FILED
United States Court of Appeals
Tenth Circuit

September 10, 2021

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

---

DOUGLAS C. LEHMAN,

Plaintiff - Appellant,

v.

BRIAN MCKINNON; JAQUES, Correctional Officer Sgt.; MCCARROLL, Correctional Officer,

Defendants - Appellees.

No. 20-1312
(D.C. No. 1:18-CV-00952-PAB-NRN)
(D. Colo.)

---

**ORDER AND JUDGMENT***

---

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

---

Douglas Lehman, a Colorado inmate representing himself, brought claims under 42 U.S.C. § 1983 against the defendants, three correctional officers. The district court granted summary judgment to the defendants, and Lehman now appeals. We affirm.

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

## I. Background

We describe the events underlying this case in the way most favorable to Lehman. Many facts are undisputed, and most relevant events were captured by a video recording.

Lehman was an inmate at Limon Correctional Facility, where the defendants worked as correctional officers. One day in the dining hall, Lehman threw food trays and other objects. He received an order from defendant Brian McKinnon to submit to handcuffs and turned to face a wall as if to comply. Without warning, and with a cast on one of his forearms, he attacked McKinnon, throwing several punches and causing McKinnon to fall. Lehman then maneuvered around a table and delivered several more blows to McKinnon.

Coming to McKinnon's aid, defendant Ryan Jaques sprayed Lehman in the face with pepper spray twice.[1] Lehman stopped punching McKinnon and lay prone on the ground, with McKinnon on his legs. From the ground, McKinnon sprayed Lehman in the face with pepper spray for three to five seconds. Jaques and defendant Patrick McCarroll approached Lehman and began restraining him. At some point after Lehman put his hands behind his back, he lost consciousness. McKinnon stood up, moved around Jaques toward Lehman's head, and then backed away as Jaques and McCarroll continued to restrain Lehman.

[1] The spray contained oleoresin capsicum, a substance obtained from the resin of cayenne and other peppers.

As a result of Lehman's assault, McKinnon suffered a facial fracture, a concussion, and a torn rotator cuff. For his part, Lehman suffered temporary blindness and excruciating pain from the pepper spray, but he did not experience any permanent physical symptoms.

Lehman sued the defendants. He claimed McKinnon violated his Eighth Amendment rights by using excessive force against him and by failing to report the force. He claimed Jaques and McCarroll violated his Eighth Amendment rights by failing to intervene against McKinnon's excessive force and by failing to report it.

These claims centered on Lehman's allegation that McKinnon sprayed him with pepper spray twice, once from the ground and a second time after he got up. The parties disputed whether Lehman could show that McKinnon sprayed him a second time. No one involved claimed to have witnessed this second spray: Lehman claimed to have been unconscious, McKinnon claimed not to recall parts of the struggle, and Jaques and McCarroll denied seeing a second spray from McKinnon. Without a witness who could establish a second spray from McKinnon, Lehman relied on video footage from the dining hall, arguing it showed McKinnon sprayed him in the face at close range after standing up and moving around Jaques.

The magistrate judge rejected Lehman's interpretation of the video. "Despite multiple viewings of the video in both real time and slow motion," the magistrate judge did not "detect any second spraying by Officer McKinnon." R. vol. 3 at 395. For that reason, the magistrate judge found, "no reasonable juror could conclude that there was a second spray by Officer McKinnon." *Id.* at 400. The magistrate judge

recommended granting summary judgment to the defendants on all claims. The district court accepted the recommendation and entered judgment for the defendants.

## II. Discussion

We construe Lehman's pro se filings liberally, without going so far that we act as his advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Although the parties debate whether Lehman waived appellate review because he did not timely object to the magistrate judge's recommendation, we need not address that issue. A party's "failure to timely object to a magistrate's report is not jurisdictional." *Hicks v. Franklin*, 546 F.3d 1279, 1283 n.3 (10th Cir. 2008). And reviewing de novo the merits of summary judgment, *see Lance v. Morris*, 985 F.3d 787, 793 (10th Cir. 2021), we readily conclude the judgment is correct.

The defendants' summary-judgment motion asserted qualified immunity. Our review of summary-judgment orders in the qualified-immunity context differs from our review of other summary-judgment orders. *Redmond v. Crowther*, 882 F.3d 927, 935 (10th Cir. 2018). Summary judgment is ordinarily appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). But when a defendant asserts qualified immunity at the summary-judgment stage, the plaintiff must "show (1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). At this stage, the plaintiff's version of the facts must have support in the record. *Redmond*, 882 F.3d at 935. We view the

evidence in the light most favorable to the party opposing summary judgment, resolving factual disputes and drawing reasonable inferences in that party's favor. *Estate of Booker*, 745 F.3d at 411.

A. Excessive Force

"An excessive force claim involves two prongs: (1) an objective prong that asks if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation, and (2) a subjective prong under which the plaintiff must show that the officials acted with a sufficiently culpable state of mind." *Redmond*, 882 F.3d at 936 (brackets and internal quotation marks omitted). An official's state of mind is sufficiently culpable "if he uses force maliciously and sadistically for the very purpose of causing harm, rather than in a good faith effort to maintain or restore discipline." *Id.* (internal quotation marks omitted).

We have long recognized "that a prison guard, to maintain control of inmates, must often make instantaneous, on-the-spot decisions concerning the need to apply force without having to second-guess himself." *Sampley v. Ruettgers*, 704 F.2d 491, 496 (10th Cir. 1983). So "when prison officials must act to preserve internal order and discipline, we afford them wide-ranging deference." *Redmond*, 882 F.3d at 938 (internal quotation marks omitted). Although this deference does not protect "actions taken in bad faith and for no legitimate purpose," it does prevent us from substituting our "judgment for that of officials who have made a considered choice." *Id.* (internal quotation marks omitted).

We agree that no reasonable juror could find that McKinnon sprayed Lehman a second time. Recall that no one, not even Lehman himself, claims to have witnessed a second spray from McKinnon. Lehman offers only the video. Yet the video does not depict the second spray. The video shows that McKinnon moved into a position from which he *could have* sprayed Lehman in the face a second time. But whether he in fact did so is anyone's guess; one can only speculate. That is the problem for Lehman, for he cannot defeat summary judgment through "mere speculation, conjecture, or surmise." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

Our analysis is not affected by the district court's earlier assessment that, in the video, McKinnon "appears to pepper spray plaintiff in the face while the two officers have plaintiff restrained." R. vol. 2 at 215. The district court made this statement while deciding whether the video contradicted Lehman's claim that he was unconscious while he lay on the ground, a distinct question from whether a reasonable juror could conclude that a second spray from McKinnon occurred. So we reject Lehman's claim that the district court made a finding that "established going forward" that the second spray occurred. Aplt. Opening Br. at 29. In any event, the district court's statement could not bind our de novo review, an analysis affording the district court no deference. *See Carlile v. Reliance Standard Life Ins.*, 988 F.3d 1217, 1221 (10th Cir. 2021).

Contrary to Lehman's argument, our conclusion does not conflict with *Ross v. Burlington Northern & Santa Fe Railway Co.*, 528 F. App'x 960 (10th Cir. 2013). In

*Ross* we concluded a video submitted by the defendant did not support summary judgment in the face of the plaintiff's evidence—expert opinion, for example—undermining the defendant's interpretation of the video. 528 F. App'x at 963–65. In contrast to the plaintiff in *Ross*, Lehman can point to no evidence other than the video itself bearing on the relevant fact.

Because no reasonable juror could find that McKinnon sprayed Lehman a second time, we must decide whether Lehman's excessive-force claim against McKinnon can survive summary judgment based on the evidence that McKinnon sprayed him from the ground. To conclude the claim cannot survive, we need only consider its subjective component—whether McKinnon used force maliciously and sadistically for the purpose of causing harm rather than in a good-faith effort to maintain or restore discipline. *See Redmond*, 882 F.3d at 936. To evaluate a prison official's state of mind, we consider the need for force; the relationship between the need for force and the amount of force used; the extent of any injuries the force caused; the threat to the safety of inmates and staff, as reasonably perceived by the official given the facts known to him; and any efforts to temper the severity of the force. *Whitley v. Albers*, 475 U.S. 312, 321 (1986). An official's "conduct itself" provides sufficient evidence of a malicious and sadistic motive if we cannot infer a "legitimate penological purpose" from the conduct. *DeSpain v. Uphoff*, 264 F.3d 965, 978 (10th Cir. 2001).

Force was surely necessary to overcome Lehman's assault. And when McKinnon sprayed him from the ground, Lehman had not yet been fully restrained.

True, as Lehman highlights, he lay prone at the time. But given that he had launched an assault after seeming to follow orders just seconds earlier, we cannot fault McKinnon for distrusting Lehman's renewed gestures of compliance. Nor can we conclude that spraying Lehman was disproportionate. Rather, we can easily infer a legitimate penological purpose for it—subduing Lehman until the officers fully restrained him. Given the facts known to McKinnon, he had good reason to perceive that Lehman posed a serious risk to the safety of staff until fully restrained.

The events underlying this case were chaotic and quick. Only about 25 seconds elapsed between Lehman's first punch and McKinnon's stepping back from Jaques and McCarroll as they restrained Lehman. Lehman's assault forced McKinnon to make precisely the type of "instantaneous, on-the-spot decisions" that courts will give deference. *See Sampley*, 704 F.2d at 496. In short, Lehman has failed to show that McKinnon acted with a sufficiently culpable state of mind when he sprayed Lehman from the ground.

Lehman does not convince us otherwise by challenging McKinnon's claimed memory loss. Pointing to McKinnon's medical records and statements after the assault, Lehman disputes McKinnon's claim of memory loss. From the premise that McKinnon did not actually suffer memory loss, Lehman posits that McKinnon fictitiously claimed memory loss to conceal his use of force. And this cover-up, Lehman concludes, shows that McKinnon knew his conduct violated the law, demonstrating his culpable state of mind. This speculative argument does not satisfy the subjective prong of an excessive-force claim, *see Bones*, 366 F.3d at 875,

especially in the face of video evidence clearly showing a legitimate penological reason for McKinnon to have sprayed Lehman from the ground.

Nor do the cases Lehman relies on suggest that he has shown a constitutional violation. *Giles v. Kearney*, for example, involved correctional officers who kicked and punched an inmate who, unlike Lehman, was "fully restrained." 571 F.3d 318, 321 (3d Cir. 2009). And *Iko v. Shreve*, to take another example, involved an inmate who, unlike Lehman, had not acted in a violent or "confrontational manner." 535 F.3d 225, 232 (4th Cir. 2008).

B. Failure to Intervene

"[A] law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983." *Estate of Booker*, 745 F.3d at 422 (internal quotation marks omitted). Having failed to show that McKinnon used excessive force, Lehman necessarily failed to show that the other defendants are liable for not preventing such force. *See Jones v. Norton*, 809 F.3d 564, 576 (10th Cir. 2015) ("[F]or there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation." (internal quotation marks omitted)).

C. Failure to Report

Lehman argues that the defendants tried to "cover up the use of excessive force" by failing to report it. Aplt. Opening Br. at 52. Yet he fails to explain how such a cover-up violated his Eighth Amendment rights, and we cannot construct an argument for him. *See Davis v. Clifford*, 825 F.3d 1131, 1134 n.1 (10th Cir. 2016).

Besides, his argument cannot succeed because he has not shown that excessive force occurred in the first place. *See Jones*, 809 F.3d at 576.

Lehman also argues that a Colorado statute and Colorado Department of Corrections regulations required the defendants to report the use of force. But "violations of state statutes and prison regulations" alone do not support a § 1983 claim. *Gaines v. Stenseng*, 292 F.3d 1222, 1225 (10th Cir. 2002).

## III. Conclusion

The judgment is affirmed.

Entered for the Court

Allison H. Eid
Circuit Judge