IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3841
Summary Calendar

JOHNNY DICKERSON,

Plaintiff-Appellant,

versus

MONROE HILL, Captain, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. CA-90-105-B

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(October 3, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[*]

Johnny Dickerson moves this Court for leave to proceed on appeal in forma pauperis (IFP). "To proceed on appeal [IFP], a litigant must be economically eligible, and his appeal must not be frivolous." Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986).

Dickerson argues that his trial was fundamentally unfair because counsel was not appointed for him before trial or at trial. A denial to appoint counsel is reviewed for abuse of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

discretion. See Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982). The record does not indicate that Dickerson requested the appointment of counsel before or during the trial. Moreover, a review of the record indicates that the issues and claim presented at trial were not factually complex. The record is also replete with Dickerson's pretrial motions concerning discovery and requests for hearings. Under these circumstances, no abuse of discretion is found, see Ulmer, 691 F.2d at 213, and Dickerson's argument of his trial being fundamentally unfair is frivolous.

Dickerson argues that the record and the trial evidence do not support the jury's verdict. He asks for a new trial. The record does not indicate that Dickerson moved for judgment as a matter of law at the close of the defendants' case. See Fed. R. Civ. P. 50. In the absence of such a motion, the sufficiency of the evidence in support of the jury's verdict is not reviewable. See Coughlin v. Capitol Cement Co., 571 F.2d 290, 297 (5th Cir. 1978). The issue is frivolous.

Dickerson argues that his summary-judgment motion was wrongfully denied and that the defendants' summary-judgment motion was wrongfully granted on his first claim of excessive use of force. Summary judgment 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." Fed. R. Civ. P. 56(c). This Court reviews de novo the district court's summary-

judgment determination. See Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 912 (5th Cir.), cert. denied, 113 S. Ct. 98 (1992).

In order to satisfy its burden, the party moving for a summary judgment has the initial responsibility of advising the district court of the basis for its motion and identifying those portions of the proper summary-judgment evidence which demonstrate the absence of a genuine issue of fact. Id. at 913. Dickerson's summary-judgment motion failed to identify such evidence to support the motion and focused primarily on the issue of damages. As plaintiff, Dickerson had the burden to prove the entire basis of his claim. As such, the district court did not err in denying Dickerson's motion.

A moving party may meet its summary-judgment burden by pointing out "the absence of evidence supporting the nonmoving party's case." Id. (internal quotations and citation omitted). The burden then shifts to the nonmoving party to produce evidence or set forth specific facts which would be sufficient to create a fact issue for trial. Id. Summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. V. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In their motion for summary judgment, the defendants argues that they were entitled to qualified immunity. "[W]e engage in a bifurcated analysis" when assessing a claim of qualified immunity. Rankin v. Klevenhagen, 5 F.3d 103, 105 (5th Cir. 1993).

"[W]e determine whether the plaintiff has `allege[d] a violation of a clearly established constitutional right.'" Id. (citation omitted). If so, we decide whether the defendant is entitled to immunity from suit because his conduct was objectively reasonable in the light of the law as it existed at the time of the conduct in question. Id. at 105, 108.

"[T]o state and 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.'" Id. at 107 (quoting Hudson v. McMillian, ___ U.S. ___, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156 (1992).

Even assuming that Dickerson has sufficiently alleged in his verified complaint a constitutional violation, he has not surmounted the second step of the qualified-immunity analysis. The law in effect at the time of the offense is used to evaluate the reasonableness of the defendants' conduct and to ascertain the defendants' eligibility for qualified immunity. Id. at 108. At the time that the officer sprayed gas in Dickerson's face, the law required the plaintiff to prove a significant injury. See Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990). The medical examination after the gassing revealed temporary symptoms of red eyes and rapid heartbeat, not a significant injury. A reasonable officer confronting Dickerson, who was standing in the shower and requesting to see a ranking officer regarding the failure to receive mailed publications, would not have known that

a short blast of mace, which would not cause significant injury, could be viewed as excessive force. See Hale v. Townley, 19 F.3d 1068, 1074-75 (5th Cir. 1994).

Further, Dickerson did not argue, either in his response to the defendants' summary-judgment motion or in his objections to the magistrate judge's report, that this instance of spraying was an excessive use of force. We "will not consider evidence or arguments that were not presented to the district court for its consideration in ruling on the [summary-judgment] motion." Skotak, 953 F.2d at 915. As such, the defendants were entitled to qualified immunity, and the grant of summary judgment for the defendants on this claim was proper.

Dickerson argues "that the errors patent on the face of the records were enough to make [his] trial on the merits fundamentally unfair." Appellant's brief, 10. He does not identify what these errors are or where they can be found in the record. As such, his argument is conclusional and need not be considered. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

Because Dickerson's appeal does not involve legal points of arguable merit, see Jackson, 811 F.2d at 261, the appeal is DISMISSED as frivolous. 5th Cir. R. 42.2. Dickerson's motion for leave to proceed IFP is DENIED.

APPEAL DISMISSED. MOTION DENIED.