UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PLRA C.R. 3(b) FINAL ORDER

December 15, 2023

No. 23-2461	KENNETH ALLEN WASHINGTON, Plaintiff - Appellant v. DEPUTY RAYL, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 3:20-cv-00461-DRL Northern District of Indiana, South Bend Division District Judge Damon R. Leichty	

The pro se appellant was DENIED leave to proceed on appeal in forma pauperis by the appellate court on November 13, 2023 and was given fourteen (14) days to pay the $505.00 filing fee. The pro se appellant has not paid the $505.00 appellate fee. Accordingly,

IT IS ORDERED that this appeal is **DISMISSED** for failure to pay the required docketing fee pursuant to Circuit Rule 3(b).

IT IS FURTHER ORDERED that the appellant pay the appellate fee of $505.00 to the clerk of the district court. The clerk of the district court shall collect the appellate fees from the prisoner's trust fund account using the mechanism of *Section 1915(b)*. *Newlin v. Helman*, *123 F.3d 429, 433* (7th Cir. 1997).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

KENNETH ALLEN WASHINGTON,

Plaintiff,

v.

RAYL *et al.*,

Defendants.

CAUSE NO.: 3:20-CV-461-DRL

OPINION AND ORDER

Kenneth Allen Washington, a prisoner without a lawyer, is proceeding in this case on two claims. First, he is proceeding against Deputy Kevin Rayl, Deputy Michael Rauen, and Deputy Nicholas Merrill in their individual capacities for compensatory and punitive damages "for placing him in a restraint chair, assaulting him, and dropping him on his head on September 2, 2019, in violation of the Fourteenth Amendment[.]" ECF 74 at 5. Second, he is proceeding against Assistant Warden Rachel Zawistowski in her individual capacity "for compensatory and punitive damages for failing to intervene to prevent him from being placed in a restraint chair, assaulted, and dropped on his head on September 2, 2019, in violation of the Fourteenth Amendment[.]" *Id.* The defendants moved for summary judgment. ECF 210. Mr. Washington filed a response, and the defendants filed a reply. ECF 228, 236, 240. The summary judgment motion is now ripe for ruling.

Summary judgment must be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists when "the evidence is such that a reasonable

jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Not every dispute between the parties makes summary judgment inappropriate; "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* To determine whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Ogden v. Atterholt*, 606 F.3d 355, 358 (7th Cir. 2010). A party opposing a properly supported summary judgment motion may not rely merely on allegations or denials in its own pleading, but rather must "marshal and present the court with the evidence she contends will prove her case." *Goodman v. Nat'l Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010).

To establish an excessive force claim under the Fourteenth Amendment, the plaintiff must show that "the force purposefully or knowingly used against him was objectively unreasonable." *Kingsley v. Hendrickson*, 576 U.S. 389, 396-97 (2015). In determining whether force was objectively unreasonable, courts consider such factors as the relationship between the need for force and the amount of force that was used, the extent of any injuries the plaintiff suffered, the severity of the security problem, the threat the officer reasonably perceived, and whether the plaintiff was actively resisting. *Id.* at 397.

The defendants provide an affidavit from Assistant Warden Zawistowski. On September 2, 2019, Assistant Warden Zawistowski was working as a supervisor at St. Joseph County Jail when police escorted Mr. Washington into the jail. ECF 212-1 at 1. Mr.

Washington was brought into the sallyport, where jail staff took him into custody, assisted him into the jail vestibule, and sat him on a bench. *Id.* at 2. While in the vestibule, Mr. Washington was acting erratically, repeatedly shouting that jail staff was going to kill him. *Id.* He began to calm down somewhat but would sporadically start screaming for help while trying to get up from the bench. *Id.* Jail staff assisted Mr. Washington back onto the bench and ordered him to remain seated until he calmed down. *Id.* Once Mr. Washington calmed down, he was ordered to stand up to be searched. *Id.* However, once jail staff began searching Mr. Washington, he began interfering with the pat down by moving back and forth quickly. *Id.* Jail staff placed Mr. Washington on the ground to search him and remove his excess clothing. *Id.*

After Mr. Washington was searched, he was picked up and placed in a safety restraint chair for his safety and the safety of jail staff. ECF 212-1 at 2. Mr. Washington tried to stand up, and he was held down in the chair by jail staff while the lap and ankle restraints were secured. *Id.* Mr. Washington refused orders to lean forward, so jail staff moved his upper torso forward so the handcuffs could be removed and the remaining restraints could be secured. *Id.* at 3. Jail staff then attempted to remove his sweatshirt, but they were unable to do so because he was thrashing his upper body. *Id.* At that point, Mr. Washington was evaluated by a nurse, cleared of all injuries, and transported in the restraint chair into a detox cell where he was monitored by jail staff. *Id.*

After approximately an hour or two in the detox cell, jail staff escorted Mr. Washington in the restraint chair to the showers so he could be dressed in the jail uniform. ECF 212-1 at 3. Jail staff removed Mr. Washington's right arm from the restraint and

removed it from his sweatshirt without incident, but when they attempted to re-secure his right arm in the restraint, he began to thrash and pull away. *Id.* at 4. Mr. Washington struggled with jail staff and refused numerous orders to stop resisting. *Id.* Eventually, after applying pressure to Mr. Washington's upper body and utilizing pressure point control techniques, jail staff was able to resecure his right wrist in the wrist restraint and his right shoulder in the shoulder restraint. *Id.* The rest of Mr. Washington's sweatshirt was cut off from his body for safety purposes, and he was transported in the restraint chair back to a detox cell where he was again monitored by jail staff. *Id.* at 5. After another hour or two in the detox cell, jail staff rolled Mr. Washington out of the cell, removed him from the restraint chair, and placed him in a padded cell without incident. *Id.* At no time did jail staff pick up the restraint chair and flip it upside down or drop Mr. Washington on top of his head. *Id.* At no time did jail staff physically interact with Mr. Washington when a camera was not recording. *Id.* at 6.

Assistant Warden Zawistowski's attestations show the defendants used only reasonable force against Mr. Washington, as they used only enough force as was reasonably necessary to maintain order and gain Mr. Washington's compliance. *See Kingsley*, 576 U.S. at 397. Mr. Washington must provide evidence raising a genuine dispute as to whether the force used was objectively unreasonable.

In his response, Mr. Washington objects to all of the defendants' facts and reiterates his assertions that the defendants turned him upside down in the restraint chair and repeatedly choked him and slammed him into the ground while he was in restraints. ECF 228. However, when "the evidence includes a videotape of the relevant events, the

Court should not adopt the nonmoving party's version of the events when that version is blatantly contradicted by the videotape." *Williams v. Brooks*, 809 F.3d 936, 942 (7th Cir. 2016) (citing *Scott v. Harris*, 550 U.S. 372, 379-80 (2007)). Here, Mr. Washington's version of events is notably contradicted by the video evidence. Specifically, the video recordings support Assistant Warden Zawistowski's affidavit and show the defendants consistently used reasonable force to maintain control of the situation, overcome Mr. Washington's resistance, and ensure his safety and the safety of jail staff. The video recordings do not support Mr. Washington's assertion the defendants flipped over the restraint chair or otherwise used excessive force against him; and Mr. Washington provides no evidence disputing Assistant Warden Zawistowski's attestation that jail staff never interacted with him when a camera was not recording. Based on the video evidence, no reasonable jury could conclude the defendants violated Mr. Washington's Fourteenth Amendment rights. *See Scott*, 550 U.S. at 380-81 (where a videotape "utterly discredited" the plaintiff's version of events, summary judgment should have been granted for police officer on excessive force claim). Summary judgment is therefore warranted in favor of the defendants.[1]

For these reasons, the court:

(1) GRANTS the defendants' summary judgment motion (ECF 210); and

[1] In his response, Mr. Washington also requests a continuance under Fed. R. Civ. P. 56(f) so he can obtain declarations from various witnesses. ECF 228 at 1-8. But Rule 56(f) does not provide for a continuance and, regardless, additional declarations would be unable to contradict the video evidence showing the defendants used only reasonable force. Moreover, the court notes Mr. Washington states in his response that he did not receive certain affidavits attached to the defendants' summary judgment motion (ECF 228 at 1), but it appears Mr. Washington crossed this statement out and he responds at length to each of the defendants' affidavits.

(2) DIRECTS the clerk to enter judgment in favor of the defendants and against Kenneth Allen Washington and to close this case.

SO ORDERED.

April 19, 2023

s/ Damon R. Leichty
Judge, United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

KENNETH ALLEN WASHINGTON,

Plaintiff,

v.

RAYL *et al.*,

Defendants.

CAUSE NO. 3:20-CV-461-DRL

ORDER

Kenneth Allen Washington, a prisoner without a lawyer, filed a motion requesting an extension of time to file an appeal. ECF 256. Under Federal Rule of Appellate Procedure 4(a)(5), a district court may extend the time for filing a notice of appeal if "a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires" and shows "excusable neglect or good cause" for the extension. In analyzing whether excusable neglect exists, the court considers relevant circumstances including "(1) the danger of prejudice to the non-moving party; (2) the length of the delay and its impact on judicial proceedings; (3) the reason for the delay (i.e., whether it was within the reasonable control of the movant); and (4) whether the movant acted in good faith." *Sherman v. Quinn*, 668 F.3d 421, 425 (7th Cir. 2012). Good cause, on the other hand, is a slightly less demanding standard and "applies in situations in which there is no fault—excusable or otherwise." *Id.* (quoting the Advisory Committee Notes to the 2002 amendments to Federal Rule of Appellate Procedure Rule 4).

The summary judgment dismissal order was signed on April 19, 2023 (ECF 253), and judgment was entered on April 20, 2023 (ECF 254). Several weeks before the case was decided, Mr. Washington was released from prison, which affects how the relevant deadlines are calculated.[1] Federal Rule of Appellate Procedure 4(a)(1) specifies that a notice of appeal must be "*filed* with the district clerk within 30 days after the *entry* of the judgment or order appealed from," which means the notice must actually be received by the court on that date. *See* FED. R. APP. P. 4(a)(1)(A) (emphasis added). Because the 30-day period ended on a Saturday, the notice of appeal was due the following Monday, May 22, 2023. *See id.*; *see also* FED. R. CIV. P. 6(a)(1)(C). As such, the deadline for filing a motion for extension of time was June 21, 2023. *See* FED. R. APP. P. 4(a)(5).

Although Mr. Washington's motion was filed within the specified time period, he hasn't satisfied the second portion of Rule 4(a)(5). Mr. Washington says he intended to file his notice of appeal on May 23, 2023, but he was arrested again the day before that so he couldn't. He states he has his "appeal to document #253" with him at the St. Joseph County Jail in his property bag, but he hasn't attached it to the motion or mailed in a separate notice of appeal to date. ECF 256 at 1. According to Mr. Washington's own admissions, he received the dismissal order and judgment on April 25, 2023, which was well in advance of the May 22, 2023, deadline. He then waited until the last possible moment and "was working to complete his appeal to be sent out on May 23, 2023"—the

[1] Specifically, he was released from the Indiana Department of Correction on March 27, 2023 (ECF 250), so he would not have received the benefit of the prison mailbox rule for anything filed while he was not incarcerated.

day *after* the deadline—but was thwarted by his arrest on the day of the deadline itself. *Id.* A notice of appeal requires only the name of the party taking the appeal, the judgment being appealed, and the name of the court to which the appeal is taken. FED. R. APP. P. 3(c)(1). It is not a complex filing, nor one that requires significant research. Mr. Washington hasn't provided any compelling reason why he didn't complete and submit his notice of appeal prior to the deadline. Of note, even if he had been able to submit the notice of appeal on the day he originally intended, it would have been late. "A simple case of miscalculating a deadline is not a sufficient reason to extend time, and judges do not have carte blanche authority to allow untimely appeals." *McCarty v. Astrue*, 528 F.3d 541, 544 (7th Cir. 2008) (quotation marks and citations omitted). Accordingly, the court cannot find Mr. Washington acted in good faith.

Furthermore, Mr. Washington states he currently has the appeal documents with him in his personal property at the jail, but he doesn't explain why he waited until May 30, 2023[2]—eight days after his arrest—to send the court his motion for extension of time or why he hasn't attached those documents to it. Taking Mr. Washington at his word, his appeal documents were all but complete at the time of his arrest considering he intended to send them out the next day (which, as noted above, would have been late), so waiting eight additional days to request an extension—without providing a compelling reason why—isn't justified. Accordingly, Mr. Washington has not shown good cause or

[2] Mr. Washington says he sent the motion out on May 30, 2023 (ECF 256 at 2), and, while the court didn't receive it until June 1, 2023, because he was incarcerated when he mailed it, he will receive the benefit of the prison mailbox rule.

excusable neglect to submit a tardy notice of appeal.[3] *See, e.g., Nestorovic v. Metro. Water Reclamation Dist. of Greater Chicago*, 926 F.3d 427, 432 (7th Cir. 2019) (neither good cause nor excusable neglect shown when plaintiff "offered no meaningful explanation for not filing a timely notice of appeal"); *Robinson v. Sweeny*, 794 F.3d 782, 784 (7th Cir. 2015) (refusing to overlook *pro se* plaintiff's tardiness because filing a notice of appeal "requires very little in the way of content, and thus essentially no research"); *Satkar Hosp., Inc. v. Fox TV Holdings*, 767 F.3d 701, 706 (7th Cir. 2014) (finding plaintiff's appeal untimely and noting that excusable neglect in the context of appellate extensions "was intended to be narrowly construed" and that "few circumstances will ordinarily qualify") (citations omitted).[4]

Mr. Washington also filed a second motion for extension of time, which was received by the court on June 26, 2023. ECF 258. Although he wrote and crossed out several dates near the top of the document, he provided a sworn statement on the bottom near his signature attesting that it was sent on June 22, 2023. *Id.* at 2. Giving him the

[3] As to which standard applies, "[t]he relevant question is one of fault, as the excusable neglect standard applies in situations in which there is fault; in such situations, the need for extension is usually occasioned by something within the control of the movant. On the other hand, the good cause standard applies in situations in which there is no fault—excusable or otherwise." *Sherman*, 668 F.3d at 425 (internal brackets, quotation marks, and citations omitted). It may be reasonably assumed that Mr. Washington's arrest can be attributed to fault of his own. More importantly, he has provided no reason why he waited until the last possible to moment to attempt to file a notice of appeal, nor does allege that he was prevented from filing it or the motion for extension by prison officials following his arrival at the Jail. Therefore, excusable neglect is the proper standard here, but, in any event, he has failed to establish either.

[4] The *Satkar* court also noted there will "never be a long delay" because the time limit for requesting the extension is "quite short," *Satkar Hosp., Inc.*, 767 F.3d at 707, so the eight-day lapse here cannot be considered insignificant.

benefit of the prison mailbox rule as of that date, it was deposited one day too late. Accordingly, the second motion must be denied because it is untimely. *See* FED. R. APP. P. 4(a)(5).[5]

For these reasons, the motions (ECF 256 & ECF 258) are DENIED.

SO ORDERED.

June 30, 2023

s/ Damon R. Leichty
Judge, United States District Court

[5] Even if the second motion was not untimely, it would still be denied because Mr. Washington hasn't provided any additional information that would change the court's analysis or final determination outlined above. He mentions that he was in the process of seeking legal representation and professional help following his release, but this does not establish excusable neglect or good cause. *See Nestorovic*, 926 F.3d at 432 (Plaintiff's "unsupported statement that she was searching for an attorney—even if we credit it—does not demonstrate excusable neglect or good cause."). Moreover, he admits, "On the day of May 22, 2023, the plaintiff did bring [the documents] into the custody of the St. Joseph [County Jail] with him which was stored within his blue inmate property bag." ECF 258 at 1-2. He claims he didn't notice that pages seven though ten of his thirteen-page notice of appeal were missing until May 31, 2023, "which caused a setback in completing plaintiff's appeal because the plaintiff ha[d] to rewrite appeal over differently." *Id.* at 2. It's not clear why Mr. Washington believes he needs to file a thirteen-page notice of appeal or why three missing pages would cause a lengthy setback in submitting it. *See Robinson*, 794 F.3d at 784 (filing a notice of appeal "requires very little in the way of content, and thus essentially no research"). That said, even if the court credits those allegations, they don't sufficiently explain why he waited until May 30, 2023—eight days after his arrest—to inform the court of any of these issues or to request an extension of time. Thus, the additional motion does not establish good cause or excusable neglect either.