UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20502
Summary Calendar

FREDDIE LEE MYLES,

Plaintiff-Appellant,

VERSUS

JAMES A. LYNAUGH, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(CA-H-88-0655)

(May 18, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PRE CURIAM:*

BACKGROUND

Freddie Lee Myles, a TDCJ inmate proceeding pro se and in forma pauperis brought this civil rights action alleging numerous claims pursuant to 42 U.S.C. § 1983. The district court initially dismissed all of Myles' claims and this court affirmed, except as

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to Myles' claims relating to the excessive use of force and destruction of his personal property.[1] Myles v. Collins, No. 91-2673 (5th Cir. Aug. 19, 1993) (unpublished). As to those claims, the court vacated and remanded, finding that the district court had misinterpreted the applicable standard for evaluating excessive-force claims.

After the excessive-force claims were remanded to the district court, the remaining, served defendants, Richardson, Jones, and Davidson, filed a motion for summary judgment in which they asserted that Myles could neither prove a constitutional violation, i.e., the requisite intent and more-than-de-minimis injury, nor overcome their entitlement to qualified immunity. The exhibits attached to the motion included certified copies of the records of internal affairs covering the two use-of-force incidents, certified copies of Myles' TDCJ medical records, Davidson's affidavit concerning the events of February 10th, and the affidavit of Dr. Larry Largent, who had reviewed the medical records and opined that there was not a medical basis for Myles' allegations of injuries from the use of force. In response, Myles did not come forward with any summary judgment evidence.

The district court concluded that although material issues of disputed fact existed as to Myles' alleged constitutional violation, the defendants were entitled to qualified immunity in light of the required elements of an excessive-force claim at the

[1]Myles' claim related to destruction of property was subsequently dismissed on remand and has not been appealed.

time that the incidents occurred.

Myles alleged two incidents of excessive force. First, Myles alleged that while he was in administrative segregation on July 9, 1986, Richardson pulled down and confiscated a sheet Myles had hung in his cell. This led to Richardson and his supervising officer searching Myles' cell for contraband. They conducted the search as Myles, handcuffed, stood outside his cell. After the supervisor left, Richardson confiscated Myles' portable fan from his cell. Myles objected to the confiscation because he did not view the item as contraband. Richardson ordered Myles back into his cell and told him that he would be thrown into the cell if he did not comply.

Myles alleged that Richardson and Jones grabbed him, threw him twice into the cell door, and slammed him down on the floor. Richardson allegedly stood on Myles' head and used his knee to repeatedly hit the base of Myles' neck. At the same time, Myles' legs were folded over the back of his head until he felt a "pop" in his spine and severe pain through his back and neck. Jones allegedly twisted Myles' cuffed hands and wrists. Myles alleged that he did not resist Richardson and Jones' actions.

As for the second incident of alleged excessive use of force, Myles alleged that on February 10, 1987, Officers Fleschner and Davidson were escorting Myles, handcuffed, to the showers. A verbal altercation erupted between Myles and Fleschner over Myles' objection to Fleschner spitting tobacco in front of Myles' cell.

Davidson ordered Myles to return to his cell, warning Myles that he would be thrown into his cell if he did not comply. Myles refused and demanded to see a supervisor. The two officers threw Myles on the floor, tightened the hand cuffs, twisted Myles' wrists, and bent his legs back over Myles' head. Myles alleged that a nurse examined Myles at the shower after this incident.

OPINION

Myles argues that the district court should have held a hearing on his claims of excessive force. He also argues that this court's initial opinion precludes summary judgment for the defendants. In a similar vein, Myles contends that summary judgment was improper in light of the defendants' failure to petition for rehearing pursuant to Fed. R. App. P. 40(a).

Myles misunderstands this court's earlier opinion. This court remanded the excessive-force claims, which had been dismissed for frivolousness, because the district court misinterpreted the required elements for an excessive-force claim. This court did not preclude the use of summary judgment to dispose of these claims. Moreover, it appears that Myles is confused by the calendar name of this court's opinion, "summary calendar". It appears that Myles confuses summary calendar with summary judgment. To the extent that Myles contends that a hearing was required (referring to Fed. R. Civ. P. 56(c)'s use of "hearing"), Rule 56 does not require a hearing, but requires ten-day notice to the nonmovant if a hearing is utilized. See Daniels v. Morris, 746 F.2d 271, 274-75 (5th Cir. 1984). In this light, these preliminary issues are without merit.

Although unartfully worded, Myles' appellate argument encompasses a general challenge to the propriety of summary judgment. "Summary judgment is proper if the movant demonstrates that there is an absence of genuine issues of material fact." Johnston v. City of Houston, Tex., 14 F.3d 1056, 1060 (5th Cir. 1994); Fed. R. Civ. P. 56(c). Review is de novo. Hale v. Townley, 45 F.3d 914, 917 (5th Cir. 1995).

> Plainly, Rule 56 means what it says: "judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citation omitted).

The initial summary judgment burden resides with the moving party to "`demonstrate the absence of a genuine issue of material fact,' but [the movant] need not negate the elements of the nonmovant's case." Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). If this burden is met, the burden shifts onto the nonmovant to "go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." Id. Myles did not provide any affidavits or other summary judgment evidence after the defendants filed their summary judgment motion. The record does, however, contain Myles' sworn statements at the Spears[2] hearing and his verified pleadings. This is deemed competent summary judgment evidence. See Nissho-Iwai Am. Corp. v.

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

Kline, 845 F.2d 1300, 1306 (5th Cir. 1988).

Myles argues that he is entitled to damages against these defendants in their individual and official capacities. A § 1983 plaintiff cannot sue a state official in his official capacity for damages. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Therefore, the following analysis presumes that the defendants are sued in their individual capacities.

The district court granted summary judgment for the defendants based on their entitlement to qualified immunity.

> In assessing a claim of qualified immunity, [this court] engage[s] in a bifurcated analysis. First, [this court] determine[s] whether the plaintiff has "allege[d] the violation of a clearly established constitutional right." If so, [this court] then decide[s] if the defendant's conduct was objectively reasonable, because "`[e]ven if an official's conduct violated a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable.'"

Rankin v. Klevenhagen, 5 F.3d 103, 105 (5th Cir. 1993) (citations omitted). Moreover, the conduct of the officials is viewed "under the law as it existed at the time of the incident, not current law." Wells v. Bonner, 45 F.3d 90, 96 (5th Cir. 1995).

Myles argues that the defendants are not entitled to qualified immunity because their actions were in violation of established law as defined in TDCJ written policies and regulations. Myles misperceives the meaning of "established law" in the context of qualified immunity and 42 U.S.C. § 1983. Violation of TDCJ rules or regulations, without more, does not give rise to a § 1983 cause of action. See Hernandez v. Estelle, 788 F.2d 1154, 1158 (5th Cir. 1986). Therefore, it is the use of excessive force, a violation of

the constitution, which gives rise to the action, not the fact that excessive use of force is prohibited by TDCJ policy. Thus, "established law" focuses on the elements of an excessive-force claim.

"When prison officials maliciously and sadistically use force to cause harm," the Eighth Amendment is violated, "exclud[ing] 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." Hudson v. McMillian, 503 U.S. 1, 9-10 (1992) (internal quotations and citations omitted). Myles' verified pleadings indicate that the amount of force used by the officers was extensive and extremely disproportionate to the amount needed. As such, Myles has alleged excessive uses of force. See Rankin, 5 F.3d at 106-08.

As noted earlier, the second prong of the qualified immunity analysis looks to the law in existence at the time of the incidents under question. See Wells, 45 F.3d at 96. "Hudson removed the `serious' or `significant' injury requirement [this court] previously held necessary to show an Eighth Amendment violation." Rankin, 5 F.3d at 107. The clearly established law at the time of the two use-of-force incidents required a severe injury. See id. at 108.

The summary judgment evidence reveals that Myles' injuries were not severe. See Valencia v. Wiggins, 981 F.2d 1440, 1448 n.42 (5th Cir.) (cases concluding the following injuries sufficient to be severe or serious: scar from facial laceration, multiple

bruises and scars, multiple lacerations and contusions requiring hospital stay, pinched nerve, severe bruising and swelling, cut fingers requiring stitches; cases concluding the following injuries were not severe or serious: minor bruises or scrapes, scratches, fear, small red mark, neck strain requiring temporary use of brace), cert. denied, 113 S. Ct. 2998 (1993). The use-of-force injury report from July 9th indicated that Myles complained of pain, but the examination did not reveal any apparent bruising or abrasions. The x-rays taken the following week did not detect any abnormality in the spine or shoulder. The use-of-force injury report from February 10th indicated swelling on the right wrist and a small abrasion below a knee. X-rays taken the following October found only early signs of degenerative disc disease of the lower lumbar region. In his affidavit, Dr. Largent, after reviewing Myles' medical records, opined that there was not a medical basis for his allegations of injuries.

Myles' verified allegations of injury encompass no more than pain and minor bruising. To the extent that Myles contends that the defendants fabricated or fixed his medical records, the contention is generalized. See Hanchey v. Energas Co., 925 F.2d 96, 97 (5th Cir. 1990). Further, Myles' allegations of injuries, as mentioned above, are not contrary to the medical evidence.

Because Myles failed to show a significant injury, as the law required at the time of the two use-of-force incidents, the conduct of the defendants falls within the parameters of objective reasonability, and the defendants are entitled to qualified

immunity. See Wells, 45 F.3d at 96 (defendant officers qualifiedly immune in plaintiff's Fourth-Amendment use-of-force claim under § 1983). The district court properly granted summary judgment for the defendants.

To the extent that Myles contends that the system-wide use of excessive force has resulted in the death of an inmate at the TDCJ Terrell Unit on October 7, 1994, as reported in the news, this issue was not raised in the district court. This court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

AFFIRMED.