IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4946
Summary Calendar

TERRY JEROME BECK,

Plaintiff-Appellant,

v.

JIMMY E. ALFORD, ET AL.,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas
(91-CV-599)

(July 27, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge:

The district court granted judgment as a matter of law during the course of a jury trial in which inmate appellant Beck contended that he was subjected to excessive use of force by various prison guards on July 6, 1991. Because Beck's evidence, taken altogether, suggests that if he was subjected to the type of force he asserts, his injuries would in all probability have been more than de minimis, we must reverse and remand.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Beck asserts that he was subjected to a pre-arranged attack by several prison guards as he was being escorted to the shower on the morning of July 6. The motives for the assault were allegedly racial and retaliatory for his having struck a prison guard a few days earlier. He alleges that the officers contrived a provocation by him, then slammed him to the ground, jumped on his back and fastened hand cuffs and leg cuffs extremely tight around his limbs. He alleges that he has experienced continuing back pain and numbness in his hands and fingers following the incident.

What led the district court to grant summary judgment was the lack of objective medical evidence corroborating Beck's claim of injury.[1] A videotape of Beck's examination by Nurse Burris immediately following the incident reveals no evidence of swelling in the wrists or bleeding or bruising. Similarly, Dr. Ford examined Burris two to three weeks after the incident and found no swelling, limitation of circulation in the hands, or objective proof of injury. Dr. Ford did, however, prescribe muscle relaxants for appellant. Further, an inmate testified, contrary to the videotape, that appellant was bleeding after the assault occurred.

The district court believed that without any objective proof of "injury," Beck was not entitled to take his case to a jury even after the Supreme Court's decision in Hudson v. McMillian, 112 S. Ct. 995 (1992), and this court's decision in Knight v. Caldwell,

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[1] In their zeal to present this question to the appellate court, the state of Texas apparently chose to waive the qualified immunity defense. See, e.g., Rankin v. Klevenhagen, 5 F.2d 103 (5th Cir. 1993).

970 F.2d 1430 (5th Cir. 1992), cert. denied, 113 S. Ct. 1298 (1993). We agree that following Hudson, proof of injury that is no more than de minimis is ordinarily insufficient to state a Section 1983 claim for excessive force under the eighth amendment. (Eighth amendment . . . not violated by de minimus uses of physical force, provided the force is not repugnant to the conscience; Hudson, 112 S. Ct. at 1000.) To say this is not, unfortunately, to implement a requirement that injury is necessarily de minimis unless there is some objective medical evidence supporting its existence. Hudson clearly contemplates that some injuries inflicted by prison guards might be minimal although they are still constitutionally cognizable. Id. Instead, in determining whether the guards used force in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm, this court, interpreting Hudson, has identified several relevant factors:

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. Hudson v. McMillan, 962 F.2d 522, 523 (5th Cir. 1992) (on remand from the Supreme Court). The constitutional test therefore balances the injury along with the circumstances of the use of force. If the injury claimed is de minimis or if the

circumstances alleged by a plaintiff shows that no more than a de minimis injury could have occurred, Hudson would not support a section 1983 claim. If, however, there are allegations of injury together with circumstances that suggest that more than de minimis injury could have occurred, or that the use of whatever force there was would shock the conscience, the stage is set for a credibility contest, and the case should go to a finder of fact.

This court is extremely sympathetic to the plight of district courts in the wake of Hudson. The court has carefully considered the possibility that absent objective medical proof of injury, a prisoner's section 1983 excessive force claim should not be sent to the factfinder. We cannot conclude that Hudson left room for such a weighing of the evidence on summary judgment unless all of the facts and circumstances demonstrate clearly de minimis injury or the type of assault, e.g., a push or slap, from which no more than de minimis injury could result.

We are also unable to uphold the dismissal of Officer King, because a prison guard may be held liable if the observes an unconstitutional assault and fails to intervene to stop it. See, e.g., Hale v. Townley, ____ F.3d ____ (5th Cir., May 3, 1994).

For these reasons, the judgment of the district court is **REVERSED** and the case is remanded for further proceedings.

REVERSED and **REMANDED**.