UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8371
Summary Calendar

FREDDIE LEE MYLES,

Plaintiff-Appellant,

VERSUS

JACK M. GARNER, Warden, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-91-CA-16)

(March 22, 1994)

Before KING, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Freddie Lee Myles, an inmate of the Texas Department of Criminal Justice-Institutional Division (TDCJ), contests, *pro se*, the dismissal of his civil rights action and denial of his Rule 59(e) motion for reconsideration. We **AFFIRM** in part and **VACATE AND REMAND** in part.

I.

Myles filed his § 1983 action in December 1990, against Warden Jack Garner, guards Glenn Woodard and Michael Hart, and nurse Mary

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Furry, based on events occurring August 20, 1992. He alleged in his complaint that Woodard and Hart seriously injured him, and Furry denied him adequate medical care, all with Garner's explicit approval.

At a *Spears* hearing[2] in March 1991, Myles described the events as follows: Hart pulled Myles out of the shower and handcuffed him tightly, causing pain to a preexisting injury. Myles complained; Hart told him to shut up. Myles told Hart that Hart "was hurting [him] and abusing his authority and [that Myles] had a right to speak up and confront [Hart] about hurting" him. Hart returned Myles to his cell, then jerked Myles out of the cell by pulling on the handcuffs. He slammed Myles into a corner and forced his shoulder into Myles's body.[3] Hart forced Myles to the floor, put his knees on Myles's head and right shoulder, bent Myles's finger back, and told him to shut up. Myles alleges that this was in violation of the Eighth Amendment, and was in retaliation for Myles's exercise of his First Amendment rights.

Myles also testified as follows: Woodard (Hart's supervisor) and two other guards responded to the disturbance; Hart continued to apply pressure to Myles's back and head with his knee while the other officers turned Myles over. This injured his back, and the officers also hurt him by twisting leg irons on his legs. The

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[2] ***Spears v. McCotter***, 766 F.2d 179 (5th Cir. 1985).

[3] An unidentified person testified at the hearing that, as Hart was escorting Myles to his cell, Myles "dropped his shoulders and pushed" Hart, and that Hart placed Myles on the floor while other officers arrived to assist him.

officers carried Myles to the infirmary; as they entered it, Hart kneed Myles in the jaw, dislocating it.[4]

Furry examined Myles briefly at the infirmary; Myles alleges that she denied him adequate medical care by failing to perform a complete physical. At the ***Spears*** hearing, the magistrate judge quoted from Furry's report, which indicated that there was no swelling of Myles's jaw. Furry later confirmed this observation in a written response to a grievance filed by Myles. An August 20, 1990, examination by a radiologist revealed no fracture of Myles's jaw; one in October 1990 revealed no spinal fracture or subluxation.

Dr. Cathy Hurley, a TDCJ physician, testified at the hearing that there was no indication that Furry's examination was inadequate. Summarizing Myles's medical record, Hurley stated that there was no swelling or discoloration of his jaw or wrist; he was treated with aspirin, aspirin-like substances, and muscle relaxants. An examination by another physician about a month after the incident revealed chronic, recurrent muscle strains pre-dating the August incident.[5]

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[4] A video tape included in the record shows the guards carrying Myles to the infirmary, but does not include the moment when they went through the infirmary door. On the tape, Myles complains that he has been kneed in the jaw, and a nurse briefly examines him.

[5] The physician also suggested that Myles suffered from a delusional disorder and an anti-social personality disorder. The day before the ***Spears*** hearing, however, a physician who examined Myles found him not to be mentally ill, and found that he did not need psychiatric medication.

In March 1992, approximately a year after the ***Spears*** hearing, Myles filed an amended complaint,[6] which contained substantially the same information as the first (*i.e.*, claims of Eighth Amendment violations during the August 20, 1990 events), and named the same defendants, but added claims under the First and Fourteenth Amendments.[7]

A second ***Spears*** hearing was held in May 1992. Myles testified that Hart cut Furry's examination of him short; and that Garner was liable under a respondeat superior theory because he always sided with the guards during grievance proceedings, regardless of what had happened. His other testimony was cumulative.

The magistrate judge ordered the defendants to respond to Myles's amended complaint. They responded that they had acted with "the reasonable and good faith belief that their actions were proper under the Constitution" and that they were therefore

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[6] It appears that Myles filed the amended complaint pursuant to the district court's order of January 28, 1992, which stated that Myles's case had been transferred from the Southern District of Texas to the Western District of Texas, and that Myles had not complied with certain local rules governing the form of prisoner civil rights complaints. The order directed Myles to complete summons and civil rights complaint forms, and to provide sufficient copies to be served on all the defendants.

[7] Specifically, Myles alleged that he repeatedly requested Hart to summon his supervisor so that they could "informally resolve" the dispute concerning Hart's handcuffing Myles too tightly; that Hart told him to file a formal request; that Myles responded by generally reciting the First Amendment and making other statements; that this led to the altercation outside Myles's cell; that Woodard watched Hart and the other guards beat Myles, and later gave Hart a signal to knee Myles in the jaw; that Woodard was vicariously liable for the injuries inflicted by Hart and the other guards; and that Garner encouraged prison personnel to violate inmates' civil rights and headed a conspiracy to have Dr. Hurley fabricate medical records to exonerate the other defendants.

entitled to qualified immunity. Garner's motion to dismiss for failure to state a claim was granted.

The court denied Myles's motion for reconsideration of the order dismissing Garner, ordered the three remaining defendants (Woodard, Hart, and Furry) to move for summary judgment within 30 days, and granted Myles 30 days to respond. Woodard, Hart, and Furry moved for summary judgment, asserting that they were immune from suit. They also contended that Myles had pushed Hart with his shoulder, knocking Hart off balance; and that Hart then placed Myles on the floor until Woodard and the other guards arrived to take Myles to the infirmary. Hart stated by affidavit that Myles's action was threatening, because he had no idea what Myles's intentions were; that Myles only briefly resisted; and that Hart followed proper procedures: "[a]t no time did I hit, punch, knee or strike [] Myles...." Woodard and the other two guards involved filed affidavits consistent with Hart's.

In their summary judgment motion, Hart, Woodard and Furry also stated that Furry performed a routine use-of-force physical examination, which revealed no injuries to Myles. Furry's affidavit supported this. Finally, Dr. Hurley, by affidavit, stated that Myles's general complaints of pain resulting from the August 20 incident were consistent with repeated complaints Myles had made since 1983, and that she found no medical basis for Myles's allegations of injury from the August 20 incident.

The district court granted summary judgment, holding that Myles failed to satisfy his summary judgment burden because his

injuries, if any, were *de minimis*. It did not rely upon qualified immunity. Myles moved for reconsideration of the summary judgment and, again, for reconsideration of the order dismissing Garner; the motion was denied.

II.

A.

Myles first contends that the district court erred in granting defendants' motion for continuance, because it was meritless, untimely, and granted the day Myles received it, and that defendants' attorney perjured herself in her certificate of service and drafted the motion in bad faith to delay the proceedings so that Myles would not be able to secure witnesses in his favor. "The district court has broad discretion in the management of its docket and the trial of lawsuits pending before it...." ***Prudhomme v. Tenneco Oil Co.***, 955 F.2d 390, 392 (5th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 84 (1992). We review a continuance for abuse of discretion. *E.g.*, ***United States v. Alford***, 999 F.2d 818, 821 (5th Cir. 1993).

The defendants moved for a continuance on July 9, 1992, stating that they had had insufficient time to prepare for trial because defense counsel did not learn of the July 13, 1992 pre-trial order deadline and July 20, 1992 trial date until July 1, 1992. The court continued trial until October 19, 1992.[8] There is

[8] In the motion, defendants asserted that Myles filed his original complaint on March 9, 1992, and that they answered on May 20, 1992; Myles bases his charges of bad faith and perjury on this statement. In fact, Myles filed his *amended* complaint then, and defendants answered on *June 24, 1992*. In their appellate brief,

no indication that the motion was filed in bad faith or that it contained perjured information. Nor is there any indication that the court or the defendants were aware of the release dates of Myles's "key witness", or that they were attempting to delay in order to disrupt Myles's case.[9] We find no abuse of discretion.

B.

Myles contends that the court erred by granting Garner's motion to dismiss and denying Myles's motion for reconsidera-tion.[10] He bases error on the claims that Garner was deliberately indifferent to his duties; failed to enforce TDCJ's use of force plan, thereby violating Myles's civil rights; encouraged guards to use excessive force; trained guards to lie about excessive uses of force; and headed a conspiracy to fabricate medical records.[11]

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defendants-appellees state: "[t]he May 20, 1992 date is obviously an error, as the court's order to answer was not filed until May 27, 1992 and defendants, pursuant to routine ***Spears*** procedures, would not answer until ordered to do so." The mistake was obvious and irrelevant to whether defendants had adequate time to prepare for trial.

[9] Further, Myles named three other witnesses to the August 20 incident, in a petition for writs of habeas corpus ad testificandum. This suggests that the inability of any one witness to appear would not be fatal to his case.

[10] Presumably, Myles refers to the district court's denial of his second motion for reconsideration, in which he again contested the dismissal. Myles appealed the denial of this motion, whereas he did not appeal the denial of his first motion for reconsideration of Garner's dismissal.

[11] Because Myles's motion for reconsideration under Rule 59(e) was timely, an appeal from its denial also brings up the underlying judgment for review. *E.g.*, ***United States v. One 1988 Dodge Pickup***, 959 F.2d 37, 41 & n.5 (5th Cir. 1992) (citing ***Foman v. Davis***, 371 U.S. 178 (1962)).

Garner filed his motion to dismiss under 28 U.S.C. § 1915(d) and/or Fed. R. Civ. P. 12(b)(6). The district court did not specify the basis on which it granted the motion, but stated that Myles had "failed to state with particularity any facts showing that Garner was `personally involved' in the alleged violations ... or [that Garner] ... `actively adopted policies which were wrongful or illegal.'" (Internal citations omitted.)[12] The quoted language is consistent with a dismissal under Rule 12(b)(6) for failure to state a claim, and we review it accordingly.

We review such dismissal *de novo*, *e.g.*, ***Jackson v. City of Beaumont Police Dep't***, 958 F.2d 616, 618 (5th Cir. 1992), accepting as true all the allegations of the complaint, considered in the light most favorable to the non-movant. ***Id.***; ***Ashe v. Corley***, 992 F.2d 540, 544 (5th Cir. 1993). "*Pro se* prisoner complaints must be read in a liberal fashion and should not be dismissed unless it appears beyond all doubt that the prisoner could prove no set of facts under which he would be entitled to relief." *E.g.*, ***Jackson v. Cain***, 864 F.2d 1235, 1241 (5th Cir. 1989) (citing cases).

Supervisory officials are not liable under § 1983 under any theory of vicarious liability for the actions of subordinates. ***Thompkins v. Belt***, 828 F.2d 298, 303 (5th Cir. 1987) (citations omitted). A supervisor may be liable for an employee's acts only

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[12] Initially, the district court had adopted the magistrate judge's report and recommendation, recommending that the case against Garner be dismissed under Rule 12(b)(6). The report used language similar to that quoted *supra*. The district court later vacated its adoption of the report as premature, and did not re-adopt it when it dismissed Garner.

if the supervisor was personally involved in the alleged constitutional deprivation, or demonstrates a "sufficient causal connection" between the violation and the supervisor's wrongful conduct. ***Id.*** at 304.

Myles does not allege any facts showing that Garner was personally liable in failing to protect him. Nonetheless, Garner would be liable under § 1983, even if unaware of the other defendants' actions, if he had implemented a policy so deficient that the policy itself was a "repudiation of constitutional rights" and the "moving force of the constitutional violation." ***Id.*** (internal quotation marks and citations omitted). Although Myles alleges in his brief that Garner encouraged guards to use, and lie about their use of, excessive force, he has not stated, either in his complaint or subsequently, particular facts in support of these allegations. Accordingly, Myles has alleged no set of facts under which he would be entitled to relief; thus, it was not error for the district court to dismiss Garner.[13]

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[13] Because Myles has provided us with *no* facts to support his allegations concerning Garner's behavior, we need not decide which pleading standard we would apply in reviewing such facts. *See* ***Elliott v. Perez***, 751 F.2d 1472 (5th Cir. 1985) (requiring heightened pleading standard in § 1983 complaints), *reversed in part,* ***Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit***, ___ U.S. ___, ___, 113 S. Ct. 1160, 1162 (1993) (abrogating heightened pleading standard with regard to complaints against municipalities, but explicitly reserving question whether heightened pleading standard applies to claims against individuals). We note, however, that in ***Burns-Toole v. Byrne***, 11 F.3d 1270, 1275 (5th Cir. 1994), this court explicitly declined a plaintiff's invitation to decide whether the heightened pleading standard still applied to cases against individuals, after ***Leatherman***. *See also* ***Richardson v. Oldham***, 12 F.3d 1373 (5th Cir. 1994) (same); *but see* ***Branch v. Tunnell***, 14 F.3d 449 (9th Cir. 1994) (declining to extend ***Leatherman*** to cases involving

C.

Myles next contends that defendants were not entitled to qualified immunity, and that the district court erred in both granting summary judgment on Myles's Eighth Amendment claims and in denying his motion for reconsideration. We review a summary judgment *de novo*, examining the evidence in the light most favorable to the non-movant. *E.g.*, ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 618 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3503 (U.S. Mar. 7, 1994) (No. 93-1136); ***Salas v. Carpenter***, 980 F.2d 299, 304 (5th Cir. 1992). It is proper if the movant establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* ***id.***; Fed. R. Civ. P. 56(c). The non-movant must then go beyond its pleadings and point out specific facts demonstrating a material issue. Fed. R. Civ. P. 56(e). We review first the summary judgment granted Furry, and then that granted Hart and Woodard.

1.

Myles alleges that Furry violated his Eighth Amendment rights by denying him adequate medical treatment after the August 20 incident. To prove that medical treatment was constitutionally inadequate, a prisoner must allege acts or omissions constituting deliberate indifference to his serious medical needs. ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976); ***Mendoza v. Lynaugh***, 989 F.2d 191, 193 (5th Cir. 1993). Merely negligent treatment or diagnosis of a

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individuals); ***Kimberlin v. Quinlan***, 6 F.3d 789, 794 n. 9 (D.C. Cir. 1993) (same).

medical condition is not constitutionally inadequate; unless the facts "clearly evince the medical need in question and the alleged official dereliction", there is no violation. ***Johnson v. Treen***, 759 F.2d 1236, 1238 (5th Cir. 1985) (internal quotation marks and citation omitted).

There is no indication that Furry acted "[w]antonly... causelessly, without restraint, and in reckless disregard" of Myles's rights. ***Id.*** As demonstrated by the videotape, she at least briefly examined Myles, and filed a report indicating that she found no swelling or bruises on his jaw or wrists. At most, she negligently failed to locate an injury which, based on the record, was never established by physical evidence. Furry was entitled to summary judgment.

2.

In prisoner complaints alleging excessive use of force in violation of the Eighth Amendment, our inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." ***Hudson v. McMillian***, ___ U.S. ___, 112 S. Ct. 995, 999 (1992). In so doing, we consider: (1) the need for the use of force; (2) the relationship between that need and the amount of force used; (3) the reasonableness of the threat perceived by the officers involved; and (4) efforts to minimize the severity of the force used. ***Id.*** (citations and quotations omitted). "[A]bsence of a serious injury is therefore relevant" to the inquiry, but not dispositive of it. ***Id.***

Myles's allegations about his injuries in his original and amended complaints were made under penalty of perjury, as was his testimony at the ***Spears*** hearings; thus, this was competent summary judgment evidence. 28 U.S.C. § 1746; ***Nissho-Iwai Amer. Corp. v. Kline***, 845 F.2d 1300, 1306 (5th Cir. 1988). As discussed, his claims regarding his injuries were unsupported by either the physical examination performed by Furry immediately after the incident, or the radiologists' spinal examinations some months later.

Nonetheless, an injury need not be "significant" or immediately apparent to establish a constitutional violation, ***Hudson***, __ U.S. at __, 112 S. Ct. at 999-1000. Even injuries that are *de minimis* -- as the district court found Myles's to be -- may be constitutionally cognizable if the use of force that caused them is "of a sort repugnant to the conscience of mankind". ***Id.*** at 1000 (internal quotation marks and citation omitted). Myles did not challenge Hart's affidavit that Myles had provoked the initial confrontation by knocking into Hart. But, Myles testified at the first ***Spears*** hearing that during the encounter, he presented no threat to Hart, because he was already handcuffed.

Similarly, with regard to Myles's allegations about his dislocated jaw, there is no dispute that at the time this allegedly occurred, Myles was handcuffed, in leg irons, and was being carried by three officers, including Hart and Woodard. If Myles was beaten or battered in the jaw while restrained and while presenting no threat to the officers, the use of force may have been "of a sort

repugnant to the conscience of mankind". ***Hudson***, ___ U.S. at ___, 112 S. Ct. at 1000 (citation omitted).

Myles did not provide affidavits of the several prisoners he contends witnessed the altercation outside his cell; and, as stated, physical examinations provided no evidence of injury. Nor does the videotape of the officers carrying Myles to the infirmary include the moment when he alleges he was kneed in the jaw. Thus, in order to resolve Myles's claims, pursuant to the factors in ***Hudson*** (including the necessity and reasonableness of force used, and steps taken to mitigate it) the court would have to resolve factual disputes based in part on credibility determinations. Of course, credibility conflicts are not properly resolved on summary judgment, *e.g.*, ***Brumfield v. Jones***, 849 F.2d 152, 155 (5th Cir. 1988); ***Slay v. Alabama***, 636 F.2d 1045, 1046 (5th Cir. 1981).

Therefore, because material fact issues exist, summary judgment was improper as to Myles's claims against the guards. *See* ***Muhammad v. Ness***, No. 92-8720, slip op. at 1-7 (5th Cir. Jan. 14, 1994) (unpublished) (holding, on somewhat similar facts, that summary judgment was inappropriate where credibility determination was involved).[14] Accordingly, we vacate that portion of the summary

[14] In general, we may affirm the judgment of the district court on any basis the district court could have used. *E.g.* ***Hanchey v. Enegras Co.***, 925 F.2d 96, 97. In this case, one such ground might be qualified immunity. A decision based on qualified immunity, however, would require us to resolve the same disputed issues regarding credibility; and, again, this is not appropriate for summary judgment.

judgment in favor of Hart and Woodard, and remand for further proceedings as to them.[15]

III.

For the foregoing reasons, the judgment as to Garner and Furry is **AFFIRMED**; as to Woodward and Hart, it is **VACATED** and the case **REMANDED** for further proceedings.

AFFIRMED in part; VACATED and **REMANDED in part**

[15] Myles also alleges that the district court erred in denying him a jury trial. This issue is moot, because, as discussed, the case was resolved by dismissal of Garner under Rule 12(b)(6) and on summary judgment as to the other defendants.

Myles also alleges that the court was biased and prejudiced against him, but he offers neither examples of this conduct nor any support for his allegations. Accordingly, we do not consider them.