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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID EVANS,
Plaintiff,
v.
D. STRUVE, et al.,
Defendants.

No. 2: 19-cv-1376 JAM KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion for partial summary judgment filed October 2, 2020. (ECF No. 57.) Defendants move for summary judgment as to all defendants except for defendant Struve. On November 16, 2020, plaintiff filed his opposition. (ECF No. 62.)

On December 3, 2020, defendants filed a motion for an extension of time to file a reply and a reply. (ECF Nos. 66, 67.) Good cause appearing, defendants’ motion for an extension of time is granted. Defendants’ reply is deemed timely filed.

For the reasons stated herein, the undersigned recommends that defendants’ summary judgment motion be granted.

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1 Legal Standards for Summary Judgment

2 Summary judgment is appropriate when it is demonstrated that the standard set forth in
3 Federal Rule of Civil Procedure 56 is met. “The court shall grant summary judgment if the
4 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
5 judgment as a matter of law.” Fed. R. Civ. P. 56(a).

6 Under summary judgment practice, the moving party always bears
7 the initial responsibility of informing the district court of the basis
8 for its motion, and identifying those portions of “the pleadings,
9 depositions, answers to interrogatories, and admissions on file,
together with the affidavits, if any,” which it believes demonstrate
the absence of a genuine issue of material fact.

10 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P.
11 56(c)). “Where the nonmoving party bears the burden of proof at trial, the moving party need
12 only prove that there is an absence of evidence to support the non-moving party’s case.” Nursing
13 Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376,
14 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 advisory
15 committee’s notes to 2010 amendments (recognizing that “a party who does not have the trial
16 burden of production may rely on a showing that a party who does have the trial burden cannot
17 produce admissible evidence to carry its burden as to the fact”). Indeed, summary judgment
18 should be entered, after adequate time for discovery and upon motion, against a party who fails to
19 make a showing sufficient to establish the existence of an element essential to that party’s case,
20 and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322.
21 “[A] complete failure of proof concerning an essential element of the nonmoving party’s case
22 necessarily renders all other facts immaterial.” Id. at 323.

23 Consequently, if the moving party meets its initial responsibility, the burden then shifts to
24 the opposing party to establish that a genuine issue as to any material fact actually exists. See
25 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
26 establish the existence of such a factual dispute, the opposing party may not rely upon the
27 allegations or denials of its pleadings, but is required to tender evidence of specific facts in the
28 form of affidavits, and/or admissible discovery material in support of its contention that such a

1 dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party
2 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
3 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
4 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
5 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return
6 a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436
7 (9th Cir. 1987), overruled in part on other grounds, Hollinger v. Titan Capital Corp., 914 F.2d
8 1564, 1575 (9th Cir. 1990).

9 In the endeavor to establish the existence of a factual dispute, the opposing party need not
10 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
11 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
12 trial.” T.W. Elec. Serv., 809 F.2d at 630. Thus, the “purpose of summary judgment is to ‘pierce
13 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”
14 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee’s note on 1963
15 amendments).

16 In resolving a summary judgment motion, the court examines the pleadings, depositions,
17 answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R.
18 Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at
19 255. All reasonable inferences that may be drawn from the facts placed before the court must be
20 drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587; Walls v. Central Costa
21 County Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011). Nevertheless, inferences are not
22 drawn out of the air, and it is the opposing party’s obligation to produce a factual predicate from
23 which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224,
24 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a
25 genuine issue, the opposing party “must do more than simply show that there is some
26 metaphysical doubt as to the material facts. . . . Where the record taken as a whole could
27 not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for
28 trial.’” Matsushita, 475 U.S. at 586 (citation omitted).

1 By contemporaneous notice provided on March 16, 2020 (ECF No. 54), plaintiff was
2 advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal
3 Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (*en banc*);
4 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

5 Plaintiff's Claims

6 This action proceeds on plaintiff's original complaint as to defendants Struve, Gonzales,
7 Dingfelder, Richardson, Calderon, Valice, Sidebotham and McCarval. (ECF No. 1 at 7.)

8 Plaintiff alleges that on May 23, 2018, an alarm was sounded on the yard where plaintiff
9 was located when an inmate tried to attack another inmate. (Id. at 9.) When an alarm sounds,
10 inmates are expected to sit down in their immediate location. (Id.) When plaintiff heard the
11 alarm on May 23, 2018, he immediately sat down in a grassy area on the foundation of a light
12 pole as several officers yelled, "get down." (Id.)

13 Plaintiff began instructing another inmate who was near him to comply with the officers
14 and get down. (Id.) At that time, an officer yelled at plaintiff to be quiet. (Id.)

15 Lieutenant Hampton instructed plaintiff to get up and relocate to the other side of the
16 walkway. (Id.) When plaintiff complied with Lieutenant Hampton's request, defendant Struve
17 ordered plaintiff to "get down," and simultaneously placed his right hand on plaintiff's neck and
18 forced plaintiff's face down on the ground. (Id.) Defendant Struve then kned plaintiff by
19 placing his knee in the center of plaintiff's back to cause plaintiff greater pain. (Id.) Defendant
20 Struve then placed his knee on the back of plaintiff's neck, using his body weight to cause greater
21 pain and suffering, choking plaintiff and making it difficult for plaintiff to breathe. (Id.)
22 Defendant Struve yelled, "stop resisting," even though plaintiff did not resist. (Id.)

23 Citing exhibit A, plaintiff alleges that Lieutenant Hampton confirms that plaintiff did not
24 resist. (Id.) Exhibit A to the complaint is a report prepared by Lieutenant Hampton regarding the
25 incident. (Id. at 14-16.) The report identifies defendants Struve, Valice and Richardson as
26 witnesses. (Id. at 14.) The undersigned herein sets forth the description of the incident contained
27 in Lieutenant Hampton's report:

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1 On May 23, 2018, at approximately 1255 hours I was assisting A
2 Facility 7 building recall their building due to a Code 3 at the
3 Minimum Facility. I then notice an Inmate running across the grassy
4 area from 6 building towards 5 building SHU wall. As I responded,
5 I heard unidentified staff members stating get down. I made two
6 radio announcements over the state issued radio for 5 and 6 Building
7 Control to open their window for gun coverage. Once I arrived on
8 the grassy area, approximately three feet from the light poll, I
9 observed two inmates sitting on the light poll and another
10 unidentified inmate in the prone position on the other side of the light
11 poll. In order to create space and keep noninvolved inmate away
12 from the scene, I ordered the first inmate sitting on the light poll to
13 relocate to the other side of the walkway. The second inmate was
14 EVANS (AU6627-A6-228) and I ordered EVANS to move to the
15 other side of the walkway as well. EVANS was speaking to the
16 unidentified Inmate which was in the prone position and telling the
17 unidentified inmate to comply with the Officers. Unidentified staff
18 members were telling EVANS to be quiet. I ordered EVANS to get
19 up and walk to the other side of the walkway. Officer D. Struve
20 ordered EVANS to get down and simultaneous placed his right hand
21 on EVANS neck and forced EVANS face down to the ground.
22 Officer Struve then mounted EVANS by straddling both legs around
23 EVANS mid back area. Officer Struve then ordered EVANS to cuff
24 up and stop resisting. EVANS stated I'm not moving and not
25 resisting. I then stated for everyone to calm down. Officer Struve
26 applied handcuffs with the assistants from an unknown Officer.
27 Officer Struve transitioned to placing his right knee on EVANS neck.
28 I then ordered Officer D. Richardson which was standing to my left
to holster his OC pepper spray and relieve Officer Struve. As
EVANS was being assisted to his feet, Officer Struve stated, put legs
on him. Once leg restraint were placed on EVANS, Officer
Richardson and other staff assisted EVANS to his feet, I directed
Sergeant J. Valice to accompany the escort to A Facility Sally port.

18 It should be noted:

19 I did not observe EVANS resist during this incident.

20 The majority of the aforementioned statements by EVANS and
21 Officer Struve were inappropriate (cursing/swearing at each other)
22 which increased the [in]ability [to] calm the incident.

22 (Id. at 14, 16.)

23 Plaintiff alleges that the excessive force committed by defendant Struve occurred in front
24 of defendants Gonzales, Dingfelder, Richardson, Calderon, Valice, Sidebotham and McCarval,
25 who failed to intervene as they watched the incident. (Id. at 10.)

26 Plaintiff alleges that he was bedridden for several days as a result of defendant Struve's
27 "take down" and "drill choke" technique applied to plaintiff's back and neck area. (Id. at 9-10.)
28 Plaintiff alleges that he required physical therapy as a result of the injuries he suffered. (Id. at

1 10.)

2 Defendants' Summary Judgment Motion

3 *Legal Standard*

4 The Eighth Amendment requires prison officials “[to] take reasonable measures to
5 guarantee the safety of the inmates.” Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal
6 quotation marks omitted). Accordingly, a prison official violates the Eighth Amendment by
7 failing to intervene when another prison official is seen using excessive force on an inmate. See
8 Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995). A prison official may be held liable for
9 such failure to intervene, however, only if the official was aware that the inmate faced a specific
10 risk of harm from the other prison official’s use of excessive force and had a reasonable
11 opportunity to intervene to stop it. See Richards v. Foutch, 2014 WL 4449822, at *7 (C.D. Cal.
12 Sept. 9, 2014). A defendant who moves for summary judgment on such an Eighth Amendment
13 claim has the burden to show that there was no reasonable opportunity to intervene. See e.g.,
14 Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995) (denying summary judgment to the
15 prison officials who “failed to carry their burden” to show they could not have prevented their
16 fellow officer from using excessive force).

17 *Analysis—Did Defendants Fail to Intervene in Violation of the Eighth Amendment?*

18 In the summary judgment motion, defendants do not dispute plaintiff’s claim that
19 Lieutenant Hampton told plaintiff to get up and move, after which defendant Struve yelled at
20 plaintiff to get down. (ECF No. 57-9 at 2-3.) For purposes of the summary judgment motion,
21 defendants do not dispute plaintiff’s allegations regarding defendant Struve’s alleged use of
22 excessive force. (ECF No. 57 at 10 n.3; ECF No. 57-9 at 3.)

23 Defendants argue that there is no evidence that the defendants moving for summary
24 judgment knew of and intentionally ignored a risk that defendant Struve would use force on
25 plaintiff. (ECF No. 57 at 10.) Defendants argue that there is no evidence that defendants had a
26 realistic opportunity to intervene to stop defendant Struve from using force, even if they had seen
27 it. (Id.) Defendants contend that at his deposition, plaintiff estimated that the incident took
28 perhaps two minutes. (Id.) Given these facts, defendants argue that no reasonable juror could

1 believe that these defendants failed to protect plaintiff from a serious risk of harm. (Id. at 11.)

2 In support of the summary judgment motion, defendants cite the declarations of
3 defendants. The undersigned sets forth these declarations herein.

4 In their declaration, defendant Calderon states, in relevant part,

5 2. I am a Correctional Sergeant at the California State Prison in
6 Sacramento, California. I have worked in the California Department
of Corrections and Rehabilitation (CDCR) for 11 years.

7 3. On May 23, 2018, I was assigned as the Facility A Enhanced
8 Outpatient Program Sergeant. While recalling the inmates in front
9 of housing unit A-7, I heard a commotion coming from the area of
10 unit A-5. I turned and saw Officer Miller extend his baton and order
11 an inmate to “get down,” which the inmate complied with. A
skirmish line was formed near unit A-5 in front of the light pole
because a few inmates were yelling obscenities at the officers. I
heard plaintiff Evans say, “Fuck these guys.” Inmate Flores was also
yelling obscenities.

12 4. I watched inmate Flores being handcuffed. When I turned back
13 toward plaintiff, I saw Officer Struve kneeling next to plaintiff, with
14 his hands placed on plaintiff’s back to control him. I did not see
plaintiff resisting but I heard him keep saying, “Fuck these guys.
Fuck you.”

15 5. Once plaintiff was handcuffed, another officer relieved Officer
16 Struve and plaintiff was escorted off the yard. I did not see any
visible injuries to plaintiff.

17 6. I did not see Officer Struve use excessive or unnecessary force
18 during the incident. I did not see Officer Struve put his knee or leg
19 on plaintiff’s back or neck, and I did not hear him use any profanity
toward plaintiff. A knee or hand on the back is permitted for restraint
if needed.

20 7. If I had seen any officer use excessive force during the incident, I
21 would have intervened to stop it if I had the opportunity (i.e., if I was
22 close enough and it was continuing), or I would report it afterward if
I witnessed it but was unable to stop it, as is my duty as a peace
officer.

23 8. I did not hear Lieutenant Hampton give any verbal commands for
24 plaintiff to move during the incident, or any announcements on the
25 radio about inmate movement. It is common practice to make a radio
announcement for authorized inmate movement, to alert staff.

26 (ECF No. 57-1 at 1-2.)

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1 In their declaration, defendant Dingfelder states, in relevant part,

2 2. I am a Correctional Officer at the California State Prison in
3 Sacramento, California. I have worked in the California Department
4 of Corrections and Rehabilitation (CDCR) for approximately 14
5 years.

6 3. On May 23, 2018, I was standing outside housing unit A-7 and A-
7 8 during yard recall when I saw an inmate jump up toward another
8 inmate who was being escorted, as if to attack him. The tower officer
9 announced on the P.A. system “down on the yard,” meaning that all
10 inmates had to get down on the ground. Responding staff ran toward
11 the incident. A skirmish line, with officers ready to engage if needed,
12 formed near units A-5 and A-6.

13 4. I saw inmate Flores laying down on his stomach but with one leg
14 back and one leg forward underneath him, and his fingertips on the
15 ground, as if he was going to run. I ordered Flores to “get down,”
16 and he laid prone on the ground and put his hands out to the side. At
17 the same time, I heard Evans yell “Don’t do it! You don’t have to do
18 it! This is police brutality!” I believed that plaintiff was talking to
19 inmate Flores, inciting him to disobey orders.

20 5. As I heard plaintiff yelling, I noticed that he was seated on the
21 concrete barrier of a light post. Officer Struve walked over toward
22 plaintiff and told him, “Evans, get down. I am going to cuff you up.”
23 Plaintiff replied, “Fuck you, Struve.”

24 5. Officer Struve then approached plaintiff and reached for his arm,
25 but plaintiff pulled away. Officer Struve pushed plaintiff forward
26 into a supine position on the ground, using his body weight. I did not
27 see Officer Struve place his arms or legs on plaintiff’s back or neck
28 area. Plaintiff continued to yell, “go fuck yourself!” to Officer
Struve. I assisted by placing leg restraints on plaintiff because he
was agitated. While I was applying leg restraints, Officer Struve
handcuffed plaintiff. I then escorted plaintiff to the holding cell in
the sallyport.

6. I do not call hearing Lieutenant Hampton give any verbal
commands for plaintiff to move during the incident, or any
announcements on the radio about inmate movement.

7. I did not see Officer Struve use excessive or unnecessary force
during the incident. I was next to plaintiff when he was being
handcuffed, but I was looking at his feet/ankles in order to apply the
leg restraints. I did not hear anything to indicate that excessive force
was being used while I was focused on the leg restraints, such as a
cry of pain.

8. If I had seen any officer use excessive force during the incident, I
would have intervened to stop it if I had the opportunity (i.e., if I was
close enough and it was continuing), or I would report it afterward if
I witnessed it but was unable to stop it, as is my duty as a peace
officer.

1 (ECF No. 57-2 at 1-3.)

2 In their declaration, defendant Gonzales states, in relevant part,

3 2. I am a Correctional Sergeant at the California State Prison in
4 Sacramento, California. I have worked in the California Department
5 of Corrections and Rehabilitation (CDCR) for approximately 14
6 years.

7 3. On May 23, 2018, I heard a radio transmission for an incident
8 occurring on the small yard of Facility A. I responded and noticed a
9 staff skirmish line in front of housing units A-5 and A-6. I also saw
10 multiple inmates laying in a prone position (on their stomachs),
11 which is what they are supposed to do following an alarm on the
12 yard.

13 4. I noticed that plaintiff Evans was not prone on the ground, but
14 was instead seated on a concrete barrier on a light post. Plaintiff was
15 yelling something and appeared to be inciting the other inmates. I
16 heard several staff give plaintiff commands to “prone out,” but he
17 ignored these orders.

18 5. I also heard Officer Struve give plaintiff several verbal commands
19 to “prone out.” Officer Struve then approached plaintiff, put his
20 hands on plaintiff’s shoulder, pulled him to a supine position on the
21 ground, and then handcuffed plaintiff. I did not see Officer Struve
22 place a knee on plaintiff, though he did kneel on the ground next to
23 plaintiff when he reached for plaintiff’s arms in order to handcuff
24 him.

25 6. I did not hear Lieutenant Hampton give any verbal commands for
26 plaintiff to move during the incident, and I did not hear anything on
27 the radio about inmate movement.

28 7. I did not see Officer Struve use excessive or unnecessary force
during the incident. I was approximately 8 feet away from plaintiff,
and was standing behind the skirmish line of officers.

8. If I had seen any officer use excessive force during the incident, I
would have intervened to stop it if I had the opportunity (i.e., if I was
close enough and it was continuing), or I would report it afterward if
I witnessed it but was unable to stop it, as is my duty as a peace
officer and a supervisor.

23 (ECF No. 57-3 at 1-2.)

24 In their declaration, defendant McCarvel states, in relevant part,

25 2. I am a Correctional Sergeant at the California State Prison in
26 Sacramento, California. I have worked in the California Department
27 of Corrections and Rehabilitation (CDCR) for approximately 22
28 years.

3. On May 23, 2018, I was assigned as the Sergeant for the treatment
center in Facility A. I heard a code 3 alarm at the minimum support

1 facility, and then I heard a code 1 alarm at the upper area of the small
2 yard. I responded to the outside area in front of housing units A-5
and A-6.

3 4. When I arrived, I saw inmate Flores on the ground and plaintiff
4 Evans was sitting on the concrete foundation near the light pole.
5 Inmate Flores was yelling, "Fuck you guys! Fuck the police!"
6 Plaintiff was also yelling at the officers.

7 5. Plaintiff was given several orders by staff to "prone out," because
8 he was in a seated position and not laying down prone. Plaintiff
9 yelled, "fuck you" and ignored the orders.

10 6. Officer Struve gave plaintiff verbal commands to "get down,"
11 which plaintiff ignored. Officer Struve then walked over to plaintiff,
12 grabbed his arm, and pulled him forward into a supine position.
13 Officer Struve briefly placed his knee onto plaintiff's lower back as
14 he handcuffed plaintiff. He had to reach for plaintiff's hands in order
15 to cuff them. Plaintiff told Officer Struve he was a "bitch."

16 7. I did not see Officer Struve put a knee on plaintiff's neck. Once
17 plaintiff was handcuffed, Officer Struve moved his knee off
18 plaintiff's lower back and remained kneeling next to plaintiff. Other
19 officers took plaintiff and escorted him out of the area. I did not see
20 any visible injuries on plaintiff.

21 8. I did not see Officer Struve use excessive or unnecessary force
22 during the incident. If I had seen any officer use excessive force
23 during the incident, I would have intervened to stop it if I had the
24 opportunity (i.e., if I was close enough and it was continuing), or I
25 would report it afterward if I witnessed it but was unable to stop it,
26 as is my duty as a peace officer and a supervisor.

27 9. I did not hear Lieutenant Hampton give any verbal commands for
28 plaintiff to move during the incident, or any announcements on the
radio about inmate movement. It is protocol to make a radio
announcement for authorized inmate movement, to alert other staff.

(ECF No. 57-4 at 1-3.)

In their declaration, defendant Valice states, in relevant part,

2. I am a Correctional Sergeant at the California State Prison in
Sacramento, California. I have worked in the California Department
of Corrections and Rehabilitation (CDCR) for approximately 13
years.

3. On May 23, 2018, I was assigned as the Clinic Sergeant for
Healthcare Access. I responded from the treatment center because
of a fight on the small yard of Facility A.

4. When I arrived, I saw a skirmish line facing housing unit A-6.
Plaintiff Evans was sitting and leaning his back against the light pole
and inmate Flores was on the grass area. Plaintiff and inmate Flores
were yelling back and forth at each other, and then they started to

1 yell at the officers on the skirmish line. Plaintiff was given orders to
2 “get down” by several officers.

3 5. Plaintiff said to inmate Flores, “Fuck these guys,” referring to the
4 officers. Officer Struve gave plaintiff orders to “get down” and
5 “prone out,” but plaintiff ignored those orders.

6 6. I saw Officer Struve walk up to plaintiff and grab his shoulder.
7 Plaintiff immediately pulled away and twisted his upper body.
8 Officer Struve then pulled plaintiff to a prone position on the ground,
9 and then placed handcuffs on him. I saw Officer Struve kneeling
10 next to plaintiff, but I did not see him put a knee on plaintiff. Officer
11 Dingfelder placed leg restraints on plaintiff and escorted him off the
12 yard.

13 7. I did not see any visible injuries to plaintiff.

14 8. I did not see Officer Struve use excessive or unnecessary force
15 during the incident. I did not see Officer Struve put his knee or leg
16 on plaintiff’s back or neck, and I did not hear him use any profanity
17 toward plaintiff.

18 9. Sometimes an officer places a knee or hand on an inmate’s back
19 during the restraint process, in order to keep them controlled to apply
20 handcuffs, and this is not excessive force so long as only the force
21 necessary to control the prisoner is used and not any extra or
22 unjustified force.

23 10. If I had seen any officer use excessive force during the incident,
24 I would have intervened to stop it if I had the opportunity (i.e., if I
25 was close enough and it was continuing), or I would report it
26 afterward if I witnessed it but was unable to stop it, as is my duty as
27 a peace officer and a supervisor.

28 11. I did not hear Lieutenant Hampton give any verbal commands
for plaintiff to move during the incident, or any announcements on
the radio about inmate movement. It is common sense to make a
radio announcement for authorized inmate movement, to alert staff.

(ECF No. 57-5 at 1-3.)

In their declaration, defendant Richardson states, in relevant part,

2. I am a Correctional Officer at the California State Prison in
Sacramento, California. I have worked in the California Department
of Corrections and Rehabilitation (CDCR) for approximately 5 years.

3. On May 23, 2018, I was the yard officer in Facility A. I heard an
announcement for a code 1 alarm on the small yard of Facility A. I
responded to the alarm and stood in the skirmish line, ready to assist
in case the incident escalated. I saw plaintiff Evans approximately
15-25 feet away, in a crouched position against a light pole. All of
the other inmates I saw on the yard were laying down prone on their
stomachs.

1 4. Officer Struve, who was also standing in the skirmish line, yelled
2 at plaintiff “get down.” Officer Struve approached plaintiff and tried
3 to handcuff him, but plaintiff tucked his hands under his chest so he
4 could not be handcuffed. Officer Struve ordered him, “stop
5 resisting,” but plaintiff kept his hands tucked under him. Officer
6 Struve used some of his body weight (leaning with his hip into
7 plaintiff’s mid-back area) in order to handcuff him. Plaintiff arched
8 his back and moved away, trying to resist, but Officer Struve
9 managed to pull plaintiff’s arms out from underneath him and
10 handcuff plaintiff, who then called Officer Struve, “punk bitch.”

11 5. Once plaintiff was handcuffed, I relieved Officer Struve and
12 conducted a pat search of plaintiff. I then escorted plaintiff to the
13 holding cell in the sallyport, along with Officer Dingfelder. I did not
14 see any visible injuries to plaintiff, and he did not mention any
15 injuries to me.

16 6. I did not see Officer Struve use excessive force or unnecessary
17 force during the incident. Officer Struve did not put his knee or leg
18 on plaintiff’s back or neck, and I did not hear him use any profanity
19 toward plaintiff.

20 7. If I had seen any officer use excessive force during the incident, I
21 would have intervened to stop it if I had the opportunity (i.e., if I was
22 close enough and it was continuing), or I would report it afterward if
23 I witnessed it but was unable to stop it, as is my duty as a peace
24 officer.

25 8. I did not hear Lieutenant Hampton give any verbal commands for
26 plaintiff to move during the incident, or any announcements on the
27 radio about inmate movement. It is common practice to make a radio
28 announcement for authorized inmate movement, to alert staff.

(ECF No. 58 at 1-3.)

In their declaration, defendant Sidebotham states, in relevant part,

2. I am a Correctional Officer at the California State Prison in
Sacramento, California. I have worked in the California Department
of Corrections and Rehabilitation (CDCR) for approximately 25
years.

3. On May 23, 2018, I was assigned as the officer in the observation
tower on A yard, located near buildings 5 and 6. During the
controlled yard recall on Facility A, I saw inmates staging on the
small yard, in front of units A-5 and A-6 on the grass area.

4. As an officer was escorting an inmate to unit A-5, I saw inmate
Mondine jump up and start running toward the inmate being
escorted. He then ran back, and staff ordered him to “get down.”
Inmate Flores had been seated, and he jumped up to yell at the inmate
being escorted, though I could not hear what he said. Responding
staff approached inmate Flores and handcuffed him.

1 5. At the same time, plaintiff Evans was yelling at inmate Mondine.
2 He was in a prone position near the light pole but appeared to be
lifting himself up, as if he was going to jump up.

3 6. I saw Officer Struve approach plaintiff, grab plaintiff's hands and
4 handcuff him. Officer Struve then kneeled next to plaintiff and put
5 his hand on plaintiff's mid-back or shoulder blades to keep him still.
Plaintiff was moving his legs around, so Officer Struve placed his
leg on plaintiff to stop him from moving.

6 7. Once plaintiff was handcuffed, Officer Struve backed 5-10 feet
7 away, and other staff escorted plaintiff to the sallyport holding cell.
I could not see any visible injuries on plaintiff.

8 8. I did not see Officer Struve put a knee on plaintiff's neck or back.
9 Nor did I see Officer Struve use excessive or unnecessary force
10 during the incident. If I had seen any officer use excessive force
11 during the incident, I would have radioed an officer on the ground to
stop it if I had the opportunity (i.e., if it was continuing), or I would
report it afterward if I witnessed it but was unable to help stop it, as
is my duty as a peace officer.

12 9. I do not know Lieutenant Hampton. I did not hear a radio
13 announcement for inmate movement during the incident. It is
14 general practice to make a radio announcement for inmate
movement.

15 (ECF No. 59 at 1-3.)

16 Citing plaintiff's deposition transcript, defendants argue that there is no evidence that any
17 of the defendants had a realistic opportunity to intervene and stop defendant Struve from tackling
18 and restraining plaintiff because plaintiff testified that the incident took perhaps two minutes.

19 (ECF No. 57 at 22.)

20 At his deposition, did not testify that the incident took two minutes:

21 Q: How long—how long was it between the time that Officer Struve
22 pushed you to the ground before you were —before he was relieved
by Officers Richardson and Dingfelder?

23 A: I'm not—I'm not actually—I don't know.

24 Q: Would you say a minute, two minutes?

25 A: I don't know.

26 Q: Can you give me an estimate?

27 A: Honestly, like I don't—I don't—I mean, I don't want to guess on
28 that. I'm not sure for sure, so I don't want to guess and, you know, I
don't—

1 Q: From your description, it sounds like it was less than five minutes;
2 do you agree with that?

3 A: Yes.

4 Q: Okay. And you—you're not sure if it was less than, say, two
5 minutes?

6 A: No.

7 (Plaintiff's transcript at 45-46.)

8 Defendants also argue that at his deposition, plaintiff testified that he did not know what
9 defendants Gonzales, Dingfelder, Richardson, Calderon, Valice, Sidebotham and McCarval were
10 doing during the incident. (See Plaintiff's deposition at 45.) While plaintiff testified that he did
11 not know exactly where these defendants were during the incident, he also testified that they were
12 close enough to the incident to write reports containing their (false) observation that plaintiff
13 resisted defendant Struve. (Id.)

14 After reviewing the record, including plaintiff's opposition, the undersigned finds no
15 evidence demonstrating that defendants Gonzales, Dingfelder, Richardson, Calderon, Valice,
16 Sidebotham and McCarval knew of and intentionally ignored a risk that defendant Struve would
17 use force against plaintiff. The undersigned also finds no evidence in the record demonstrating
18 that any of these defendants participated in the alleged excessive force.

19 After reviewing defendants' declarations, the undersigned finds that defendants Gonzales,
20 Dingfelder, Richardson, Calderon, Valice, Sidebotham and McCarval were in the area where the
21 alleged excessive force occurred. This finding is based on the statements in defendants'
22 declarations regarding their observations of the incident. The undersigned cannot determine
23 exactly how close each defendant was to the incident based on the information in the declarations.

24 However, for the reasons stated herein, the undersigned finds that defendants Gonzales,
25 Dingfelder, Richardson, Calderon, Valice, Sidebotham and McCarval did not have a reasonable
26 opportunity to intervene in the alleged excessive force.

27 As discussed above, plaintiff submitted Lieutenant Hampton's report in support of his
28 complaint. Plaintiff does not dispute the statements made by Lieutenant Hampton in this report.
Lieutenant Hampton's report indicates that Lieutenant Hampton was present during the incident

1 of alleged excessive force and took steps to intervene. Based on Lieutenant Hampton’s
2 intervention in the incident, it is unclear what further actions defendants Gonzales, Dingfelder,
3 Richardson, Calderon, Valice, Sidebotham and McCarval could have taken to intervene,
4 assuming they were near the incident. For these reasons, the undersigned finds that these
5 defendants did not have a reasonable opportunity to intervene when defendant Struve allegedly
6 used excessive force against plaintiff. Accordingly, defendants’ summary judgment should be
7 granted on these grounds.

8 *Analysis—Are Defendants Entitled to Qualified Immunity?*

9 In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court set forth a two-pronged test to
10 determine whether qualified immunity exists. First, the court asks: “Taken in the light most
11 favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated
12 a constitutional right?” Id. at 201. If “a violation could be made out on a favorable view of the
13 parties’ submissions, the next, sequential step is to ask whether the right was clearly established.”
14 Id. To be “clearly established,” “[t]he contours of the right must be sufficiently clear that a
15 reasonable official would understand that what he is doing violates that right.” Id. at 202 (internal
16 quotation marks and citation omitted). Accordingly, for the purposes of the second prong, the
17 dispositive inquiry “is whether it would be clear to a reasonable officer that his conduct was
18 unlawful in the situation he confronted.” Id. Courts have the discretion to decide which prong to
19 address first, in light of the particular circumstances of each case. See Pearson v. Callahan, 555
20 U.S. 223, 236 (2009).

21 As discussed above, the undersigned finds that defendants Gonzales, Dingfelder,
22 Richardson, Calderon, Valice, Sidebotham and McCarval did not violate the Eighth Amendment
23 by failing to intervene. However, in an abundance of caution, for the reasons stated herein, the
24 undersigned finds that defendants should be granted qualified immunity based on the second
25 prong of the qualified immunity test.

26 As discussed above, Lieutenant Hampton intervened in the incident. Lieutenant Hampton
27 was a senior officer to defendants, who were correctional sergeants or correctional officers.
28 Based on these circumstances, the undersigned finds that it would not be clear to a reasonable

1 correctional officer or correctional sergeant that their failure to intervene violated plaintiff's
2 Eighth Amendment rights. Accordingly, defendants should be granted qualified immunity on
3 these grounds.

4 Conclusion

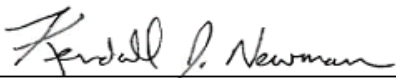
5 Following the district court's adoption of these findings and recommendations, the
6 undersigned will set this action for trial as to plaintiff's Eighth Amendment claim against
7 defendant Struve.

8 Accordingly, IT IS HEREBY ORDERED that defendants' motion for an extension of
9 time (ECF No. 66) is granted; defendants' reply is deemed timely filed; and

10 IT IS HEREBY RECOMMENDED that defendants' summary judgment motion (ECF
11 No. 57) be granted.

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
14 after being served with these findings and recommendations, plaintiff may file written objections
15 with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that
17 failure to file objections within the specified time may waive the right to appeal the District
18 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 Dated: March 15, 2021

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21 _____
22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE

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