

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4820
Summary Calendar

WAYNE A. SMITH,

Plaintiff-Appellant,

versus

WAYNE SCOTT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas
(9:92-CV-120)

(February 18, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Wayne Anthony Smith, a prisoner in the Texas Department of Criminal Justice - Institutional Division, Eastham Unit, filed an action under 42 U.S.C. § 1983 against Deputy Director Wayne Scott, Captain Hammer, Officer Billy Scott Tillman, and Officer James R. Nixon. The substance of the complaint was that Officers Tillman and Nixon used racial slurs against him, threw him down a flight of stairs, and beat and kicked him unnecessarily.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

The parties consented to have the case heard by the magistrate judge and to have her enter final judgment. A bench trial was held in this matter on March 23, 1993. Following the trial, the magistrate judge issued a memorandum opinion and final judgment granting Smith no relief and dismissing his action with prejudice against all defendants. The magistrate judge found as follows:

In this case, the preponderance of the credible evidence shows that neither of the officers named as being involved in the alleged use of force acted maliciously or sadistically or had any intent to cause harm. Instead, the preponderance of the credible evidence shows that Smith turned around during an escort, an action which the escorting officers reasonably interpreted as potentially threatening. When they attempted to restore discipline by restraining Smith, he resisted, causing himself to fall to the floor and necessitating the use of a restraining hold. Smith has failed to show by a preponderance of the evidence that he suffered a constitutional violation as a result of the incident at issue in this case.

On appeal, Smith contests the magistrate judge's conclusion that he was not subjected to cruel and unusual punishment as the result of the use-of-force by prison personnel. The factual findings supporting the conclusion of the magistrate judge will be overturned only if they are clearly erroneous. See Fed. R. Civ. P. 52(a); Irby v. Sullivan, 737 F.2d 1418, 1427 (5th Cir. 1984) (clearly erroneous standard applied to district court factual findings in a § 1983 employment discrimination case).

The magistrate judge decided this case based on the standard for complaints for the use of excessive force by prison personnel set forth in Hudson v. McMillian, ___ U.S. ___, 112 S.Ct. 995, 999,

117 L.Ed.2d 156 (1992). The Supreme Court held that "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Id. Factors relevant to this inquiry include (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. See Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992) (on remand).

At the bench trial, there were essentially two versions of the alleged events. The first version came from the testimony of Smith and two fellow inmates, Matthew Tomlinson and Gilbert Esponzoza. Smith testified that Officers Nixon and Tillman came to his cell to move him out of solitary confinement for 72 hours. Smith asserted that Tillman began to threaten him with racial slurs. Smith testified that he was handcuffed and as he was being led to his new cell Officer Tillman grabbed his right leg and threw him down a flight of stairs. Tomlinson testified that he heard Tillman threaten to throw Smith down the stairs and that he saw Tillman do it. Esponzoza testified that he also saw Tillman shove Smith down the stairs. Esponzoza testified that he was able to see the events through the use of a small mirror.

The second version of the events came from Officers Tillman, Nixon, Lipscomb, and Stewart. Tillman testified that as he and Nixon were escorting Smith to his new cell, Smith became belligerent and threatening. Tillman stated that while on the stairs, Smith spat at him and struck him with him with his knee. As Tillman attempted to restrain Smith, they began to struggle and both fell down the stairs. Tillman denied using any racial slurs against Smith. Nixon's version of the events was essentially the same as Tillman's version. Officer Lipscomb testified that he did not hear Tillman use racial slurs, but did hear Smith threaten Tillman. Lipscomb testified that Tillman did not beat Smith once he was restrained. Sergeant Stewart testified that he did not allow Tillman to beat Smith after he was restrained. Further, Stewart testified that it would be virtually impossible to witness the alleged events using a hand mirror as Esponzoza had testified.

The magistrate judge, after hearing all of the testimony, made factual findings in accordance with the testimony of the corrections officers. On appeal, Smith argues that the magistrate judge was clearly erroneous in making these factual findings. Smith's argument is that the testimony given by him, Tomlinson, and Esponzoza was true and the other evidence given was false. To support this contention, Smith asserts that there was an inconsistency between the testimony of Tillman and Nixon (that both Tillman and Smith fell down the stairs) and Lipscomb's testimony (that he saw Smith "scooting" down the stairs alone). This is not

an inconsistency because Lipscomb did not arrive on the scene until after the incident on the stairs occurred. Smith has also taken issue with some of the medical testimony given at the bench trial. Here again, Smith simply claims that Nurse Dorothy Yarborough falsified his medical records concerning the incident. None of these allegations is sufficient to show that the magistrate judge was clearly erroneous in her fact-finding.

Applying the Hudson factors to the magistrate judge's fact-finding supports her conclusion that Smith suffered no constitutional deprivation. The magistrate judge found that Smith had threatened the officers and that they acted appropriately to restore discipline. She also found that they did not act maliciously or sadistically or had any intent to harm Smith. See Hudson, 962 F.2d at 523. The magistrate judge did not err in concluding that the force used against Smith was not excessive.

For the reasons we have set forth, the judgment of the district court is

A F F I R M E D.