[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-13221

CARTARVIS A. JORDAN,

Plaintiff-Appellant,

versus

STATE OF GEORGIA,

Defendant,

CAMPBELL,
Officer, CO2,
SHARP,
Officer, CO2,
CANTINA ALLEN,
Officer, CO2,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 7:18-cv-00061-HL-TQL

Before JORDAN and ROSENBAUM, Circuit Judges, and STEELE,* District Judge.

PER CURIAM:

Cartarvis Jordan appeals the district court's grant of summary judgment in favor of Richard Campbell, Patrick Sharp, and Cantina Allen, who are correctional officers at Valdosta State Prison. The district court ruled that the officers were entitled to qualified immunity because they had not violated Mr. Jordan's constitutional rights. Following oral argument and a review of the record, we reverse and remand for further proceedings because Mr. Jordan was not provided relevant discovery and the district court ruled on an incomplete evidentiary record.[1]

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* The Honorable John Steele, United States District Judge for the Middle District of Florida, sitting by designation.

[1] The record contains numerous spellings of Officer Allen's first name, *see, e.g.,* D.E. 19 (Cantina), D.E. 28 (Catina), D.E. 37 (Contina), and of Officer Sharp's last name, *see, e.g.,* D.E. 28 (Sharp), D.E. 37 (Sharpe). As to both of these officers, we use the spelling in the district court case style for ease of reference.

I

A

On March 18, 2018, Mr. Jordan was stabbed eleven times by his cellmate, Rickey Upshaw. The incident began when Officer Sharp and Officer Campbell came to the men's cell to take them to the showers. They ordered Mr. Jordan to put his hands through the cell door's food slot so that they could handcuff him, and Mr. Jordan complied. Mr. Upshaw, who had not yet been cuffed, retrieved a shank from his lockbox and began stabbing Mr. Jordan. He stabbed Mr. Jordan four times in the head, four times in the back of his left arm, two times in his legs, and once in his chest.

While Mr. Jordan was being stabbed, Officer Sharp radioed for backup. Neither Officer Sharp nor Officer Campbell intervened in any way—they did not order Mr. Upshaw to stop stabbing Mr. Jordan, use pepper spray, or physically try to restrain Mr. Upshaw. Eventually, Officer Allen responded to the call for backup and arrived at the cell.

All of these facts are undisputed. But other facts, as explained below, are not.

B

On April 17, 2018, Mr. Jordan filed a *pro se* verified complaint under 42 U.S.C § 1983 against the officers. Mr. Jordan asserted that they had violated his Eighth Amendment rights by (1)

failing to prevent the attack on him by Mr. Upshaw and (2) failing to intervene while Mr. Upshaw was stabbing him.[2]

In later filings—all but one of which was verified—Mr. Jordan set out additional allegations in support of his claims, most of which the officers disputed. First, he asserted that after Officer Allen arrived at the cell, Mr. Upshaw threw the first shank out of the cell but that he later "pulled out another shank and began hitting [Mr. Jordan] with it again." D.E. 47 at 2. He claimed that Mr. Upshaw only threw the first shank out of the cell because he convinced him to, rather than as the result of any action by the officers. Second, with respect to the timing of the attack—something which would prove to be critical—Mr. Upshaw stated that there "was no way that he was in the [cell] with [Mr.] Upshaw for less than a minute during the . . . incident." *Id.* at 3. He later added that he "ha[d] two witnesses who [would] testify . . . that [he] was in the cell an additional 5 to 7 minutes until [Mr.] Upshaw threw out the second weapon." D.E. 50 at 8.

C

Mr. Jordan's case eventually proceeded to discovery. He sent the officers numerous requests for production, seeking documents such as the incident reports related to the stabbing and the prison's handcuffing policies.

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[2] The State of Georgia was also named as a defendant in the complaint, but was dismissed on September 4, 2018, because the claims against it were barred by the Eleventh Amendment. *See* D.E. 8; D.E. 22.

On October 29, 2018, Mr. Jordan filed a motion for extension of time to complete discovery, stating that he had not yet received responses to the requests for production. He requested that the district court extend the discovery period until 45 days from the date of receipt of that discovery. *See* D.E. 25. The following day, the district court entered an order directing the officers to address the status of their responses to Mr. Jordan's requests for production and their position on the requested extension. *See* D.E. 26.

The officers responded, stating in part that they would be producing the incident reports and handcuffing policies. *See* D.E. 28 at 2. They further stated that they had no objection to continued extensions of time in the event that they were unable to timely produce the documents. The officers advised the district court that they "d[id] not intend to hamper [Mr. Jordan's] ability to prosecute his case by late production of documents." *Id.*

Then, beginning on December 18, 2018, Mr. Jordan filed three separate motions to compel. The motions specified that although the officers had produced some of the requested documents, they had failed to turn over the incident reports from the stabbing on March 18, 2018. *See* D.E. 31, 33–34. The officers responded to the motions, representing that they had complied with their discovery obligations. The magistrate judge subsequently

entered an order denying the motions to compel because Mr. Jordan had not complied with the local rules. *See* D.E. 36.[3]

Two weeks later, the officers filed their motion for summary judgment, arguing that Mr. Jordan could not demonstrate that they had knowledge of the fact that Mr. Upshaw was a danger. They stated that Mr. Upshaw "was a well-respected inmate" who they had no "reason to believe . . . was a threat to anyone." D.E. 38 at 6. They also asserted that they had acted reasonably under the circumstances, particularly given the fact that "the assault by [Mr.] Upshaw ended within 60 seconds after it started." *Id.* at 8–9. They further argued that the claims were barred by qualified immunity.

Mr. Jordan opposed the motion, in part arguing that summary judgment should not be entered against him "because [the d]efendants ha[d] not complied with his discovery requests." *See* D.E. 49 at 11 (citing D.E. 41 at 10). Mr. Jordan's opposition made clear that he was not in possession of "the most important and material [documents] to the case at bar . . . the incident reports." D.E. 41 at 11.

The magistrate judge issued a report recommending that the officers' motion for summary judgment be granted on qualified

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[3] We now know that the officers in fact had *not* complied with their discovery obligations at the time they filed their responses to Mr. Jordan's motions to compel. *See* Oral Argument Audio at 11:14–16, 13:13–24. After we set this case for oral argument and appointed counsel for Mr. Jordan, the officers provided copies of the incident report, the emergency report, and the internal investigation report to his new attorneys. *See* Appellant's Br. at Ex. A–C.

immunity grounds. The report specifically addressed the discovery claims and concluded that Mr. Jordan "had an adequate opportunity for discovery." D.E. 49 at 12. In reaching that conclusion, the magistrate judge expressly relied on the officers' representation that they had produced the relevant documents to Mr. Jordan and complied with their discovery obligations. *See id.* Because of this, and because Mr. Jordan had not served any other requests for production of documents, the magistrate judge found that outstanding discovery did not present a bar to summary judgment. *See id.* at 12–13. On the merits, the magistrate judge concluded that the officers were entitled to summary judgment regarding "any failure to intervene once the attack had begun" because "[b]ased upon the facts before the [c]ourt that the incident was very short and less than one minute . . . [the officers] did not have a realistic chance to intervene given the brevity of the attack." *Id.* at 9–10 (internal quotation marks and citations omitted). The magistrate judge also concluded that the officers were entitled to qualified immunity because "the facts [did] not show that [the officers] violated a constitutional right." *See id.* at 11.

Over Mr. Jordan's objection, *see* D.E. 50, the district court adopted the report and recommendation, and granted summary judgment in favor of the officers. This appeal followed.

II

We review for an abuse of discretion the grant or denial of discovery under rule 56(d). *See Fla. Power & Light Co. v. Allis*

Chalmers Corp., 893 F.2d 1313, 1316 (11th Cir. 1990) (citing to a prior label).

III

On appeal, Mr. Jordan argues that the district court erred in "granting summary judgment before [he] obtained . . . requested discovery." Appellant's Initial Br. at 13. He asserts that the officers "promised to turn [the incident reports and prison policies] over but never did." *Id.* As a result, he argues that we should reverse and remand to "give [him] a chance to rely on this discovery when responding to the [officers'] summary judgment motion." *Id.* at 14. We agree that the district court abused its discretion.

"The law in this circuit is clear: the party opposing a motion for summary judgment should be permitted an adequate opportunity to complete discovery prior to consideration of the motion." *Jones v. City of Columbus*, 120 F.3d 248, 253 (11th Cir. 1997) (citing *Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870–71 (11th Cir. 1988); *WSB–TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988)). "Generally[,] summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests." *Snook*, 859 F.2d at 870 (citation omitted). *See also Cowan v. J.C. Penney Co., Inc.*, 790 F.2d 1529, 1532 (11th Cir. 1986) ("We have held that, generally, summary judgment is premature when the moving party has not answered the opponent's interrogatories.") (citation omitted). This is "especially true" where the propounded discovery "request[s] information

that is critical to the issues in dispute." *Cowan*, 790 F.2d at 1532–33.

Mr. Jordan asserted claims against the officers for failure to prevent the attack and failure to intervene. We have held that "an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for his nonfeasance." *Velazquez v. City of Hialeah*, 484 F.3d 1340, 1341 (11th Cir. 2007). The duty to intervene in such a situation arises when "the non-intervening officer was in a position to intervene yet failed to do so." *Hadley v. Gutierrez*, 526 F.3d 1324, 1331 (11th Cir. 2008). An officer is "in a position to intervene" when the use of force at issue "may have lasted as long as two minutes." *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 925 (11th Cir. 2000) (emphasis omitted). Although we have not addressed the question of an officer's duty to intervene in an inmate-on-inmate attack, as the magistrate judge recognized, district courts within the circuit have discussed the issue. *See, e.g., Metcalf v. Hetzel*, No. 13-cv-002, 2015 WL 7751683, at *7 (M.D. Ala. Oct. 22, 2015); *Williams v. Simmons*, No. 11-cv-378, 2014 WL 1664549, at *3, 9 (N.D. Fla. Apr. 24, 2014); *Clary v. Hasty*, No. 12-cv-044, 2013 WL 4008634, at *4 (M.D. Ga. Aug. 5, 2013). Those courts have concluded, in the inmate-on-inmate context, that the non-intervening officer must have had a realistic chance to intervene and act in time in order to have violated his duty to intervene—just as we have held in the officer-on-inmate context. *Cf. Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014) ("Prison officials have an

obligation to protect prisoners from violence inflicted upon them by other prisoners.").

So if the attack on Mr. Jordan had been by an officer rather than another inmate, the officers may have had a duty to intervene. If the stabbing lasted five to seven minutes, as Mr. Jordan contends, and not "60 seconds," as the officers contend, the officers had an opportunity to do something. The duration of the attack on Mr. Jordan, then, speaks directly to the officers' duty to intervene.

The reports related to the stabbing are arguably the most important piece of discovery for Mr. Jordan's claims. And we now know that the incident report, the emergency report, and the internal investigation report, at least in part, corroborate Mr. Jordan's account of the stabbing incident. For example, the reports indicate an apparent time discrepancy. The incident report states that the stabbing occurred at 7:44 a.m. and that Mr. Jordan was taken to the hospital at 9:15 a.m. The emergency report states that the stabbing occurred at 8:15 a.m. and that Mr. Jordan was transported to the hospital at 9:25 a.m. The internal investigation report states that the incident took place at 9:06 a.m. and makes no mention of when Mr. Jordan was taken to the hospital. The timing and length of the attack was crucial to the officers' arguments both below and on appeal. And, as we have stated, it may also be critical to the merits of Mr. Jordan's failure to intervene claim. *See, e.g., Hadley*, 526 F.3d at 1331. The officers contend that the attack lasted less than one minute, which made it hard (or impossible) for them to respond, prevent, or intervene. Mr. Jordan, for his part, asserts that he has

witnesses who will state that it actually lasted several minutes. The times reported on each of the documents matters to Mr. Jordan's claims and to his response to the officers' asserted defenses.

The incident report also indicates that Mr. Upshaw in fact had "2 homemade weapons," states that he "stabb[ed] [Mr. Jordan] with two homemade weapons," and notes that "[b]oth weapons were recovered." Finally, the reports state that Mr. Upshaw belongs to the security threat group (or STG) "Bounty Hunter." This suggests that, contrary to what the officers argued below in their summary judgment motion, *see* D.E. 38 at 2, 6, Mr. Upshaw may not have been "a well-respected inmate" who did not present a threat to anyone.

Without the incident report, emergency report, and internal investigation report, Mr. Jordan did not have adequate discovery with which to refute many of the officers' factual and legal assertions at summary judgment. And that is a problem. *See Dean v. Barber*, 951 F.2d 1210, 1213 (11th Cir. 1992) ("[A]lthough Sheriff Bailey responded to Dean's interrogatories, we cannot say from the record that the responses were complete or that Dean had an adequate opportunity to discover the facts necessary to justify his opposition to Sheriff Bailey's motion for summary judgment.").

The district court abused its discretion in not delaying its consideration of summary judgment. The magistrate judge and the district court were on notice of the outstanding discovery issue. Mr. Jordan repeatedly complained that the officers had not given him a copy of the incident report. *See, e.g.,* D.E. 25 (motion for

extension of time to complete discovery); D.E. 31, 33–34 (motions to compel discovery responses); D.E. 41 at 10–11 (opposition to motion for summary judgment); D.E. 50 at 3–4 (objection to report and recommendation). And he was clear that he opposed summary judgment because of the officers' failure to adequately respond to his discovery requests. *See* D.E. 41 at 10–11 (stating that the officers had "circumvent[ed] the proper discovery procedure" and failed to provide him a copy of the incident report). Mr. Jordan did not merely assert general complaints about wanting additional unspecified discovery; he specified what he needed and was missing—the incident report of the stabbing, a document essential to his claim. The report and recommendation from the magistrate judge, which the district court "review[ed]" and "accept[ed]," set forth Mr. Jordan's opposition on the same grounds. *See* D.E. 49 at 11–12; D.E. 53.[4]

[4] Based on our precedent, it is immaterial that Mr. Jordan did not file a separate Rule 56(f) affidavit. *See Snook*, 859 F.2d at 871. *See also Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d 525, 527 (11th Cir. 1983) (stating that Rule 56(f) "is infused with a spirit of liberality"). We have recognized that "the interests of justice sometimes require postponement in ruling on a summary judgment motion, although the technical requirements of Rule 56(f) have not been met." *Fernandez v. Bankers Nat. Life Ins. Co.*, 906 F.2d 559, 570 (11th Cir. 1990) (citing *Snook*, 859 F.2d at 871). Mr. Jordan's opposition to the motion for summary judgment, which was sworn to and notarized as an affidavit would be, was sufficient to apprise the magistrate judge and the district court of the officers' failure to produce the incident report.

At oral argument, counsel for the officers acknowledged that Mr. Jordan had not received any of the reports related to the stabbing before the district court granted summary judgment, despite having requested them in discovery. *See* Oral Argument Audio at 13:21–24. Counsel for the officers also agreed that the incident report should have been timely produced to Mr. Jordan. *See id.* at 14:27–28. We thank counsel for her candor.[5]

Under our precedent, Mr. Jordan was entitled to a copy of the incident report, as requested, prior to the district court's grant of summary judgment. The court erred in granting the officers' motion before they had adequately responded to Mr. Jordan's discovery requests and complied with their discovery obligations.[6]

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[5] We do not hold that a district court must *sua sponte* delay summary judgment after the end of discovery where there are no pending motions to compel or a request to extend the discovery period. But in this particular case, in which the magistrate judge denied several motions to compel due to an imprisoned pro se litigant's failure to comply with a technical requirement of the local rules—failure to certify good faith conferral with opposing counsel—and the district court was aware that Mr. Jordan was clearly entitled to (at least part of) the discovery he sought—the incident report for his incident and Mr. Upshaw's prior incident—"[t]he interests of justice" require more. *See Fernandez*, 906 F.2d at 570.

[6] We thank Thomas Burch, Esq. and the University of Georgia School of Law for accepting the appointment to represent Mr. Jordan on appeal. Given the factual issues raised by the contents of the incident report, the emergency report, and the internal investigation report, on remand the district court may want to reconsider appointing counsel for Mr. Jordan.

IV

We vacate the summary judgment in favor of the officers and remand for further proceedings. The parties are free to move for summary judgment once the district court ensures that all relevant discovery has been provided.[7]

VACATED and REMANDED.

[7] We don't consider whether the officers are entitled to qualified immunity because we lack a full evidentiary record. The district court can address the issue on remand in light of the new evidence.