

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4857

Summary Calendar

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GEORGE WARNER,

Plaintiff-Appellant,

v.

ASA . JEFFCOAT, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(92-CV-149)

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(April 21, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Proceeding pro se and in forma pauperis, George Warner, an inmate of the Texas Department of Criminal Justice, Institutional Division, appeals the district court's dismissal of his claim brought pursuant to 42 U.S.C. § 1983. We vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

George Warner (Warner), an inmate of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), filed a civil rights suit pursuant to 42 U.S.C. § 1983 in the 349th district court of Anderson County, Texas, against Lloyd B. Lott (Lott), Asa Jeffcoat (Jeffcoat), and Frederick Brown (Brown), officers at the TDCJ-ID. Specifically, Warner complained that these officers had used excessive force against him in violation of his Eighth and Fourteenth Amendment rights.

The defendants removed the case to the United States District Court for the Eastern District of Texas. In their answer, they raised the defense of qualified immunity and moved to dismiss Warner's complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that Warner had not suffered a "significant" injury. The district court referred the case to a magistrate judge, who--as a result of a Spears<sup>1</sup> hearing--granted the motion to dismiss with respect to defendants Jeffcoat and Brown.<sup>2</sup> However, the magistrate also determined that Warner's claim against Lott was sufficient to escape the motion to dismiss in that Warner alleged facts which arguably showed that Lott struck him without provocation and justification and that an inference could be made that the attack was malicious. Further, during this hearing the parties consented to the magistrate's

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

<sup>2</sup> Warner does not contest the dismissal of the claims against Jeffcoat and Brown on appeal.

conducting all further proceedings in the case pursuant to 28 U.S.C. § 636(c).

The magistrate then ordered Warner to file a response providing a detailed statement of the facts relied upon to defeat Lott's claim of qualified immunity and his motion to dismiss. In response to this order, Warner filed a supplemental complaint. In his original and supplemental complaint, Warner alleged the following facts.

On August 19, 1991, Warner attempted to leave the prison school to go to the mailroom, and Lott told him he could not go. Later that afternoon, Warner again attempted to leave the school, but Jeffcoat told him to go back inside. After the other inmates had left, Lott and Brown came into the school, and Lott and Jeffcoat told Warner to stand against the wall. Lott then ordered Warner to remove everything from his pockets and to put his hands against the wall. Warner complied, and Lott began harassing and threatening Warner, telling him he was going to "knock the gold teeth out of his mouth," while Jeffcoat and Brown made jokes. Warner then asked Lott if he had done anything wrong. When Lott failed to respond, Warner added that he did not want any trouble.

After Lott ordered the other two officers to stand outside the door and to make sure that no one else came in, Lott struck Warner, forcing Warner to the ground, and then struck him again. Warner remained on the ground until he was handcuffed by the other two officers. Warner suffered a swollen eye and a cut lip.

The magistrate then dismissed Warner's claim against Lott because Warner had not alleged facts showing a "significant injury." This appeal ensued.

## II.

This court reviews a judgment rendered by a magistrate as we would a judgment rendered by a district court judge. See 28 U.S.C. § 636(c)(3); James v. Hyatt Corp., 981 F.2d 810, 812 (5th Cir. 1993). Thus, we review de novo a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Giddings v. Chandler, 979 F.2d 1104, 1106 (5th Cir. 1992). The dismissal will be upheld "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." Id. (internal quotations and citation omitted). In making such a determination, we accept the plaintiff's well-pleaded allegations as true. Id.

To determine whether a defendant is entitled to qualified immunity, a court must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right. Siegert v. Gilley, 111 S. Ct. 1789, 1793-94 (1991); Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). If so, the court must then decide whether that right had been clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. Brewer, 3 F.3d at 820. Thus, the objective reasonableness of a defendant's conduct must be

measured with reference to the law as it existed at the time of alleged incident. Rankin v. Klevenhagen, 5 F.3d 103, 108 (5th Cir. 1993).

### III.

Warner argues that the court below erred in failing to rely on the standards enunciated in Hudson v. McMillian, 112 S. Ct. 995 (1992), and Whitley v. Albers, 475 U.S. 312 (1986), in determining whether he had been subjected to the use of excessive force by Lott. Although we disagree with this particular contention, we conclude that the court below improperly dismissed Warner's claim against Lott.

In determining whether a plaintiff alleged a constitutional violation, a court must utilize the currently applicable constitutional standards. Rankin, 5 F.3d at 106. Under current standards, "[t]o 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.'" Id. at 107 (quoting Hudson, 112 S. Ct. at 999). Warner's allegation that Lott hit him twice without provocation was sufficient to allege a violation of a constitutional right.

However, the court below correctly determined that the law in effect at the time of the offense is used to evaluate the reasonableness of the defendant's conduct and to ascertain the

defendant's eligibility for qualified immunity. See id. at 108. Warner alleged that he was injured in August 1991. Thus, to prevail on his excessive force claim under the Eighth Amendment, Warner was required to show

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

Huquet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990). Because the failure to meet any one of these four prongs requires a dismissal of Warner's claim, see id., the court below dismissed Warner's claim on grounds that Warner failed to allege a "significant" injury.

What the court below failed to recognize, however, is that we have determined that a plausible claim of an unprovoked attack on an inmate by a guard who is not engaged in a legitimate employment function lowers the standard for assessing the significance of an injury such that bleeding cuts and swelling could be deemed "significant." See Luciano v. Galindo, 944 F.2d 261, 264 (5th Cir. 1991); Oliver v. Collins, 914 F.2d 56, 59-60 (5th Cir. 1990); see also Roberson v. Scott, No. 93-4231 (5th Cir. January 14, 1994) (unpublished). Warner has set forth such a plausible claim here. Warner alleged that Lott struck him without any justification for doing so. He did not allege that Lott was acting in an over-zealous manner in lawfully

disciplining him. In his answer and his motion for dismissal, Lott argues that he did not violate Warner's constitutional rights because Warner did not suffer a "significant" injury, but he does not deny having struck Warner without provocation. Accepting Warner's allegations as true, it does not appear with certainty that Warner cannot prove facts that may entitle him to relief. Thus, the court below erred in dismissing Warner's excessive force claim under Rule 12(b)(6).

#### IV.

Warner also argues that Lott's use of force was not justified under the standards set out in the prison's use-of-force plan.

Generally, a state's failure to follow its own procedural regulations does not establish a constitutional violation. Jackson v. Cain, 864 F.2d 1235, 1251-52 (5th Cir. 1989). However, "[a] state can create a protected liberty interest by establishing sufficiently mandatory discretion-limiting standards or criteria to guide state decision makers." Id. at 1250.

Warner alleged in his pleadings that "pursuant to the Texas Department of Criminal Justice's Use of Force Plan[, ] force is justified 'only' when no reasonable alternative exists . . . . When a situation requires the use of force, only a minimum force reasonably believed necessary shall be used. In no event shall force be used to impose discipline."

Warner provided neither the court below nor this court with a copy of the prison regulations upon which he was relying. The language of the regulations cited by Warner, however, indicates that it is within the discretion of prison personnel to determine whether the use of force is necessary in a particular situation. Thus, Warner has not shown that the regulations contain "mandatory discretionary-limiting standards" which specifically limited Lott's conduct such that a violation of these regulations will support a constitutional violation.

V.

For the foregoing reasons, we VACATE the judgment of the district court and REMAND for further consideration of Warner's excessive force claim against Lott.