COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1935

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FRANK T. WHITE,

PLAINTIFF-APPELLANT,

V.

RICHARD RAEMISCH, DEPUTY CASPER AND DEPUTY DAY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Frank White appeals from a summary judgment order dismissing his civil rights action against two Dane County deputy sheriffs. He says the trial court erred when it determined that the deputy sheriffs were

protected by qualified immunity against his claims of excessive force and deliberate indifference to his medical needs, and when it refused to allow him to amend his complaint to include an additional defendant and claim under the Americans with Disabilities Act.

BACKGROUND

¶2 On February 26, 1999, White filed a complaint against former Dane County Sheriff Richard Raemisch and Deputy Sheriffs Todd Kasper[1] and Steven Day seeking damages under 42 U.S.C. § 1983 for civil rights violations. White alleged that Kasper and Day had used excessive force while transporting him to a segregation cell in the Dane County Jail, and that they and other staff had subsequently denied him appropriate medical treatment and ordered him to get up to obtain his food and medication when he was supposed to be on bed rest. He claimed that he eventually needed surgery to repair an abscess in his pelvic region which he says was caused by the deputies' treatment of him.[2]

¶3 The trial court dismissed Raemisch from the suit because there was no allegation that he was directly involved in any of the conduct complained of, and White does not challenge that decision. White subsequently attempted to add Dr. George Daley to the suit along with an additional claim under the Americans with Disabilities Act.[3] The trial court denied that motion because it found no

[1] Although the caption, the pleadings, and briefs all refer to Deputy Casper, one of the incident reports was signed by Todd Kasper. We will refer to the deputy by the name Kasper, on the assumption that he provided the correct spelling of his own name.

[2] In his appellate brief, however, White seems to suggest that the abscess was actually caused by a stitch which was mistakenly left inside him during a prior surgery.

[3] Neither White's motion nor a transcript from a telephonic hearing at which it was discussed have been included in the appellate record. However, the record does include the minutes from the hearing and the trial court's order disposing of the motion.

correlation between the proposed ADA claim and the 42 U.S.C. § 1983 claims which were already the subject of the suit.

¶4 The deputies moved for summary judgment on the grounds of qualified immunity. White submitted an affidavit in opposition to summary judgment in which he reiterated his allegations from the complaint that one of the deputies had twisted his arm behind him while they were transporting him to the segregation unit, despite his complaints of pain and his lack of resistance, and that, once they arrived at the segregation cell, one of the deputies grabbed his pant cuff and pulled his legs out from under him so that he fell onto the concrete striking his face, left shoulder, and pelvis. He added that the deputies then uncuffed him and left the cell laughing. White also averred that he had severe swelling in his elbow and continuing numbness in three fingers as a result of the deputies' treatment of him. He attached a progress note sheet from the Dane County Jail which indicated medical staff had examined White on the day following the incident and documented the swelling and his complaints of pain.

STANDARD OF REVIEW

¶5 We apply the same summary judgment methodology as that employed by the circuit court. *See* WIS. STAT. § 802.08 (1997-98)[4]; ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *See* ***Dunn***, 213 Wis. 2d at 368. If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the

[4] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

moving party's affidavits to determine whether they establish a prima facie case for summary judgment. *See* ***id***. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. *See* ***id***.

ANALYSIS

¶6 42 U.S.C. § 1983 provides a federal cause of action against one who deprives another of a constitutionally guaranteed right. However, government officials are shielded from civil liability for discretionary actions taken in the performance of their duties unless the right violated was clearly established by analogous case law or the conduct was so plainly egregious that the official ought to have known his conduct was improper. *See* ***Rice v. Burks***, 999 F.2d 1172, 1174 (7th Cir. 1993).

¶7 White claims that the deputies violated his constitutional right to be free from cruel and unusual punishment. *See* U.S. CONST. amend. VIII. Cruel and unusual punishment includes the unnecessary and wanton infliction of pain by prison guards. *See* ***Whitley v. Albers***, 475 U.S. 312, 319 (1986). The test for determining whether a guard's use of physical force was necessary or excessive is whether the force "was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically" to cause harm. ***Hudson v. McMillian***, 503 U.S. 1, 6 (1992) (citation omitted). The de minimus use of force is excluded from constitutional recognition, however, when the type of force used is not "repugnant to the conscience of mankind." ***Id.*** at 9-10 (citation omitted).

¶8 Eighth Amendment protection also extends to the denial of medical care. *See* ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976). In order to prevail, the prisoner must objectively establish that a serious medical need was ignored, and

subjectively establish that the prison officials were deliberately indifferent to the prisoner's condition. *See* ***Gutierrez v. Peters***, 111 F.3d 1364, 1369 (7th Cir.1997); ***Santiago v. Leik***, 179 Wis. 2d 786, 793, 508 N.W.2d 456 (Ct. App. 1993). A "serious medical need" means that the illness or injury is sufficiently serious or painful to make the refusal of assistance uncivilized and should not be of the type that people who are not in prison do not seek medical attention for. *See* ***Cooper v. Casey***, 97 F.3d 914, 916 (7th Cir.1996). "Deliberate indifference" implies "an act so dangerous that the defendant's knowledge of the risk [of harm resulting from the act] can be inferred." ***Duckworth v. Franzen***, 780 F.2d 645, 652 (7th Cir. 1985). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the [Eighth Amendment….]" ***Whitley v. Albers***, 475 U.S. 312, 319 (1986).

¶9 Here, we are satisfied that the rough grasp of White's arm while transporting him to solitary confinement was a de minimus contact which is not significantly repugnant to warrant constitutional attention. We are similarly satisfied that the deputies had a good faith basis for placing White on the ground in order to remove his handcuffs before leaving his cell. White has not cited any cases which would establish that force of the nature he alleges occurred rises to the level of an Eighth Amendment violation.

¶10 We are also unable to conclude that the facts White has presented establish that the deputies acted with deliberate indifference to White's medical needs. To the contrary, it appears that White was given medical attention on several occasions, beginning the day after the incident in question. The fact that he was dissatisfied with the care given cannot be attributed to the deputies. *See* ***Wolff v. McDonnell***, 418 U.S. 539, 562 (1974) (frustration and resentment are

commonplace in prison). There was no "obduracy and wantonness" in the treatment provided to White.

¶11 Finally, we are unable to review White's claim that the trial court erred in refusing to allow him to amend his complaint, because the record does not contain White's motion to amend or the transcript of the hearing on the matter. It is the appellant's responsibility to provide this court with an adequate record. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Given an incomplete record, "we must assume that the missing material supports the trial court's ruling." ***Id.*** at 27.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.