

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8720  
Summary Calendar

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ELISHA SHABAZZ AZIZ WADUD MUHAMMAD,  
a/k/a Roland 7X Rudd,

Plaintiff-Appellant,

VERSUS

NESS, Lieutenant, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
(W 90 CA 229)

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(January 14, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Elisha Muhammad appeals the denial of relief in his state prisoner's civil rights suit brought pursuant to 42 U.S.C. § 1983. We vacate and remand.

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\* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On August 22, 1990, Muhammad filed this suit against Ness, Smith, Patterson, Vega, Ament, and Cortasie, all Texas Department of Criminal Justice ("TDCJ") employees. Muhammad alleged that on May 28, 1990, the defendants handcuffed him, removed him from his cell, beat him for fifteen minutes, took him to the infirmary (where nothing was done despite his complaint of pain), photographed him, and returned him to his cell. Muhammad asserted that the defendants caused swelling over his entire face, fractured ribs and ankles, pains in his back and neck, blood "clogs" in his eyes, bruises all over his body, internal bleeding, and vomiting of blood. Muhammad requested a trial by jury, \$20,000 in compensatory damages, and that the defendants be enjoined from assaulting him in the future.

On October 30, 1990, the magistrate judge conducted a Spears<sup>1</sup> hearing regarding the incident. Defendants Ness, Smith, Patterson, Vega, Ament, and Cortasie later moved for summary judgment, which the magistrate judge recommended be granted.

The magistrate judge found that on May 28, 1990, the defendants were members of a use-of-force team that was dispatched to Muhammad's cell after receiving a complaint that Muhammad had been throwing liquid on corrections officers. Muhammad was removed from his cell while it was searched for containers. After being handcuffed and removed, Muhammad began resisting and was placed on the floor by Officer Britt. Officers Cortasie, Eary, Patterson,

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<sup>1</sup> Spears v. McCotter, 766 F.2d 179, 181-82 (5th Cir. 1985).

and Vega assisted in restraining Muhammad. After Muhammad was placed in leg irons, he was escorted to the infirmary, where a medical examination was conducted and photographs of him were taken. Notes from the use-of-force physical examination that was conducted on May 28, 1990, indicate that no injuries were found.

The magistrate judge found that the medical records reflect that Muhammad made no complaint concerning his injuries until June 14, 1990, and that he had a history of being uncooperative in the treatment of peptic ulcer disorder, which Muhammad had suffered from since 1976. The magistrate judge also found Muhammad had complained of neck and back pains in March 1990 after an unrelated use-of-force incident, although Muhammad insisted at the evidentiary hearing that he had no neck pain prior to the May 28, 1990, use-of-force incident. The medical records demonstrated that Muhammad suffered from cervical spondylosis, a degenerative condition that may be congenital, hereditary, or related to disease but was not related to trauma.

The magistrate judge recommended that the district court grant the defendants' motion for summary judgment on qualified-immunity grounds. Specifically, the magistrate judge found that Muhammad did not suffer a significant injury. In the alternative, the magistrate judge recommended that the district court find that Muhammad's suit lacked a basis in law or fact.

On March 27, 1992, the district court granted the defendants' motion for summary judgment on qualified-immunity grounds. The court determined that Muhammad had failed to state a claim that a

constitutional violation occurred and disregarded the magistrate judge's analysis regarding the significance of Muhammad's injuries. The court concluded that the use of force was provoked by Muhammad.

## II.

On October 30, 1990, Muhammad filed a supplemental complaint adding two defendants, asserting that on October 26, 1990, Officers Kinabrew and Seigmon beat him for about fifteen minutes, causing him to suffer "internal bleeding[] by vomiting blood, bursted lips, knots and swellings over his entire face, bruises and fractures on his back and neck [and] around his wrists and ankles." Muhammad alleged that this beating occurred while Kinabrew was escorting him to his cell after a disciplinary hearing.

Muhammad averred that, as he and Kinabrew were walking down a hallway, Kinabrew was pulling and jerking Muhammad's arm. Muhammad alleged that he asked Kinabrew why he was doing this, and Kinabrew responded by telling him "to shut the fuck up" and attacking Muhammad. Muhammad claimed that Seigmon then joined in the beating. Muhammad alleged that, after the beating, he was taken to the infirmary and examined by two nurses but given no treatment and that he then was photographed and returned to his cell.

The magistrate judge found that Muhammad's allegations against Kinabrew and Seigmon were frivolous based upon observations of inconsistencies in Muhammad's allegations and Muhammad's "conveniently shift[ing]" his allegations to explain various medical records at an evidentiary hearing. The magistrate judge recom-

mended that these claims be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

The district court determined that the magistrate judge's recommendation that Muhammad's suit against Seigmon and Kinabrew be dismissed as frivolous was based upon lack of credibility regarding the significance of Muhammad's injuries. The district court, citing to Hudson v. McMillian, 112 S. Ct. 995 (1992), determined that Muhammad's suit could not be dismissed as frivolous because the Supreme Court had overruled the significant-injury test. The district court conducted a bench trial on Muhammad's allegations concerning the October 26, 1990, use-of-force incident and subsequently dismissed the suit.

### III.

#### A.

Muhammad argues that the district court erred by granting summary judgment in favor of defendants Ness, Smith, Patterson, Vega, Ament, and Cortasie on the May 28, 1990, incident. Review of the district court's ruling on a motion for summary judgment is plenary. King v. Chide, 974 F.2d 653, 655 (5th Cir. 1992). Summary judgment is appropriate if, "viewing all the evidence in the light most favorable to the non-movant, there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991) (internal quotations and footnote omitted).

Muhammad's complaints were made under penalty of perjury. Declarations made under penalty of perjury are competent to raise a fact issue precluding summary judgment. 28 U.S.C. § 1746; Nissho-Iwai Am. Corp. v. Kline, 845 F.2d 1300, 1306 (5th Cir. 1988).

This court engages in a bifurcated analysis when assessing a claim of qualified immunity. Rankin v. Klevenhagen, No. 92-2627 (5th Cir. Oct. 21, 1993), slip op. at 475. The court first determines whether the plaintiff has alleged a violation of a clearly established constitutional right under currently applicable legal standards. If so, the court then decides whether the defendant is entitled to immunity from suit because his conduct was objectively reasonable in light of the law as it existed at the time of the conduct in question.

"To state an Eighth Amendment excessive force claim, a prisoner . . . must show that force was applied not 'in a good faith effort to maintain or restore discipline,' but rather that the force complained of was administered 'maliciously and sadistically to cause harm.'" Rankin, slip op. at 477 (quoting Hudson, 112 S. Ct. at 999). If the first prong of the test is satisfied, the law in effect at the time of the offense is used to evaluate the reasonableness of defendant's conduct to ascertain eligibility for qualified immunity. Id. at 479.

The law in effect is stated in Huquet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990). Under Huquet, to state a claim of excessive force under the Eighth Amendment that will overcome

qualified immunity, a plaintiff must show (1) a significant injury that (2) resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was (3) clearly unreasonable, and (4) that the action constituted an unnecessary and wanton infliction of pain.

The record demonstrates that the May 28, 1990, incident occurred while officers were restraining Muhammad during a search of his cell. TDCJ records indicate no evidence to suggest that the defendants acted "maliciously and sadistically to cause harm" or that Muhammad was injured.

Nevertheless, Muhammad's complaints, made under penalty of perjury, allege that he was beaten without provocation on both occasions. Because Muhammad's sworn declarations are competent to raise a fact issue precluding summary judgment, Kline, 845 F.2d at 1306, there were disputed issues of fact that precluded summary judgment. See Enlow v. Tishomingo County, 962 F.2d 501, 511-13 (5th Cir. 1992) (existence of genuine issue of material fact will preclude summary judgment based upon qualified immunity).

Furthermore, the district court's finding that Muhammad provoked the use of force is a factual finding that runs to Muhammad's credibility. Conflicts in credibility should not be resolved on summary judgment. Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 81 (5th Cir. 1987). Accordingly, the summary judgment in favor of the defendants involved in the May 28, 1990, incident must be vacated.

B.

Muhammad argues that the district court erred by not granting him a jury trial concerning his allegations arising out of the October 26, 1990, use-of-force incident. The district court rejected the magistrate judge's recommendation that Muhammad's claims arising out of the incident be dismissed as frivolous, as the district court believed that Hudson v. McMillian overruled the significant-injury test. The district court thereafter held a bench trial on Muhammad's claims. The denial of a timely demand for a jury trial of issues triable by a jury constitutes reversible error. Pinemont Bank v. Belk, 722 F.2d 232, 235 (5th Cir. 1984); see also Morgantown v. Royal Ins. Co., 337 U.S. 254, 258 (1949).

The record reflects that Muhammad requested a trial by jury in his original complaint, which involved the May 28, 1990, incident. He did not demand a jury in his amended complaint; the district court, however, considered the amended complaint as an addition to the first complaint. A party's jury demand in the first complaint covers all issues raised in subsequent pleadings affecting the party demanding a jury. FED. R. CIV. P. 38(c), 39(a); see, e.g., YJR Enters. v. Twin County Grocers, 709 F. Supp. 499, 501 (S.D.N.Y. 1989). The district court should have granted Muhammad's request for a jury trial.

Because there were genuine issues of material fact precluding summary judgment and because Muhammad was denied the right to a jury trial, the judgment is VACATED and REMANDED for further proceedings. Because of the remand, it is unnecessary to address



Muhammad's other contentions.