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United States Court of Appeals
Tenth Circuit

October 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRITTNEY BROWN,

Plaintiff - Appellant,

v.

ROGER FLOWERS; JOHN CHRISTIAN, Pontotoc County Sheriff; MIKE SINNETT,

Defendants - Appellees.

No. 23-7006
(D.C. No. 6:17-CV-00347-EFM)
(E.D. Okla.)

ORDER AND JUDGMENT*

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

Brittney Brown, a former pretrial detainee at Pontotoc County Justice Center, filed a complaint under 42 U.S.C. § 1983 alleging that the defendants violated her Eighth and Fourteenth Amendment rights and seeking punitive damages against Roger Flowers. Before trial, the district court granted summary judgment to Flowers on the punitive-damages claim and to John Christian and Mike Sinnett on all § 1983 claims. Ultimately, a jury awarded Brown damages on the one claim at trial—Flowers's liability under § 1983.

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Brown now appeals the district court's decisions granting summary judgment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

I. Facts

In March 2016, Brown and Flowers had sexual intercourse on successive weekends while Brown was a pretrial detainee and Flowers was employed as a detention officer at the Pontotoc County Justice Center.[1] During this time, Christian was the Pontotoc County Sheriff, responsible for overseeing operations at Pontotoc County Justice Center, and Sinnett was the jail administrator in charge of "day-to-day operations."

In 2014, another male detention officer had sex with a different female detainee at the Pontotoc County Justice Center. When Sheriff Christian was alerted about that incident, he reviewed the security footage and found evidence of the conduct, even though the actual sexual acts occurred outside of camera range. Sheriff Christian then fired the detention officer, sent an email to all Pontotoc County Justice Center staff reminding them that sexual contact with inmates and detainees was strictly prohibited and would result in immediate termination, and doubled the number of cameras to try to reduce the number of blind spots around the facility.

[1] Brown was awaiting trial on a variety of felony drug-related charges based on two criminal cases.

By March 2016, Flowers had worked at Pontotoc County Justice Center for about three months. Before hiring Flowers, Sheriff Christian performed a routine background check and called his previous employer, another correctional center, learning that Flowers had no issues while working there. Sheriff Christian and Sinnett also conducted separate in-person interviews with Flowers. As part of the interview process, Flowers disclosed his prior burglary and forgery convictions.

One of Flowers's responsibilities as a detention officer was working in the jail's control tower. When doing so, Flowers was able to communicate over an intercom with residents of the pod where Brown was housed and see them over video. Flowers often made comments "over the speaker whenever the [detainees] would be getting in and out of the shower." And the detainees, including Brown, would sometimes "flash" the camera and engage in mutual "sexual teasing." No report, grievance, or complaint was ever filed about Flowers's conduct, though Pontotoc County Justice Center had a grievance policy in place for detainees to use.

On March 20, 2016, Flowers asked Brown over the intercom system if she was "going to come up [to the tower]." Brown then asked if he was going to let her up. Flowers responded by opening Brown's pod door remotely and directing her over the intercom system how to get to the control tower, remotely unlocking the jail doors along the way. When Brown arrived at the control tower door, Flowers let her inside and they had sexual intercourse. One

week later, this happened again. As Brown was leaving the control tower the second time, Brown and Flowers noticed that a female employee was in the hallway. Brown then turned around and went back into the control tower to hide until she could get back to her pod without being detected. Brown did not file a grievance following either incident.

Three days later, while reviewing surveillance footage as part of an "occasional" routine check, Sheriff Christian saw that a woman had been with Flowers inside the control tower in violation of Pontotoc County Justice Center Policy. Because Flowers had readjusted the cameras inside the control tower, Sheriff Christian could not identify the woman. Together, Sheriff Christian and Sinnett later identified the woman as Brown. That same day, Sheriff Christian interviewed both Brown and Flowers.

At the beginning of Brown's interview, Sheriff Christian assured Brown that she was not in any trouble. Then, during the interview, Brown told Sheriff Christian that she had, on two occasions, had sex with Flowers and that he had then brought cigarettes to her in her pod. But she did not mention, suggest, or hint that Flowers used any form of violence, force, or pressure during either of their sexual encounters.

During Flowers's interview, he admitted that he had had sex with Brown on these two occasions, confirmed that he knew having sex with a detainee "was a criminal offense," and acknowledged knowing that he would be arrested

and lose his job if caught having sexual relations with a detainee.[2] At the end of the interview, Sheriff Christian arrested Flowers and terminated his employment. Flowers later pleaded guilty in Oklahoma state court to two counts of second-degree rape under an Oklahoma statute that categorically defines sex between a guard and a prisoner as rape, but does not include coercion or use of force as an element of the crime. *See* Okla. Stat. Ann. tit. 21, § 1111(7).

Nearly two months later, Brown was placed in disciplinary segregation for thirty days after she threatened violence against another detainee in violation of Pontotoc County Justice Center Policy. *See* App. vol. 2, at 507 (stating that fighting between detainees results in up to thirty days in disciplinary segregation, "with complete loss of privileges"). Neither Sheriff Christian nor Sinnett took part in this decision. Sinnett learned that Brown was in segregation when he arrived at work the next day, and Sheriff Christian was never informed about the decision. Brown never exercised her right to appeal this disciplinary segregation decision.

[2] Indeed, Pontotoc County Justice Center Policy states that there is "zero tolerance for the incidence of inmate rape and sexual related offense and attempts thereof and will make every effort to prevent these incidents" and that "[s]exual conduct between detention staff and detainees . . . regardless of consensual status, is prohibited and subject to administrative and criminal disciplinary sanctions." App. vol. 2, at 506; Suppl. App. at 26, 28. The Policy provides inmates with the option to report any assaults to any "detention personnel, medical staff, or Chaplain" if the inmate does not feel comfortable reporting it to an immediate point-of-contact detention officer. App. vol. 2, at 506; Suppl. App. at 26–27.

Eight days into segregation, Brown broke a fire suppression sprinkler and flooded her cell with water, resulting in thirty additional days in segregation. Later that same day, after the staff found Brown standing on her sink trying to "pop" the sprinkler head again, they placed her in a restraint chair for about one hour and forty minutes to prevent her from "harming county property." Brown has acknowledged that damaging the sprinkler head was against jail regulations.

A month after being released from segregation, Brown accepted a plea deal in open court with her counsel present, subjecting her to a seven-year sentence on both of her criminal cases, with both sentences "to be suspended upon completion of the Oklahoma Department of Corrections' [residential treatment] program."

II. Procedural Background

About a year and a half later, Brown brought this suit under § 1983 against: (1) Flowers for violating her Eighth Amendment and Fourteenth Amendment rights and sought punitive damages; and (2) Sheriff Christian in his individual capacity based on supervisor liability and retaliation, and in his official capacity based on a failure-to-train theory. Brown later amended her complaint by adding a claim against Sinnett in his individual and official

capacity based on supervisor liability and retaliation.[3] After discovery, Flowers, Sheriff Christian, and Sinnett all separately moved for summary judgment.

Preliminarily, we note that as a pretrial detainee, Brown was protected by the Fourteenth Amendment instead of the Eighth Amendment. *See Colbruno v. Kessler*, 928 F.3d 1155, 1162 (10th Cir. 2019). And though the district court stated as much, it analyzed her claim as an Eighth Amendment violation, reasoning that a pretrial detainee must be "treated with at least the same standard of care prison officials owe convicted inmates." *Brown v. Flowers* (*Flowers*), No. 17-CIV-347, 2019 WL 13257839, at *1 (E.D. Okla. Mar. 18, 2019) (cleaned up).[4] Brown, however, does not take issue with the district court's characterization of her claim or with its Eighth Amendment analysis.

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[3] The district court dismissed the official-capacity claim against Sinnett because the record did "not reflect that he is a policymaker or final decisionmaker for the county." *Brown v. Flowers* (*Sinnett*), No. 17-CIV-347, 2019 WL 13257832, at *1 (E.D. Okla. Mar. 18, 2019). The district court also dismissed the supervisory-liability claim as outside the statute of limitations. *Id.* at *2. On appeal, Brown challenges neither decision.

[4] As we noted in *Brown v. Flowers* (*Brown II*), after the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), Eighth and Fourteenth Amendment analyses are no longer "identical." 947 F.3d 1178, 1182–83 (10th Cir. 2020). Instead, as *Kingsley* held, "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one" and that therefore "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." 576 U.S. at 397–98; *see also Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019) ("[T]here is no subjective element of an excessive-force claim brought by a pretrial detainee."). And because we "treat sexual abuse of prisoners as a species of excessive-force claim," *Graham v. Sheriff of Logan*

(*footnote continued*)

The district court denied Flowers's motion for summary judgment in which he asserted qualified immunity, but it granted the motion against Brown's claim for punitive damages. *Id.* at *5. In opposing Flowers's motion for summary judgment on punitive damages, Brown relied on *Graham v. Sheriff of Logan County*, where we stated this rule: "[W]here no legitimate penological purpose can be inferred from a prison employee's alleged conduct, including but not limited to sexual abuse or rape, the conduct itself constitutes sufficient evidence that force was used 'maliciously and sadistically for the very purpose of causing harm.'" 741 F.3d 1118, 1123 (10th Cir. 2013) (quoting *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1290 (10th Cir. 1999)); *see Flowers*, 2019 WL 13257839, at *5. But the district court determined that this quote "contain[ed] terms of art, indicating that the subjective prong" of an excessive-force claim—under which the plaintiff must show that the official acted with a sufficiently culpable state of mind—"ha[d] been satisfied," but did "not stand for the proposition that every such claim which survives summary judgment on the merits also survives as to punitive damages." *Flowers*, 2019 WL 13257839, at *5. The district court then granted summary judgment on the punitive-damages claim after noting that Brown had neither contended that she "suffered serious physical injury" nor demonstrated that Flowers committed "violence or

Cnty., 741 F.3d 1118, 1126 (10th Cir. 2013), a pretrial detainee bringing such a claim after *Kingsley* need not meet the "subjective element" required of Eighth Amendment excessive-force claims, *Colbruno*, 928 F.3d at 1163.

threat of violence," used "physical force," or exhibited a "malevolent intent." *Id.*

As for the remaining § 1983 claim against Flowers, the district court denied summary judgment. The court first noted that though "consent is available as a defense" to an Eighth Amendment claim based on sexual acts, *id.* at *2 (citing *Graham*, 741 F.3d at 1126), coerced sex is not consensual. *Id.* at *3–4. The district court then emphasized the inherently coercive nature of the prison setting and found that there may have been "some *quid pro quo*" (i.e. cigarettes in exchange for sex) that made it "difficult to characterize" the sexual intercourse between Flowers and Brown "as truly the product of free choice." *Id.* at *3 (quoting *Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012)). Accordingly, the district court found that "consent and coercion are issues for the fact-finder in this case." *Id.* at *4.

Flowers then appealed the portion of the district court's decision denying him summary judgment, and we affirmed. *Brown v. Flowers* (*Brown II*), 974 F.3d 1178, 1184 (10th Cir. 2020).[5] After a four-day trial, the jury returned a verdict for Brown on the § 1983 claim against Flowers and awarded her damages of $75,000, plus post judgment interest.

[5] Because it was an interlocutory appeal, and thus we generally had to accept the facts as the district court found them, we concluded that we did not have jurisdiction to consider Flowers's argument that the district court erred in finding that the question of consent and coercion was a jury question. *Brown II*, 947 F.3d at 1180.

The district court also granted summary judgment to Sheriff Christian and Sinnett on Brown's retaliation claim. *Brown v. Flowers* (*Sinnett*), No. 17-CIV-347, 2019 WL 13257832, at *3 (E.D. Okla. Mar 18, 2019). Brown asserted that after her interview with Sheriff Christian on March 30, during which she confirmed having had sex with Flowers (Brown characterizes this interview as her report of the sex and "a constitutionally protected First Amendment activity" Op. Br. at 26), Sheriff Christian and Sinnett retaliated against her by coercing her to enter a guilty plea, by placing her in disciplinary segregation, and by restraining her. *Sinnett*, 2019 WL 13257832, at *2–3.

To state a claim for retaliation, Brown had to demonstrate that (1) she was engaged in constitutionally protected activity, (2) Sheriff Christian's and Sinnett's actions caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) Sheriff Christian's and Sinnett's adverse actions were substantially motivated as a response to Brown's exercise of constitutionally protected conduct. *Id.* at *2.

The district court first found that Brown could not pursue a § 1983 retaliation claim based on her allegedly coerced guilty plea "until her conviction is reversed or set aside." *Id.* at *2 (citing *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994)). Second, the court found that Brown's admission that she had damaged jail property (breaking a fire suppression sprinkler and flooding her cell with water), discredited any assertion that she was put in disciplinary segregation and placed in a restraint chair in retaliation for

reporting the rape. *Id.* at *2. And similarly, the court dismissed her remaining allegations of retaliatory conduct based on its finding that "there exists 'some evidence' that [Brown] committed a rule violation." *Id.* at *3 (quoting *Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018)). Finally, because the court found that Brown could not succeed on the merits of her retaliation claims, it deemed it unnecessary to discuss Sinnett's claim of qualified immunity. *Id.* at *3.

The district court likewise granted summary judgment to Sheriff Christian on all other claims against him. *Brown v. Flowers* (*Christian*), No. 17-CIV-347, 2019 WL 13257833, at *3 (E.D. Okla. Mar. 18, 2019). First, the court found that Brown's supervisory-liability claim against Sheriff Christian in his individual capacity could not succeed because there was no evidence that Sheriff Christian had "acted with deliberate indifference," as was required to prove her claim. *Id.* at *2. Specifically, the district court concluded that though the conduct at issue is designated as "'rape' under the Oklahoma statute, the underlying circumstances here (the detainee perceiving that she can get cigarettes or other items in return for sex) seem[ed] much more difficult for a jail supervisor to detect and prevent." *Id.* The district court further determined that Brown had failed to present any evidence that (1) Sheriff "Christian was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed" or (2) "he actually drew that inference." *Id.* (citing *Perry v. Durborow*, 892 F.3d 1116, 1122 (10th Cir.

2018)). And because "deliberate indifference requires a higher degree of fault than negligence or even gross negligence," *id.* (citing *Berry v. City of Muskogee*, 900 F.2d 1489, 1495–96 (10th Cir. 1990)), the court dismissed "the supervisor liability claim (and thus all claims against Christian in his individual capacity)," *id.* at *2.

Second, the district court concluded that Brown's claim against Sheriff Christian in his official capacity based on "inadequate training, supervision, and deficiencies in hiring," which it treated as a claim "against the local government entity," could not succeed. *Id.* at *2–3. To succeed on her claim, the court explained, Brown had to "demonstrate that (1) Sheriff Christian promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained-of constitutional harm and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Id.* at *3 (citing *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769–71 (10th Cir. 2013)).

For "purposes of th[e] motion, the court f[ound] the first element satisfied." *Id.* As for the second element, the district court found that Brown failed to demonstrate causation. *Id.* Specifically, the court explained, Flowers's criminal record at hiring (including burglary, forging a $46 money order, public intoxication, and two protection orders against him from 1997 and 2005) was insufficient to demonstrate the "close relationship" between the decision to hire him and the later-challenged conduct. *Id.* The court reasoned that the

relationship was too tenuous because nothing in a standard background check would have pointed to the future conduct at issue: sex between a detention officer and detainee where the officer used no force or violence. *Id.* As for the third element, the court found that Brown had not "established the requisite state of mind," noting that this requirement "ensures that culpability is established with the County itself and 'is not simply a single inadequate decision or bad employee.'" *Id.* (quoting *McCubbin v. Weber Cnty.*, No. 1:15-CV-123, 2017 WL 3394593, at *17 (D. Utah Aug. 7, 2017)). Finally, the court explained that because it granted Sheriff Christian summary judgment on the merits, it did not need to address his qualified-immunity defense. *Id.*

This appeal followed.

STANDARD OF REVIEW AND APPLICABLE LAW

We review a grant of summary judgment de novo and apply the same legal standard that applies in the district court. *Jones v. Barnhart*, 349 F.3d 1260, 1265 (10th Cir. 2003). This means we view all facts in favor of the non-moving party and draw all reasonable inferences in her favor. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1220 (10th Cir. 2015).

Summary judgment is appropriate when "the movant shows that 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). An issue is "genuine" if there is evidence on both sides of the dispute that would allow a rational trier

of fact to resolve the issue in either side's favor. *Lounds*, 812 F.3d at 1220. A fact is "material" if it is essential to a claim. *Id.*

DISCUSSION

I. Punitive Damages: Flowers

In a § 1983 suit, "[a] jury may be permitted to assess punitive damages in an action" if the plaintiff shows that the defendant's conduct is "motivated by evil motive or intent, or when it involved a reckless or callous indifference to the federally protected rights of others." *Eisenhour v. County*, 897 F.3d 1271, 1280 (10th Cir. 2018) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)).[6]

First, Brown offered no evidence that Flowers was motivated by evil motive or intent. Indeed, in her briefing before this court, Brown does not cite the record or indicate what evidence she believes might support a conclusion that Flowers had an evil motive or intent.[7] Instead, Brown asserts that

[6] Because *Eisenhour* established the standard for determining whether punitive damages are available in a § 1983 claim, we note that we disagree with the part of the district court's analysis granting Flowers summary judgment on punitive damages because Brown did not present sufficient evidence to prove that Flowers committed violence, a threat of violence, used physical force, caused Brown serious injury, or exhibited malevolent intent. *See Flowers*, 2019 WL 13257839, at *5. But Brown does not assert that the district court erred in this analysis.

[7] Throughout most of Brown's brief, she neglects to cite to the appellate record in support of her factual assertions, as required under Federal Rule of Appellate Procedure 28(a)(8)(A). Though she does technically cite the appellate record in her "Statement of the Case," those citations are merely to the fact section in her *own* responses to Defendant Christian's motion for summary judgment. *See* App. vol. 5, at 1218–27.

Flowers's "conduct itself is sufficient evidence to prove the action was taken sadistically and maliciously." Op. Br. at 20. In doing so, Brown urges us to adopt a per se rule that punitive damages should always be submitted to a jury in detainee-rape cases. In support, she relies generally on *Giron*, 191 F.3d at 1290, and *Whitley v. Albers*, 475 U.S. 312 (1986), claiming, without any explanation, that they "mandate the conclusion of malice from the absence of Flowers's assertion of a legitimate penological purpose." Op. Br. at 22. Neither *Giron* or *Whitley*, however, discuss punitive damages or the defendant's motive or intent in the context of a punitive-damages analysis. And we could not find any case adopting such a per se rule. Thus, we conclude that Brown has failed to raise a genuine issue of material fact about whether Flowers's conduct was motivated by evil motive or intent.

Second, Brown has failed to raise a genuine issue of material fact about whether Flowers's conduct involved a "reckless or callous indifference to the federally protected rights of others." *Eisenhour*, 897 F.3d at 1281. "'[R]eckless or callous indifference' requires that the defendant have acted 'in the face of a perceived risk that [his] actions will violate federal law.'" *Id.* (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999)). This requires "evidence of an additional required mens rea—that [Flowers] perceived that he was violating [Brown's] *federal* rights." *Id.* (emphasis added). Again, without citing any evidence in the record or supporting caselaw, Brown argues that because "Flowers admitted knowledge that his conduct was wrongful and

illegal," a jury could have found "that Flowers knew or had reason to know his conduct posed a threat to Plaintiff's constitutionally protected rights." Op. Br. at 21. Flowers's admission that his conduct was wrongful and illegal, even if supported by the record, is still insufficient to prove that Flowers "perceived that he was violating [Brown's] *federal* rights," *Eisenhour*, 897 F.3d at 1281 (emphasis added), as required to withstand summary judgment.

For these reasons, we affirm the district court's grant of summary judgment, albeit on different grounds.

II. Supervisor Liability: Sheriff Christian

Section 1983 does not "authorize liability under a theory of respondeat superior." *Schneider*, 717 F.3d at 767 (quoting *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011)). Instead, to prove her claim, Brown must demonstrate that Sheriff Christian personally violated her constitutional rights. *See Keith v. Korner*, 843 F.3d 833, 837 (10th Cir. 2016). To do that here, Brown must "show an 'affirmative link' between" Sheriff Christian and the rape. *Schneider*, 717 F.3d at 767 (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010)).

This "affirmative link" requirement has three elements: (1) personal involvement, (2) causation, and (3) a culpable state of mind. *Id.* To show personal involvement, Brown must prove that Sheriff Christian was responsible for but failed to create and enforce policies to protect detainees from sexual intercourse as occurred here, including exercise of control or failure to

supervise. *Id.* Because the district court concluded that Brown had presented sufficient evidence to satisfy personal involvement and causation, the only issue on appeal is whether Brown has presented sufficient evidence to satisfy the culpable-state-of-mind prong.

To establish the culpable-state-of-mind prong, Brown must prove that Sheriff Christian acted with deliberate indifference. *Keith*, 843 F.3d at 848–49. Deliberate indifference requires a higher degree of fault than negligence, or even gross negligence. *Berry*, 900 F.2d at 1495–96.

"The standard is subjective, requiring that the official actually be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Keith*, 843 F.3d at 848 (cleaned up). To satisfy this standard, Brown must produce "evidence showing that [Sheriff Christian] knowingly created a substantial risk of constitutional injury." *Schneider*, 717 F.3d at 769 (cleaned up). Inaction, in some cases, can be enough—"[a] local government policymaker is deliberately indifferent when he deliberately or consciously fails to act when presented with an obvious risk of constitutional harm which will almost inevitably result in constitutional injury of the type experienced by the plaintiff." *Id.* (cleaned up).

"At the summary judgment stage, the requirement of deliberate indifference imposes a burden on the plaintiff to present evidence from which a jury might reasonably infer that the prison official was actually aware of a constitutionally infirm condition." *Tafoya v. Salazar*, 516 F.3d 912, 922 (10th

Cir. 2008). This is required because a "prison official may only be held liable if a jury finds that he first had actual notice that a constitutional violation was substantially likely to occur." *Id.*

Brown asserts that she has presented sufficient evidence to demonstrate that Sheriff Christian was actually aware that a constitutional violation was substantially likely to occur. In support, Brown makes various factual declarations in her opening brief without a single citation to the appellate record, which contains seven volumes including over 1,800 pages and 17 video exhibits. *See* Op. Br. at 22–28. As such, we conclude that Brown has failed to comply with Federal Rule of Appellate Procedure 28(a)(8)(A), which requires in part that an opening brief contain "citations to the . . . parts of the record on which the appellant relies." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840–41 (10th Cir. 2005) (cleaned up) (quoting parts of Federal Rule of Appellate Procedure 28). "[W]e cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Wingfield v. Pruitt*, 825 F. App'x 553, 560 (10th Cir. 2020) (unpublished). Because Brown has failed to "tie the salient facts, supported by specific record citation, to [her] legal contentions," *United States v. Rodriguez-Aguirre*, 108

F.3d 1228, 1237 n.8 (10th Cir. 1997), we deem her arguments based on these factual assertions waived, *see Wingfield*, 825 F. App'x at 560.[8]

Brown does, however, argue that in *Tafoya*, we concluded that "less significant, yet similar, evidence" supported a deliberate-indifference claim against a sheriff. Opp. Br. at 29. We disagree.

The defendant-sheriff in *Tafoya* had already "faced three civil suits" arising from multiple reported sexual assaults by multiple male detention officers. 516 F.3d at 915 (citing *Gonzalez v. Martinez*, 403 F.3d 1179, 1181 (10th Cir. 2005) (describing the sheriff's shortcomings in the previous lawsuits and specifically calling attention to his failure to "adequately address" the inmates' complaints)). Even after these three civil suits, the defendant-sheriff "made only minimal efforts to address the glaring safety problems at the jail." *Id.* at 918. His efforts included a "no-contact" policy, installation of new surveillance cameras, hiring additional female staff, and providing a half-day

[8] In her reply brief, Brown tries to rectify this deficiency by citing seven pages in the appellate record containing Sheriff Christian's deposition testimony. *See* Reply Br. at 8. In the cited pages, Sheriff Christian acknowledged that he (1) knew of and terminated one prior officer for having had sexual relations with an inmate; (2) had terminated an employe who had tried to bring methamphetamines into the jail; (3) was aware that a deputy sheriff, who never worked at Pontotoc County Justice Center, had taken possession of a gun while on duty and did not put all of the pieces of the gun in the property room at the sheriff's office; and (4) has never changed his policy that prohibits one-on-one contact between female inmates and male officers. But none of these facts can be used to show that Sheriff Christian had "actual notice" that the incident between Flowers and Brown was "substantially likely to occur." *Tafoya*, 516 F.3d at 922. So even if these few citations to the record had been in her opening brief, they would not change our analysis.

training about sexual contact between staff and inmates. *Id.* But the evidence also showed that the sheriff made no effort to alter his "lackadaisical" managerial style: he did not impose serious threats of discipline for policy violations; he enforced the no-contact policy infrequently; he continued to employ officers with known criminal records; he eliminated the jail's grievance process because there were "too many complaints"; and he "actively discouraged" "both inmates and staff . . . from making complaints." *Id.* at 917–21. We explained that even with policies in place to respond to misconduct, such policies may be "empty gesture[s] without corresponding supervision and a legitimate threat of discipline for infractions." *Id.* at 919. We therefore concluded that "[t]he knowing failure to enforce policies necessary to the safety of inmates may rise to the level of deliberate indifference" and reversed the judgment of the district court dismissing the plaintiff's § 1983 claim in that case. *Id.*

Here, we again emphasize that Brown has provided no evidence that Sheriff Christian had "actual notice that a constitutional violation was substantially likely to occur." *Id.* at 922. On this point alone this case is distinguishable from *Tafoya* where there was evidence in the record that the defendant-sheriff had "failed to adequately address inmate complaints" and had dismissed complaints that were brought to his attention. *Id.* at 917.

And unlike in *Tafoya*, there is no evidence that Sheriff Christian failed to enforce the Pontotoc County Justice Center "no tolerance" policy against rape

and sex-related-offenses or impose serious threats of discipline for policy violations. Indeed, in his initial interview with Sheriff Christian, Flowers stated that he knew it was illegal to have sexual relations with a detainee and that he would (and he did) lose his job and face criminal charges as a result of his conduct. Additionally, before Flowers and Brown, there had been only one other known instance of officer-detainee sexual relations at the Pontotoc County Justice Center. Once Sheriff Christian learned of that illegal conduct, as in this case, he terminated and arrested the detention officer and sought criminal charges against him. And after that first incident, Sheriff Christian emailed all Pontotoc County Justice Center staff reminding them that sexual contact with inmates and detainees was strictly prohibited and would result in immediate termination and doubled the number of cameras to try to cover more blind spots. Finally, there is no evidence that Sheriff Christian has eliminated the jail's grievance process or discouraged detainees or staff from making complaints. And though there is evidence in the record that Flowers was often unsupervised in the control tower and had engaged in inappropriate dialogues with the detainees, there is no evidence that Sheriff Christian had actual knowledge of this conduct or that anyone made a report using the Pontotoc County Justice Center grievance policy. Thus, contrary to Brown's contentions, this case is distinguishable from *Tafoya*.

For these reasons, we affirm the district court's order dismissing the supervisor liability claims against Sheriff Christian in his individual capacity. *See Christian*, 2019 WL 13257833, at *2.

III. Official Capacity Liability: Sheriff Christian

Brown's claim against Sheriff Christian in his official capacity is treated as a suit against the local-government entity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978), the Supreme Court ruled that a government entity is liable under § 1983 only when the constitutional injury can fairly be said to have been caused by that entity's own official policy or custom.

"The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to actions for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). "A challenged practice may be deemed an official policy or custom for § 1983 municipal-liability purposes if it is a formally promulgated policy, a well-settled custom or practice, a final decision by a municipal policymaker, or deliberately indifferent training or supervision." *Schneider*, 717 F.3d at 770.

To succeed on her claim, Brown must "show that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury." *Id.* at 769. We have interpreted this requirement as establishing three

elements: (1) official policy or custom, (2) causation, and (3) state of mind. *Id.* at 769–71.

The district court assumed without deciding that the first element was met and granted summary judgment based on the second and third elements—causation and state of mind. We similarly assume without deciding that the first prong is satisfied.

As for causation, Brown argues, without identifying any specific evidence or citations to the record or caselaw, that the district court's conclusion that the causation element was unsupported by the evidence was "squarely in conflict with the finding of causation related to the supervisory liability claim." Op. Br. at 32. In her view, "[i]t cannot be the case that causation existed when Christian acts as a supervisor but not when he acts in his official capacity as Sheriff." *Id.* But in making this argument, Brown ignores that the causation element of each claim is different. Indeed, to prove causation against Sheriff Christian in his individual capacity, Brown must show that Sheriff Christian "set in motion a series of events that he knew or reasonably should have known would cause others to deprive [Brown] of her constitutional rights." *Perry*, 892 F.3d at 1122 (cleaned up). In contrast, to prove causation against Sheriff Christian in his official capacity, Brown first had to identify an official policy or custom, and then establish that the challenged policy or custom was the "'moving force' behind the injury alleged." *Bryan Cnty.*, 520 U.S. at 404. Additionally, as we have recognized,

for official-capacity claims, the causation element is "applied with especial rigor" when, as here, the "municipal policy or practice is not itself unconstitutional," but "based upon inadequate training, supervision, and deficiencies in hiring." *Schneider*, 717 F.3d at 770.

Thus, we conclude that the causation element of each claim is distinct, and a finding of causation for one claim does not necessarily compel a finding of causation for the other. And Brown does not cite to any caselaw indicating otherwise. We therefore see no error in the district court finding causation as it relates to one claim and not as it relates to the other.

Finally, we agree with the district court that Flowers's criminal record when Sheriff Christian hired him did not demonstrate the requisite "close relationship" between the alleged inadequate hiring and the statutory rape. *Christian*, 2019 WL 132574833, at *3. Brown does not dispute this conclusion in her brief or explain how Flowers's criminal record establishes the requisite close relationship.[9]

As for state of mind, in support of her argument that Sheriff Christian was deliberately indifferent, Brown again makes various factual assertions

[9] Flowers's criminal record revealed an arrest at age seventeen for burglary and forging a $46 money order, both felonies. He was also arrested for public intoxication in 2003, a misdemeanor. In 1997, Flowers's first wife got a protection order against him for harassment, claiming that Flowers was "driving by her house and stuff like that." Finally, Flowers's ex-brother-in-law's girlfriend got a protective order against Flowers in 2005 when he tried to fight her.

including that Sheriff Christian: (1) has not made changes to how the jail operates, (2) has a custom or practice of ignoring the policies, and (3) failed to train Flowers. But Brown does not support her assertions with citations to the appellate record or any caselaw. Thus, we conclude that Brown has waived this argument. *See Wingfield*, 825 F. App'x at 560.

IV. Retaliation: Sheriff Christian and Sinnett

First, Brown argues that the district court improperly applied *Heck v. Humphrey*, 512 U.S. 477 (1994), in concluding that Brown could not recover on her retaliation claim based on her allegation that she was "forc[ed]" to "accept an unfavorable plea deal." Op. Br. at 37.[10]

In *Heck*, the petitioner filed a § 1983 action against the prosecutors and police investigator in his criminal case, alleging "unlawful, unreasonable, and arbitrary investigation," which included the destruction of exculpatory evidence. *Heck*, 512 U.S. at 479. Recognizing the potential for overlapping, parallel litigation if these types of § 1983 claims could go forward, the Supreme Court determined that § 1983 actions "are not appropriate vehicles for

[10] In support, Brown claims that her plea offer changed on March 30, 2016, the day that Sheriff Christian interviewed her about the rape. But this is not reflected in the district attorney's notes. Rather, the record shows that Brown received three plea agreement offers: one in June 2015 proposing a ten-year sentence, a second in April 2016 proposing a seven-year sentence, and a third (which she ultimately accepted) in July 2016 subjecting her to concurrent seven-year sentences from her two criminal cases "to be suspended upon completion of the Oklahoma Department of Corrections' [residential treatment] program."

challenging the validity of outstanding criminal judgments" when that action will "require the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* at 486 (footnote omitted). Thus,

> to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance for a writ of habeas corpus.

Id. at 486–87.

In a four-Justice concurrence, the Supreme Court later carved out a possible exception to *Heck*, explaining that "a former prisoner, no longer in custody, may bring a § 1983 action establishing the unconstitutionality of a conviction or requirement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring). We have adopted this exception. *Cohen v. Longshore*, 621 F.3d 1311, 1316–17 (10th Cir. 2010) ("We are also persuaded that the *Spencer* plurality approach is both more just and more in accordance with the purpose of § 1983.").

Brown maintains that she brought this action after she was no longer incarcerated, so *Heck* does not apply to her under *Spencer*. But when Brown filed her complaint in this case, she was serving a suspended sentence while on

supervised probation.[11] And because a person serving a suspended or stayed sentence is still "in custody," we conclude that Brown was in custody for purposes of *Heck*. *See Jones v. Cunningham*, 371 U.S. 236, 241–43 (1963) (concluding that despite the petitioner's release from prison, he was still "in custody" because he was still required to report regularly to a parole officer, remain in a particular community, residence, and job, and refrain from certain activities); *Calhoun v. Att'y Gen. of Colo.*, 745 F.3d 1070, 1073 (10th Cir. 2014) (noting that "actual, physical custody" is not required to satisfy the in-custody requirement). Accordingly, we affirm the district court's grant of summary judgment based on *Heck*.

Next, Brown asserts that she was retaliated against for what she describes as her reporting the rape when questioned by Sheriff Christian—a valid "exercise" of her "First Amendment" rights. Op. Br. at 36. "'[P]rison officials may not retaliate against or harass an inmate because of the inmate's exercise of h[er]' constitutional rights." *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1988) (quoting *Smith v. Machner*, 899 F.2d 940, 947 (10th Cir. 1990). But

[11] Brown's judgment and sentence for her state convictions provides that, even though her sentence was suspended, Brown "WILL be supervised under the terms set forth in the Rules and Conditions of Probation attached hereto." App vol. 3, at 681. Those rules included (1) that she was not free to leave the state of Oklahoma without written permission; (2) that her person, vehicle, and other personal property were subject to search by a probation officer at any time; and (3) that she must provide "written certification of employment when requested." App. vol. 3, at 683. We thus reject Brown's assertion that there are "no restraints or conditions at issue in a parole order." Reply Br. at 18.

to succeed on her § 1983 claim, Brown must prove that the "alleged retaliatory motives were the 'but for' cause of the defendants' actions." *Id.*

Specifically, Brown claims that she was placed in segregation, secured to a restraint chair, and deprived of phone and visitation privileges as retaliation for what she characterizes as reporting the rape. But this claim is not supported by the record.[12] Rather, Brown was placed in segregation for threatening violence against another detainee. So despite Brown's claim that her segregation "was a violation of Jail policies," Pontotoc County Justice Center Policy states that threats or fighting result in an automatic thirty days of segregation. Op. Br. at 40. And a detainee in segregation "may lose any and all privileges to include phone, commissary and visitation." Suppl. App. at 17. Additionally, by her own admission, Brown received extra time in segregation for breaking the sprinkler system in her cell and was secured to a restraint chair after she tried to break the sprinkler again.

Brown also makes various assertions including that Sinnett would play loud rap music into her cell to keep her from sleeping and told her that she was pregnant when she was not, "retaliation was integral" to Sheriff Christian's and Sinnett's schemes, and Sheriff Christian maintained a "wait and litigate policy." Op. Br. at 40–41. But in making these allegations, Brown does not cite

[12] And again, Brown does not cite to the record in support of any of her factual assertions as required by Federal Rule of Appellate Procedure 28(a)(8)(A).

any supporting evidence in the record as required by Federal Rule of Appellate Procedure 28(a)(8)(A). And we could not find any evidence in the record supporting these claims. Moreover, even if these claims were supported by the record, Brown has still not explained how her telling Sheriff Christian about having had sex with Flowers was the "but for" cause of any of these alleged incidents. *See Peterson*, 149 F.3d at 1144.

For these reasons, and because "mere allegations of retaliation, without more, are insufficient to show a retaliatory motive," *Sherratt v. Utah Dep't of Corr.*, 545 F. App'x 744, 747 (10th Cir. 2013) (unpublished), we affirm the district court's grant of summary judgment on Brown's retaliation claims against Sinnett and Sheriff Christian (and thus all claims against Sheriff Christian).

V. Qualified Immunity

Because we affirm the district court's decision in favor of Sheriff Christian and Sinnett, we need not address the issue of qualified immunity as it pertains to them.

CONCLUSION

For these reasons, we affirm.

Entered for the Court

Gregory A. Phillips
Circuit Judge