NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 2, 2024*
Decided May 24, 2024

Before

DIANE S. SYKES, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 23-1842

TROY HAMMER,
Plaintiff-Appellant,

v.

CHRISTOPHER BORTZ and
CHRISTOPHER OLSON,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 20-cv-202-wmc

William M. Conley,
Judge.

O R D E R

Troy Hammer, a former Wisconsin prisoner, sued two corrections officers under 42 U.S.C. § 1983 seeking damages arising from the officers' efforts to secure him in a restraint chair for transport to a suicide-watch unit. Hammer accuses Officer Christopher Bortz of using excessive force in violation of the Eighth Amendment and

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Lieutenant Christopher Olson of failing to intervene to stop the alleged constitutional violation. Ruling on the officers' motion for summary judgment, the district judge concluded that the evidence—including video recordings of the incident—could not support an inference that Officer Bortz acted maliciously to inflict pain rather than to maintain safety and order. And because there was no underlying constitutional violation, Lieutenant Olson could not be liable for failure to intervene. The judge accordingly entered judgment for both officers. We affirm.

We take the following factual account from the summary-judgment record, reviewing the evidence in the light most favorable to Hammer and drawing reasonable inferences in his favor as the non-moving party, *Moore v. W. Ill. Corr. Ctr.*, 89 F.4th 582, 590 (7th Cir. 2023), except to the extent that his account is clearly contradicted by the video evidence in the record, *see Scott v. Harris*, 550 U.S. 372, 380 (2007).

In November 2018 Hammer was serving a sentence in Wisconsin's Columbia Correctional Institution and was housed in the prison's restrictive housing unit. On the evening of November 6, Hammer cut his arm using a metal shard and yelled to guards that he was suicidal. A short while later, he interrupted the nightly distribution of medication by refusing to close his cell's trap door, so Lieutenant Olson responded to assess the situation. Hammer repeated that he was suicidal, showed Olson the laceration on his arm, and asked to be put on suicide watch. Olson initiated the steps necessary to move Hammer to a suicide-watch cell. Hammer did not comply with his directives. The parties disagree about the extent to which Hammer was uncooperative, but it's undisputed that his refusal to follow instructions prompted Olson to call for an extraction team to remove him from his cell.

Officer Christopher Bortz and several other officers responded, one of whom recorded the events with a handheld camera. Olson also captured the incident on his body-worn camera. The officers removed Hammer from his cell and restrained him without incident. They searched him and his cell for the metal shard but did not find it. The officers then escorted Hammer to the shower area for a strip search. A nurse arrived and treated Hammer's cut. Throughout the strip search, Hammer continued to threaten to harm himself, so the officers put him in a restraint chair equipped with shoulder straps. Officer Bortz attested that as he wheeled the restraint chair around to face a wall, Hammer began rolling his right shoulder to manipulate the shoulder strap and it fell off his shoulder. Hammer disputes that he was trying to manipulate the restraints, attesting that he merely "tried to readjust [himself] a few times" because he

was uncomfortable. The videos do not clearly resolve this dispute because Bortz's body blocks the handheld camera's view, and Olson's camera was pointed away.

The videos confirm, however, that the strap fell off Hammer's shoulder, and regardless of how it came loose, the unsecured shoulder strap was a safety concern. Bortz told Hammer to stop messing with the restraints and initiated a "compliance hold" by wrapping his fingers beneath Hammer's jaw and tilting his head backwards. Olson and the other officers then secured the strap. Hammer continued to protest that he was not manipulating the restraints. Once the strap was secure, Bortz released the hold. In all, the hold lasted less than a minute. Olson then called the mental-health unit, determined that Hammer did not need to be monitored, and returned him to his cell.

Hammer sued for damages under § 1983 accusing Bortz of using excessive force in violation of the Eighth Amendment and Olson of failing to intervene to stop him. The district judge screened the complaint and permitted the claims to move forward; the officers eventually moved for summary judgment. Bortz attested that he used the compliance hold because Hammer manipulated the restraints and made the shoulder strap fall off, had cut himself earlier in the evening, continued to threaten to harm or kill himself, and could have hurt himself or others if he escaped the chair. Hammer attested that he was only readjusting his body, that the strap was only "slightly" off his shoulder, that Bortz used a "pressure point" hold in violation of prison policy, and that he felt extreme pain during the hold. The officers maintained that Hammer did not report injuries traceable to the hold. But Hammer pointed to medical requests he filed after the encounter in which he had reported neck and back pain for which he blamed Bortz.

The judge entered judgment for the officers, explaining that a reasonable jury could not find that Bortz acted maliciously and sadistically in using force because there was no dispute that Hammer was moving around, that the strap was out of place, and that Hammer had cut his arm and was threatening to further harm himself. The judge noted that Bortz's response was proportionate because he held Hammer's head in place rather than yanking or pulling on him, he let go as soon as the strap was secure, Hammer was able to speak normally and did not struggle or cry out in pain, and the hold lasted less than a minute. Hammer's contention that he suffered extreme pain was undermined by the fact that he had been able to speak normally during the hold and did not immediately complain that he was in pain. Moreover, Hammer lacked evidence that the type of hold Bortz used violated prison policy or was meant to cause extreme

pain. Finally, the judge explained that Olson could not be liable for failing to intervene because the force Bortz used was not excessive.

Judgment was entered on January 25, 2023. Hammer did not file a notice of appeal within 30 days as required by 28 U.S.C. § 2107(a). In April, he inquired about the status of the case, and the judge sent him the summary judgment order. On April 28, Hammer mailed a notice of appeal and a declaration stating that he first received the court's dispositive order on April 21. We construed the declaration as a motion to reopen the time to appeal, *see* 28 U.S.C. § 2107(c); FED. R. APP. P. 4(a)(6), and directed it to the district judge. On June 27 the judge granted the motion to reopen, making the following findings pursuant to § 2107(c): (1) the docket did not reflect proper service of the order on Hammer; (2) Hammer filed his notice and declaration within 14 days of receiving the order; and (3) reopening the time to appeal would not prejudice any party.

Hammer did not file a new notice of appeal. In July he moved for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure and for sanctions under Rule 11, asserting that Bortz and Olson lied in affidavits supporting their summary judgment motion. The judge denied the motions, and Hammer did not appeal that order.

We begin with appellate jurisdiction. Although the officers have not raised a jurisdictional objection, we have an independent duty to ensure that jurisdiction is secure. *See India Breweries, Inc. v. Miller Brewing Co.*, 612 F.3d 651, 657 (7th Cir. 2010).

In civil cases, the timely filing of a notice of appeal is required for appellate jurisdiction. *Bowles v. Russell*, 551 U.S. 205, 209–10 (2007). Here, Hammer filed an untimely notice of appeal together with a declaration that we construed as a motion to reopen the time to appeal; he did not, however, file a new notice of appeal after the district judge granted the motion. Other circuits that have addressed this question have reached divergent conclusions on whether the failure to file a new notice of appeal after the time is reopened deprives the appellate court of jurisdiction. A divided panel of the Fourth Circuit concluded that an untimely notice of appeal does not spring into effect when a motion to reopen under § 2107(c) is granted; the court held that the appellant must file a new notice of appeal. *Parrish v. United States*, 74 F.4th 160, 165–66 (4th Cir. 2023). The Sixth Circuit reached the opposite conclusion, ruling that a second notice of appeal is not necessary; the court held that when a judge reopens the time to appeal under § 2107(c), the first notice "ripens when the [new] window to appeal begins."

Winters v. Taskila, 88 F.4th 665, 671 (6th Cir. 2023) (citing *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 273 (1991)).

Our practice has aligned with the Sixth Circuit's. *See Norwood v. E. Allen Cnty. Schs.*, 825 F. App'x 383, 387 (7th Cir. 2020); *Dobbey v. Miller*, 730 F. App'x 375, 376–77 (7th Cir. 2018). Neither § 2107(c) nor Rule 4(a)(6) expressly requires the appellant to file a second notice of appeal within the reopened window for appeal. Rule 4(a)(2) provides that a notice of appeal that is filed prematurely—after the court's decision or order but before entry of judgment—"is treated as filed on the date of and after the entry" of judgment. In that context, the rule recognizes that "certain premature notices do not prejudice the appellee and that the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal." *FirsTier Mortg. Co.*, 498 U.S. at 273. Like a premature notice of appeal under Rule 4(a)(2), the technical defect here did not prejudice the defendants: Hammer had already filed a notice of appeal with his declaration explaining that he had not received notice of the judge's summary judgment decision, which we construed as a motion to reopen the time to appeal. Moreover, the purpose of a notice of appeal is to give notice of the filing party's intent to appeal. *See Smith v. Barry*, 502 U.S. 244, 248–49 (1992). Here, Hammer's original notice did so; the problem was timeliness, and that defect vanished when the judge accepted Hammer's explanation and granted the motion to reopen. At that point—and as our practice reflects—his notice of appeal became effective. *See Norwood*, 825 F. App'x at 387; *Dobbey*, 730 F. App'x at 376–77.

Moving to the merits, Hammer argues that he presented sufficient evidence from which a reasonable jury could conclude that Bortz used excessive force. A prison official may be found liable for an Eighth Amendment violation if he used force against a prisoner "maliciously and sadistically to cause harm" rather than "in a good-faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992). That standard is subjective, *Lewis v. Downey*, 581 F.3d 467, 476 (7th Cir. 2009), so Hammer cannot prevail by showing that Bortz's use of force was unreasonable, *Whitley v. Albers*, 475 U.S. 312, 322 (1986). Instead, he must produce evidence to support "a reliable inference of wantonness in the infliction of pain." *Id.* The Supreme Court has identified several non-exhaustive considerations to guide this inquiry: (1) the need for the force; (2) the relationship between that need and the amount of force used; (3) the extent of any injury; (4) the threat reasonably perceived; and (5) efforts to temper the force's severity. *Hudson*, 503 U.S. at 7. (De minimis force does not raise Eighth Amendment concerns, *id.* at 9–10, but the defendants have not argued that Bortz's force was de minimis.)

Here, the first and fourth factors—the need to use force and the threat Bortz reasonably perceived from Hammer's conduct—weigh against Hammer. Bortz attested that he used the compliance hold because Hammer had cut himself, threatened to kill or further harm himself, was manipulating the restraints, loosened the shoulder strap, and could have hurt himself if he escaped the restraints. The videos confirm that the strap had indeed come off Hammer's shoulder. For the first time on appeal, Hammer says that he was not moving at all. But in the district court he attested that he was readjusting his position, so his own evidence does not match his new assertion that he was immobile. And Hammer admits that he had cut his arm earlier in the evening and continued to threaten to kill himself mere minutes before Bortz used the compliance hold.

Hammer argues that his threats of self-harm are irrelevant because he could not act on them once in restraints, but Bortz had a duty not to ignore the risk Hammer posed to himself if he were to shake free. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Given Hammer's undisputed self-harm, suicidal threats, movement in the restraint chair, and the risks posed by the loose shoulder strap, the record does not support a reasonable inference that Bortz needlessly used force or concocted a pretextual safety concern.

The second and fifth factors—the relationship between the need for force and the amount of force used, and the efforts to temper its severity—also weigh against Hammer. Bortz used force only until Hammer's restraints were secure. He held Hammer's head in place for less than a minute, and Hammer gave Bortz no reason to think that the hold was inflicting extreme pain. Hammer could speak normally, did not yell or otherwise complain of pain, and gave no other sign that he was in pain. And Bortz let go as soon as other guards refastened the shoulder strap. That response was proportionate to the risks Hammer posed if he were to break free. *Cf. Guitron v. Paul*, 675 F.3d 1044, 1045–46 (7th Cir. 2012) (slamming prisoner into wall after he disobeyed order to move was not excessive force). And because Hammer did not signal that he was in pain, Bortz had no reason to think that he needed to temper the force he was using.

Hammer maintains that Bortz overreacted by using a pressure-point hold that is designed to cause extreme pain. But he cites only his declaration as evidence that pressure-point holds are designed for that purpose. Affidavits must be based on personal knowledge, *Moore*, 89 F.4th at 593, and Hammer has never explained how he knows anything about pressure-point holds.

As for the third factor, the extent of any injury, Hammer offered some evidence in the district court that he experienced neck and back pain (although to an unknown extent). We do not second-guess Hammer's sworn statement that he experienced pain. But on appeal he does not mention any injuries, much less argue that his injuries (whatever they were) are evidence that Bortz knew he was in pain at the time, or that Bortz acted wantonly. In any event, given the evidence that Bortz was simply responding to risks associated with Hammer's self-harm, suicidal ideation, and possible escape, a reasonable jury could not infer from the mere fact of pain that Bortz acted maliciously or sadistically to cause harm.

Hammer also argues that Bortz violated prison policy by using the pressure-point hold and failing to warn him before using force. But he does not specify what law or policy he thinks Bortz violated, and the regulation governing use of force in Wisconsin prisons says nothing about holds or warnings. *See* WIS. ADMIN. CODE DOC § 306.07. Regardless, a violation of state law or prison regulations is not sufficient to demonstrate a violation of the Constitution. *Courtney v. Butler*, 66 F.4th 1043, 1052–53 (7th Cir. 2023).

Next, Hammer challenges the ruling for Olson. But a failure to intervene requires an underlying constitutional violation. *Rosado v. Gonzalez*, 832 F.3d 714, 718 (7th Cir. 2016). We have concluded that a reasonable jury could not find Bortz's use of force excessive, so Olson cannot be liable for failing to intervene.

Finally, Hammer challenges the denial of his Rule 60(b) and Rule 11 motions, but we lack jurisdiction to consider those arguments. A litigant who files a notice of appeal and later a Rule 60(b) motion (more than 28 days after judgment) must file a separate notice of appeal if the motion is denied; otherwise, the appellate court lacks jurisdiction to review that decision. *See* FED. R. APP. P. 4(a)(4)(A)(vi); FED. R. CIV. P. 59(b); *Sosebee v. Astrue*, 494 F.3d 583, 590 (7th Cir. 2007); *Goffman v. Gross*, 59 F.3d 668, 672–73 (7th Cir. 1995). The same is true of post-judgment Rule 11 motions for sanctions, which are collateral to the lawsuit. *See Keck Garrett & Assocs., Inc. v. Nextel Commc'ns, Inc.*, 517 F.3d 476, 488 (7th Cir. 2008). Here, Hammer appealed the summary judgment decision, then filed his Rule 60(b) and Rule 11 motions months after judgment, and he did not file a new notice after the judge denied them. We lack jurisdiction to review those rulings.

Hammer's remaining arguments are not developed enough to merit discussion.

AFFIRMED