NONPRECEDENTIAL DISPOSITION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 May 4, 2023*
Decided May 15, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-1543

JAMES D. GREEN,
Plaintiff-Appellant,

v.

BRIAN FOSTER, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 21-CV-053

Stephen C. Dries,
Magistrate Judge.

O R D E R

James Green was extorted by fellow prisoners who threatened to beat him if he did not fund their canteen accounts. He informed prison staff that "guys" were doing this to him, but they did not address the issue, so Green paid for his safety. When he stopped doing so two years later, another prisoner attacked him. Green sued, asserting

* 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).

that prison staff violated his rights under the Eighth Amendment by failing to protect him. The district court entered summary judgment for the defendants. Because no reasonable jury could find that any defendant was deliberately indifferent, we affirm.

We present the facts from the record in the light most favorable to Green. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). While in Wisconsin's Waupun Correctional Institution in 2017, Green, who was apparently rumored to be an informant, began receiving anonymous threats. The threats promised physical violence unless he purchased and turned over commissary items or had his family members deposit money into other prisoners' canteen accounts. Green does not know who was behind the threats, in part because he made his payments through intermediaries. Sometime between 2017 and 2019, Green had urine thrown on him in his sleep because (he believes) he had not fully satisfied the extortioners' demands.

Green reported the extortion to three prison officials. In June 2017, he went to Bret Mierzejewski, a member of Waupun's gang task force, and Mierzejewski told Green he would look into it and try to change Green's housing assignment. But that was the last that Green heard from Mierzejewski about it. Green next notified Jeremy Westra, his housing unit's supervisor, sometime in 2018. Westra, too, had an initial conversation with Green, assured Green he would look into the threats and see what he could do, and did nothing. The extortion continued, so Green wrote to the warden at the time, Brian Foster. Foster also took no action. Green never identified the extortioners or the middlemen who collected payments by name, gang affiliation, housing unit, or otherwise; he referred to them collectively as the "guys."

Green moved between housing units (for other reasons) five times in two years without the threats abating. Then, sometime in 2019, he decided to stop paying off the other prisoners. Fearing retaliation, he wrote in advance to the defendants at least three times—in January, June, and August. The precise content of these letters is not in the record, but Green attests that he informed the defendants that he planned to stop paying and that he wanted to be protected. Nothing was done to protect Green.

On September 2, 2019, another prisoner, D.T., ran into Green's cell and began attacking him. D.T. yelled, "time to pay up n[*****]." Green fought back and eventually gained the upper hand. Guards intervened to stop the fight, incapacitating Green with foam and tackling him. While being subdued, Green banged his knee against a metal railing. This injury required physical therapy and still causes him pain.

Green sued Mierzejewski, Westra, and Foster under 42 U.S.C. § 1983, alleging that they knew he was at risk of an attack and did nothing to stop it, violating Green's rights under the Eighth Amendment. A magistrate judge presided by consent of the parties. 28 U.S.C. § 636(c). In a sworn discovery response, Westra stated that he did not remember receiving any letters from Green, but in a later declaration, Westra attested that he remembered getting at least one piece of correspondence from Green.

Green moved for summary judgment, attaching as evidence prison records and three affidavits from fellow prisoners. Each of the prisoners explained that: Green had told them about the extortion and his fears; they had told him to write prison officials with his concerns; they had seen him write and send those concerns to prison staff (in January, June, or August of 2019); and they had all (to some degree) witnessed the assault and had heard D.T. exclaim "time to pay up n[*****]."

The defendants also moved for summary judgment, based primarily on their declarations and the absence of any record of letters communicating specific threats or any formal request for a special housing placement, which comes with various requirements. Mierzejewski and Westra each recalled Green telling them his concerns in some manner, but attested that it was impossible to investigate because Green did not identify his extortioners. Foster testified that he remembered Green writing to him and that his normal practice was to refer reports of threats to the security director.

The district court granted the defendants' summary judgment motion and denied Green's. It took as given that Green was exposed to an objectively serious harm, *see Brown v. Budz*, 398 F.3d 904, 910–11 (7th Cir. 2005), but explained that Green's communications were too vague to trigger a duty to protect. Green admitted that he did not specifically identify the extortioners; thus, the district court concluded, no reasonable jury could infer that any defendant was liable for failing to protect him from the attack he eventually suffered.

On appeal, Green contends that fact disputes should have precluded summary judgment for the defendants here. We review the district court's decision de novo. *Sinn v. Lemmon*, 911 F.3d 412, 419 (7th Cir. 2018). A duty to protect arises if a prisoner faces an objectively serious harm (including a beating), and a prison official has actual knowledge of the impending harm and does not protect the prisoner. *Gevas v. McLaughlin*, 798 F.3d 475, 480 (7th Cir. 2015).

The problem for Green is that he cannot rebut the defendants' evidence that they did not have enough information to substantiate a threat of violence that they could act

on. We look to see if a prisoner has identified "a specific, credible, and imminent risk of harm" and the "prospective assailant." *Gevas*, 795 F.3d at 481. True, Green repeatedly informed them of the threats, but he said only that he feared being attacked at some unknown time for not paying unknown extortioners. This is puzzling because the record indicates that, at a minimum, Green must have had some inkling as to who some of the intermediaries were or some identifying information linked to the commissary accounts in question. But as far as we can tell from the record, he never fully provided that information to the defendants.[1]

Green unpersuasively responds that, even if he could not identify the actual extortioners, other facts support an inference that the defendants knew about or should have discovered the risk and investigated it. He emphasizes that, for years, he told the defendants that he was labeled an informant and was being extorted, and he told them in advance that he decided to stop paying. But even if the defendants could have done more to investigate, this information, as we have already said, did not give the defendants the notice needed to protect him from the attack that occurred. *See Giles v. Tobeck*, 895 F.3d 510, 514 (7th Cir. 2018) (guard's actions did not cross line from "negligently enabling the attack to recklessly condoning it").

Further, Green asserts, the defendants knew about the urine attack, and knowing about a preceding attack, even without knowing who did it, shows deliberate indifference to further violence. Green is correct that it is not always required for a prisoner to point to "who the individual attackers would be." *Sinn*, 911 F.3d at 422. But in *Sinn*, the threat came from a specific group, the attack in question followed within days of a previous one, and other factors suggested further danger was imminent. By contrast, it is not clear here when the urine incident happened, or when or whether Green told the defendants about it. A reasonable jury could not infer that the defendants knew that another attack was imminent and did nothing to protect Green.

Green also insists that Mierzejewski and Westra must have found his reports specific enough to be actionable because both initially told him that they would investigate. But even if they had, by September 2019—when the attack happened—the information he had communicated to Mierzejewski (in 2017) and Westra (in 2018) was

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[1] This is not a case where a prisoner, who has no investigatory leads, conveys everything that he or she knows to the correctional officers. Whether, under such facts, correctional officers have an obligation to perform some type of an inquiry of credible threats is not before us today.

too "stale" to give notice of an imminent attack. *Gevas*, 798 F.3d at 480–81. True, Green also sent letters in 2019, but, again, these were descriptions of his fears and unspecific requests for "protection," which did not give the notice that would allow them to protect him from a specific person or group of prisoners.

Green next argues that the district court should have barred Westra's declaration under the "sham affidavit" rule because, in saying that he remembers correspondence with Green, Westra contradicts a sworn interrogatory answer. But Green does not demonstrate that this was anything more than Westra correcting "a memory lapse." *Cook v. O'Neill*, 803 F.3d 296, 298 (7th Cir. 2015). Further, the sham affidavit rule applies when a litigant uses an affidavit to drum up a fact dispute through new testimony; here, Westra's more recent testimony supported Green, so Green suffered no prejudice. Finally, Green insists that the court was biased against him by accepting the defendants' evidence and ruling in their favor. This is nothing more than a disagreement with the magistrate judge's legal conclusions, and adverse rulings alone rarely establish bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

We have considered Green's remaining arguments, and none has merit.

AFFIRMED