

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TREMAYNE COLLIER,

Plaintiff,

v.

SHERIFF M. HENNESSEY, et al.,

Defendants.

No. C 06-01143 CW (PR)

ORDER DENYING DEFENDANTS'
MOTION TO STRIKE PLAINTIFF'S
OPPOSITION; DENYING THEIR
MOTION FOR SUMMARY JUDGMENT;
AND REFERRING CASE TO PRO SE
PRISONER SETTLEMENT PROGRAM

INTRODUCTION

On February 16, 2006, Plaintiff Tremayne Collier, a state prisoner currently incarcerated at Kern Valley State Prison, filed this civil rights action under 42 U.S.C. § 1983, arising from incidents occurring while he was a pretrial detainee at San Francisco County jail, against Defendants Sheriff Michael Hennessey, Captain Ideta, Deputy H. Castro, Deputy E. Staehly, Deputy S. Neu, Senior Deputy Jackson and Senior Deputy J. Aragon.

On September 23, 2008, the Court found that Plaintiff stated a cognizable claim against Defendants Castro, Staehly, Neu, Jackson and Aragon for excessive use of force in violation of Plaintiff's due process rights.¹

On February 20, 2009, Defendant Castro filed a motion for

¹ Plaintiff's supervisory liability claims against Defendants Hennessey and Ideta were dismissed with leave to amend. The Court gave Plaintiff until October 23, 2008 to file his amended supervisory liability claims in an amendment to the complaint. He was told that the failure to do so would result in dismissal of his supervisory liability claims without prejudice. On September 4, 2009, due to Plaintiff's failure to amend, the Court dismissed Plaintiff's supervisory liability claims against Defendants Hennessey and Ideta without prejudice.

1 summary judgment, which the Court denied without prejudice to
2 refiling as a joint motion with the remaining Defendants.

3 On November 3, 2009, Defendants Castro, Staehly, Neu, Jackson
4 and Aragon filed a joint motion for summary judgment. Plaintiff
5 filed an opposition, and Defendants filed a reply. Thereafter,
6 Defendants took Plaintiff's deposition, and then Defendants filed a
7 motion for leave to file a supplement to their motion for summary
8 judgment. The Court granted Defendants' motion. Plaintiff filed
9 an opposition to Defendants' supplement, and Defendants filed a
10 reply and a motion to strike Plaintiff's opposition to the
11 supplement.

12 Having considered the papers filed by the parties, the Court
13 DENIES Defendants' motion to strike Plaintiff's opposition to the
14 supplement, and DENIES their motion for summary judgment in its
15 entirety.

16 BACKGROUND

17 The following facts are taken from Plaintiff's declaration in
18 support of his opposition to the motion for summary judgment.

19 On February 28, 2004, Plaintiff returned to his cell and was
20 informed that there had been a physical altercation between two
21 inmates while he was gone. Jail officials began to interview the
22 inmates. When it was time for Plaintiff's interview, Defendant
23 Jackson informed Plaintiff that he was being transferred to
24 administrative segregation at D-Block. Plaintiff was not given a
25 reason for the transfer, but was told he had to go to D-Block
26 immediately. Defendant Jackson handcuffed Plaintiff, and Plaintiff
27 cooperated while his hands were cuffed in the front. Plaintiff
28 then asked Defendant Jackson to search Plaintiff's paperwork in

1 front of Plaintiff so that he could take it with him to D-Block.
2 Defendant Jackson "became upset" and ordered Defendants Neu, Castro
3 and Staehly to take Plaintiff to D-Block and house him in Cell D-
4 16, stating that "he didn't give a fuck" if they had to drag
5 Plaintiff there. (Pl.'s Decl. at 2.)

6 Plaintiff's declaration states that he complied with
7 Defendants' orders and that he did not pose a threat to any of
8 them. (Id.) Plaintiff states that his feet were kicked out from
9 under him and that he fell while Defendants Neu and Castro were
10 still holding on to his arms. (Pl.'s Dep. at 145:23-24.)
11 According to Plaintiff, once he was tripped, he fell face down,
12 bracing his fall with his elbows. (Id. at 146:5-9.) Plaintiff
13 asserts, "When I hit the ground, Neu went down with me and I know
14 Staehely went down with me because Staehely was directly behind
15 me." (Id. at 147:16-18.)² While on the ground, Plaintiff "felt
16 several officers fall on his back." (Pl.'s Decl. at 2.) Plaintiff
17 asserts, "Staehely jumped on my back and there were others that
18 followed, you can feel when people are jumping on your back. Who
19 exactly, I can't tell you exactly." (Pl.'s Dep. at 147:19-22.)
20 Plaintiff alleges that Defendants Castro, Neu and Jackson were
21 present but failed to intervene when "several officers" fell on his
22 back and prevented him from breathing. (Pl.'s Decl. at 2.)

23 Defendant Neu then "applied a 2 finger choke hold to
24 [Plaintiff's] adams apple." (Pl.'s Decl. At 2.) According to
25 Plaintiff, the choke hold "cut off all my breathing. As I used my
26 hands that were handcuffed in front of me to come up underneath me

27
28 ² Staehly is misspelled in the transcript of Plaintiff's
December 23, 2009 deposition.

1 and grab Neu's hands . . . and pulled it away." (Pl.'s Dep. at
2 148:23-149:40.) Plaintiff then lowered his head to the ground to
3 "prevent any other attacks." (Pl.'s Decl. at 2.) Defendant
4 Jackson placed his foot on the left side of Plaintiff's face and
5 Defendant Castro placed his foot on the left side of Plaintiff's
6 wrist inside the handcuff, "causing the cuff to cut into
7 [Plaintiff's] wrist." (Id.) For purposes of this motion,
8 Defendants do not claim that Plaintiff resisted in any way during
9 the incident.

10 Plaintiff asserts that sometime during the incident Defendant
11 Aragon and Deputy Kilgariff arrived. (Pl.'s Dep. at 150:12-13.)
12 Plaintiff then observed Defendant Aragon asking Defendant Jackson
13 questions. Plaintiff also states he saw a video camera being held
14 and operated by Deputy Kilgariff and then given to Defendant
15 Staehly.³ (Pl.'s Decl. at 3.)

16 Plaintiff claims that he began complaining of breathing
17 problems. Defendant Jackson advised the deputies to "get off" of
18 Plaintiff's back. (Id.) Plaintiff continued complaining that he
19 had trouble breathing. After several minutes, Plaintiff was moved
20 to the safety cell. His clothes were cut off his body. He
21 continued to complain that he could not breathe and that he needed
22 more oxygen. A nurse arrived to administer the oxygen and
23 Plaintiff informed her that he also had chest pains. Plaintiff was
24 then given a nitroglycerin tablet. Paramedics arrived and
25 transported Plaintiff to San Francisco General Hospital for
26

27 ³ Defendants have submitted a video tape of the incident.
28 However, the video begins after the incident involving Defendants'
use of force had already ended.

1 treatment. After Plaintiff was medically cleared, he was returned
2 to the jail. A few days later, Senior Deputy Robinson conducted a
3 video interview of Plaintiff.⁴

4 Plaintiff states that he continues to have "ongoing chest
5 pain, complication of breathing, and has to carry nitroglycerin
6 where ever he goes." (Pl.'s Compl. at 5.) On September 9, 2004,
7 Plaintiff was examined by medical officials at San Francisco County
8 Jail because of continued pain in his wrist and elbow. (Ex. A to
9 Pl.'s Opp'n.)

10 On February 16, 2006, Plaintiff filed the present action.

11 DISCUSSION

12 I. Legal Standard

13 Summary judgment is properly granted when no genuine and
14 disputed issues of material fact remain, and when, viewing the
15 evidence most favorably to the non-moving party, the movant is
16 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
17 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
18 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
19 1987).

20 The moving party bears the burden of showing that there is no
21 material factual dispute. Therefore, the court must regard as true
22 the opposing party's evidence, if it is supported by affidavits or
23 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,

24
25 ⁴ Defendants have submitted the video tape and audio tape of
26 Plaintiff's interview by Senior Deputy Robinson. The Court does
27 not rely on Plaintiff's interview because: (a) the bulk of the
28 interview centers on whether Plaintiff resisted or not, which is
not at issue in this case, and (b) the rest of the interview
contains information that is duplicative of the parties' other
filings.

1 815 F.2d at 1289. The court must draw all reasonable inferences in
2 favor of the party against whom summary judgment is sought.
3 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
4 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
5 1551, 1558 (9th Cir. 1991).

6 Material facts which would preclude entry of summary judgment
7 are those which, under applicable substantive law, may affect the
8 outcome of the case. The substantive law will identify which facts
9 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
10 (1986).

11 Where the moving party does not bear the burden of proof on an
12 issue at trial, the moving party may discharge its burden of
13 production by either of two methods:

14 The moving party may produce evidence negating an
15 essential element of the nonmoving party's case, or,
16 after suitable discovery, the moving party may show
17 that the nonmoving party does not have enough
evidence of an essential element of its claim or
defense to carry its ultimate burden of persuasion at
trial.

18 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
19 1099, 1106 (9th Cir. 2000).

20 If the moving party discharges its burden by showing an
21 absence of evidence to support an essential element of a claim or
22 defense, it is not required to produce evidence showing the absence
23 of a material fact on such issues, or to support its motion with
24 evidence negating the non-moving party's claim. Nissan, 210 F.3d
25 at 1106; see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885
26 (1990); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir.
27 1991). If the moving party shows an absence of evidence to support
28 the non-moving party's case, the burden then shifts to the non-

1 moving party to produce "specific evidence, through affidavits or
2 admissible discovery material, to show that the dispute exists."
3 Bhan, 929 F.2d at 1409.

4 If the moving party discharges its burden by negating an
5 essential element of the non-moving party's claim or defense, it
6 must produce affirmative evidence of such negation. Nissan, 210
7 F.3d at 1105. If the moving party produces such evidence, the
8 burden then shifts to the non-moving party to produce specific
9 evidence to show that a dispute of material fact exists. Id.

10 If the moving party does not meet its initial burden of
11 production by either method, the non-moving party is under no
12 obligation to offer any evidence in support of its opposition. Id.
13 This is true even though the non-moving party bears the ultimate
14 burden of persuasion at trial. Id. at 1107.

15 II. Discussion

16 Plaintiff sues under 42 U.S.C. § 1983, claiming that
17 Defendants used excessive force with intent to cause harm. (Pl.'s
18 Compl. at 6.) Plaintiff alleges Defendants' actions violated his
19 rights under the Eighth Amendment to be free from cruel and unusual
20 punishment. However, pretrial detainees are protected by the
21 Fourteenth Amendment from the use of excessive force that amounts
22 to punishment. Graham v. Connor, 490 U.S. 386, 395 n. 10 (1989).
23 Defendants assert that Plaintiff has failed to come forward with
24 admissible evidence that he suffered any physical injuries as a
25 result of Defendants' actions, and that an allegation of physical
26 injury is required. Defendants also argue that Plaintiff has no
27 evidence that their actions were malicious.

28 A pretrial detainee, who has not yet been convicted of the

1 crime for which he has been charged, is entitled to at least the
2 protections afforded convicted prisoners. Bell v. Wolfish, 441
3 U.S. 520, 545 (1979). When prison officials stand accused of using
4 excessive force, the core judicial inquiry is whether the force was
5 applied in a good faith effort to maintain or restore discipline,
6 or maliciously and sadistically to cause harm. Hudson v.
7 McMillian, 503 U.S. 1, 6-7 (1992). This inquiry requires courts to
8 balance several factors focusing on the reasonableness of the
9 officers' actions given the circumstances. White v. Roper, 901
10 F.2d 1501, 1507 (9th Cir. 1990). These factors are (1) the need
11 for the application of force, (2) the relationship between the need
12 and the amount of force that was used, (3) the extent of the injury
13 inflicted, and (4) whether force was applied in a good faith effort
14 to maintain and restore discipline. Id.

15 Further, law enforcement officers may be held liable if they
16 have an opportunity to intercede but fail to do so when their
17 fellow officers violate the constitutional rights of a plaintiff.
18 Cunningham v. Gates, 229 F.3d 1271, 1289-90 (9th Cir. 2000); Motley
19 v. Parks, 383 F.3d 1058, 1071 (9th Cir. 2004). The passive
20 defendant violates a constitutional right that is "analytically the
21 same as the right violated by the person who strikes the blows."
22 United States v. Koon, 34 F.3d 1416, 1447 n. 25 (9th Cir. 1994),
23 rev'd on other grounds, 514 U.S. 81 (1996). On the other hand, if
24 an officer is not present during a constitutional violation, or if
25 a violation happens so quickly that an officer had no "realistic
26 opportunity" to intercede, then the officer is not liable for
27 failing to intercede. Cunningham, 229 F.3d at 1290.

28 Based on Plaintiff's evidence, a finder of fact could

1 reasonably conclude that the actions of Defendants Castro, Staehly,
2 Neu and Jackson above constituted excessive force. Defendants'
3 argument that Plaintiff must show more severe physical injury is
4 not well taken. The Supreme Court has recently clarified that
5 injury and force are only imperfectly correlated, and it is the
6 latter that ultimately counts. Wilkins v. Gaddy, __ U.S. __, 130
7 S. Ct. 1175, 1178-79 (2010). An inmate who is gratuitously beaten
8 by guards does not lose his ability to pursue an excessive force
9 claim merely because he has the good fortune to escape without
10 serious injury. Id. In sum, an excessive force claim may be
11 dismissed because the force used was de minimis, but not because
12 the injuries suffered were de minimis. To conclude that the
13 absence of some arbitrary quantity of injury requires automatic
14 dismissal of an excessive force claim improperly bypasses Hudson's
15 core inquiry of whether force was applied maliciously and
16 sadistically to cause harm. Wilkins, 130 S. Ct. at 1178.
17 Therefore, contrary to Defendants' argument, Plaintiff does not
18 have to prove the he suffered from physical injury to prevail on
19 his excessive force claim.

20 Defendants' attempt to analogize the present facts to those in
21 White is unavailing. (Defs.' Mot. for Summ. J. at 5 (citing White,
22 901 F.2d at 1507).) Defendants state, "Under Ninth Circuit
23 precedent, purported force resulting in the absence of any physical
24 injury whatsoever fails to rise to the level of a 'malicious and
25 sadistic' use of force by defendants." (Id.) In White, the Ninth
26 Circuit based its affirmance of the district court's grant of
27 summary judgment on the reasoning that, although the amount and
28 type of force used was disputed between the parties, the plaintiff

1 did not show he requested medical treatment, lost consciousness at
2 any time or suffered any permanent injury. Id. Here, Defendants
3 argue that Plaintiff "has not shown that he required or even that
4 he requested medical treatment for the cuts he allegedly suffered
5 on his wrists and thumb areas." (Def.' Mot. for Summ. J. at 5.)
6 Contrary to Defendants' argument, Plaintiff's own assertions --
7 regarding Defendants' use of force and his resulting injuries --
8 are admissible evidence. Plaintiff asserts under penalty of
9 perjury that he received medical treatment for his injuries and
10 that he suffered permanent harm, including "ongoing chest pain,
11 complication of breathing, and has to carry nitroglycerin wherever
12 he goes." (Pl.'s Compl. at 5.) Therefore, Plaintiff has provided
13 evidence of enough physical harm to overcome summary judgment.

14 As noted above, Defendants also argue that Plaintiff has not
15 shown that the force was used with the requisite malice and sadism.
16 In determining whether force was applied "maliciously and
17 sadistically for the very purpose of causing harm," the Court may
18 look to many factors, including the need for the application of
19 force and any efforts made to temper the severity of a forceful
20 response. White, 901 F.2d at 1507; Hudson, 503 U.S. at 7.

21 There is no evidence in the present case that Defendants applied
22 force to Plaintiff in a good faith effort to maintain or restore
23 discipline. Hudson, 503 U.S. at 6. As mentioned above, at least
24 for the purposes of this motion, Defendants do not allege that
25 Plaintiff resisted during the incident. Rather, Defendants again
26 argue that because Plaintiff came forward with "no evidence that he
27 suffered any physical injuries," he could not prove that force was
28 applied maliciously and sadistically. This argument is without

1 merit. Plaintiff has created genuine issues of fact as to whether
2 Defendants Castro, Staehly, Neu and Jackson applied excessive force
3 against him. From this, a fact-finder could infer that they acted
4 wantonly, maliciously and for the express purpose of causing harm.
5 Direct evidence of malice and sadism is not required. Therefore,
6 these Defendants are not entitled to summary judgment on the
7 excessive force claim as a matter of law.

8 There is a dispute over Defendant Aragon's involvement in the
9 incident. Defendants argue that Defendant Aragon did not make
10 physical contact with Plaintiff and therefore could not have caused
11 Plaintiff physical injury. (Defs.' Supplement at 3.) Defendants
12 assert that at Plaintiff's December 23, 2010 deposition, he
13 admitted that Defendant Aragon never caused him any injury. They
14 point out that when Plaintiff was asked about Defendant Aragon's
15 involvement and whether he caused him any physical injury,
16 Plaintiff said, "no." (Pl.'s Dep. at 109:18-21.) However, at
17 other points in the deposition, Plaintiff stated that he was not
18 sure of Defendant Aragon's involvement, and that he was not sure of
19 the identity of the officers who jumped on his back as he was face
20 down. (Id. at 106:13-14, 145:15-22.) Based on this evidence, a
21 finder of fact could reasonably conclude that Defendant Aragon used
22 excessive force.

23 Alternatively, Plaintiff could prevail against Defendant
24 Aragon by showing that he was present and failed to intervene while
25 Plaintiff's constitutional rights were being violated by Defendants
26 Castro, Staehly, Neu and Jackson. See Cunningham, 229 F.3d at
27 1289-90. Plaintiff's testimony at his deposition does not suggest
28 that the timing of events was so rapid and fluid as to preclude

1 Defendant Aragon from interceding. See Koon, 34 F.3d at 1447 n.25
2 (finding liability for failure to intervene where one officer
3 witnesses another striking blows). Plaintiff has created a genuine
4 issue of fact as to whether Defendant Aragon had an opportunity to
5 intervene to prevent the excessive force against Plaintiff by the
6 other Defendants. Therefore, Defendant Aragon is not entitled to
7 summary judgment on the excessive force claim as a matter of law.

8 Accordingly, Defendants' motion for summary judgment is
9 DENIED.

10 CONCLUSION

11 For the foregoing reasons,

12 1. Defendants' motion for summary judgment (docket no. 60)
13 is DENIED.

14 2. Defendants' motion to strike Plaintiff's opposition to
15 the supplement (docket no. 80) is DENIED.

16 3. The Northern District of California has established a Pro
17 Se Prisoner Settlement Program. Certain prisoner civil rights
18 cases may be referred to a magistrate judge for a settlement
19 conference. The Court finds that a referral is in order now that
20 Plaintiff's excessive force claim has survived summary judgment.
21 Thus, this case is REFERRED to Magistrate Judge Vadas for a
22 settlement conference.

23 The conference shall take place within one-hundred-twenty
24 (120) days of the date of this Order, or as soon thereafter as is
25 convenient to the magistrate judge's calendar. Magistrate Judge
26 Vadas shall coordinate a time and date for the conference with all
27 interested parties and/or their representatives and, within ten
28 (10) days after the conclusion of the conference, file with the

1 Court a report regarding the conference.

2 The Clerk shall provide a copy of this Order, and copies of
3 documents from the court file that are not accessible
4 electronically, to Magistrate Judge Vadas.

5 4. The Clerk shall send a copy of this Order to Plaintiff.

6 5. The Clerk shall prepare an Order for Pretrial
7 Preparation, setting the case for a pretrial conference and a five-
8 day jury trial.

9 6. This Order terminates Docket nos. 60 and 80.

10 IT IS SO ORDERED.

11 Dated: 5/13/2010



CLAUDIA WILKEN
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 TREMAYNE COLLIER,

5 Plaintiff,

6 v.

7 M HENNESSY, SHERIFF et al,

8 Defendant.

Case Number: CV06-01143 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on May 13, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Tremayne Collier V-60930
16 Kern Valley State Prison
17 P.O. Box 5102
18 A6-208
19 Delano, CA 93216

20 Dated: May 13, 2010

21 Richard W. Wieking, Clerk
22 By: Nikki Riley, Deputy Clerk
23
24
25
26
27
28

United States District Court
For the Northern District of California