IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

VINCENT E. MCGRIFF,
Plaintiff,

vs. **Case No: 3:07cv85/RV/MD**

OFFICER C.L. HALL and SERGEANT R.A. COWAN, et al.,
Defendants.

REPORT AND RECOMMENDATION

This case filed pursuant to 42 U.S.C. § 1983 is now before the court upon the defendants' motion for summary judgment (doc. 21). Plaintiff filed a response (doc. 24) and the court entered an order advising the parties of the importance and ramifications of Rule 56 summary judgment consideration, and informing the parties that the summary judgment motion would be deemed submitted on January 7, 2008. (Doc. 25). Plaintiff filed an additional declaration in opposition to defendants' motion for summary judgment (doc. 26). Upon consideration of the record before it, the undersigned recommends that the defendants' motion for summary judgment be denied for the reasons set forth herein.

Background

The record reflects that plaintiff is currently serving a life sentence at Martin Correctional Institution. The incidents described in the complaint took place in March of 2005 just after plaintiff's transfer to Santa Rosa Correctional Institution.

Plaintiff states that incident to the transfer, his property was inventoried by an Officer Butler who is not named as a defendant in this complaint. At the time, plaintiff questioned Officer Butler's disposal of some of his property that had been purchased from the inmate canteen. (Doc. 11, ¶ 3). Butler told him to sit down and not ask any questions. After the inventory was complete, plaintiff was directed to sit down and face the wall until the escorting officers arrived. Plaintiff states that he complied without a verbal response. (Doc. 11, ¶ 4). Defendants C.L. Hall and R. A. Cowan entered the visitation park where plaintiff was waiting. Defendant Hall allegedly approached plaintiff, sat behind him and whispered in plaintiff's ear "Inmate McGriff, I understand that you have a problem?" (Doc. 11, ¶ 6). Plaintiff turned his head to see who was talking to him and Hall shook his head and pointed a gloved finger towards the wall, and told plaintiff to face the wall. Plaintiff complied. (*Id.*) Hall then repeated his question about whether plaintiff had a problem, and after a brief exchange told plaintiff to get his property and come along. (Doc. 11, ¶¶7, 8).

Plaintiff states that when he and Hall reached the exit, Hall peered out the door, closed the door again and turned to face the plaintiff. (Doc. 11, ¶ 9). Cowan nodded his head, and Hall elbowed plaintiff twice in the ribs, grabbed plaintiff's left arm and pulled him through the door. (*Id.*) Hall maintained contact with plaintiff's left arm while they were walking to B-Dorm, plaintiff's assigned housing unit. During the walk, Hall told plaintiff that he was lucky that Hall didn't work at B-Dorm any more. (Doc. 11, ¶ 10). Cowan then stated that they still had the blindside of A-Dorms to "handle [their] business." When the three men reached the sidewalk near A-Dorm, Cowan began kicking plaintiff and stepping on plaintiff's leg irons, joined by Hall. (Doc. 11, ¶ 11). When plaintiff and the two officers reached the gate by A-Dorm, Hall picked plaintiff up and slammed him face first into the sidewalk, scraping his forehead against the concrete. (Doc. 11, ¶ 12). Hall stood on plaintiff's head and back as he lay on the sidewalk, then dismounted and placed a knee on plaintiff's

neck and kneed him several times in the back. (Doc. 11, ¶ 13). As plaintiff lay with the left side of his faced pressed into the sidewalk, Hall forced plaintiff's right eye open, rubbed his gloved finger against plaintiff's eyeball, stuck his finger in his own mouth and wetted it with saliva, stuck it in the dirt, then put the "wet spit sand" into plaintiff's right eye. (Doc. 11, ¶ 14). According to plaintiff, Hall then ripped the crotch of plaintiff's pants, reached his hand inside, squeezed plaintiff's testicles and fondled his penis and tried to stick his finger in plaintiff's rectum while "hunching" his crotch on the back of plaintiff's head. (Doc. 11, ¶ 15). Hall warned him that there would be "serious consequences" if plaintiff said anything about what had happened. He remained in position with a knee on plaintiff's neck until the shift commander and about 15 additional correctional officers arrived twenty minutes later. (Doc. 11, ¶ 16). Plaintiff was then escorted to medical where he received stitches above the left eye and the injuries to his forehead, knees and ankles were cleaned up. (Doc. 11, ¶¶ 17-18). The injury above plaintiff's left eye caused the eye to be completely closed for well over a week, and plaintiff needed medical care for all of his injuries for almost two weeks. (Doc. 11, ¶ 21).

After the incident, defendant Hall wrote plaintiff disciplinary reports (DR's) for disobeying an order and unarmed assault. Plaintiff asserts that these reports were falsified to cover up the assault. (Doc. 11, ¶ 22). Plaintiff was found guilty of the two DR's based on defendant Hall's written statements and sentenced to 90 days in disciplinary confinement. (*Id.*). Cowan wrote two witness statements with respect to the DR's. Cowan stated that he witnessed plaintiff disobeying an order, but that although he was present he did not witness the assault. (Doc. 11, ¶ 23).

Plaintiff claims that as a result of the defendants' actions, he suffered bodily injury resulting in pain and suffering, physical abuse, disfigurement, mental anguish, psychological injury and damage, humiliation and degradation. He seeks compensatory and punitive damages against both defendants, as well as injunctive relief.

The exhibits to the complaint[1] reveal that plaintiff has filed numerous grievances related to this matter, and that his complaints were reported to the Office of the Inspector General for investigation.

Plaintiff first filed an emergency grievance about the incident which was approved and referred to the Office of the Inspector General for investigation. (Doc. 11 at 14). In this grievance plaintiff stated that he did not slip and fall as he apparently had previously reported, but that he had only said that due to threats from Hall and Rowan. Plaintiff further stated that he was still being harassed, and referred to an unprofessional cell search.

On March 27, 2005, plaintiff filed an emergency grievance to Colonel Long regarding the use of force incident. (Doc. 11 at 14). In this grievance, he contends that he reported at the time that he had slipped and fallen due to threats from Officers Hall and Cowan, but that was not what had happened. He complained about continued abuse and harassment, including a cell search. The grievance was approved to the extent that his complaint was referred to the office of the Inspector General for investigation. (Doc. 11 at 14).

On the same date, he filed a grievance to Inspector Coe-Martin regarding the use of force incident. (Doc. 11 at 15). In this grievance, plaintiff explained that while he was being walked past A-Dorm, Officer Hall picked him up and slammed him face first to the sidewalk, which scraped plaintiff's face against the sidewalk, then positioned his entire body weight on top of plaintiff, kneeing plaintiff in the back, and told plaintiff that if he said anything about what happened he would face serious consequences. (Doc. 11 at 15-16). This grievance was also approved for the same reason.

On March 30, 2005 plaintiff filed an emergency grievance to the Secretary about the incident. (Doc. 11 at 19). He contended in this grievance that the officers

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[1]The complaint and the exhibits have been electronically docketed as a single pleading. Thus, for ease of reference, they will be referred to by their sequential page numbers in the court's electronic docketing system, rather than by the exhibit numbers assigned by the plaintiff.

falsified DRs against him to cover up the incident. Plaintiff's request for action was denied as the issue was under investigation by the Office of the Inspector General. (Doc. 11 at 19-21).

On May 11, 2005, plaintiff filed a grievance to Dr. Rummel regarding the allegedly improper medical treatment he received after his injuries. (Doc. 11 at 17-18). Relevant to this case, plaintiff described the force allegedly used by Officer Hall as he had previously, maintaining that Hall picked him up, slammed him to the sidewalk, put his entire weight on the plaintiff then kneed him in the back. Plaintiff described his injuries and the continuing pain he was experiencing after the incident. Dr. Rummel's response indicated that plaintiff had received proper medical treatment. (Doc. 11 at 17).

On May 17, 2005, plaintiff unsuccessfully appealed the issue of allegedly insufficient medical care to the Warden. (Doc. 11 at 22). His subsequent appeal to the Secretary on this issue was likewise denied. (Doc. 11 at 23-25).

On October 9, 2006, he filed an "emergency formal grievance" to the Secretary complaining of ongoing verbal abuse, medical neglect and retaliation. (Doc. 11 at 26). He mentioned the March 24, 2005 incident that is the subject of this complaint, among other things. This grievance was returned without action as it was not in compliance with the Inmate Grievance Procedure and was not accepted as a grievance of emergency nature. (Doc. 11 at 27).

Plaintiff submitted a copy of the DR charging him with disobeying an order , and his appeals of his conviction on this charge (doc. 11 at 28-32), as well as the DR for assault and his subsequent appeals. (Doc. 11 at 33- 37). He also filed a petition for writ of mandamus with the state circuit court with respect to the DRs that was dismissed for lack of jurisdiction due to its untimely filing. (Doc. 11 at 38-40).

Defendants have moved for summary judgment, claiming that there is no genuine issue as to any material fact and that they are entitled to judgment as a

matter of law. They assert that the fact that plaintiff was convicted of the disciplinary report charging him with unarmed assault precludes plaintiff's § 1983 claim.

Legal Analysis

Summary Judgment Standard

On a motion for summary judgment, this court must evaluate the record in the light most favorable to plaintiff as the nonmovant and grant defendants' motion only if the record demonstrates that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986); *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002); F.R.C.P. 56. The court must resolve all disputes and draw all inferences in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); see also *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11th Cir.1999). Summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Cornelius v. Highland Lake*, 880 F.2d 348, 351 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Id.*; *see also Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986). Finally, it is improper for the district court to make credibility determinations on a motion for summary judgment. *Miller v. Harget,* 458 F.3d 1251, 1256 (11th Cir. 2006); *Bischoff v. Osceola County,* 222 F.3d 874, 876 (11th Cir. 2000); *Harris v. Ostrout*, 65 F.3d 912, 916-17 (11th Cir. 1995); *Perry v. Thompson*, 786 F.2d 1093, 1095 (11th Cir. 1986); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1531 (11th Cir. 1987).

Heck v. Humphrey

Defendants argue that the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994) bars plaintiff's § 1983 claim. In *Heck* the Court held that "to recover damages for . . . harm caused by actions whose unlawfulness would render a conviction or sentencing invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486-487, 114 S.Ct. at 2372. A claim for damages that would render invalid a conviction or sentence that has not been invalidated is not cognizable under § 1983. *Id.* 512 U.S. at 487, 114 S.Ct. at 2372. However, if a successful § 1983 action by the plaintiff will not demonstrate the invalidity of a conviction or sentence, the action should be allowed to proceed. *Id.*

Defendants assert that plaintiff's claim is barred by *Heck* because judgment in his favor would call into question the validity of his disciplinary conviction. Defendants rely primarily on an unpublished case from the Seventh Circuit, *Wooten v. Law*, 118 Fed. Appx. 66, 2004 WL 2676624 (7th Cir. 2004); see also *Simmons v. Carriero*, 2000 WL 432793 (D.N.Y. 2000). In *Wooten*, a state prison inmate alleged that guards had beaten him for making insolent remarks without any other provocation. The guards, on the other hand, reported that inmate Wooten had threatened and physically resisted them. A disciplinary committee found Wooten guilty of assault, intimidation, and disobeying. Relevant here, Wooten brought suit alleging an Eighth Amendment excessive force claim, which the guards moved to dismiss as barred by *Heck*. The court held that a plaintiff's own allegations control whether his claim is barred by *Heck,* and because, accepting Wooten's allegations as true, his disciplinary conviction was "almost certainly" in error, his claim was barred. 2004 WL 2676624 *1. It further stated that the "theoretical possibility of a judgment for the plaintiff based on findings that do not call his conviction into

question is irrelevant if the plaintiff's own allegations foreclose that possibility." *Id.* at *2.

Although the facts of Wooten appear squarely on point with those in the instant case, this unpublished disposition has no precedential value even in the Seventh Circuit. Additionally, the "logical necessity" that is at the heart of the *Heck* opinion is not present here. A successful § 1983 suit by plaintiff would not "necessarily imply the invalidity of his conviction" for unarmed assault. *Heck*, 512 U.S. at 487 (emphasis added). The Court in *Heck* emphasized the importance of logical necessity with this example:

> **[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery and especially harmless error, such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.**

***Heck*, 512 U.S. at 487 n. 1 (citations omitted) (emphasis in original). Here, plaintiff's conviction of the DR for assault was based on C.O. Hall's statement in the disciplinary report, confirmed by investigation, that while he was escorting plaintiff, plaintiff attempted to break the custodial touch, jerked away and lunged towards Hall in an aggressive manner, resulting in Hall's use of force to prevent injury to himself. (Doc. 21, exh. A). According to plaintiff's uncontradicted description of events,[2] the use of force against him was premeditated. Furthermore, although none of plaintiff's grievances include details about Hall placing his finger in plaintiff's eye or sexually assaulting him after he was on the ground,[3] such actions clearly could not have been taken to "prevent injury" to the correctional officers and could not be construed as necessary to subdue him.**

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[2]Defendants have not submitted affidavits explaining their version of events.

[3]The court also notes that these details were included in plaintiff's petition for writ of mandamus to the state court, filed in December of 2006. (Doc. 24, exh. A).

Defendants have failed to distinguish, or even cite, an Eleventh Circuit decision analyzing and applying *Heck* that was published just six months before their motion was filed. *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007). The facts in *Dyer* are not as squarely on point as the unpublished case relied upon by the defendants, as *Dyer* did not involve the prison context. Nonetheless, the excessive force claim of plaintiff Dyer and the court's analysis of it is instructive here. In *Dyer*, the Eleventh Circuit held that "as long as it is possible that a § 1983 suit would not negate the underlying conviction, then the suit is not *Heck* barred." 488 F.3d at 879-880. That is, if even following a successful § 1983 suit "there would still exist a construction of the facts that would allow the underlying conviction to stand" the § 1983 suit may proceed. *Id.* at 880.

Plaintiff Dyer was convicted of resisting arrest with violence after kicking and physically resisting deputies who were arresting her on suspected DUI. Dyer, who had been cuffed with her hands behind her back, was removed from the patrol car to be re-cuffed after deputies noticed that she had moved her cuffed hands from behind her back to the front. According to the plaintiff, during this process she was shoved against the car, kneed in the leg and lower back and sprayed with pepper spray, and she apparently resisted and kicked the deputies. *Id.* at 878. After she was re-cuffed, Dyer was placed back in the patrol car, and one of the deputies allegedly opened the door to the vehicle and sprayed her again with pepper spray. The Eleventh Circuit found that "so long as the last act in the altercation was one of excessive force by the police, a § 1983 suit on that basis would not negate the underlying conviction." 488 F.3d at 882-883. Thus, the same rationale applies in the instant case. So long as the last act in the altercation was one of excessive or unconstitutional force by the correctional officers, a § 1983 suit would not, of necessity, negate the DR conviction, and thus would not be *Heck* barred. As the Seventh Circuit stated, upholding the application of *Heck* in such a case:

> **Would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while**

> **forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much force as they wanted – and be shielded from accountability under civil law–as long as the prosecutor could get he plaintiff convicted on a charge of resisting. This would open the door to undesirable behavior and gut a large share of the protections provided by § 1983.**

***Dyer*, 488 F.3d at 884 (citing *VanGilder v. Baker*, 435 F.3d 689, 692 (7th Cir. 2006)). The last acts described by plaintiff in this case were Hall's intentional scraping of plaintiff's face against the sidewalk after he had been thrown down, placement of a wet, dirty gloved finger in plaintiff's eye, a sexual assault, and the holding of Hall's knee on plaintiff's neck for at least fifteen minutes as he lay subdued on the ground. Such conduct may be sufficient to state an Eighth Amendment claim, and would not necessarily invalidate plaintiff's DR for assault. Under prevailing Eleventh Circuit law, plaintiff's claim therefore is not barred by *Heck*, and defendants' motion for summary judgment on this basis must be denied.**

Accordingly, it is respectfully RECOMMENDED:

That defendants' motion for summary judgment (doc. 21) be DENIED, and this case be referred to the undersigned for further proceedings.

At Pensacola, Florida, this 28th day of February, 2008.

/s/ Miles Davis
MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy hereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of any objections shall be served upon any other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; *United States v. Roberts,* 858 F.2d 698, 701 (11th Cir. 1988).