

NONPRECEDENTIAL DISPOSITION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 January 5, 2023*

Decided January 20, 2023

Before

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-2085

BRIAN A. MAUS,
Plaintiff-Appellant,

v.

ROBERT LADE, et al.,
Defendants-Appellees.

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

No. 17-cv-65-pp

Pamela Pepper,
Chief Judge.

ORDER

Brian Maus sued several correctional officers at the Green Bay Correctional Institution, primarily alleging that officer Robert Lade sexually assaulted him during pat searches and that supervisor Mark Lesatz failed to intervene. *See* 42 U.S.C. § 1983. He also alleged that Lade and Lesatz retaliated against him for reporting the alleged

* 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).

conduct and that administrators conspired to cover up the assaults. The district judge dismissed a number of claims at screening and eventually ruled for Lesatz at summary judgment. Then, a jury found that Lade did not violate Maus's rights under the Eighth Amendment. Maus moved for a new trial, which the judge denied. Maus appeals each of these rulings, but we affirm.

Correctional officers regularly search those incarcerated at Green Bay when they pass through the prison's "rotunda" when moving between their housing units and other areas of the prison for meals, activities, and medical appointments. Kitchen workers—like Maus—are pat-searched on their way to and from work to prevent the exchange of contraband at meals and the removal of contraband items from the kitchen. Pat searches involve searching clothing, frisking the body, and inspecting the mouth.

Between January 2011 and June 2012, Lade either was present for or conducted nine pat searches out of a total of nineteen on Maus. Lesatz was the supervisor on duty for one of those. Maus filed three inmate complaints about searches performed by Lade, one of which asserted that Lade inappropriately groped Maus. (Maus later attested in this case that Lade sexually assaulted him by grabbing his genitals for several seconds, on six to nine separate occasions.) All of Maus's prison grievances regarding these incidents were rejected as unfounded, and the findings were sustained on the prison's administrative review.

Maus then filed suit under 42 U.S.C. § 1983. He alleged that Lade sexually assaulted him multiple times and that when told about an assault, Lesatz did not care. He further alleged that Lade and Lesatz retaliated against him after he said he would report the assaults. Lastly, he alleged that the other named defendants conspired to violate his rights and cover up the assault after they read his grievances.

At screening, the district judge pared Maus's complaint down to three claims against Lade and Lesatz. *See* 28 U.S.C. § 1915A. She allowed Maus to proceed on an Eighth Amendment claim against Lade for sexual assault and against Lesatz for failing to intervene. She also allowed a claim against both defendants for retaliation in violation of the First Amendment. But the judge dismissed the remainder of the complaint. She explained that, on these facts, none of the other defendants could be liable for dismissing his grievances or failing to investigate allegations of past misconduct and that Maus's allegations of conspiracy were too conclusory to state a claim.

Lade and Lesatz moved for summary judgment after discovery. They maintained that the pat searches followed prison policy: Lade searched each of Maus's legs for contraband using his forefinger and thumb with his palm facing down, beginning near the groin and continuing down to the ankle in search of any objects. In a declaration, Lade clarified that "[a]ny contact with the groin area is incidental to the search and done to make sure there is no concealed contraband," and that no searches were conducted to harass Maus. In his declaration, Lesatz explained that he was present for only one of the searches Maus complained of. He attested that, after that search, Maus told him that searches were a "game of harassment," and that he would file a grievance. Lesatz told him that doing so would not stop future searches necessary for prison safety. Lesatz attested that he never instructed anyone to single out Maus for searches. According to rotunda-search records, Maus was not disproportionately searched.

In response, Maus submitted an affidavit in which he described five separate occasions when Lade stopped Maus in the rotunda and "grabbed, felt, and touched" Maus's groin for several seconds. Maus attested that after the second assault, he informed Lesatz what Lade had done and threatened to report both officers, after which Lesatz told Maus that he would ensure Maus was searched every time he left his cell. Maus argued that, based on his version of the searches, Lade's conduct violated both prison policy and federal law, which forbid sexual harassment and assault. He further argued that Lesatz, as a captain, had a duty to protect him from Lade.

The judge entered summary judgment on all claims except the sexual-assault claim against Lade. The judge explained that Lesatz could not be liable for failing to stop the improper touching when there was no evidence that he saw it or knew that it was a regular occurrence. And Maus's retaliation claim against the officers failed too. First, Maus's threat to file grievances was not protected speech. Second, there was no evidence of retaliatory action by Lesatz after Maus's threat (such as being targeted for more searches). Third, even if Maus's version of events was true, Lade's actions predated Maus's threat to report the conduct and therefore were not retaliatory.

The judge recruited counsel to represent Maus at trial. After a motion in limine, the judge permitted Maus to attend the trial in person and in civilian clothes. But she denied Maus's request to be unrestrained and required that correctional officers sit with him throughout trial. Both Maus and Lade testified. The jury found for Lade, deciding he had not searched Maus in a harassing manner without any penological justification.

After the verdict, Maus moved for a new trial, arguing that his court-recruited lawyer made several decisions at trial that unfairly prejudiced him. The judge denied

Maus's motion. She determined that Maus's disagreements with his lawyer's trial strategy did not make the trial unfair or warrant a new one.

On appeal, Maus challenges the screening order, the summary judgment ruling, and the denial of his motion for a new trial. First, he argues that the judge erred when she dismissed the claims against certain officials at screening. We review the screening order de novo. *Schillinger v. Kiley*, 954 F.3d 990, 994 (7th Cir. 2020). Even drawing all inferences in Maus's favor, *id.*, we conclude that Maus failed to state a claim against the various officials (including complaint examiners and the warden) who dismissed his grievances or affirmed the dismissal on administrative review. Claims against these defendants were properly dismissed because prison officials "who reject prisoners' grievances do not become liable just because of...[their] inaction following receipt of a complaint about someone else's conduct." *Estate of Miller v. Marberry*, 847 F.3d 425, 428–29 (7th Cir. 2017). Further, the judge was correct that Maus's "bare assertions" and "conclusory" allegations that the officials conspired with each other failed to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009).

Maus next challenges the summary judgment ruling, which we also review de novo, while construing the evidence in the light most favorable to Maus. *See Stockton v. Milwaukee County*, 44 F.4th 605, 614 (7th Cir. 2022). Maus argues that the judge improperly entered judgment for Lesatz, who, Maus insists, did nothing to stop Lade's assault. However, the evidence showed that Lesatz did not see an assault and therefore did not have a "realistic opportunity" to stop it—a necessary element of a failure-to-intervene claim. *See Doxtator v. O'Brien*, 39 F.4th 852, 864–65 (7th Cir. 2022). To the extent that Maus also claims that Lesatz should be liable because Maus later informed him that Lade had assaulted him, this kind of derivative liability is not available under § 1983. To be liable, a supervisor must be "personally responsible" for a constitutional violation by acting with "deliberate, reckless indifference," *see Stockton*, 44 F.4th at 619, to the potential misconduct. *See Kemp v. Fulton County*, 27 F.4th 491, 498 (7th Cir. 2022). Maus reported the alleged misconduct only *after* it happened and did not inform Lesatz that it was an ongoing occurrence. Lesatz therefore had no advance notice of the specific incident or a pattern of misconduct. And there is no evidence that Lesatz was reckless in supervising rotunda searches. Moreover, a jury determined that there were no sexual assaults; therefore, Lesatz cannot be liable for failing to intervene or take responsive action. *See Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017).

Maus also contends that at summary judgment he proved that Lesatz ordered Lade to search Maus every time he left his cell as revenge for reporting the allegations.

But, as the judge explained, Maus's statement that he *would* file a grievance about the assault is not necessarily protected speech. See *Bridges v. Gilbert*, 557 F.3d 541, 555 (7th Cir. 2009) ("[I]t seems implausible that a *threat* to file a grievance would itself constitute a First Amendment-protected grievance."). Further, the record does not show that Maus "suffered a deprivation that would likely deter First Amendment activity in the future," *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012), because there is no evidence that Maus was in fact searched every time he left his cell or otherwise punished. Indeed, the search reports showed that Maus was not singled out.

Finally, Maus challenges the denial of his motion for a new trial, which we review for an abuse of discretion. *Lewis v. McLean*, 941 F.3d 886, 891 (7th Cir. 2019). Before discussing the merits, we note that Maus failed to include in the record transcripts of "all evidence relevant" to the district court's ruling on his motion, as required by Rule 10(b)(2) of the Federal Rules of Appellate Procedure. We chose not to order Maus to supplement the record with the trial transcripts because he was informed of this obligation twice (in the order to complete a transcript information sheet and in the appellees' brief), and he had time to correct the error but did not. See *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 731 n.10 (7th Cir. 2003). We could dismiss the appeal on this ground. *Morisch v. United States*, 653 F.3d 522, 529 (7th Cir. 2011). Given the nature of Martin's arguments on appeal, however, we can address his challenge to the denial of his new-trial motion even without the transcripts.

Maus maintains that he deserves a new trial because his pro bono counsel mishandled several issues in a way that prejudiced him. He argues that the jury would have found in his favor if his lawyer had reframed his claim as a violation of the Prison Rape Elimination Act, presented all evidence suggested by Maus, objected to more testimony, and challenged the presence of correctional officers in the courtroom. But a disagreement between lawyer and client over litigation strategy does not signify poor performance by the lawyer. Undoubtedly, Maus was better off with the generous assistance of counsel than if he had tried the case on his own. Regardless, we would not vacate a jury verdict based on an argument that a civil plaintiff received ineffective assistance of counsel at trial. *Stanciel v. Gramley*, 267 F.3d 575, 581 (7th Cir. 2001). Even if a lawyer were to perform deficiently—and we see no evidence of that here—reversal would not be warranted because civil litigants like Maus have no constitutional right to counsel. *Diggs v. Ghosh*, 850 F.3d 905, 911 (7th Cir. 2017).

AFFIRMED