IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8827

Summary Calendar

KIRK WAYNE MCBRIDE,

Plaintiff-Appellant,

versus

CITY OF NEW BRAUNFELS et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CV-1251)

(September 30, 1994)

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Kirk Wayne McBride filed a § 1983 action against a New Braunfels police officer, among others, alleging the officer used excessive force in violation of McBride's constitutional rights. We agree with the district court that McBride failed to provide evidence of a significant injury and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

Kirk Wayne McBride filed a civil rights suit against Ray Douglas, a New Braunfels police officer, Bernie Boeck, the deceased former chief of police, and the City of New Braunfels alleging that his civil rights were violated when Douglas arrested him illegally, interrogated him outside the presence of his attorney, obtained hair and blood samples without a search warrant and outside the presence of his attorney, and used excessive force during the interrogation and to obtain the blood samples. Specifically, McBride alleges that immediately following his arrest on January 16, 1990, Douglas handcuffed him to a chair and repeatedly struck him in the stomach in order to obtain head and pubic hair samples. McBride also claims that on January 31, 1990, while he was a pretrial detainee, Douglas handcuffed him and dragged him down a hall by pulling on the handcuffs.

The only claims at issue in this appeal are the excessive force claims against Douglas. The district court granted Douglas's motion for summary judgment, denied McBride's motion for summary judgment, and dismissed the complaint. McBride appeals the district court judgment.

II.

McBride argues that the district court improperly granted Douglas's motion for summary judgment based on qualified immunity. This Court conducts a bifurcated analysis to assess whether a defendant is entitled to qualified immunity. Rankin v. Klevenhagen, 5 F.3d 103, 105 (5th Cir. 1993). The first step is to

determine whether the plaintiff has alleged a violation of a clearly established constitutional right. Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991). The Court uses "currently applicable constitutional standards to make this assessment." Rankin, 5 F.3d at 106. The second step is to determine whether the defendant's conduct was objectively reasonable. Id. at 105. The reasonableness of the conduct is assessed in light of the legal rules established at the time of the incident. Id. at 108.

McBride argues that Douglas used excessive force on January 16, 1990, during the interrogation immediately following his arrest. If a law enforcement officer uses excessive force during an arrest the Fourth Amendment guarantee against unreasonable seizures is implicated. See King v. Chide, 974 F.2d 653, 656-57 (5th Cir. 1992). McBride also argues that Douglas used excessive force on January 31, 1990, when Douglas was transporting him to the hospital to obtain blood samples. These allegations are sufficient to allege a Fourteenth Amendment due process claim. See Valencia v. Wiggins, 981 F.2d 1440, 1443-45 (5th Cir.), cert. denied, 113 S. Ct. 2998 (1993) (pretrial detainee's excessive force allegation stated a Fourteenth Amendment due process claim). McBride has alleged cognizable constitutional violations, and the Court next considers whether Douglas's actions were objectively reasonable.

January 16, 1990, Incident

McBride was arrested on January 16, 1990, and therefore the standard in Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989), applies. Under this standard McBride must provide competent

summary judgment evidence demonstrating "(1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." Id. at 480 (footnote omitted).[1]

McBride stated in sworn pleadings that during the interrogation Douglas handcuffed him to a chair and repeatedly punched him in the stomach causing recurring stomach problems. These sworn statements are competent summary judgment evidence. See Isquith v. Middle South Util., Inc., 847 F.2d 186, 194 (5th Cir.), cert. denied, 488 U.S. 926 (1988) (verified pleading may be proper summary judgment evidence). McBride also submitted an unsworn declaration setting forth the proposed testimony of Dr. Chester William Ingram.[2] McBride said that Dr. Ingram would testify that McBride suffers from some sort of chronic stomach disorder which has been treated with Maalox. According to McBride, Dr. Ingram recommended that the prison medical officials perform a "Lower G.I." McBride asserts that he requested that the test be performed but was refused. In response, Douglas submitted medical records which contradicted McBride's allegations of an injury and

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[1] Although this Court has overruled the Johnson "significant injury" requirement, see Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994), government conduct must be measured with reference to the law as it existed at the time of the relevant conduct. Id. at 601. In January 1990, a plaintiff was required to prove significant injury. See Johnson, 876 F.2d at 480.

[2] The district court held McBride's recitation of Dr. Ingram's testimony to be improper summary judgment evidence. We decline to address this issue in light of our finding that McBride has suffered no significant injury.

an affidavit from Dr. Chambless who stated that McBride's records failed to indicate any abuse.

Viewing the evidence in the light most favorable to the non-movant, we find that McBride has failed to establish that he has suffered a significant injury.[3] The district court found that the medical records revealed one report of an upset stomach in February 1990, four additional reports of an upset stomach in 1992, and a period between October and December 1992 when McBride was treated with Maalox. We agree with the district court that these incidences are not sufficient to constitute a significant injury. Cf. Wise v. Carlson, 902 F.2d 417, 417-18 (5th Cir. 1990) (holding that bruises on front chest wall and right forearm, and hematoma on right upper eyelid did not rise to the level of significant injury). The district court properly granted summary judgment for Douglas on this claim.

January 31, 1990, Incident

McBride alleges that the second incident occurred on January 31, 1991, while he was a pretrial detainee;[4] therefore, the standard in Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981) applies. Under this standard the plaintiff must prove (1) a severe

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[3] McBride also seems unconvinced that he has suffered a significant injury. His brief is devoted not to arguing that the district court erred in finding no significant injury but to arguing that he is not required to show a significant injury in order to state a claim.

[4] Because the second incident of alleged excessive force occurred two weeks after McBride's arrest, McBride was a pretrial detainee and the Fourteenth Amendment excessive force standard applies. Valencia, 981 F.2d at 1443-45.

injury, (2) action grossly disproportionate to the need, and (3) malice. Pfannstiel v. City of Marion, 918 F.2d 1178, 1185 (5th Cir. 1990). Although the Court has overruled the Shillingford "severe injury" requirement, see Valencia, 981 F.2d at 1449, in January 1990 a plaintiff was required to prove a severe injury. See id. at 1448.

McBride alleged in a sworn statement that Douglas handcuffed him and then dragged him down the hall by pulling on the handcuffs. He has not presented any competent summary judgment evidence to establish that he suffered any injury as a result of this incident, and therefore cannot establish a Fourteenth Amendment violation. See Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (de minimis uses of force that do not cause injury and are not repugnant to the conscience are excluded from constitutional recognition). The district court properly granted summary judgment for Douglas on this claim.

AFFIRMED.