

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40903
(Summary Calendar)

MARIO A. YARRITO,

Plaintiff-Appellant,

versus

JEFFREY A. COOK, ETC., ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Texas
(6:93-CV-694)

(June 22, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Mario A. Yarrito, a prisoner in the Institutional Division of the Texas Department of Criminal Justice (TDCJ) appeals the district court's dismissal of his 42 U.S.C.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 1983 civil rights action implicating use of excessive force and complicity in the use of excessive force by the individual defendants, all of whom were correctional officers in the service of TDCJ at the time of the incidents of which Yarrito complains. Yarrito also urges that (1) the district court applied an incorrect legal standard to his excessive force claim and abused its discretion by imposing sanctions; and (2) the magistrate judge erred in denying discovery motions. In this court the Defendants-Appellees (collectively, Defendants) urge dismissal of Yarrito's appeal for failure to provide record citations in his brief. We decline to dismiss Yarrito's appeal on those grounds, but we remand the part of the district court's judgment that imposes sanctions for the limited purpose of additional development and retain jurisdiction of the case for that purpose. We affirm, however, the district court's dismissal of Yarrito's § 1983 claims.

I

FACTS AND PROCEEDINGS

Yarrito filed the instant complaint against correctional officers Jeffrey Cook, Stephen Ham, Roger Adair, Charlie Page, Wallace Allsip, Jr., Alan Walter, and William Jock. Yarrito alleged that Cook, Ham, Adair, Page and Allsip brutalized him during an incident on August 3, 1993, and that Walter and Jock stood by and did nothing while he was being beaten by the other officers. The magistrate judge granted Yarrito leave to proceed in forma pauperis (IFP), held a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), following which the

magistrate judge determined that Yarrito's claims were nonfrivolous, and ordered service on the Defendants.

The magistrate judge next held an evidentiary hearing pursuant to 28 U.S.C. § 636(b)(1)(B), after which she recommended that the district court dismiss Yarrito's complaint and award the Defendants the cost of defending against Yarrito's suit. The district court adopted the magistrate judge's recommendations, dismissed Yarrito's complaint, and awarded costs to the defendants.¹

Yarrito testified at the evidentiary hearing that for no reason four TDCJ correctional officers (none of whom are named as defendants in the present lawsuit) had denied him recreation, a shower, and his noon meal. Yarrito said that another officer later denied him recreation but took him to the shower, returning him to his cell at approximately 9:30 a.m.. As yet another officer was passing out lunches, stated Yarrito, he was told by the officer who had accompanied him not to give Yarrito a lunch. Yarrito, who was wearing handcuffs, told the officers that he would not return the handcuffs if he did not receive his meals, whereupon those officers placed Yarrito inside his cell, closed his food slot, and left.

Yarrito testified further that after he asked to speak with a supervisor, Defendants Jock and Walter came to his cell, followed by Defendants Cook, Ham, Adair, Page, and Allsip. According to Yarrito, on the orders of Jock and Walter, the other officers rushed into Yarrito's cell and assaulted him. According to

¹ We affirmed the district court's denial of a preliminary injunction; and a judge of this court denied Yarrito's motion for production of transcripts and stay of the judgment imposing costs.

Yarrito, he was lying on the floor when the officers entered his cell, and Cook turned Yarrito's head and slammed it into the floor, causing two cuts below his eyebrows as a result of Cook's actions. Meanwhile, said Yarrito, Ham and Adair bent his legs and twisted his ankles "wanting to break [Yarrito's] ankles," and Page and Allsip bent his arms "so much that [Yarrito] thought they would break." Page and Allsip also twisted Yarrito's wrists severely, testified Yarrito.

Cook, Adair, Page, Allsip and Ham then escorted Yarrito to the prison infirmary. Nurse Molly Johnson cleaned the wounds on Yarrito's face. A physician ordered stitches, but at Yarrito's request Nurse Johnson used tape stitches on Yarrito rather than sutures.

According to Yarrito, he was eventually escorted to a cell in another part of the prison. Cook, Ham, Adair, Page, and Allsip ordered Yarrito to lie down on the floor, whereupon the officers beat Yarrito, leaving him half unconscious. He said that Jock and Walter were present but did nothing to stop the beating.

On cross-examination, Yarrito testified that he slipped his handcuffs off after being returned to his cell from the shower. He knew that he was supposed to return the handcuffs but refused to do so. He disobeyed the orders of the officer who returned him to the shower. He was in his cell with the handcuffs for about one hour before the officers used force against him. According to Yarrito, no officer came to his cell to discuss his grievance or attempt to convince him to return the handcuffs. Yarrito lay prone when the

officers entered his cell. Cook hit Yarrito with the shield he carried then threw the shield aside. Yarrito believed that Cook was the one who had slammed Yarrito's face into the floor three or four times. Yarrito suffered neither broken bones nor a bloody nose, but did develop a black eye the next day.

A videotape of the use of force against Yarrito begins with a correctional officer's explaining that Yarrito had used the handcuffs to lock the cell. A correctional officer used bolt cutters to detach the handcuffs. A voice on the tape indicates that Yarrito took the handcuffs after the officer cut them. The use-of-force team, in riot gear, entered Yarrito's cell. The leader, who held a plastic shield in front of himself, entered moving downward. For a moment the interior of Yarrito's cell is not visible on the tape because of the camera angle, and Yarrito is not visible when the camera showed the interior of his cell. The officers are crouching, evidently atop Yarrito. The officers are seen moving their arms about, but do not appear to be hitting Yarrito.

The officers then escort Yarrito to be photographed. A nurse wipes blood off his face before the photographs are taken. The officers escort Yarrito to the prison infirmary where a nurse tends to his forehead.

The officers then escort Yarrito to his new cell where he lies on the floor and his handcuffs are removed. The view is obscured by the officers' bodies, but there is no movement consistent with officers hitting, kicking, or beating Yarrito.

Security Officer Pamela Davis testified that she operated the videocamera. She stated that she saw no punching or kicking of Yarrito. According to Davis, the videocamera malfunctioned after the initial use of force but before the officers escorted Yarrito to the infirmary. The camera was off for less than ten seconds. The camera also malfunctioned for less than 30 seconds while the officers escorted Yarrito to the infirmary. One Defendant's attorney, through use of the elapsed time shown on the videotape and the counter on the district court's video cassette recorder, purported to demonstrate that the first camera malfunction lasted six seconds and the second malfunction lasted 21 seconds.

TDCJ Registered Nurse Molly Johnson testified that she treated Yarrito for lacerations below both eyebrows and that the lacerations were "fairly superficial." Johnson also noted a red area on Yarrito's back.

On cross-examination by Yarrito, Johnson testified that Yarrito should have been bruised if his face had been slammed into the floor. She also testified that the lacerations around Yarrito's eyes did not necessarily mean that someone had hit Yarrito in that area. On examination by the magistrate judge, Johnson testified that such lacerations usually result from a prisoner's falling on the floor or running into a shield.

Cook testified that he was the lead officer of the use-of-force team that dealt with Yarrito, and that he (Cook) had held the shield used in the incident. Cook was outside Yarrito's cell for three or four minutes before force was used and witnessed Jock and

Walter attempting to persuade Yarrito to return the handcuffs, but that Yarrito had refused their entreaties.

Cook testified that Yarrito was in a crouched position five or six feet from the cell door and two feet from the back wall, with his left shoulder facing the door when it was opened, but said nothing as the use-of-force team charged into the cell. Cook immediately knocked Yarrito to the floor with the shield. Yarrito went down face forward and the officers positioned themselves on his back. Cook did not grab Yarrito by his hair or slam his face to the floor; neither did he attempt to break Yarrito's wrist or twist his arms more than necessary to handcuff him. Cook saw no other officer use what he considered excessive force. According to Cook, no force was used against Yarrito during his transfer to the new cell.

Lieutenant Jock testified that he was the supervisor in charge of the use of force against Yarrito. Jock had gone to Yarrito's cell to discuss his complaints but Yarrito declined to talk to Jock, telling him that he wished to speak with a captain. According to Jock, Walter had earlier attempted to convince Yarrito to return his handcuffs.

Jock also testified that Yarrito used the handcuffs to lock his door shut. According to Jock, officers ordinarily would have placed a "retainer" on a prisoner under similar circumstances while removing the handcuffs from the door, obviating the need to use force; however, Yarrito refused to allow the use of a retainer.

Jock testified further that he observed no violations of

TDCJ's use-of-force policy. He did not see an officer slam Yarrito's head into the floor; he did not see any officers hitting or kicking Yarrito; he did not see Yarrito lying down in an unconscious or "semi-dazed" condition after the transfer to the new cell.

Sergeant Walter testified that Yarrito refused to speak with him when he attempted informally to resolve Yarrito's grievance. Walter explained to Yarrito that he must return the handcuffs before prison officials would listen to his complaints. When Yarrito asked to see a captain, Walter notified Jock, who also attempted to resolve the problem amicably. When that failed, the use-of-force team was assembled. Id.

According to Walter, he saw no one punch or kick Yarrito and saw no one slam Yarrito's face into the floor. Walter testified that Yarrito picked up the handcuffs after they were cut from the door. Walter saw no one mistreat Yarrito during the walk to the infirmary; neither did Walter see anyone mistreat Yarrito during the transfer to the new cell. Yarrito complied with the officers' orders during the transfer and did not resist the officers. On redirect examination, Walter testified that no one struck Yarrito or attempted to strike him during the first camera malfunction.

Ham testified that he was the second officer into Yarrito's cell. His assignment was to apply handcuffs to Yarrito's arms and he carried out his assignment, restraining Yarrito's left arm. He did not see or hear Cook slam Yarrito's head into the floor; neither did he see anyone kick or hit Yarrito nor do so himself.

He did not see anyone kick or hit Yarrito during the transfer to the new cell and he did not hit or kick Yarrito himself.

Allsip testified that he was the third officer into Yarrito's cell. He restrained Yarrito's right arm but was unable to see much inside the cell. He testified that he did not punch or kick Yarrito. According to Allsip, Yarrito resisted the officers somewhat. Allsip did not see anyone kick Yarrito and did not see or hear Cook slam Yarrito's face to the floor. Allsip did not see any officer abuse Yarrito during the transfer to the new cell.

Adair testified that he was the fifth officer into Yarrito's cell, helping to affix leg irons to Yarrito. Adair denied that he attempted to break Yarrito's legs or ankles. Adair did not see or hear any other officer hit or kick Yarrito, and saw no indication that Yarrito's face had been slammed into the floor. Adair saw nobody kick or hit Yarrito during the transfer to the new cell.

Page testified that he was the fourth officer into Yarrito's cell, also helping to affix the leg irons. Page denied that he used excessive force in restraining Yarrito's legs. According to Page, he did not see any officer hit Yarrito during the use of force and did not see Cook slam Yarrito's face to the floor. Page did not see any officer hit or kick Yarrito during the transfer to the new cell and did not hit or kick Yarrito himself.

Following the completion of Page's testimony, the Defendants moved for sanctions against Yarrito pursuant to FED. R. CIV. P. 11. Specifically, the Defendants requested that Yarrito be ordered to pay the costs of the suit and that his IFP status be revoked.

Yarrito responded that neither sanctions nor dismissal of his case was appropriate, as he had suffered a violation of his Eighth Amendment rights.

In her report, the magistrate judge recommended sanctions because the videotape clearly shows that Yarrito lied about what happened during the transfer to the new cell. The magistrate judge recommended imposition of costs, citing FED. R. CIV. P. 54. Before the district court entered judgment, the Defendants' attorneys submitted bills of costs, including attorneys' fees, totaling \$7,830.20. The district court imposed costs and ordered the defendants to submit bills of costs within 20 days of the court's order.

II

ANALYSIS

A. Record Citation in Appellate Brief

The Defendants contend that we should not consider Yarrito's contentions because he failed to provide record citations in his brief. We may dismiss an appeal for an appellant's failure to provide record citations. Moore v. FDIC, 993 F.2d 106, 107 (5th Cir. 1993). We should not, however, exercise our discretion to dismiss an appeal for relatively minor infractions of the rules. Coats v. Pierre, 890 F.2d 728, 731 (5th Cir. 1989) (failure to provide a transcript), cert. denied, 498 U.S. 821 (1990). The record in Yarrito's case is fairly brief, so perusal is not unduly burdensome or time consuming. We decline to dismiss Yarrito's appeal for failure to provide record citations.

B. Standard of Proof

Yarrito contends that the district court mistakenly applied the "preponderance-of-the-evidence" standard to his case rather than the correct legal standard for use-of-force cases. Yarrito confuses the evidentiary burden to be borne by a plaintiff in a civil case with the legal standard applied to review of district court decisions in excessive-force cases. A civil plaintiff seeking to recover damages for use of excessive force must prove his claim by a preponderance of the evidence. See, e.g., Bender v. Brumley, 1 F.3d 271, 278 (5th Cir. 1993). Thus Yarrito's standard-of-proof contention is unavailing.

C. Eighth Amendment and Excessive Force

Yarrito contends that the district court erred by holding (1) that the Defendants did not violate his Eighth Amendment rights, and (2) the Defendants were protected by qualified immunity. Before addressing qualified immunity, courts must determine whether the plaintiff's allegations state a violation of a constitutional right. Quives v. Campbell, 934 F.2d 668, 670 (5th Cir. 1991). Thus we must address the district court's treatment of Yarrito's Eighth Amendment claim before considering whether the Defendants were protected by qualified immunity.

When examining an excessive-force claim, "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 v. McMillian, 503 U.S. 1, 7 (1992).

Factors to consider when evaluating a claim of use of

excessive force include:

1. the extent of the injury suffered;
2. the need for the application of force;
3. the relationship between the need and the amount of force used;
4. the threat reasonably perceived by the responsible officials; and
5. any efforts made to temper the severity of a forceful response.

Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992).

That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. 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."

Hudson, 503 U.S. at 9-10 (internal and ending citations omitted).

The district court accepted the Defendants' version of events and declined to believe Yarrito's testimony. "An appellate court is in no position to weigh conflicting evidence and inferences or to determine the credibility of witnesses; that function is within the province of the finder of fact." United States v. Samples, 897 F.2d 193, 198 (5th Cir. 1990) (citations omitted). To the extent that the magistrate judge believed the Defendants' testimony and discredited Yarrito's testimony, that credibility determination was proper.

Nurse Johnson's testimony indicates that Yarrito suffered lacerations under his eyelashes and a red spot on his back. Those injuries were minimal. See Young v. Saint, No. 92-8420, slip op. at 3, 6-7 (5th Cir. Mar. 31, 1993) (unpublished; copy attached) (blow to hand resulting in cuts, blood, and slight decrease in

flexion a de minimis use of force). The Defendants' testimony indicates that Yarrito had disobeyed an order to return his handcuffs to a prison officer and had used the handcuffs to lock prison officers out of his cell. Without using force, Jock and Walter attempted to convince Yarrito to allow officers to regain custody of the handcuffs but he refused. True, the officers then knocked Yarrito to the floor and placed him in hand and ankle restraints, but the Defendants' testimony, supported by the videotape, confirms that they used no more force than was necessary to subdue and restrain Yarrito. Moreover, the testimony and the videotape indicate that the Defendants used no force against Yarrito during the transfer to the second cell.

The evidence reflects that Yarrito suffered minor injuries; that the Defendants were left no choice but to apply some force to regain custody of the handcuffs; that the force used was no more than was necessary; and that the Defendants first attempted to obtain the handcuffs without resort to force, but to no avail. See Hudson, 962 F.2d at 523. The record confirms that the Defendants used force against Yarrito in a good-faith effort to restore discipline and did not violate Yarrito's Eighth Amendment rights in so doing. As the evidence reveals no constitutional violation, we need not address whether the defendants are entitled to qualified immunity. See Quives, 934 F.2d at 670.

D. Sanctions

Yarrito contends that the district court erred by imposing costs on him, insisting that his complaint was well grounded in

fact. He does not challenge the amount of the sanction.

We cannot tell with any degree of certainty under just what statute or rule the district court assessed costs to Yarrito. Neither can we tell exactly the dollar amount assessed.

The magistrate judge cited to FED. R. CIV. P. 54(d)(1) and (d)(2) in support of her recommendation that the district court assess costs to Yarrito as sanctions, but did not specify whether attorneys' fees and any other usually non-taxable costs should be included. The magistrate judge discussed the imposition of costs under the heading "sanctions," but did not cite FED. R. CIV. P. 11, the provision relied on in the Defendants' motion for sanctions. The magistrate judge also recommended that the district court conclude that Yarrito "filed this lawsuit for purposes of vexation and harassment rather than for any proper purpose," echoing the language of 28 U.S.C. § 1927, which allows the award of costs and attorneys' fees; but she did not cite that statute. On the other hand, the attorney-fee provisions of Rule 54, to which the magistrate judge did cite, do not apply to "claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927." FED. R. CIV. P. 54(d)(2)(E).

The Defendants' attorneys submitted bills for costs, including attorneys' fees, totaling \$7,830.20. The district court awarded costs to the Defendants, but did not specify an amount; neither did the court indicate that the Defendants were to receive attorneys' fees or cite to any specific provision governing such awards. Rather, the district court ordered the Defendants to submit bills

of costs within 20 days. The docket sheet of May 23, 1995, does not indicate that the Defendants submitted new cost bills in response to the district court's order.

Before we can review the award of costs against Yarrito, we must remand to the district court for the limited purpose of obtaining the court's clarification of its order imposing costs. The district court should indicate the basis and reasons for assessing costs to Yarrito; the total amount of the costs assessed; and whether that amount includes attorneys' fees. This panel shall retain jurisdiction of this appeal and revisit the matter following the district court's compliance with the remand.

E. Denial of Other Requests

Yarrito contends that the magistrate judge erred by denying discovery requests, a motion for appointment of an expert in video technology, and a witness list; however, Yarrito did not appeal the magistrate judge's denial of his motions. "[P]retrial matters referred by a trial judge to a magistrate must be appealed first to the district court." Singletary v. B.R.X., Inc., 828 F.2d 1135, 1137 (5th Cir. 1987). We are therefore without jurisdiction to consider Yarrito's contentions.

For the foregoing reasons we affirm all rulings of the district court (including dismissal of Yarrito's § 1983 claims), save only the award of sanctions in the nature of costs; and we hold this appeal in abeyance as to that issue and remand to the district court for the limited purpose of allowing it to clarify the basis and nature of such awards.

AFFIRMED in part and REMANDED in part.