UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 93-7698

Summary Calendar

Clifton E. Lawrence,

Plaintiff-Appellant,

VERSUS

Irie Knighten, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

(91-CV-345)

(July 13, 1994)

Before WISDOM, KING, and GARWOOD, Circuit Judges.

WISDOM, Circuit Judge:[*]

The plaintiff/appellant, Clifton Lawrence, is an inmate of the Mississippi Department of Corrections at Parchman, Mississippi

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

("Parchman"). In October 1991, Lawrence filed an action under 42 U.S.C. § 1983 against the following Parchman officials: Irie Knighten, Lieutenant; Lawrence Self, Sergeant; Martha Shoemaker, correctional officer; Robert Armstrong, Colonel; and Bill Hoskins, Associate Superintendent (collectively the "officials"). In his complaint, Lawrence charged that the officials at Parchman used excessive force in responding to an altercation and, in so doing, deprived him of his constitutional rights.[1]

I.

The magistrate judge to whom this case was assigned did not make explicit factual findings. In his report and recommendation, he explained that he thought both sides had overstated their cases and that the truth was somewhere in between. We do not quarrel with that conclusion.

Lawrence alleged that on October 6, 1991, the duty officer (Shoemaker) failed to give the inmates in his unit their customary wake-up call. As a result of that oversight, several of the inmates in the unit were not ready when it was time to go to breakfast. The door was shut and they missed their meal.

Prison food never had such boosters: the missed meal was the catalyst for the protest that ensued. The inmates who had been left behind voiced their frustration by banging their doors and

[1]He also charged the officials with failing to provide adequate medical care, subjecting him to forced labor, and threatening future beatings.

shouting sundry intemperate unpleasantries at Shoemaker.[2] Shoemaker felt that the inmates were getting out of control and called for assistance from Knighten, Self, and Armstrong.

When the others arrived on the scene, Shoemaker identified Lawrence as one of the participants -- if not instigators -- of the shouting. Lawrence asserts that until then, the interaction between the guards and the inmates was verbal only. It was only after Shoemaker informed the other guards that Lawrence had called her a "bitch" and threatened her that the guards became physically aggressive.

According to the plaintiff's witnesses, the officials engaged in a brutal show of force and violence. The officials forced him (and a number of others) to lay down whereupon he was kicked on his ankles and feet. Later, he was taken to a lobby where he was again kicked and then beaten. In the course of this treatment, the officials placed him in a full head-lock and beat him in the groin area, stomach, chest, neck, and face. All the while, according to Lawrence, defendants Armstrong and others stood and watched. No one found the events sufficiently compelling to speak up or otherwise indicate disapproval of the tactics being applied to the prisoner.

The officials, on the other hand, deny that any physical violence occurred. Instead, they contend that seven inmates

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[2]Lawrence addressed Shoemaker with this expressive, if inelegant, directive: "Bitch, open the door. If you don't we're going to kick this motherfucker down and kick your ass in the process." This outburst apparently precipitated the officials's response.

(including Lawrence) were forced to lie down, but then taken into the prison yard and interviewed. In the alternative, they argue that any force used was minimal and that Lawrence was not injured.

An examination performed on October 8, 1991, revealed a lumbar sprain in the plaintiff's back. He was prescribed medication and given a five day "lay-in". Three weeks later, Lawrence returned to the prison medical facility complaining of groin pain. The examination revealed a small hernia which was surgically removed two months later. Although the testimony showed that Lawrence's hernia did not result from the beating and likely had been present six months prior to it, a prison physician testified that an incident like this one could have exacerbated the hernia's condition.

Before the trial, the magistrate judge dismissed claims against defendants Shoemaker and Hoskins. A non-jury trial was conducted as to the remaining defendants before a magistrate judge. The judge recommended that judgment be entered for the defendants.[3] The district court adopted the report and recommendation of the magistrate judge and, consequently, dismissed the case with prejudice. Lawrence took this appeal.

II.

We begin by outlining our focus on review. We review findings

[3]Because the magistrate purported to grant summary judgment for the defendants, the trial actually was more of an evidentiary hearing entertaining a prisoner's challenge to the conditions of confinement. See 28 U.S.C. § 636(b)(1)(B).

of fact for clear error[4]; the district court is in the best position to resolve factual conflicts and make credibility choices. We review de novo the court's conclusions of law. We note that Lawrence is proceeding in forma pauperis and pro se. This Court has often stated that we read such pro se petitions liberally to ensure that the plaintiff's lack of access to legal resources and education will not work as a bar to his day in court.[5] The liberal construction of his pleadings notwithstanding, at trial Lawrence carried the burden of proving his allegations by a preponderance of the evidence.[6]

IV.

Lawrence's chief claim is that the officials at Parchman violated his Eighth Amendment right to be free from cruel and unusual punishment when they used excessive force. The Supreme Court's decision in Hudson v. McMillian[7] provides our starting point. The Court in Hudson framed the core inquiry: Whether the officials applied force in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. In answering that question, we look to five 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;

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[4]Seal v. Knorpp, 957 F.2d 1230, 1234 (5th Cir. 1992).

[5]Kahey v. Jones, 836 F.2d 948, 949 (5th Cir. 1988).

[6]Bender v. Brumley, 1 F.3d 271, 278 (5th Cir. 1993).

[7]__ U.S. __, 112 S.Ct 995, 117 L.Ed.2d 156, 165-66 (1992).

(5) any efforts made to temper the severity of a forceful response.[8]

These factors are a means of balancing "the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force".[9] We filter our examination through our long-standing deference to the prison authorities. In so doing, we acknowledge that prison officials often must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance".[10] We turn to the five factors.

The first consideration is the extent of the injury suffered. The magistrate judge, in his report and recommendation, stated:

> Although the plaintiff suffered a small scratch on his hand and tenderness in his back, nothing about the injury suffered by plaintiff evinced wantonness or knowing willingness to inflict injury.

While the magistrate was correct that the extent of the injury is relevant in assessing whether the injury was the product of wanton or unnecessary force,[11] the lack of a serious injury does not terminate our Eighth Amendment inquiry. The Supreme Court in Hudson expressly instructed that a "significant injury" is not

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[8]Id. at __, 117 L.Ed.2d at 166.

[9]Id. at __, 117 L.Ed.2d at 165.

[10]Whitley v. Albers, 475 U.S. 312, 320, 89 L.Ed.2d 251 (1986).

[11]Flowers v. Phelps, 956 F.2d 488, 491 (5th Cir.), vacated in part, superseded in part on reh'g on ther grounds, 964 F.2d 400 (1992).

necessary to press an Eighth Amendment claim.[12] Still, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights"[13].

At trial, Dr. A. M. Phillips, the Medical Director at Parchman, testified that Lawrence complained of blisters on his hand and damage to his knee. In addition, Phillips noted trauma to the neck and a lumbar sprain. Lawrence complained of pain in his groin area when he saw another Parchman physician three weeks later. The parties disputed whether the altercation aggravated his pre-existing hernia condition. In sum, the magistrate's conclusion that the truth is somewhere in between the parties's position appears sound.

The second factor we examine is the need for the application of force. Shoemaker testified that Lawrence continued to bang on his prison door and threatened to break it down. Presumably, given the secure nature of the Parchman facility, this was but an idle threat. The officials contend that the force eventually exerted was necessary to restore order and ensure the protection of the prison guards.

Again, it is difficult to know for sure. The entire altercation may have been triggered by the offense taken at Lawrence's verbal jab. There was no melee or outbreak that

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[12]Hudson, __ U.S. at __, 117 L.Ed.2d at 164.

[13]Id. at __, 117 L.Ed.2d at 167; Jackson v. Culberton, 984 F.2d 699, 700 (5th Cir. 1993).

threatened prison security or order. If there was, a number of proper response options were available. Taking one of the inmates out to rough him up was not one of them.

Having ascertained that the need for the use of force was minimal, we look to the relationship between the need and the amount of force used. In Miller v. Leathers[14], the Fourth Circuit encountered similar facts and reached the same result. The court there found that a prisoner had been beaten solely because of a verbal exchange. The court registered its disapproval: "Verbal provocation alone does not justify a response such as occurred in this case."[15]

Here, it is a tough call, in part because the degree of physical force used on Lawrence is in question. Certainly we cannot countenance a violent corporeal response to a verbal jab. Here, however, the guards may have taken the steps necessary to restore order to the prison. On this record, we cannot say that the district court's findings are clearly erroneous.

The same goes for the final two factors, the threat perceived by the officials and their attempts to temper the severity of the response. There is no basis upon which to conclude that Lawrence's version represents the facts as they actually transpired. In sum, although we might have come to a different conclusion than the district court, we cannot say that the findings below are clearly

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[14]913 F.2d 1085 (4th Cir. 1990) (en banc), cert. denied, 498 U.S. 1109 (1991).

[15]Id. at 1089. Cf. Anonymous, Nursery Rhyme ("Sticks and stones may beak my bones, but words can never hurt me.").

erroneous. Lawrence failed to prove his case.

A prison is not a country club; prison officials often must make quick, decisive judgment calls in an effort to preserve order. Still, we will not turn a blind eye to improper behavior. On the facts before us, however, we must uphold the determination made below that the force used was not excessive.

III.

Next, we examine Lawrence's contention that he was subjected to cruel and unusual punishment when the defendants failed to respond adequately to his hernia condition. In Wilson v. Seiter[16], the Supreme Court held that the deliberate indifference to a prisoner's medical needs violates the Eighth Amendment. Neither the magistrate judge nor the district court addressed Lawrence's argument that the officials failed to respond to his need for prompt medical attention. Lawrence presented the issue at trial, but the magistrate in his report focussed solely on the question of excessive force. Similarly, the district court addressed only the excessive force claim in its final judgment. As such, we have no findings of fact upon which we can rely in our process of review. We thus must remand on this question.[17]

IV.

Last, Lawrence argued in the district court that the officials subjected him to forced labor. He alleged that the officials

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[16]501 U.S. 294, 115 L.Ed.2d 271 (1991).

[17]See Woodland v. City of Houston, 940 F.2d 134, 139 (5th Cir. 1991).

violated his constitutional guarantee to be free from involuntary servitude when they forced him to work following his assault. Lawrence does not press this issue on appeal. We treat it as abandoned.[18]

V.

We AFFIRM the district court on the judgment entered for the defendants on the question of excessive force; we REMAND this case on the question of whether the defendants failed to respond adequately to Lawrence's request for prompt medical attention.

It is so ordered.

[18]Bender, 1 F.3d at 275; Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).