IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-11005
Summary Calendar

WILLIAM STEVE McGREW,

Plaintiff-Appellant,

versus

WICHITA FALLS POLICE DEPARTMENT,
NORMAN WALKER, Officer, and
DAVID HOARD, Officer,

Defendants-Appellees.

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

(March 23, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

I

William Steve McGrew filed a 42 U.S.C. § 1983 complaint against the Wichita Falls Police Department and two police officers alleging that he was falsely arrested for robbery without probable cause. McGrew also alleged that the officers searched his

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

automobile without a warrant, employed excessive force, and filed false reports following the arrest.

The defendants filed motions to dismiss the complaint. The district court granted the defendants' motions and dismissed the complaint pursuant to 28 U.S.C. § 1915(d). The district court determined that § 1983 was not the proper procedural vehicle insofar as the complaint challenged the validity of McGrew's confinement. The district court further determined that McGrew had failed to allege facts that negated the officers' qualified immunity in connection with the arrest and did not allege "an official city policy."

McGrew appealed the dismissal of the complaint. We held that the district court should determine whether McGrew was presently confined as a result of the defendants' conduct and, if so, whether his claims were cognizable habeas claims.[1] See McGrew v. Wichita Falls Police Dep't, No. 93-1867 at 4-6 (5th Cir. Mar. 18, 1994) (unpublished). We further held that "McGrew's allegations that the

[1]This case was decided prior to Heck v. Humphrey, 114 S.Ct. 2364, 2369-70 (1994), which held that habeas exhaustion is not a requirement to seeking § 1983 relief from alleged unconstitutional incidents that implicate the validity of the undenying conviction. In this case, the resolution of excessive force claim would have no effect on the determination of the validity of the conviction, and, thus, it may be addressed although McGrew has not alleged that his state court conviction has been invalidated. See id. at 2370 (a claim that challenges the lawfulness of procedures used by state officials rather than the validity of the plaintiff's confinement may be raised although the plaintiff has not demonstrated that his conviction or sentence has been set aside in a postconviction proceeding).

officers slammed him on the ground without cause may constitute a nonfrivolous excessive force claim despite the defendants' assertion of qualified immunity." We determined that the allegations required further factual development before a proper § 1915(d) determination could be made and remanded the case for further consideration of the excessive force claim. We also held that McGrew had abandoned his claim against the Wichita Falls Police Department on appeal.

Following remand, the district court ordered McGrew to file a more definite statement of fact in response to specific questions posed by the court. All the questions posed by the district court, however, addressed the potential habeas issues in the case. Although McGrew filed responses to the questions, he asserted that he was not challenging his conviction. McGrew filed another pleading entitled "PLAINTIFF'S MORE DEFINITE STATEMENT AND WITHDRAWS," in which he stated that he was withdrawing all claims challenging his confinement. McGrew further stated that he was pursuing his excessive-force claims against Officers Walker and Hoard.

The district court reconsidered the defendants' summary judgment motion, which had been filed prior to McGrew's initial appeal, and McGrew's pleadings filed in response to the request for a more definite statement. The district court determined that McGrew's habeas-related § 1983 claims should be dismissed until he had exhausted his remedies. The district court further determined

that there were genuine issues of material fact that precluded its granting the defendants' summary judgment motion on the excessive force claim. The district court, however, conditionally granted the defendants' motion to dismiss the excessive force claim unless McGrew amended his complaint to allege that the improper acts of the officers were based on established policy or custom. In a subsequent order, however, the court noted that the claim against the Wichita Falls Police Department had been "dismissed" by this Court.[2] The district court also noted that McGrew had withdrawn his habeas claims in his earlier pleadings.

In accordance with the district court's instructions, McGrew filed a supplemental complaint in which he alleged that the excessive force used during his arrest was a policy or custom of the department. McGrew also alleged that the officers should have known that slamming him to the ground while he was handcuffed was a violation of his constitutional rights. McGrew alleged that he suffered agonizing back pain as a result of the officers' actions. McGrew further alleged that he was not resisting arrest or threatening the officers during the incident and, thus, that the officers were not acting to restore discipline. McGrew alleged that the officers intentionally and unnecessarily inflicted pain upon him.

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[2]This court actually determined that McGrew had abandoned the claim against the police department because he did not brief the issue on appeal. See No. 93-1867 at 9.

The case was subsequently transferred from the docket of Judge Belew to the docket of Judge Kendall. Judge Kendall re-issued the last order issued by Judge Belew, which dismissed the habeas-related § 1983 claims but did not address the excessive-force claim. The district court subsequently issued another order dismissing on the basis of absolute immunity what it characterized as McGrew's remaining § 1983 claim: that the prosecutor at his mandatory supervision revocation hearing knowingly adduced false testimony. Still, the district court did not address McGrew's supplemental complaint or the excessive force claim and ordered the case closed.

II

McGrew argues that he was not allowed to develop his action further and that his suit was dismissed without any reference to his supplemental complaint or excessive force claim. McGrew reiterates his allegations that the officers maliciously and unnecessarily used force during his arrest that caused him agonizing back pain.

We review de novo a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993). A Rule 12(b)(6) dismissal is appropriate when, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff, the plaintiff can prove no set of facts that would entitle him to relief. McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir.

1992). A prisoner should be afforded the opportunity to develop his case to the point where any merit it contains is ascertainable. Jackson v. Cain, 864 F.2d 1235, 1241 (5th Cir. 1989). "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." Id.

Our review of the record confirms that the district court has not allowed McGrew to develop the allegations of his complaint in accordance with this court's previous opinion. See No. 93-1867 at 8-9. The questionnaire sent to McGrew addressed the potential habeas claims only and did not seek the development of the excessive-force claim. There was no Spears[3] hearing held.

Further, Judge Belew's determination that McGrew was required to allege that the defendant officers were executing a custom or policy of the department to state an excessive-force claim against the officers in their individual capacities was incorrect. The "custom or policy" element need not be alleged to state a claim against an individual officer for the use of excessive force. See Harper, 21 F.3d at 600.

Although McGrew's allegation in his supplemental complaint that the officers were executing a policy of the police department in using excessive force arguably states a claim against the

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

officers in their official capacities, McGrew no longer has a claim against the police department because he abandoned his claim at the time of his initial appeal. See Goodpasture, Inc. v. M/V Pollux, 688 F.2d 1003, 1006 n.5 (5th Cir. 1992) (an issue which has been concluded in a prior appeal is barred from further consideration under the law of the case doctrine). Therefore, McGrew is barred from suing the officers in their official capacities.

The district court failed to address specifically McGrew's supplemental complaint. A review of the complaint reflects that the district court erred in dismissing the complaint for failure to state a claim.

McGrew's allegations that the officers slammed him to the ground during the arrest without provocation was sufficient to state a constitutional violation. See Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994) (an allegation of the use of excessive force by a law enforcement officer during the course of an arrest implicates the Fourth Amendment guarantee against unreasonable seizures).

The second step of the analysis, however, requires the court to determine the reasonableness of the officers' conduct in light of the clearly established law at the time of the incident. See King v. Chide, 974 F.2d 653, 657 (5th Cir. 1992). Hudson v. McMillian, 112 S.Ct. 995, 998-99 (1992) overruled the "significant injury" requirement in an Eighth Amendment excessive force context. King, 974 F.2d at 657 n.2. When a prisoner alleges that a prison

official has used excessive force in violation of the Eighth Amendment, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson, 112 S.Ct. at 999. Nevertheless, every malevolent touch by a prison guard does not give rise to a federal cause of action. Id. at 1000. "The Eighth Amendment's prohibition of `cruel and unusual' punishment necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." Id. (internal quotation and citations omitted).

McGrew alleged that he was subjected to the use of excessive force by the officers during his arrest in January 1993, which was after Hudson was decided. However, whether Hudson overruled the significant-injury requirement for claims of excessive force during an arrest was an open question at that time. See Bender v. Brumley, 1 F.3d 271, 278 n.7 (5th Cir. 1993). It is arguable that a reasonable officer confronting the situation may have believed that the Hudson standard was applicable to arrestees who had been allegedly subjected to the use of excessive force. See Valencia v. Wiggins, 981 F.2d 1440, 1446-47 (5th Cir.), cert. denied, 113 S.Ct. 2998 (1993) (applying Hudson to pretrial detainees who were allegedly subjected to the use of excessive force by prison guards).

However, even if Hudson is inapplicable to the second prong of the qualified immunity analysis, McGrew's complaint states a claim under the prior, more restrictive standard of Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc). Johnson held that an arrestee alleging an excessive force under the Fourth Amendment must prove: (1) a significant injury; (2) which resulted from the use of force that was clearly excessive to the need; and (3) excessiveness that was objectively unreasonable.[4] Id.

McGrew alleged that the officers slammed him to the ground which caused him agonizing back pain. Similar injuries have been found to be a "significant injury." See Harper, 21 F.3d at 599-601 (allegations that an officer grabbed the plaintiff by the throat and threw her to the ground, resulting in a sore throat and a badly bruised knee, were sufficient to create a genuine issue of material fact regarding the "significant injury" requirement).

Further, the standard for a significant injury is lessened if the injury is intentionally inflicted in an unprovoked and vindicative attack. Oliver v. Collins, 914 F.2d 56, 59-60 (5th Cir. 1990). McGrew alleges that he was not resisting arrest or threatening the officers at the time of the incident and that the officers unnecessarily and intentionally caused him pain during the

[4]Although a plaintiff is no longer required to prove a "significant injury" to prove a constitutional violation under current law, whether the officer caused a significant injury may remain relevant to a determination of the reasonableness of his conduct at the time that the incident occurred. See Harper, 21 F.3d at 601.

course of the arrest. These allegations are sufficient to meet the Johnson "significant injury" test.

Even if the court determines that McGrew's allegations of "agonizing back pain" are too general to establish a significant injury, because the district court did not develop the issue, the dismissal pursuant to Rule 12(b)(6) was premature. See Jackson, 864 F.2d at 1241.

III

Thus, the district court erred in granting the defendants' motion to dismiss. The case must again be remanded for further consideration of the excessive force claim. However, the decision of the district court is AFFIRMED insofar as it dismisses McGrew's habeas corpus claims.

We note that in his reply brief, McGrew again raises arguments regarding other incidents during which officers allegedly used excessive force against him and arguments that could be construed as challenging the validity of his confinement. As we have observed, however, McGrew abandoned his habeas-related claims in the district court. Further, we do not consider issues that are addressed for the first time in a reply brief. See United States v. Heacock, 31 F.3d 249, 259 n.18 (5th Cir. 1994).

In conclusion, we REMAND for further consideration not inconsistent with this opinion.

AFFIRMED in part, REVERSED in part and REMANDED.