FILED
United States Court of Appeals
Tenth Circuit

July 30, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ZABRIEL L. EVANS,

Plaintiff - Appellant,

v.

DAN SCHNURR, Warden, Hutchinson Correctional Facility, in his official capacity; DOUGLAS W. BURRIS, Secretary of Corrections, in his official capacity; STEVE FOSTER, Captain/Shift Supervisor, Hutchinson Correctional Facility, in his individual and official capacity; KYLE CHICK, CSII, Hutchinson Correctional Facility, in his individual capacity; DYLAN DARTER, Correctional Officer I, Hutchinson Correctional Facility, in his individual capacity,

Defendants - Appellees.

No. 20-3088
(D.C. No. 5:18-CV-03193-JWB-TJJ)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **BACHARACH**, Circuit Judges.

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* We conclude that oral argument would not materially help us to decide the appeal, so we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

This appeal grew out of a prison infraction. The prisoner, Mr. Zabriel Evans, allegedly exposed himself to a female guard. Another guard responded by ordering Mr. Evans to move to a more restricted area. Mr. Evans did not comply. From there, the accounts differ. Mr. Evans says that he simply asked the guards whether he was being moved as punishment, adding that any such punishment would violate prison policy. Authorities say that Mr. Evans refused to move and threatened to batter officers.

A guard, Officer Kyle Chick, ultimately sprayed a chemical into the cell and moved Mr. Evans to the more restricted area. Mr. Evans sued for excessive force, and Officer Chick sought summary judgment based on qualified immunity. The district court granted Officer Chick's motion, and Mr. Evans appeals. We affirm.

Stay of Discovery

In appealing, Mr. Evans argues in part that the district court erred in staying discovery.

In our circuit, many prison officials seek summary judgment based on an investigative report (frequently called a "*Martinez* report"). When Officer Chick sought summary judgment, prison officials filed an investigative report and the district court stayed discovery.

Mr. Evans argues that the district court abused its discretion by staying discovery. But he did not respond to the defendants' motion for a stay.

To oppose summary judgment based on an inability to conduct discovery, a plaintiff must file an affidavit in district court; the plaintiff would otherwise waive that argument. Fed. R. Civ. P. 56(d); *see Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1124 (10th Cir. 2008). Because Mr. Evans filed no such affidavit, he waived the argument and we reject his challenge to the stay of discovery.

Injunction

Mr. Evans also argues that the district court should have enjoined use of a prison policy allowing excessive force. But Mr. Evans doesn't identify anything in the prison policy that allows excessive force. He instead suggests that the use of chemical agents on non-combative inmates is always excessive. We disagree.

We review the denial of an injunction for an abuse of discretion. *EagleMed LLC v. Cox*, 868 F.3d 893, 899 (10th Cir. 2017). In determining whether the district court acted within its discretion, we consider the constitutionality of using a chemical agent. Using a chemical agent may be excessive, but it is sometimes permissible. *Redmond v. Crowther*, 882 F.3d 927, 936–38 (10th Cir. 2018); *see also Staples v. Gerry*, 923 F.3d 7, 17 (1st Cir. 2019) (stating that "it is not per se unconstitutional for guards to

spray mace at prisoners confined in their cells" and "the totality of the circumstances" must be examined).

Given the absence of an apparent defect in the policy, the district court did not abuse its discretion in denying Mr. Evans's request for an injunction.

Excessive Force

On the claim of excessive force, the district court granted summary judgment to Officer Chick based on qualified immunity. On this ruling, we conduct de novo review, applying the same standard that governed in district court. *McCoy v. Meyers*, 887 F.3d 1034, 1044 (10th Cir. 2018). Summary judgment is appropriate when no genuine dispute exists on a material fact and the movant is entitled to judgment as a matter of law. *In re Rumsey Land Co.*, 944 F.3d 1259, 1270 (10th Cir. 2019). The court views the evidence and all reasonable inferences favorably to the nonmovant (Mr. Evans). *Id.* at 1271.

We apply the summary-judgment standard in light of the underlying test for qualified immunity. To defeat qualified immunity, Mr. Evans must show that Officer Chick committed a constitutional violation that had been clearly established. *Estate of Reat v. Rodriguez*, 824 F.3d 960, 964 (10th Cir. 2016).

Excessive-force cases often turn on factual disputes that are irresolvable on summary judgment. *Buck v. City of Albuquerque*, 549 F.3d

1269, 1288 (10th Cir. 2008) ("[U]nreasonable force claims are generally fact questions for the jury."). Here, however, the entire incident is captured on video.

"When the record on appeal contains video evidence of the incident in question, . . . we will accept the version of the facts portrayed in the video . . . to the extent that it blatantly contradicts the plaintiff's version of events." *Emmett v. Armstrong*, 973 F.3d 1127, 1130–31 (10th Cir. 2020) (brackets & internal quotation marks omitted). So we rely on "what is indisputably shown by the video[ ], and therefore necessary to take as a matter of fact." *Id.* at 1131 (internal quotation marks omitted); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). The video prevents any reasonable decisionmaker from finding excessive force.

The force was excessive only if Officer Chick had sprayed Mr. Evans with malice and sadism in order to cause harm rather than to maintain discipline. *Redmond v. Crowther*, 882 F.3d 927, 936 (10th Cir. 2018). To determine whether Officer Chick acted maliciously and sadistically, we consider the need for force and its proportionality. *Id.* at 937.

Officer Chick defends the award of summary judgment, arguing in part that he didn't use excessive force. Mr. Evans disagrees, pointing to the

use of a chemical agent. The disagreement is reflected in vastly different versions of events. Mr. Evans's version is that he had propped his mattress against the bars to supply privacy and simply wanted to know if the officers were moving him to a more restricted area as a form of punishment. In Officer Chick's version, Mr. Evans flatly refused to comply with a lawful order to go to a more restricted area after exposing himself to a female guard.

Ordinarily the different accounts would create a fact issue. But the video shows that Officer Chick repeatedly asked Mr. Evans to get cuffed and move to another area, reluctantly using a chemical agent only when Mr. Evans had refused. After spraying Mr. Evans, Officer Chick offered to help Mr. Evans get air. Officers then took Mr. Evans to a shower to remove the spray. From the video, no factfinder could reasonably determine that Officer Chick had acted maliciously or sadistically for the purpose of causing harm. We thus conclude that Mr. Evans failed to show the violation of a clearly established constitutional right.

Affirmed.[1]

Entered for the Court

Robert E. Bacharach
Circuit Judge

[1] We grant Mr. Evans's motion for leave to appear without prepayment of fees. *See* 28 U.S.C. § 1915.