

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8243
Summary Calendar

SERGIO ORTEGA,

Plaintiff-Appellant,

VERSUS

HARON COPELAND, Sheriff, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(SA 92 CA 141)

(February 10, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Sergio Ortega filed a civil rights complaint pursuant to 42 U.S.C. § 1983 alleging an excessive use of force against him while he was incarcerated in the Bexar County Adult Detention Center (BCADC). In his second amended complaint, Ortega named Sheriff

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Harlon Copeland, Major Daniel Gabehart, Sergeant Carlos M. Santiago, Sert Team Leader Orlando R. Torres, Officer Kurt Granberry, Officer Dean F. Watson, and Officer Michael D. Gray¹ as defendants. Under penalty of perjury, Ortega alleged that on September 9, 1991, all of the defendants, except Sheriff Copeland, entered his administrative-segregation cell and ordered him to lay face-down on the floor. Ortega alleged that once on the floor, the defendants jumped on his back and brutally handcuffed and shackled him. Further, that once he was subdued in this manner one of the defendants kicked him in the back. Ortega alleged that "[a]s a direct result of this objectively unreasonable, unwarranted excessive use of vicious force, Plaintiff suffered a de[e]p cut to his chin which was bad enough to require five (5) stitches, pain and numbness in his hands and feet, and severe pain in his shoulder, as well as psychological damage."

All of the defendants filed motions for summary judgment and Ortega filed a motion for partial summary judgment. The magistrate judge issued her report and recommendation that the defendants' motions for summary judgment should be granted and that Ortega's motion should be denied. The magistrate judge found that defendants Gabehart, Santiago, Torres, Granberry, and Watson were entitled to summary judgment based on qualified immunity because Ortega had not established a significant injury. The magistrate judge found that Sheriff Copeland was entitled to summary judgment

¹According to the magistrate judge's report, Officer Gray was not served with the lawsuit and was not before the district court. On appeal, Ortega has not disputed this.

because he had no direct personal involvement in the incident. The magistrate judge also dismissed the claims against Bexar County arising out of the claims against the defendants acting in their official capacities. The magistrate judge found that the summary judgment evidence was insufficient to establish any policy on the part of the county to support liability under § 1983. Ortega objected to this recommendation, but the district court adopted the magistrate judge's report and entered judgment accordingly.

On appeal, Ortega has addressed only the issue of whether the district court incorrectly granted summary judgment based on qualified immunity because he lacked a significant injury. He has not argued that the district court erred in granting summary judgment to all the defendants in their official capacities, nor has he argued that the district court erred in dismissing Sheriff Copeland in his individual capacity. Ortega does argue that he was a pretrial detainee and not a prisoner at the time of the incident; however, he admits that the incident occurred after his parole was revoked.

OPINION

Review of the district court's ruling on a motion for summary judgment is plenary. King v. Chide, 974 F.2d 653, 655 (5th Cir. 1992). Summary judgment is appropriate if, "viewing all the evidence in the light most favorable to the non-movant, there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Amburgey v. Corhart

Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991) (internal quotations and footnote omitted).

This Court engages in a bifurcated analysis when assessing a claim of qualified immunity. Rankin v. Klevenhagen, 5 F.3d 103, 105 (5th Cir. 1993). The Court first determines whether the plaintiff has alleged a violation of a clearly established constitutional right. Id. If so, the Court then decides 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 108.

"To 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.'" Rankin, at 106 (quoting Hudson v. McMillian, ___ U.S. ___, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992)). Ortega's allegations are sufficient to state a constitutional violation under Hudson.

The law in effect at the time of the offense, September 9, 1991, is used to evaluate the reasonableness of the defendants' conduct to ascertaining their eligibility for qualified immunity. See Huquet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990). Under Huquet, a plaintiff must 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) clearly unreasonable, and (4) that the action constituted an unnecessary

and wanton infliction of pain. Id. The magistrate judge determined that Ortega's claim failed on the first prong of the Huquet test.

The magistrate judge made the following finding:

[Ortega] alleges in this lawsuit that he sustained injuries to his shoulder, back, chin, and hands as a result of the altercation with the BCADC guards on September 9, 1991. His own medical records reveal that (1) his chin laceration was two centimeters in length and required sutures, (2) he sustained a black eye, (3) he sustained a bruise to the chest area, (4) he sustained unspecified trauma to the left shoulder, and (5) aside from the sutures and an antiseptic ointment, he was treated solely with Motrin and Maalox.

Although there is no dispute that Ortega's chin was cut sufficiently to require five stitches, the district court concluded that this was an insignificant injury. In Mark v. Caldwell, 754 F.2d 1260, 1261 (5th Cir.), cert. denied, 474 U.S. 945 (1985), addressing the pre-Huquet standard of severe injury, the court found that a slap causing no bleeding and requiring no medical attention did not show a severe injury. This language suggests, however, that an injury that resulted in bleeding and required medical attention may be severe - a higher standard than significant injury. Id.; Oliver v. Collins, 914 F.2d 56, 58 (5th Cir. 1990). Also, an injury of "lacerated fingers requiring sutures" has been held to satisfy the significant injury prong of Huquet. Adams v. Hansen, 906 F.2d 192, 194 (5th Cir. 1990). Therefore, it is arguable that Ortega's injury was significant as a matter of law.

Additionally, the Court has held that an unprovoked use of force that was vindictive and punitive in nature could affect whether an injury is significant. Oliver, 914 F.2d at 59. In this case, Ortega has alleged under of penalty of perjury that he was following the officers instructions and that they jumped on him and kicked him in the back without any provocation. This is sufficient to create a genuine issue of material fact with respect to significant injury under the language of Oliver. As a result, the district court's grant of summary judgment on the issue of qualified immunity was inappropriate and is vacated, and the case is remanded for additional proceedings. The remainder of the case is affirmed.

VACATE and REMAND in part; AFFIRM in part.