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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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FILED
Feb 28, 2020
DEBORAH S. HUNT, Clerk

In May 2014, Vaughn filed a complaint under 42 U.S.C. § 1983 against Hawkins, Cureington, and Odell, claiming that they removed him from his cell, beat him severely, and then placed him in solitary confinement for three days without any clothes. Vaughn also claimed that the defendants retaliated against him for filing grievances. The district court granted Vaughn's

motion to proceed in forma pauperis, and his individual-capacity claims survived initial screening by the district court.

The Marshals Service served Cureington with the summons and complaint, but Cureington never answered or appeared in the case. The district court ordered Cureington to appear and show cause why default should not be entered against him. The district court's show-cause order was returned to the court as undeliverable, and Cureington did not appear at the hearing. But after a telephone conference with Vaughn and counsel for Hawkins and Odell, the district court entered an order stating that Vaughn's claims against Cureington would proceed in absentia. A few days later, however, Vaughn filed a motion for default judgment against Cureington.

Vaughn filed a motion for appointment of counsel, which the district court denied because the issues in the case were not complex, and Vaughn had demonstrated sufficient ability to present his case to the court. Vaughn's claims proceeded to a jury trial. The district court directed a verdict against Vaughn on his retaliation claims, and the jury returned verdicts in favor of all defendants, including Cureington, on Vaughn's excessive-force claims. The district court then denied Vaughn's motion for default judgment against Cureington as moot.

Vaughn filed a motion to obtain the trial transcript at government expense. The district court transferred the motion to this court. We denied the motion because Vaughn failed to demonstrate that his appeal presented a substantial question.

On appeal, Vaughn argues that the district court erred in: (1) failing to instruct the jury that the defendants could be collectively liable for using excessive force; (2) denying his motion for appointment of counsel; (3) failing to find good cause for his "failing to effectuate process" on Cureington; and (4) not admitting into evidence his medical records, which allegedly would have established his injuries and shown that the defendants tampered with the videotape of the incident. Vaughn also argues that he should have been given a free trial transcript so that he could adequately present his issues on appeal.

Vaughn's argument that he should have received a free trial transcript is apparently a request for us to reconsider our order denying his motion for a transcript at government expense, and as such, it is untimely. *See* Fed. R. App. P. 40(a)(1). In any event, Vaughn's original motion failed to show that his appeal presented a substantial question for review, *see* 28 U.S.C. § 753(f),

and he cannot raise new arguments in support of his original request in a motion for reconsideration. *See Shah v. NXP Semiconductors USA, Inc.*, 507 F. App'x 483, 495 (6th Cir. 2012).

Vaughn argues that the district court's jury instructions on excessive force were erroneous. Vaughn says that because he did not know which defendant inflicted which blows, he could not have shown that each defendant "acted maliciously and sadistically for the very purpose of causing him harm" as stated in the district court's instructions to the jury. Accordingly, he argues that the district court should have instructed the jury that it could find that the defendants were collectively liable for using excessive force. Vaughn also argues that the instructions were wrong because they did not define "sadistically" for the jury.

Vaughn did not file a copy of the trial transcript and therefore he has not shown that he objected to the allegedly erroneous jury instructions. Vaughn's failure to obtain a trial transcript would normally call for plain-error review of the district court's jury instructions. *See Fed. R. Civ. P. 51(c) & (d); Alsobrook v. UPS Ground Freight, Inc.*, 352 F. App'x 1, 1 (6th Cir. 2009). But assuming that Vaughn raised a timely objection to the jury instructions, and therefore that de novo review applies, *see Fisher v. Ford Motor Co.*, 224 F.3d 570, 576 (6th Cir. 2000), he has not shown reversible error.

Section 1983 requires a plaintiff to prove by a preponderance of the evidence that each defendant individually violated his right to be free from excessive force, even where he is unable to identify which officer among a small group of identified officers committed specific acts during the incident. *See Fazica v. Jordan*, 926 F.3d 283, 292-93 (6th Cir. 2019); *Burley v. Gagacki*, 834 F.3d 606, 613-15 (6th Cir. 2016). In that scenario, a defendant may show individual liability by demonstrating that each officer either personally applied excessive force or witnessed excessive force and failed to intervene. *Fazica*, 926 F.3d at 292. To the extent Vaughn interprets the jury instructions to have negated this possibility and required that he identify which defendant inflicted which blow, he is mistaken. The language he now challenges simply informed the jury of the requirement that in order to find a defendant liable, it must find that the defendant acted maliciously and sadistically. Consequently, we find no reversible error. And the district court did not err in failing to define "sadistically" because it is a common word that people of ordinary

intelligence are capable of understanding without a definition. *See Requena v. Roberts*, 278 F. App'x 842, 849 (10th Cir. 2008); *United States v. Perkins*, 161 F.3d 66, 70 (D.C. Cir. 1998).

The district court did not abuse its discretion in denying Vaughn's motion for appointment of counsel because his pleadings demonstrated that he was capable of adequately presenting his claims to the district court. *See Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993). Moreover, the issues in the trial were not complex, and the videotape of the incident, which evidently was presented to the jury, would have adequately demonstrated whether the defendants used excessive force.

Vaughn argues that the district court erred by not finding that he had good cause for failing to effect timely service of the summons and complaint on Cureington. He complains that Cureington did not appear for trial and was not available to respond to discovery requests. But the record shows that Vaughn did accomplish service on Cureington. Moreover, the district court did not dismiss Vaughn's claims against Cureington for not effectuating timely service of the summons and complaint. *See Fed. R. Civ. P. 4(m)* (providing that the district court must extend the time for effecting service "for an appropriate period" if the plaintiff shows good cause for not serving the defendant within ninety days after the complaint is filed). Consequently, the district court's alleged failure to order Vaughn to show cause for not effecting timely service on Cureington was harmless.

Finally, Vaughn argues that the district court abused its discretion by not admitting his medical records into evidence. This assignment of error is without merit because the exhibit inventory filed by the court reporter shows that the district court admitted Vaughn's sick call requests and his medical progress notes.

Accordingly, we **AFFIRM** the district court's judgment and **DENY** all pending motions as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

B

EDDIE GENE VAUGHN

PLAINTIFF

V.

LT. TIMOTHY HAWKINS
OFFICER JAMES CUREINGTON
OFFICER MELVIN O'DELL

DEFENDANTS

:
: CIVIL ACTION NO. 5:14-CV-99-TBR
: SENIOR JUDGE THOMAS B. RUSSELL
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JUDGMENT

XX Jury Verdict

This action came before the Court for a trial by jury on February 11, 2019 and concluded on February 11, 2019.

Plaintiff, Eddie Gene Vaughn, was present and represented himself, *pro se*. Linda M. Keeton and Allison Brown represented the defendants, Lt. Timothy Hawkins and Officer Melvin O'Dell. Officer James Cureington, was not present and was not represented.

Terri Turner, was the official court reporter.

Upon Defendants' motion, the Court granted directed verdict against Plaintiff Eddie Gene Vaughn on all of his First Amendment Retaliation claims.

This Judgment renders Plaintiff Vaughn's motion for default judgment against James Cureington moot. (Docket #102)

The issues have been tried and the jury has rendered its verdict in favor of the Defendants, Lt. Timothy Hawkins, Officer James Cureington, and Officer Melvin O'Dell on Plaintiff's claims.

Consistent with the above, **IT IS ORDERED AND ADJUDGED** that all claims asserted herein by the Plaintiff against all Defendants are **DISMISSED WITH PREJUDICE**.

cc: Counsel

Mailed to:
Eddie Gene Vaughn
182952
Kentucky State Penitentiary
266 Water Street
Eddyville KY 42038



Thomas B. Russell, Senior Judge
United States District Court

February 13, 2019

No. 19-5205

IN THE
SUPREME COURT OF THE UNITED STATES

EDDIE GENE VAUGHN — PETITIONER
(Your Name)

VS.

LT. TIMOTHY HAWKINS, et al. — RESPONDENT(S)

PROOF OF SERVICE

I, Eddie Gene Vaughn, do swear or declare that on this date, April 6, 20 20, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

COMMONWEALTH OF KENTUCKY, OFFICE OF LEGAL SERVICES, JUSTICE AND
PUBLIC SAFETY CABINET, 125 Holmes Street, 2d Floor, Frankfort,
Ky. 40601

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 6, 20 20

Eddie Gene Vaughn
(Signature)