UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-2010

(Summary Calendar)

DONALD WAYNE CRAWFORD,

Plaintiff-Appellant,

versus

JAMES LYNAUGH, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-90-3190)

(September 20, 1993)

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

PER CURIAM:[*]

Donald Wayne Crawford filed a 42 U.S.C. § 1983 (1988) action pro se and in forma pauperis, alleging that his Eighth Amendment rights were violated as a result of the excessive use of force by a prison guard. The district court dismissed the complaint as frivolous pursuant to 28 U.S.C. § 1915(d) (1988) and Crawford appealed. We remanded for reconsideration in light of the Supreme Court's decision in *Hudson v. McMillian*, ___ U.S. ___, 112 S. Ct.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

995, 117 L. Ed. 2d 156 (1992). The district court again dismissed the action as frivolous and Crawford appeals. Finding that the district court erred, we reverse and remand for further proceedings.

I

Crawford alleged the following facts in his pleadings. Crawford was assigned to clean the prison dining room. While so engaged, he requested permission to use the restroom from the supervising officer, Sergeant Michael Davenport. Sergeant Davenport refused permission in highly vulgar terms. Crawford's subsequent requests for access to the restroom were repeatedly denied and he was eventually reduced to urinating in a "butt can." Crawford reported this incident to Davenport's supervisor, Captain Wendell Banks, who arranged for Crawford to be moved from the dining room to the kitchen, where he would be under the supervision of a different officer.

Eleven days later, Sergeant Davenport entered the kitchen and told Crawford to get to work. Sergeant Davenport then stood, blocking a doorway through which Crawford had to, or wished to, pass. Crawford made no threatening move toward Sergeant Davenport, but instead ducked under the officer's outstretched arm in an attempt to pass through the doorway. Davenport grabbed Crawford around the neck in a tight grip and bent him over until his head was at his knees, at the same time jabbing Crawford in the side with an ink pen. Crawford noted that "S[ergeant] Davenport weigh[ed] at approximately 300 pounds to my 185 and all his weight was [used] on me [causing] a strain to my lower back and neck."

Record on Appeal at 27. After Sergeant Davenport released him, Crawford protested. In response, Davenport pulled out his handcuffs, placed them on Crawford's hands "as though they were brass knuck[les]," and in vulgar terms threatened to use them on Crawford if he failed to go back to work. *Id.* at 26-27.

Experiencing back and neck pain after the incident, Crawford asked Davenport for permission to go to the infirmary, but he refused. Crawford located other officers on duty and requested that they escort him to the infirmary. Davenport refused to permit the officers to escort Crawford, and warned Crawford of an unspecified reprisal if he were to report the incident. The impasse was broken by the arrival of an officer, who directed Davenport to take the inmate to the infirmary. Davenport complied, and the medical staff gave Crawford heat treatment for strained back and neck muscles.[1] Sergeant Davenport subsequently filed a false disciplinary report charging Crawford with striking an officer and refusal to obey an order. At the disciplinary hearing Crawford was found not guilty of striking an officer, and the refusal to obey an order charge was dismissed.

Crawford then brought a § 1983 suit against James Lynaugh, Director of the Texas Department of Criminal Justice, Warden Billy Ray Crawford, Captain Banks, and Sergeant Davenport, alleging violations of his constitutional rights. Subsequently, Crawford's

[1] Crawford claims that he had to wear a cervical collar for 90 days, experienced constant pain in his neck and upper back and numbness in his legs, had difficulty sleeping, and had nightmares because of the incident. Although he recovered fairly well, Crawford still experiences a popping sensation in his neck.

claims against Director Lynaugh, Warden Crawford, and Captain Banks were dismissed upon Crawford's motion. The district court dismissed the remaining excessive force claim against Sergeant Davenport as frivolous pursuant to 28 U.S.C. § 1915(d), finding that Crawford's claim had no arguable basis in law or fact because no significant injury occurred and, in the alternative, because Crawford alleged only a single, spontaneous attack. While Crawford's appeal to this Court was pending, the Supreme Court held that prison officials violate the Eighth Amendment when they maliciously and sadistically use force to cause harm to an inmate, whether or not the injury is significant. *See Hudson v. McMillian*, ___ U.S. ___, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156 (1992). We remanded Crawford's claim for reconsideration in light of *Hudson*. On remand, the district court again dismissed Crawford's claim. In doing so, the district court found that Crawford alleged only a de minimis injury and that the incident was only a single, spontaneous act. Crawford appeals.

II

Crawford contends that the district court erred in dismissing his claim as frivolous.[2] We review a §1915(d) dismissal for abuse

[2] Crawford also argues that he was entitled to an opportunity to develop his case before dismissal. Specifically, he objects to the district court's failure to hold a *Spears* hearing. *See* Brief for Crawford at 2. A *Spears* hearing is one tool in the judicial workshop for winnowing out the wheat from the mountains of chaff in pro se prisoner litigation. *See Spears v. McCotter*, 766 F.2d 179, 182 (5th Cir. 1985). It is used to dig beneath a pro se prisoner's conclusory allegations to determine the factual and legal bases of a claim. *Id.* at 180. It is not, however, the only procedure available to the district court, *see id.* at 181-82 (noting similar function of *Spears* hearings, questionnaires, and motions for more definite statement), nor is it a mandated procedure, *Wilson v. Barrientos*, 926 F.2d 480, 483 n.4 (5th Cir. 1991). After the complaint was filed, the district court ordered Crawford to submit a more definite statement. *See* Record on Appeal at 15. The court required Crawford to answer twenty-seven

of discretion. *Denton v. Hernandez*, ___ U.S. ___, ___, 112 S. Ct. 1728, 1734, 118 L. Ed. 2d 340 (1992); *Mayfield v. Collins*, 918 F.2d 560, 561 (5th Cir. 1990). A claim may be dismissed as frivolous pursuant to § 1915(d) when the complaint lacks an arguable basis in law or fact. *Denton*, 112 S. Ct. at 1732-33.

A

Crawford maintains that the district court erred in finding that his excessive force claim alleged only a de minimis injury, and was therefore not actionable even under *Hudson*. Crawford contends that the district court misconstrued the Supreme Court's holding in *Hudson* and applied the wrong standard. "`[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" Hudson, ___ U.S. at ___, 112 S. Ct. at 998 (quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986)). A de minimis use of force that does not shock the conscience, however, is not protected under the Eighth Amendment. *Id.*, ___ U.S. at ___, 112 S. Ct. at 1000. The core inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.*, ___ U.S. at ___, 112 S. Ct. at 999, 117 L. Ed. 2d at 165-66. On remand from the Supreme Court, we enumerated several of the factors relevant to the inquiry. *See Hudson v. McMillian*, 962 F.2d

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specific questions pertaining to the incident, and the record reflects that Crawford responded with particularity. *Id.* at 22-28. We therefore find Crawford's contention that he was denied an opportunity to develop the facts of his case to be without merit.

522, 523 (5th Cir. 1992). A court should consider: "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 a forceful response." *Id.*

The district court based its finding that Crawford's claim was frivolous on its conclusion that "[Crawford's] injury was de minimis, an injury of the type that is not actionable even under *Hudson*." Record on Appeal at 44. In reaching that conclusion, the district court compared Crawford's alleged injuries to those sustained by the plaintiff in *Hudson*, remarking that "[t]he Supreme Court found that Hudson's bruises, swelling, loosened teeth, and cracked dental plate were not de minimis." Record on Appeal at 42. The district court misconstrued *Hudson.* The sentence in *Hudson* to which the district court apparently referred reads as follows: "[y]et the *blows* directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not de minimis for Eighth Amendment purposes." *Hudson*, ___ U.S. at ___, 112 S. Ct. at 1000 (emphasis added). It is the *blows*, not the resulting injuries, which are the subject of the sentence and which are not de minimis. In any event, the injuries alleged here were not *de minimis*. *Hudson* rests squarely on the proposition that force is to be measured in terms of its appropriateness to the situation))evidence of significant injury is relevant but not controlling. *See id.*, ___ U.S. at ___, 112 S. Ct. at 999 ("The

absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it."); *see id.*, ___ U.S. at ___, 112 S. Ct. at 1002 (Blackmun, J., concurring) (approving Court's decision to disavow significant injury requirement); *Hudson v. McMillian*, 962 F.2d 522, 523 (5th Cir. 1992) (listing factors considered in excessive force claim).[3] The extent of the injuries suffered is but one factor to be considered in determining the validity of an excessive force claim. The district court therefore erred in viewing this factor as dispositive, and abused its discretion in dismissing Crawford's claim on this ground. The district court on remand is directed to consider the other aforementioned factors in determining whether the "force was applied in a good-faith effort to maintain and restore discipline, or maliciously and sadistically to cause harm." *Hudson,* ___ U.S. ___, 112 S. Ct. at 999.

B

As an alternative basis for its holding, the district court found that Crawford's complaint alleged a "single, spontaneous act" which is not actionable under the Eighth Amendment. The district court cited *George v. Evans*, 633 F.2d 413 (5th Cir. 1980), where we held that an isolated, unauthorized))and presumably spontaneous))act does not constitute punishment within the meaning of the Eighth

[3] We have not abandoned this Circuit's requirement that a plaintiff show proof of injury in excessive force claims, but after *Hudson* the degree of injury required to satisfy this test is nominal. *See Knight v. Caldwell*, 970 F.2d 1430, 1432 (5th Cir. 1992) (noting that some injury, however small, must be alleged to bring excessive force claim), *cert. denied,* ___ U.S. ___, 113 S. Ct. 1298, 122 L. Ed. 2d 688 (1993); *cf. Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993) (finding no claim where plaintiff sustained no injuries).

Amendment, but is actionable under the Fourteenth Amendment. *Id.* at 415 (citing *Johnson v. Glick,* 481 F.2d 1028, 1032 (2d Cir. 1972) ("[A]lthough a spontaneous attack by a guard is `cruel' and, we hope, `unusual,' it does not fit any ordinary concept of `punishment.'"), *cert. denied,* 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324 (1973)). Crawford alleged more than a single, spontaneous act; Crawford's pleadings alleged an unprovoked attack by a guard whose safety Crawford did not endanger and who acted antagonistically toward Crawford before and after the attack. Consequently, Crawford's unanswered claim has an arguable basis in law and fact. *Cf. Adams v. Hansen,* 906 F.2d 192, 193-94 (5th Cir. 1990) (district court erred in dismissing inmate's Eighth Amendment excessive force claim as frivolous where inmate alleged only that a guard "in an act of gratuitous brutality grabbed and twisted his right arm in an attempt to break it" and "put the `lid' on [the inmate's] fingers and placed all his weight on the `lid.'"). We therefore hold that the district court abused its discretion in dismissing Crawford's claim as frivolous under *George*.

III

For the foregoing reasons, we **REVERSE** and **REMAND** for further proceedings in accordance with this opinion.