

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

ANDRE HUBBARD,)	
Plaintiff)	Civil Action No.: 7:07cv00021
)	
v.)	
)	<u>REPORT AND RECOMMENDATION</u>
B. CALTON, et al.,)	
Defendants)	By: PAMELA MEADE SARGENT
)	United States Magistrate Judge

Plaintiff, Andre Hubbard, an inmate incarcerated at Wallens Ridge State Prison, (“Wallens Ridge”), filed this action pro se for monetary damages under 42 U.S.C. § 1983 against B. Calton and B. McCray, two Wallens Ridge correctional officers, claiming that he was injured by their use of excessive force on July 16, 2005. By Memorandum Opinion and Order dated November 21, 2007, Glen E. Conrad, United States District Judge, denied the defendants’ motion for summary judgment and referred Hubbard’s claim 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 February 8, 2008. Based on the evidence presented, the undersigned recommends that the court find in favor of the defendants on Hubbard’s claim.

I. Facts and Analysis

The undisputed evidence before the court shows that Hubbard, an African American, was an inmate at Wallens Ridge on July 16, 2005, housed in the C-6

building or “pod.” On that date, defendants Calton and McCray, who are white, were working as correctional officers at Wallens Ridge.¹ The events at issue in this case occurred at approximately 4:30 p.m. as the inmates housed in the C-6 building were going to the Dining Hall for their evening meal. After the inmates, including Hubbard, left the C-6 building and lined up on the sidewalk crossing the recreation yard, an altercation broke out in the Dining Hall. The inmates were then ordered to return to the C-6 building, where they would receive their evening meals.

The undisputed evidence also shows that, as Hubbard approached the door to the C-6 building, Correctional Officer Givens ordered him to exit the line and stand with his face to the wall. Givens testified that he ordered Hubbard to exit the line because he intended to charge Hubbard with an institutional infraction and have him restrained and taken to segregation. After Hubbard exited the line, Givens ordered Hubbard to kneel on the ground so that restraints could be placed on his wrists and ankles. Hubbard complied with each of these orders.

Hubbard testified that, after lining up in the recreation yard to enter the Dining Hall on July 16, 2005, a correctional officer with a dog ordered the inmates to return to the C-6 building by saying “All ya’ll turn around and go back to the building like cattle.” Hubbard stated that he thought the comment was inappropriate. Hubbard testified that he approached Givens and asked for the officer’s name and a complaint form so that he could file a complaint against the officer. Hubbard testified that Givens told him, “You don’t need his name” and “we don’t like people like you who

¹McCray continues to work at Wallens Ridge, but Calton does not. Calton currently is employed by the Federal Bureau of Prisons at the United States Penitentiary in Lee County.

write paperwork.” According to Hubbard, Givens then asked him to step out of the line and stand facing the building wall. Hubbard testified that he followed Givens’s orders, including kneeling to be restrained and standing up so that he could be escorted to segregation. Hubbard claims that handcuffs were placed on both his wrists and his ankles.

Hubbard stated that, as he was being escorted to segregation, Calton and McCray pushed him down while making racial and threatening comments. According to Hubbard, Calton and McCray jumped on him and put their knees in his back and on his neck smashing the side of his face and chin into the concrete sidewalk. Hubbard stated that Sergeant Porchie ordered them to stand him up. After walking a few steps, Porchie told the officers to stop. Hubbard stated that a set of leg irons were thrown down out of a control room window, and Porchie had the handcuffs on his ankles replaced with the leg irons. Hubbard stated that when Calton and McCray pushed him to the ground, his hands were cuffed in front of his body. Significantly, Hubbard later testified that, as Calton and McCray escorted him to segregation, they kept pushing up on his arms, which he claimed were restrained behind his back.

Hubbard admitted on cross-examination that he had previously completed two separate grievance forms on July 25, 2005, one of which stated that he was assaulted by five officers, the other which stated that Givens, Porchie, McCray, Calton and two other officers jumped on him. Hubbard also admitted on cross examination that, in a previous letter, he had written that the officer with the dog had used the word “niggers” to order the inmates to return to their building. Hubbard stated that it was true that the officer had used this word, even though he had not included that in his testimony.

Hubbard claims that he sustained injuries to his back and neck in the incident, including a compression fracture in his L1 vertebrae. Hubbard claims that he has suffered from chronic back pain since the injury. He also claims that the handcuffs used on his ankles cut his ankles. He claims that his knees and legs were swollen after this incident, and that his ankles and knees have scars on them as a result of the injuries suffered in this incident. Hubbard claims that when a nurse from the medical staff examined him in segregation later that afternoon, the nurse put antibiotic ointment and two adhesive bandages on the cuts on his ankles. Hubbard claims that he also told the nurse that he had hurt his back, but that he was not given any treatment for his back pain.

Jim Serrac appeared and testified that he was the correctional officer working with the dog who ordered Hubbard and the other inmates to return to the C-6 building on the afternoon of July 16. Serrac claimed that, after being ordered to return to the building, Hubbard became disruptive and threatened both him and his dog by saying, "I can still kick your ass and your dog." Serrac stated that Officer Givens was not present when Hubbard made this first threat. As the inmates began returning to the C-6 building, Serrac said that Officer Givens came out of the building and overheard Hubbard again threaten Serrac and his dog. Serrac testified that Givens then ordered Hubbard out of the line of inmates returning to the C-6 building so that he could be charged with threatening Serrac and taken to the segregation housing unit.

Terry Givens appeared and testified that he was the correctional officer who ordered Hubbard to step out of the line of inmates returning to the C-6 building on July 16. Givens stated that he actually accompanied Hubbard and the other inmates

as they originally left the C-6 building to travel to the Dining Hall. He stated that he then walked along with the inmates as they returned to the C-6 building. Givens stated that he ordered Hubbard to step out of line because he was being disruptive and he intended to charge him with an institutional violation for threatening Serrac and his dog. Givens stated that when he observed Hubbard that afternoon, he was talking loud and being verbally abusive, raising his arms and stepping out of line. He stated that Hubbard came toward him in a threatening manner demanding a grievance form because he wanted to complain that Serrac had "belittled" him. Givens stated that he ordered Hubbard on three different occasions to get in line and stay in line and that Hubbard did not follow his orders. Givens admitted that Hubbard did follow his orders to step out of the line and to kneel down so that he could be restrained, although he claimed that Hubbard continued to be verbally disruptive during this time.

Sergeant James Porchie appeared and testified that when he arrived outside of the C-6 building on the afternoon of July 16, Hubbard was fully restrained and kneeling on the ground. Porchie stated that Hubbard was being very disruptive, cursing, fidgeting and not following orders. Porchie stated that he ordered Calton and McCray to escort Hubbard to the segregation housing unit. Porchie stated that, as the officers started to escort Hubbard, it looked like he tried to pull away from the officers and leaned toward Calton and the officers took him down to the concrete sidewalk. Porchie stated that Hubbard was taken down to the ground on the grass on another occasion before becoming compliant and being escorted to segregation. Porchie stated that he never overheard anyone make any racial or threatening statements to Hubbard.

Porchie specifically testified that Hubbard had leg irons and not handcuffs on

his ankles when he saw him that afternoon. More importantly, he specifically denied that he had someone throw him a set of leg irons from a control booth so that he could replace the handcuffs on Hubbard's ankles with leg irons.

Calton testified that when he arrived outside of the C-6 building on the afternoon of July 16, Hubbard was fully restrained and was kneeling on his knees. Calton stated that Hubbard was being very verbally disruptive and that he overheard Hubbard threaten Serrac and his dog. Calton testified that, as he and McCray were escorting Hubbard to the segregation housing unit, Hubbard stopped walking and said he wasn't "f—ing walking anymore." Calton stated that McCray was on Hubbard's right side and that he was on Hubbard's left side. Calton said that Hubbard then moved toward him, as if he was attempting to head butt him. Calton said that he and McCray then placed Hubbard down on the concrete sidewalk. Calton stated that Hubbard continued to be verbally disruptive while on the ground and that he pinned Hubbard to the ground by placing one knee on Hubbard's left shoulder blade. Calton stated that he took Hubbard down to the ground because he felt threatened by Hubbard's actions.

Calton stated that after Hubbard calmed down, he and McCray helped him to his feet to again attempt to escort him to the segregation housing unit. Calton stated that Hubbard again became disruptive and lunged toward him in another effort to head butt him. Calton stated that he and McCray placed Hubbard down on the ground in the grass on this occasion. Calton stated that when Hubbard agreed to be compliant with their orders, they again assisted him to his feet and escorted him without additional incident to the segregation housing unit.

Calton specifically denied making or overhearing anyone else make any racial or threatening statements to Hubbard. Calton denied slamming Hubbard's head or chin into the concrete sidewalk or placing his knee on Hubbard's neck or lower back. Calton stated that, when Hubbard was on the ground, McCray's knees were not on Hubbard's back or neck. Calton stated that he and McCray used only that amount of force necessary to protect themselves and Hubbard.

McCray testified that when he and Calton approached Hubbard on the afternoon of July 16, Hubbard was acting aggressive and cursing. McCray testified that Hubbard kept saying that he "would kick Serrac's and his dog's asses." McCray stated that when he and Calton first stood Hubbard up, he was "squirming." McCray stated that he was on Hubbard's right side and Calton was on Hubbard's left. He stated that he and Calton had to place Hubbard on the ground twice while they were escorting him to the segregation housing unit. On the first occasion, McCray stated that Hubbard tried to head butt Calton. On the second occasion, McCray testified that, after taking only a couple of steps, Hubbard lunged more forcefully toward Calton. McCray stated that Hubbard was being very aggressive and that he and Calton used only that amount of force necessary to ensure their and Hubbard's safety.

McCray specifically denied making or overhearing anyone else make any racial or threatening statements to Hubbard. McCray also specifically denied that he ever placed either of his knees on Hubbard's neck or back area. McCray further denied that anyone ever smashed Hubbard's chin against the concrete.

Marsha Stanford appeared and testified that she was the custodian of the inmate medical records at Wallens Ridge. Stanford testified that Hubbard's medical records

show that upon his transfer to segregation on July 16, 2005, he was assessed by a nurse who recorded that Hubbard complained of only a couple of places on his heels caused by the restraints. According to Stanford, the records show that some ointment and BandAids were applied to small scratches on each of Hubbard's heels. Stanford said that the nurse's report does not include any complaint of injury to or pain in Hubbard's neck or back.

Stanford stated that Hubbard's medical records do reflect that he complained of pain in his neck on July 18, 2005, after being hit in his neck the previous Saturday. Hubbard's medical records also show that on July 20, 2005, Hubbard complained that officers had held him down on July 16 and had hurt his neck. The medical records reflect that Hubbard did not complain of back pain after this incident until July 21, 2005.

The court also has reviewed two videotape recordings dating from the date and time of this incident. One of the videotape recordings is of the recreational yard outside of the C-6 building and the other is of the area around one of the entry doors of the C-6 building. On first review, it would appear that these recordings contain little, if any, evidence, to support either side's version of events. After exhaustive review in court with the parties, and a more thorough review in chambers, it appears that these videotape recordings do show at least two important facts. First, the videotape recording of the recreational yard shows that only one minute of time elapsed from when Calton and McCray first began escorting Hubbard until they resumed escorting him across the yard without incident after taking him down twice. Second, the videotape recording of the entry door area shows that, as Calton and McCray began escorting Hubbard, Hubbard's head did indeed turn to the left toward

Calton.

Hubbard argues that Calton and McCray used excessive force against him in this incident 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 (4th 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 the hearing, I find that Hubbard has not 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 Hubbard. While I find that Calton and McCray did use

force on Hubbard on two occasions on July 16, I find that they used only that amount of force necessary to subdue and control Hubbard and to protect Hubbard and themselves. Therefore, I recommend that the court find in the defendants' favor on Hubbard's excessive force claim.

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. Defendants B. Calton and B. McCray used force against Hubbard on July 16, 2005, but the amount of force used was only that force necessary to subdue and control Hubbard; and
2. The amount of force used by these officers, therefore, was not excessive.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court find in the defendants' favor on Hubbard's excessive force claim.

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 26th day of February 2008.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE