

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted October 4, 2023*

Decided October 10, 2023

Before

DIANE S. SYKES, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 23-1394

DESMOND AARON,
Plaintiff-Appellant,

v.

JACK SURGUY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.

No. 1:20-cv-03290-JRS-MG

James R. Sweeney II,
Judge.

ORDER

Desmond Aaron, an Indiana prisoner, contends that a correctional officer violated his Eighth Amendment rights by deploying pepper spray out of racial malice. *See* 42 U.S.C. § 1983. The district judge entered summary judgment for the officer because the officer said that he sprayed Aaron out of fear that Aaron might attack him.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Because a jury must resolve this genuine dispute about the reason the officer used the spray, we reverse and remand for a trial.

We view the record in the light most favorable to Aaron, the nonmovant, and construe all reasonable inferences in his favor. *McCottrell v. White*, 933 F.3d 651, 661–62 (7th Cir. 2019). This appeal stems from an incident in February 2020. At the time Jack Surguy, a correctional officer with the Indiana Department of Correction, ordered Aaron, who was outside of his cell, to return to his cell. When Aaron argued with him, Surguy called his supervisor, who also told Aaron to return to his cell. This interaction lasted several minutes and was recorded on a prison camera. Ordinarily the recording could establish the sequence of events. *See Scott v. Harris*, 550 U.S. 372, 380–81 (2007). But because the camera’s position does not capture all movements and the recording lacks audio, it does not confirm the complete interaction between Aaron and Surguy.

After several minutes of dialogue, the video shows Aaron moving toward his cell. At first, Aaron walks backwards and then stops. Surguy appears to remove his pepper spray; Aaron then turns to face forward, and he and Surguy walk toward Aaron’s cell, with Aaron walking in front of Surguy. The video then skips, and Aaron and Surguy are next visible down the hall, near Aaron’s cell. At this point Aaron turns around (or has turned around), faces Surguy, and quickly leans or steps toward him. Surguy then deploys pepper spray in Aaron’s face.

The precise events immediately preceding Surguy’s blast of pepper spray are disputed. The incident occurred too quickly and too far away from the camera for the recording to show conclusively what happened. On appeal Surguy summarizes his account: He says that once Aaron was facing him, he pointed to Aaron’s cell, took out his pepper spray, and told Aaron that he would use the spray if Aaron did not enter the cell. Aaron responded by saying that if Surguy sprayed him, he would attack Surguy. Aaron then “assum[ed] a bladed body position with clenched fists,” which Surguy says made him fear for his safety and led him to deploy the spray. Surguy places all these events between 09:29 and 09:31 of the recording, a span of two seconds.

In his verified complaint, which the judge cited and relied on in the summary-judgment order, Aaron attested to his account. He says that as he and Surguy walked toward his cell, Surguy was spewing “racist and threatening slurs” at him, including calling him the N-word. In his grievance, attached as an exhibit to his summary-judgment papers, Aaron says that he turned and asked Surguy, “What did you just say?” After that question, Surguy sprayed him with pepper spray. Aaron denies that he ever threatened Surguy and insists that he gave Surguy “no reason” to spray him.

The events following the spray are uncontested. Under the effects of the spray (and, in Aaron's telling, the slurs), Aaron punched Surguy. Surguy then pepper sprayed Aaron again, Aaron tried to flee, and Aaron was placed briefly in a segregated cell. Later, Surguy wrote an incident report in which he recounted his version of the facts as recited above. Aaron responded with a grievance about his view of the incident. In resolving the grievance, the warden wrote that the "[a]vailable footage does show conclusive evidence that the incident report is inaccurate" and that he would refer the incident for further investigation.

Aaron sued Surguy, asserting that his use of pepper spray was excessive force that violated Aaron's rights under the Eighth Amendment. *See* 42 U.S.C. § 1983. Surguy moved for summary judgment. He first argued that based in part on the pending investigation of the incident, Aaron had not exhausted his administrative remedies. After Surguy later conceded that his filings contained factual inaccuracies, including falsely stating the investigation was still pending, the judge chastised Surguy for his misstatements to the court and rejected the exhaustion defense. Surguy then contended that he undisputedly used the pepper spray in a good-faith effort to maintain discipline. The judge ruled that although Aaron posed a minimal threat when he turned to face Surguy, no reasonable jury could find that Surguy was malicious or sadistic because Aaron had defied orders to go to his cell and Surguy used limited force.

On appeal Aaron maintains that the use of pepper spray was unlawful because Surguy maliciously harmed him "for no reason" after using a racial slur against him. We interpret him to mean that he presented adequate evidence—namely, his verified complaint—from which a jury could conclude that Surguy sprayed him not to maintain or restore order but out of racial animosity.

When a prisoner argues that a guard used excessive force under the Eighth Amendment, our core inquiry asks whether the "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, 6–7 (1992); *McCottrell*, 933 F.3d at 664. The question of good faith can turn on the need for force, the amount used, the prisoner's injury, the threat reasonably perceived by the official, and any efforts to avert a forceful response. *See McCottrell*, 933 F.3d at 663.

The issue of Surguy's good faith cannot be resolved on this record because of the numerous factual disputes. If a fact-finder believes Aaron's version and disbelieves Surguy's, it could rationally find (based on Surguy's use of a racial epithet) that he deployed the pepper spray only because of racial malice, and malice of any sort is never a legitimate use of force. *See Soto v. Dickey*, 744 F.2d 1260, 1270 (7th Cir. 1984). If the fact-

finder believes Surguy's version—that Aaron had assumed a “bladed” stance and threatened him—then it could conclude that the force was proper because a guard may use a chemical spray “to subdue recalcitrant prisoners.” *Santiago v. Walls*, 599 F.3d 749, 757 (7th Cir. 2010) (quotation marks omitted).

Both viewpoints are permissible on this record. Indeed, the warden believed that the video provided “conclusive evidence” that Surguy's version is “inaccurate.” And a jury could disbelieve Surguy's version for the reason that he squeezes too many events into just two seconds. In that short time, Surguy says that he pointed to Aaron's cell, took out his pepper spray, told Aaron he would use it, heard Aaron say he would attack Surguy, saw Aaron assume a bladed position with clenched fists, and deployed the spray. Nonetheless, “our job when assessing a summary judgment motion is not to weigh evidence, make credibility determinations, resolve factual disputes and swearing contests, or decide which inferences to draw from the facts.” *Miller v. Gonzalez*, 761 F.3d 822, 827 (7th Cir. 2014); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (“Where the parties present two vastly different stories[,] ... it is almost certain that there are genuine issues of material fact in dispute.”). Thus, summary judgment was improper.

We address four additional points that inform our analysis. First, Surguy argues that a jury would have to find that he used the pepper spray in good faith because, as is undisputed, Aaron turned and leaned toward him in front of the cell, and that motion showed disobedience that justified force. It is true that a jury could find that Surguy responded lawfully if he genuinely perceived that Aaron was disobedient. But a jury need not do so. See *Lewis v. Downey*, 581 F.3d 467, 477 (7th Cir. 2009). Instead, it could reasonably infer from Surguy's calling Aaron a racial slur just before Aaron turned to face him that racial hatred, not a good-faith desire to quell disobedience, motivated Surguy to pepper spray Aaron. Further, even if Surguy perceived Aaron's turning around as disobedience, a jury could also find that Surguy incited that situation by goading Aaron with racial slurs, and as a result his use of force was excessive. See *Miller v. Leathers*, 913 F.2d 1085, 1088 (4th Cir. 1990) (en banc) (concluding that the prisoner's account supported a reasonable inference that the guard provoked the incident); see also *Hendrickson v. Cooper*, 589 F.3d 887, 894 (7th Cir. 2009) (affirming an excessive-force verdict against a guard and stating that punitive damages were appropriate partly because the guard “goaded” the prisoner “into leveling an insult,” which the guard “used as an excuse to attack”).

Second, Surguy and the judge point out that Aaron had earlier been insubordinate—he argued with Surguy and his supervisor—before Aaron relented and began walking back to his cell. But Aaron's previous conduct did not unequivocally

justify the use of force once he became compliant and walked back to his cell. We have held that a trial was required to resolve a dispute about whether a previously volatile situation had resolved itself because if the volatility had dissipated, then the need for force arguably also dissipated. *See McCottrell*, 933 F.3d at 667, 671.

Third, in explaining why the use of a racial slur did not create a triable issue, the judge suggested that words alone cannot create an Eighth Amendment violation. But Aaron is not relying just on the racial slur; he relies also on the force that followed the slur. Further, we have said that verbal harassment can itself, in limited circumstances, violate Eighth Amendment rights when it accompanies danger or harm to a prisoner. *Lisle v. Welborn*, 933 F.3d 705, 717–18 (7th Cir. 2019).

Finally, for two reasons we disagree with Surguy’s suggestion that he is entitled to summary judgment because Aaron did not furnish evidence of substantial injuries. To begin, attachments to Aaron’s verified complaint state that the pepper spray left him in pain and with mental anguish. And we have held that verified complaints may serve as evidence at summary judgment. *Jones v. Van Lanen*, 27 F.4th 1280, 1285 (7th Cir. 2022); *see also* FED. R. CIV. P. 10(c). In any case, the Supreme Court has said that a prisoner need not show a “significant injury” if the force used was excessive. *See Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010); *see also Dean v. Jones*, 984 F.3d 295, 303 (4th Cir. 2021) (determining that a several second “blast of pepper spray directly to the face” is more than “de minimis force”). And as we have explained above, pepper spray used solely for reasons of racial malice is excessive.

REVERSED and REMANDED