

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth circuit

AUG 02 1990

ROBERT L. HOECKER
Clerk

DONALD GEE,

Plaintiff-Appellant,

v.

JOSEPH HASWELL, Leavenworth
County Deputy Sheriff,

Defendant-Appellee.

No. 90-3044
(D.C. No. 89-3226-S)
(D. Kansas)

ORDER AND JUDGMENT*

Before MCKAY, MOORE, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Donald Gee appeals the district court's order granting summary judgment in favor of defendant Joseph Haswell in this

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

civil rights action under 42 U.S.C. § 1983. After reviewing the record, we conclude summary judgment is appropriate and affirm the district court.

Mr. Gee alleges that on March 15, 1989, his constitutional rights were violated by Mr. Haswell while Mr. Gee was incarcerated in the Leavenworth County Jail, Leavenworth, Kansas. He claims that Mr. Haswell, a deputy sheriff, violated the Eighth Amendment prohibition against cruel and unusual punishment by hitting him in the eye while passing a telephone cord through a food slot opening on a cell door. Because we conclude there is no evidence in the record indicating that Mr. Gee sustained any trauma in his left eye, we affirm as a matter of law summary judgment in favor of Mr. Haswell.

I.

On the evening of March 15, 1989, jail employees at the Leavenworth County Jail placed a telephone through the food slot in the "A" tank door to allow Mr. Gee and other inmates in the "A" tank to call their families. After an hour, Mr. Haswell approached the "A" tank and asked that the inmates hand the telephone back out through the food slot. A verbal dispute arose between Mr. Gee and Mr. Haswell. Mr. Gee contended he did not get his turn to speak with his family, and Mr. Haswell commanded Mr. Gee to follow his directive. Eventually, Mr. Haswell unplugged the telephone from the outlet and put the cord through the feeding slot into the tank area.

One hour later, Mr. Haswell and deputy sheriff John Knight returned to the "A" tank area in response to banging on the door

by Mr. Gee. Mr. Gee told Mr. Haswell he had been hit in the eye by the telephone cord and by Mr. Haswell's hand when it passed through the slot. Mr. Gee filled out a medical request form and saw the jail physician, Dr. William McCollum, who recommended that Mr. Gee be taken to the emergency room at a local hospital. Mr. Gee was examined in the emergency room by Dr. James H. McMechan who diagnosed light conjunctivitis. He covered the eye with an eye patch and prescribed neosporin ophthalmic solution.

Mr. Gee continued to complain of pain and loss of vision in his left eye. Between March 19, 1989, and August 3, 1989, he submitted approximately twenty-four written medical request forms to the employees of the jail. Each of these complaints was responded to by the jail physician, and Mr. Gee was examined by ophthalmologists in the Leavenworth area and from the University of Kansas Medical Center.

Mr. Gee filed this § 1983 action against Mr. Haswell, alleging Mr. Haswell violated the Eighth Amendment prohibition against cruel and unusual punishment by throwing the phone cord through the food slot and hitting Mr. Gee in the left eye. The district court concluded defendant Mr. Haswell was entitled to summary judgment as a matter of law. Holding that Mr. Gee had to demonstrate that the guard's conduct involved "the unnecessary and wanton infliction of pain," the court determined Mr. Gee presented no evidence that would support a finding that Mr. Haswell acted with the purpose of causing harm to Mr. Gee. Thus, the court

concluded Mr. Gee failed to set forth facts sufficient for a jury to impose liability and dismissed the action.

II.

In reviewing the summary judgment order, we apply the same standard employed by the trial court under Fed. R. Civ. P. 56(c). Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141 (10th Cir. 1988). "It is the appellate court's duty to examine the record to determine if any genuine issue of material fact was in dispute; if not, the court must determine if the substantive law was correctly applied." Id. at 143. The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). We may affirm the granting of summary judgment if any proper ground exists to support the district court's ruling. Goichman v. City of Aspen, 859 F.2d 1466, 1468 (10th Cir. 1988).

After examining the record, we conclude that as a matter of law summary judgment was appropriate since there was no evidence that Mr. Gee suffered severe pain or lasting injury in his left eye. A prison guard's use of force against an inmate is "cruel and unusual" only if it involves the "unnecessary and wanton infliction of pain." Sampley v. Ruettgers, 704 F.2d 491, 495 (10th Cir. 1983). In Sampley, we set forth three requirements for an inmate to state a cause of action under the Eighth Amendment and § 1983 for an attack by a prison guard:

First, "wanton" requires that the guard have [sic] intended to harm the inmate. Second, "unnecessary"

requires the force used to have been more than appeared reasonably necessary at the time of the use of force to maintain or restore discipline. Third, "pain" means more than momentary discomfort; the attack must have resulted in either severe pain or a lasting injury.

Id. In its order, the district court focused on Mr. Haswell's intent and concluded that Mr. Gee presented no evidence to support a finding that Mr. Haswell acted with a purpose of causing harm to Mr. Gee. Although we find the district court erred because circumstantial evidence of Mr. Haswell's intent was in dispute, nevertheless, we conclude summary judgment was proper since there was no evidence of trauma in Mr. Gee's left eye.

The medical records and documentation submitted to the district court show the only evidence of any harm was the emergency room doctor's diagnosis of light conjunctivitis¹ within hours of the alleged injury.² Dr. W. Lee Murray, a local ophthalmologist who examined Mr. Gee, reported tests indicated Mr. Gee's left eye was functioning with binocular vision and there was no basis for his complaint of poor vision and persistent pain in that eye. When the University of Kansas Medical Center treated Mr. Gee within a month of his alleged injury, the ophthalmologist suspected malingering and found no reason for a follow-up examination. Finally, Dr. McCollum, the jail physician maintained, after reviewing all records of Mr. Gee's medical treatment and the

¹Conjunctivitis is the "inflammation of the conjunctiva," the mucous membrane covering the anterior surface of the eyeball and lining the lids. Stedman's Medical Dictionary 312 (5th. unabridged. ed. 1982).

²There was no effort made by the examining doctor to connect the conjunctivitis with trauma, and he speculated that the infection had "been going on for perhaps as much as a day." Therefore, the cause of the infection is undisclosed.

Leavenworth County Jail medical request forms, that "there was no evidence of significant injury to his left eye at any time." Therefore, we conclude the record does not support Mr. Gee's claim that he has a cause of action under the Eighth Amendment and § 1983 against Mr. Haswell.

The order of the district court is **AFFIRMED**. The mandate shall issue forthwith.

Entered for the Court

John P. Moore
Circuit Judge