that the event violated ***Shillingford***; therefore, the error could not have swayed the judgment of the jury, which was instructed on qualified immunity.[4]

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[4] The jury was instructed

> ... that prison officials are entitled to assert a defense of qualified immunity when they are sued in a civil action for money damages, as has happened in this case. Prison officials performing discretionary employment are shielded from liability as long as their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known.
>
> The plaintiff in this case claims that the Defendant Anderson Bradford violated his constitutional rights under the Eighth Amendment to be protected from the infliction of excessive or undue force, and also that on this date that the plaintiff alleges that his claim arose, the clearly established law specifies that the plaintiff must show that he suffered a severe injury due to the willful actions of the defendant.

B.

Nickens raises other issues regarding Bradford's credibility, and the failure to instruct the jury that it should determine whether Bradford was present at the time and place of the alleged beating -- despite a general credibility instruction. Witness credibility is, of course, a jury question. ***United States v. Lerma***, 657 F.2d 786, 789 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). These contentions are without merit.

Nickens also challenges the sufficiency of the evidence supporting the verdict (though this issue is intertwined with the credibility issues). Because he failed to move after the verdict for judgment as a matter of law, this issue is reviewable on appeal only insofar as there is plain error or an absence of *any* evidence supporting the jury verdict. ***Illinois Cent. Gulf R.R. Co. v. International Paper Co.***, 889 F.2d 536, 541 (5th Cir. 1989). We do not find that either circumstance existed in this case.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

> *If you find from a preponderance of the evidence, credible evidence that the plaintiff in this case did not suffer a severe injury as a result of the willful action on the part of the defendant, then you should return a verdict in favor of the defendant*.

(Emphasis added).