

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>JERITH T. SCOTT,</b>	)	
Plaintiff	)	Civil Action No.: 7:05cv00310
	)	
v.	)	
	)	<b><u>REPORT AND RECOMMENDATION</u></b>
<b>WARDEN DAVID BRAXTON,</b>	)	
<b>et al.,</b>	)	
Defendants	)	By: PAMELA MEADE SARGENT
	)	United States Magistrate Judge

Plaintiff, Jerith T. Scott, an inmate previously incarcerated at Red Onion State Prison near Pound, Virginia, (“Red Onion”), originally filed this action pro se for monetary damages under 42 U.S.C. § 1983 against 15 employees of Red Onion. By Memorandum Opinion and Order dated September 28, 2006, Glen E. Conrad, United States District Judge, entered summary judgment in favor of defendants Nurse Phipps, R. Fleming, D. Braxton and J. Armentrout, dismissing the claims against them. Scott’s remaining claims for excessive force and failure to protect against defendants K. McCoy, L. Fleming, G. Kendrick, S. Day, R. Phipps, R. Boyd, B. Berg, D. Fleming, M. Thacker, S. Fleming and J. Mullins were referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) to conduct an evidentiary hearing and to make a recommended disposition. The undersigned held an evidentiary hearing in this case on January 9, 2007. Based on the evidence presented, the undersigned recommends that the court find in favor of the defendants on Scott’s remaining claims.

## *I. Facts and Analysis*

The evidence before the court shows that Scott was an inmate at Red Onion on June 6, 2004.<sup>1</sup> On this day, by Scott's own admission, he purposefully broke the sprinkler head off of the fire suppression sprinkler in his cell, causing water to stream into the cell and out of the cell into the hallway. Scott further admitted that he repeatedly refused officers' orders to present himself at his cell door to be restrained so that he could be removed from the cell. Scott testified that he refused to present himself to be restrained because the officer in charge, K. McCoy, told him that "you're going to take an ass beating" whether he presented himself to be restrained or not. Scott testified that he told McCoy, "If you're going to beat me, I'm not going to put my hands behind me."

Scott admitted that he covered his face with clothing to avoid the effects of the use of pepper spray. Scott also admitted that, when an extraction team of correctional officers entered his cell to forcibly remove him, he purposefully threw a blanket over the electronic immobilization shield used by the officers to subdue an inmate. Scott stated that he threw this blanket over the shield to protect himself from being electrocuted by the shield, which emits an electrical shock, and to block the officers' view as they entered the cell. Scott claimed, however, that he offered no resistance to officers as they attempted to place restraints on him to remove him from the cell. Scott further claimed that, despite his lack of resistance, the officers brutally beat him, causing injury to his head and face.

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<sup>1</sup>Scott currently is incarcerated at Sussex I State Prison.

Scott testified that the officers took turns beating him in his head and face. He stated that one of the officers swung the shackles at his head but missed hitting him. Scott stated that, at one point, Officers Berg and Boyd were holding him up to allow the other officers to continue hitting him. Scott stated that he did not grab or punch any of the officers. Scott testified that he was struck 15 to 20 times before being placed in restraints and at least 30 some times after being placed in restraints. He stated that as soon as the officer took him down to the bed, he balled up to protect himself and stopped resisting. He stated that the officers placed him in restraints, but continued to strike him. He stated that he specifically remembered Day, Phipps, Thacker and Fleming striking him after he was restrained. He stated that the officers kept telling him to stop resisting after he was already placed in restraints.

As a result of this incident, Scott said that his face was beaten so badly that he could not recognize himself. He testified that his lip was cut and that he suffered other cuts on his eye and head. Scott claims that his left eye was damaged so that it caused him to become myopic in that eye, requiring eyeglasses to correct his vision.

Four inmates who also were housed in the A Building at Red Onion on June 6, 2004, testified regarding their knowledge of this incident. Mikal Corbett testified that, on this date, he was housed in Cell A-520, the cell directly above Scott's cell. Corbett stated that he witnessed the extraction team in riot gear as it prepared to enter Scott's cell. He stated the team included Officers Day, Fleming, Thacker and Kendrick. Corbett stated that he witnessed Day lead the officers into Scott's cell holding the shield. Corbett admitted that he could not see inside Scott's cell, but that he heard a lot of banging after the extraction team entered Scott's cell. Corbett testified that he heard Scott screaming, "No resisting, I'm not resisting." He stated that he heard

officers tell Scott to stop resisting.

Corbett stated that when Scott was removed from the cell, he observed bruising on his face and blood coming from Scott's mouth or nose. Corbett stated that he observed correctional officers laughing and smiling after the incident. Corbett stated that the next time he saw Scott, his face was severely bruised and remained bruised for approximately two months.

Inmate Slimero Grimes testified that he was housed in cell 318 on the upper tier in the A Building at Red Onion on June 6, 2004. Grimes stated that he could not see what occurred in Scott's cell when the extraction team entered, but he stated that it sounded as if someone was being hit with shackles or handcuffs. Grimes said that he heard the officers tell Scott to stop resisting. Grimes testified that he witnessed the officers cheering and giving each other "high fives" after the incident. Grimes stated that when he saw Scott after the incident, his nose was purple and blue and the skin under one of his eyes was scraped.

Inmate Esau Shaw stated that he was at recreation on June 6, 2004, when the officers brought him back into to his cell, cell 316, in the A Building because of the need to extract Scott from his cell. Shaw testified that he saw Day, Fleming, Phipps and Thacker enter Scott's cell. Shaw testified that he saw the officers take Scott down to the floor and then start pushing his head down to the floor. Shaw stated that he saw Phipps hit Scott with the restraints after Scott's hand were restrained behind his back. Shaw testified that he saw Day and Phipps raise Scott up after he was placed in restraints and then one of these two hit Scott in the face with a set of restraints. Shaw stated that he saw Scott bleeding from his face as the officers led him to the shower.

Shaw stated that, after the incident, he saw the officers patting each other on the back. Shaw testified that Scott's left eye was swollen and discolored after the incident and showed signs of injury for two to three months afterward.

Inmate Ahoto Mulazim testified that he was housed in cell 306 in the A Building at Red Onion on June 6, 2004. Mulazim admitted that he could not see anything that occurred in Scott's cell after the extraction team entered. Mulazim stated that he heard screaming while the team was in Scott's cell and saw Kendrick run into Scott's cell with his hand balled up. When Scott was removed from the cell, Mulazim stated that he observed blood coming from Scott's mouth. He also testified that he saw the officers cheering after the incident. Mulazim stated that he observed bruising on Scott's face after this incident and he noticed that Scott started wearing glasses.

Captain Kevin McCoy testified that he was the Watch Commander in charge at Red Onion on June 6, 2004. McCoy testified that he was called to Scott's cell, cell A-310 in the A3 pod of the A Building. When he arrived at the cell, Scott had broken the head off of the sprinkler located in the cell and water was coming out from under the cell door. McCoy stated that he went to Scott's cell and asked Scott to present himself to the cell door to be restrained to be removed from the cell. McCoy stated that Scott ignored several orders to present himself to be restrained and began wrapping items around his face. McCoy stated that at one point Scott said, "This is war."

McCoy stated that after approximately 15 to 20 minutes of attempting to convince Scott to present himself to be restrained, he told Scott that he was ordering

him one last time to present to be restrained or he would disburse pepper spray into his cell. McCoy said he asked Scott, "Are you coming out?" Scott responded, "No, this is war." At that, McCoy had officers disburse pepper spray into the cell. After that, McCoy said that he gave Scott another order to back up to the door to be restrained. When Scott refused, the extraction team went into the cell.

McCoy stated that the five-person extraction team is led by an officer carrying a concave shaped electronic shield, which is used by the lead officer to hold the inmate down while the other officers restrain him. McCoy stated that Officers Day, Randy Phipps, Randy Boyd, Bryan Berg and Matt Thacker made up the extraction team that entered Scott's cell on June 6, 2004. McCoy also stated that a videotape recording was made of this incident.

McCoy stated that Scott met the extraction team with force when they entered the cell by throwing a wet blanket over the shield. McCoy stated that Scott then swung at the officers. McCoy stated that Scott began kicking, swinging his arms and screaming. McCoy stated that as soon as Scott was placed in restraints, he was taken to the shower to rinse off the pepper spray. McCoy stated that it took the officers only three to five minutes to restrain Scott and bring him out of the cell. McCoy stated that he personally observed the entire incident and did not see any officer strike Scott after he was placed in restraints.

McCoy stated that Officers S. Fleming, Mullins and D. Fleming had no role in the extraction of Scott from his cell on that date. McCoy stated that S. Fleming and Mullins were sweeping water out of the floor and D. Fleming was dealing with the rest of the pod. McCoy stated that Kendrick did administer the pepper spray into

Scott's cell and helped supervise the extraction and L. Fleming helped supervise the extraction.

Officer Kendrick testified that he was the Building Sergeant for the A Building on June 6, 2004. Kendrick stated that Scott became very angry and aggressive after officers earlier in the day had found two televisions in his cell in violation of prison policy and had confiscated them. Kendrick stated that he did not participate in the cell extraction, except to step in and assist Phipps when his helmet became dislodged during the struggle and was choking him. Kendrick specifically stated that he did not strike Scott. Kendrick also stated that he did not see anyone strike Scott after he was placed in restraints.

Officer Lafayette Fleming stated that when he arrived at Scott's cell door, he observed water coming from under the door and Scott inside the cell with cloth tied across his face. L. Fleming stated that he observed that Scott was near the back of the cell and was going back and forth between the bed and toilet messing with something. L. Fleming stated that, based on this behavior, he was concerned that Scott possessed a weapon. L. Fleming stated that he played no role in the extraction, other than to step in to remove the immobilization shield after it was discarded and to help Officer Phipps remove his helmet. L. Fleming stated that he repeatedly told Scott to stop resisting and to stop grabbing the officers. L. Fleming stated that once Scott was placed in restraints he was stood up, removed from the cell and taken to the shower. L. Fleming stated that he did not strike Scott.

Sergeant Stacy Day stated that when Scott was being pulled for recreation earlier in the day on June 6, 2004, officers discovered two televisions in his cell. Day

stated that prison policy allowed inmates to have only one television in their cells. Officers confiscated the televisions and told Scott that one of them would be returned when it was determined which one of them he had permission to have.

Day stated that, later that same day, he was called to the A Building to be a member of the extraction team to remove Scott from his cell. When he arrived at Scott's cell, Day stated that large amounts of water were coming out from under the cell door. He stated that Scott had wrapped clothing around his face and was pacing back and forth in his cell. Day stated that he was the first man on the extraction team to enter Scott's cell. Day stated that he entered the cell carrying the immobilization shield. Day stated that Scott came toward him and threw a blanket over the shield, blocking his view. Day stated that he dropped the shield and grabbed Scott and took him down. Day stated that Scott was swinging his fists and that he swung his fists toward Scott. Day stated that, while he threw blows in Scott's direction, he does not know whether or not he hit Scott. Day stated that he physically forced Scott down onto the steel bed. Day stated, "I did what I could do to get him under control."

Office Randy Phipps stated that he was working in the C Building of Red Onion on June 6, 2004, when he was called to the A Building to participate in the extraction of Scott from his cell. Phipps stated that he was the second officer into Scott's cell and that his responsibility was to try to restrain one of Scott's arms. Phipps stated that when the door to Scott's cell was opened, Scott came toward the extraction team. Phipps stated that he and Officer Day took Scott down. He stated that Scott was being very combative and throwing punches. Phipps stated that Scott struck Phipps's helmet with his closed fist and broke an attachment. Phipps stated that Scott then grabbed the gas mask Phipps was wearing and shoved it back on Phipps's head.

Phipps stated that he threw two punches with his fist closed in Scott's direction. Phipps stated that his fist hit something, but he could not see what because of the position of the gas mask on his face. Phipps stated that Scott then let go of his gas mask. Phipps then turned and sought help because the strap of his helmet was preventing him from being able to breathe. After Phipps's helmet was removed, he was able to grab Scott's right arm and force it behind Scott's back. After Scott was placed in restraints, Phipps took him to the shower.

Officer Matthew Thacker stated that he also was a member of the extraction team which removed Scott from his cell on June 6, 2004. Thacker stated that he was the third person on the extraction team to enter Scott's cell, and that he was responsible to trying to restrain Scott's left leg. Thacker stated that as the team entered the cell, Scott approached the team and threw a blanket over the shield. Thacker stated that as he reached down to grab Scott's leg, Scott grabbed Thacker in his groin area. Thacker stated that he struck Scott to break Scott's grip on his groin area. Thacker stated that it took several attempts to restrain Scott's leg. Thacker stated that during this incident he saw a hand come up and Phipps's helmet was displaced. Thacker stated that he did not see anyone, other than himself strike Scott.

Officer Randy Boyd stated that he was working outside of the C Building at Red Onion on June 6, 2004, when he was called to participate in the extraction of Scott from his cell. Boyd stated that he was the fourth person on the extraction team to enter Scott's cell that day and that it was his responsibility to place restraints on one of Scott's legs and to place Scott in handcuffs. Boyd stated that as the officers entered the cell, Scott began punching and kicking. Boyd stated that he did not strike Scott or hold him down to allow other officers to strike him. Boyd stated that he was

concentrating on restraining Scott's legs during the incident and that he did not know how Scott's face and head were injured during the incident.

Office Bryan Berg stated that he was working in another building at Red Onion when he was called to participate in the extraction of Scott from his cell. Berg stated that he was the fifth person on the extraction team to enter Scott's cell and that he was responsible for attempting to restrain Scott's right leg. Berg stated that, when the team entered the cell, Scott was combative, kicking and punching at the officers. Berg stated that he was not struck by Scott, but that he saw Scott grab the thigh of Officer Thacker. Berg stated that he saw Thacker strike Scott's hand one time to get Scott to release his grasp on Thacker's thigh. Berg stated that he never struck Scott and did not see any other officer strike Scott.

Sergeant Drew Fleming stated that he was working in the B Building at Red Onion on June 6, 2004, when he was called to come to the A Building. When he arrived at the A Building he saw water coming from under the door of Scott's cell. D. Fleming stated that Scott was in his cell, refusing to present himself to be restrained. D. Fleming stated that he did not participate in, observe or supervise the extraction of Scott from his cell. Instead, D. Fleming stated that he was asked to supervise the remainder of the building while the extraction was taking place. In particular, D. Fleming stated that it was his responsibility to prepare an empty cell in which to place Scott after he was removed from his cell.

Officer Jared Mullins stated that when he arrived at Scott's cell on June 6, 2004, he saw water coming from under the cell door. Mullins stated that he was not a member of the extraction team and never entered Scott's cell. Mullins stated that he

was responsible for using a broom to push water out of the hallway floor.

Officer Samie Fleming stated that he was working at Red Onion on the day in question, but does not remember where or what he was doing. S. Fleming stated that he does not remember anything concerning the extraction of Scott from his cell on June 6, 2004. S. Fleming stated that he was not a member of the extraction team. In fact, S. Fleming stated that he has no memory of these events. He admitted, however, that a videotape recording of the incident shows that he was present in the area trying to push water out of the area and clean up.

A videotape recording of this incident was admitted into evidence. While the recording does not clearly show everything that occurred while the extraction team was present in Scott's cell, what it does show corroborates the officers' testimony and contradicts Scott's testimony. The recording shows that McCoy ordered Scott to present himself to be restrained on several occasions prior to ordering the extraction team into Scott's cell. Upon the team's entry into the cell, the camera's view of Scott is obstructed by the officers. The recording shows officers' arms moving, but does not clearly show any particular officer striking Scott. It is clear from the recording that a struggle ensued when the officers attempted to subdue Scott and place him in restraints. The recording also establishes that less than three minutes of time elapsed from the time the extraction team entered Scott's cell until he was placed in restraints, removed from the cell and taken to the shower. The recording further shows that no one struck Scott after he was placed in restraints and brought to his feet. The recording also shows that Scott did suffer injury to his mouth and around his left eye and that he was bleeding after the incident. The recording does not show any of the officers celebrating after the incident, although it does show several of the officers,

including McCoy, checking on members of the extraction team after the incident.

Scott argues that Day, Thacker, Phipps, Boyd, Berg, Kendrick and L. Fleming used excessive force against him in this incident and that McCoy, D. Fleming, S. Fleming, Boyd, Berg and Mullins failed to protect him from this use of excessive force, all in violation of the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishment." U.S. CONST. AMEND. VIII. This amendment not only prohibits excessive sentences, but it also protects inmates from inhumane treatment and conditions while imprisoned. *See Williams v. Benjamin*, 77 F.3d 756, 761 (4<sup>th</sup> Cir. 1996). The unnecessary and wanton infliction of pain by a prison official through the use of excessive force upon an inmate has been clearly established as a violation of the Eighth Amendment's prohibition on cruel and unusual punishment for a number of years. *See Hudson v. McMillian*, 503 U.S. 1, 5 (1992); *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The Eighth Amendment also requires prison officials to take reasonable measures to guarantee the safety of inmates. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984).

The determination of whether the use of force by a prison official violates the Eighth Amendment includes both a subjective and objective component. *See Williams*, 77 F.3d at 761 (citing *Wilson v. Seiter*, 501 U.S. 294, 302 (1991)). Not every malevolent touch by a prison guard amounts to a deprivation of constitutional rights. *See Hudson*, 503 U.S. at 9 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). To meet the objective component in an excessive force case, an inmate must show that he suffered more than de minimis pain or injury. *See Williams*, 77 F.3d at 761(citing *Hudson*, 503 U.S. at 9-10). Since mankind has devised some tortures that leave no lasting physical evidence of injury, the courts have recognized

that the objective component can be met by “the pain itself” even if the inmate suffers no “enduring injury.” *Williams*, 77 F.3d at 762 (quoting *Norman v. Taylor*, 25 F.3d 1259, 1264 n.4 (4th Cir. 1994) (en banc)). “A prisoner ... asserting malicious and sadistic use of force need not show that such force caused an ‘extreme deprivation’ or ‘serious’ or ‘significant’ pain or injury to establish a cause of action. ... All that is necessary is proof of more than *de minimis* pain or injury.” *Williams*, 77 F.3d at 761 (citation omitted) (emphasis in original).

To meet the subjective component in an excessive force case, the inmate must show that the prison official applied force “maliciously and sadistically for the very purpose of causing harm.” *Whitley*, 475 U.S. at 320-21. The inquiry under the subjective standard is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*, 503 U.S. at 7. The Supreme Court in *Whitley* set out several factors which should be considered in determining whether prison officials acted maliciously and sadistically. In particular, the court should 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; and
- 4) any efforts made to temper the severity of a forceful response.

*Williams*, 77 F.3d at 762 (citing *Whitley*, 475 U.S. at 321).

Given the evidence presented at trial, I first find that the injuries suffered by Scott in this incident meet the objective component of an excessive force claim. The

uncontradicted evidence shows that Scott suffered cuts and bruising to his face in this incident. Further, the evidence shows that the injuries to Scott's face, especially around his left eye, were so severe that it remained swollen and discolored for several weeks after this incident. That being the case, I find that Scott suffered more than de minimis injury as a result of this incident.

I do not, however, find that Scott has met his burden of proof on the subjective component of an excessive force claim. In making this finding, I specifically find the officers' version of events more credible than the version of events given by Scott. In particular, I find that Kendrick and L. Fleming did not apply any force to Scott on June 6, 2004. Both of these officers denied any use of force against Scott. Furthermore, the videotape evidence showed that these officers were not part of the extraction team and that they entered Scott's cell only to assist Phipps after his helmet became dislodged.

I further find that each of the officers on the extraction team, Day, Phipps, Thacker, Boyd and Berg, used only that amount of force necessary to subdue, restrain and remove Scott from his cell. It should be noted that the uncontradicted evidence establishes that Scott, himself, created the hazard that required his removal from his cell when he purposefully broke off the sprinkler head in his cell. Scott also created the need to use force to remove him from his cell when he refused orders to present himself to be restrained. While the officers admitted to grabbing and even punching at Scott, each of the officers stated that they grabbed at Scott in an effort to secure his arms and legs in restraints or they punched at him to either protect themselves against his punches or to break his grip on them or their equipment. The entire incident inside of Scott's cell took place in less than three minutes. Furthermore, the videotape

evidence does not show anyone striking Scott after he was placed in restraints and brought to his feet, in clear contradiction to Scott's testimony.

Because I find that the force used against Scott on June 6, 2004, was not excessive, I further find that Scott cannot prevail on his failure to protect claim against McCoy, D. Fleming, S. Fleming, Boyd, Berg and Mullins. Insofar as Scott claims that Boyd and Berg held him up so that other officers could strike him, I find that the videotape evidence clearly contradicts this version of events. I also specifically find that no evidence was presented that D. Fleming, S. Fleming or Mullins either participated in or supervised the extraction of Scott from his cell on this date.

For all of these reasons, I find that Scott has failed to meet his burden of proof on the excessive force and failure to protect claims, and I recommend that the court find in the defendants' favor on these claims.

### **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. The members of the extraction team, Day, Thacker, Phipps, Boyd and Berg, used force against Scott on June 6, 2004, but the amount of force used was only that force necessary to subdue, restrain and remove Scott from his cell;
2. The amount of force used by these officers, therefore, was not excessive;
3. Kendrick and L. Fleming were not members of the extraction team and did not use force against Scott on June 6, 2004;

4. D. Fleming, S. Fleming and Mullins did not participate in or supervise the extraction of Scott from his cell on June 6, 2004;
5. Because the amount of force used to remove Scott from his cell on June 6, 2004, was not excessive under the circumstances, McCoy, D. Fleming, S. Fleming, Boyd, Berg and Mullins did not fail to protect Scott from the use of excessive force;
6. D. Fleming, S. Fleming and Mullins did not participate in or supervise the extraction of Scott from his cell on June 6, 2004; and
7. The injuries suffered by Scott in this incident were more than de minimis.

### **RECOMMENDED DISPOSITION**

Based on the above-stated reasons, I recommend that the court find in the defendants' favor on Scott's excessive force and failure to protect claims.

#### **Notice to Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. § 636(b)(1)(c) (West 2006):

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and

recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen E. Conrad, United States District Judge.

The Clerk is directed to send certified copies of this Report and Recommendation to all counsel of record at this time.

DATED: This 21<sup>st</sup> day of March 2007.

*/s/ Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE