UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAVON LAMAR TORBERT,

Plaintiff,

v.

WILLIAM D. GORE, Sheriff of San Diego Sheriff Department; DEPUTY DAILLY, Sheriff of San Diego Sheriff Department; DEPUTY McMAHON, Sheriff of San Diego Sheriff Department; DEPUTY Y.G. GEBREBIORGIS, Sheriff of San Diego Sheriff Department; SERGEANT ESTRADA, Sheriff of San Diego Sheriff Department; COUNTY OF SAN DIEGO; and DOES 1-50,

Defendants.

Case No.: 3:14-cv-02911-BEN (NLS)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE

Plaintiff Javon Lamar Torbert, a state prisoner proceeding pro se and in forma pauperis, brought this action under 42 U.S.C. § 1983, asserting claims under state law and for violations of the Eighth Amendment arising from two alleged incidents. On October 26, 2016, this Court adopted the Magistrate Judge's report and recommendation on Defendants' motion for summary judgment. (MSJ Order, ECF No. 109). The order granted Defendants' motion in part, leaving only Plaintiff's claim for excessive force

against Defendant Deputy James Dailly to go to trial. Now, upon reconsideration of its summary judgment order, the Court grants summary judgment to Defendant Dailly and dismisses the remaining claim.

I. Factual Background

Plaintiff's remaining claim for excessive force arises out of incident on October 2, 2014 at Vista Detention Center when Defendant Dailly closed a cell door that allegedly hit Plaintiff's left forearm. Video footage captured the incident.

On the day of the incident, Plaintiff was causing tension in Medical Ward 2, where he was being housed with other inmates. He was pacing back and forth, without the use of his cane, for several minutes and was yelling and disturbing the other inmates. Deputy Estrada told Plaintiff to gather his belongings so he could move to a different cell. Plaintiff did not submit to handcuffing through the cell door and, consequently, Deputy Dailly and Deputy McMahon entered Medical Ward 2 to calm Plaintiff and escort him to another cell. Deputy Dailly picked up Plaintiff's cane, which had been hanging on his bunk bed. Deputy Dailly states that given Plaintiff's unpredictable behavior and that he had been walking without the cane, Dailly took the cane for safety reasons to ensure Plaintiff did not use it as a weapon. Plaintiff gathered his belongings.

A couple minutes later, several other deputies arrived in Medical Ward 2. Deputies McMahon and Estrada declared that Plaintiff had said they would need more deputies to assist with Plaintiff's transfer, which they perceived to be a threat. With the other deputies there, Deputy Dailly returned the cane to Plaintiff so he could walk to the medical isolation cell.

When they reached the medical isolation cell, Plaintiff faced the wall opposing the door while Deputy Dailly unlocked the door. With the door open, Plaintiff turned and began to walk into the cell. The video footage shows that as Plaintiff entered the new cell, his arm remained outstretched—either maintaining a grasp on the cane or trying to reach for the cane that Dailly had in his own grasp—when Dailly closed the cell door. Deputy Dailly declares that he sought to take the cane as he was concerned Plaintiff

might use it as a weapon. It appears the door hit the cane handle or part of Plaintiff's appendage prior to latching. The door moved forward to close, slightly retreated backward upon coming into contact with something, and then resumed its forward travel and latched. Dailly appeared to use average force to close the cell door. The incident took place over three seconds.

Plaintiff states that, as a result of the door hitting him, his forearm was swollen and his fingers could not squeeze anything. He pushed the emergency button for help. Deputy McMahon and Dr. Alfred Joshua, Chief Medical Officer of the San Diego Sherriff's Department, declare that medical staff were unable to treat Plaintiff that night because he was acting unpredictably. However, Deputy Dailly provided Plaintiff with three Tylenols that evening.

The next morning, on October 3, 2014, Dr. Martinez examined Plaintiff's forearm and ordered an X-ray to rule out a fracture. On October 4, 2014, Plaintiff complained of chest pain and was taken to Tri City Medical Center. Cardiac tests were negative, and X-ray images of his left wrist and forearm were negative for fractures. At the time, Plaintiff was taking three pain medications. He received a sling for his arm.

On October 7, 2014, a jail nurse examined Plaintiff and noted that he was able to move his left fingers and that he remained on pain medications. Fifteen days after the incident, on October 17, 2014, Dr. Serra examined Plaintiff and noted that he was no longer taking two of the three pain medications. That same day, Deputy Brown observed Plaintiff doing pull-ups and push-ups in the medical housing unit. He warned Plaintiff that working out is not permitted in the medical ward. Deputy Brown prepared a report detailing the incident.

On October 21, 2014, Dr. Sadler examined Plaintiff, the fourth physician to examine his forearm. Plaintiff requested a referral to a neurologist for nerve damage to his arm, which Dr. Sadler thought unwarranted given her exam of him. Medical records indicate that Plaintiff complained that his left elbow had been hurting since he started doing push-ups. Plaintiff sought pain medication, but refused Motrin. Dr. Sadler noted

that Plaintiff showed decreased strength in his left arm but suspected it was due to poor effort on Plaintiff's part. The records also indicate that Plaintiff had been using his left hand spontaneously and was using his arm without difficulty when not being examined.

II. Legal Standards

a. The Court Has Authority to Reconsider Its Own Orders

The Court can reconsider its previous orders sua sponte. *See United States v. Smith*, 389 F.3d 944, 949 (9th Cir. 2004). Federal Rule of Civil Procedure 54(b) provides that "any order or other decision . . . that adjudicates fewer than all the claims . . . of fewer than all the parties . . . may be revised at any time before the entry of . . . judgment." Fed. R. Civ. P. 54(b). And Federal Rule of Civil Procedure 60(a) stipulates that the "court may correct . . . a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so . . . on its own, with or without notice." Fed. R. Civ. P. 60(a).

b. Summary Judgment

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is material if it might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "[F]acts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). A court need not accept the nonmoving party's version of the facts when it is contradicted by video evidence. *Id.* ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury

to return a verdict for that party." *Anderson*, 477 U.S. at 249.

c. Eighth Amendment Excessive Force Claims

To prevail on his excessive force claim, Plaintiff must prove that Defendant Deputy Dailly deprived Plaintiff of his rights under the Eighth Amendment to the Constitution when Dailly closed the door on Plaintiff's arm. The Eighth Amendment prohibits the imposition of cruel and unusual punishment. U.S. Const. amend. VIII. "[U]nnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment." *Furnace v. Sullivan*, 705 F.3d 1021, 1027 (9th Cir. 2013) (quoting *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)). However, the "Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" *Hudson*, 503 U.S. at 9-10 (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1986)); *see also Whitley*, 475 U.S. at 319 ("To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety."). Therefore, not every "malevolent touch by a prison guard gives rise to a federal cause of action." *Hudson*, 503 U.S. at 9.

To establish a claim for the use of excessive force, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 7. In conducting this inquiry, a court must consider (1) the need for application of force, (2) the relationship between that need and the amount of force used, (3) the threat reasonably perceived by the responsible officials, (4) any efforts made to temper the severity of a forceful response, and (5) the extent of the injury. *Id.* An inmate need not suffer a serious injury for force to be deemed excessive but the lack of serious injury is relevant to the analysis. *Id.*

In ruling on a motion for summary judgment, "courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives." *Whitley*, 475 U.S. at 322. "Unless it

appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain . . . , the case should not go to the jury." *Id.*

III. Discussion

Defendant Deputy Dailly contends that he did not intend to close the door on Plaintiff's forearm and that the incident was nothing more than an accident. (Dailly Decl. ¶ 5). By characterizing the incident as an accident, inquiries into whether the force was applied "maliciously and sadistically to cause harm" are irrelevant because Dailly's position is that he did not use force. However, even if the Court assumes that Dailly intentionally used force, no reasonable jury could return a verdict that Dailly's actions constituted cruel and unusual punishment.

The evidence establishes that the officers reasonably perceived Plaintiff's cane to be a security threat. (Dailly Decl. ¶ 5; McMahon Decl. 7; Defs.' Notice of Lodgment ("D-NOL") Ex. E, Officer Report). Plaintiff was in an agitated mood and had been capably walking around for several minutes without the use of the cane. Dailly "did not want [Plaintiff] to have the cane inside the cell in the event he would have been banging on the glass and possibly destroying jail property. Also, in the event he would have to be moved, he would not be able to use it as a weapon." (D-NOL Ex. E). Dailly sought to take the cane and place it on the outside of the cell door. (*Id.; see also* Pl.'s Notice of Lodgment ("P-NOL") Ex. G, Def. Dailly's Resp. to Pl.'s Interrog. No. 4 (explaining that canes are kept outside cells and provided to the inmate when he or she is escorted out of cell)). Dailly's decision is afforded deference. *See Whitley*, 475 U.S. at 321-22 ("Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline.").

Dailly closed the door as Plaintiff was either still holding the cane or reaching for the cane. Even if the Court assumes that Dailly deliberately applied force in closing the door, the amount of force applied was minimally necessary to close the door. Dailly applied enough force to actually close the door and secure release of the cane, but not so much that Plaintiff suffered significant injuries. Medical records indicate that Plaintiff did not suffer any fractures, did not need neurological evaluation, and was seen using his left arm shortly after the incident. The minor nature of Plaintiff's injuries suggests that the force applied by Dailly was *de minimis*.

Further, once the door hit Plaintiff's forearm (assuming that it did), it appears that Dailly immediately re-opened the door. Video evidence demonstrates that these events occurred in quick succession. Dailly did not hold Plaintiff's arm down and close the door on it. Nor did he hold Plaintiff's arm in the door once he realized it was caught. Instead, he acted quickly to release Plaintiff's arm.

Outlaw v. Newkirk, 259 F.3d 833 (7th Cir. 2001), is directly on point. In *Outlaw*, Cameron Mable, a prison guard, was attempting to distribute a pair of gym shorts to the prisoner plaintiff through a cuffport door, which is a small hatch within the cell door, when the plaintiff, holding some garbage, placed his hands in the cuffport. Mable, thinking that the plaintiff was attempting to throw the garbage out of the cell, closed the cuffport door on the plaintiff's hand. The plaintiff filed suit, claiming that Mable violated his Eighth Amendment right to be free from cruel and unusual punishment by slamming his hand in the cuffport door causing severe pain, swelling, and bruising. Mable moved for summary judgment claiming that the incident was an accident or, alternatively, that it was a justified response to the threat posed by prisoners that try to attack or grab officers through the cuffport opening. The plaintiff responded by arguing that he was not attempting to throw trash at Mable and that Mable was retaliating for a grievance the plaintiff had filed earlier against Mable. The district court granted Mable's motion for summary judgment and the Seventh Circuit affirmed, stating:

> [The plaintiff] cannot escape summary judgment even if his own account of the incident is accepted as true (that is, even if he was merely attempting to "place" rather than to "throw" the garbage through the cuffport when Mable closed the door on his hand). As we have noted, Eighth Amendment claims based on *de minimis* uses of physical force by prison guards are not cognizable unless they involve "force that is repugnant to the conscience of mankind." *Hudson*, 503 U.S. at 9–10. All of the evidence adduced in this case suggests that Mable had a legitimate security reason to close the cuffport door, whether [the plaintiff] was actually attempting to throw the garbage or merely holding it through the cuffport while uttering hostile words, and that in closing the door Mable applied only enough force to cause superficial injuries to [the plaintiff's] hand. Even viewing the facts in a light most favorable to [the plaintiff], a rational jury could draw one of only two possible conclusions: that the incident was an accident, or that Mable deliberately and perhaps unnecessarily applied a relatively minor amount of force to achieve a legitimate security objective. Neither scenario would involve a use of force that was "repugnant to the conscience of mankind."
>
> . . .
>
> [The plaintiff's] evidence does not suggest that his injury was more than minor, nor does it identify any other fact sufficient to raise a genuine issue on the question of whether Mable shut the cuffport door "maliciously and sadistically for the very purpose of causing harm."

Id. at 839–40.

Similarly, considering all the evidence and the *Hudson* factors, summary judgment is warranted because no reasonable jury could conclude that Dailly applied force "maliciously and sadistically to cause harm," rather than "in a good-faith effort to maintain or restore discipline." Even if the Court were to find Dailly's action to be an unnecessary application of force, the minor nature of the injury, the minimal amount of force used and the extremely brief amount of time that Plaintiff's arm was caught in the door, the absence of any other indicia of malice, and the security threat posed by Plaintiff and his cane lead the Court to conclude that Dailly's use of force does not rise to a constitutional violation. Stated another way, Dailly's use of force was not of the kind "repugnant to the conscience of mankind." *Hudson*, 503 U.S. at 10.

/ / /

Accordingly, the Court **GRANTS** summary judgment on Plaintiff's sole remaining claim of excessive force against Defendant Deputy Dailly. The action is **DISMISSED.**

IT IS SO ORDERED.

Dated: July 21, 2017

Hon. Roger T. Benitez
United States District Judge