A P P E N D I X A.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

CERTIFIED COPY

A True Copy:
Teste:
Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

ORDER

January 2, 2024

Before
DIANE P. WOOD, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
JOHN Z. LEE, *Circuit Judge*

No. 23-2490	CORNELL SMITH, Plaintiff - Appellant v. NICHOLAS SANCHEZ, Defendant - Appellee
Originating Case Information:	
District Court No: 1:21-cv-00242-WCG Eastern District of Wisconsin District Judge William C. Griesbach	

The following are before the court:

1. **LETTER**, filed on August 21, 2023, by the pro se appellant.

2. **AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS**, filed on October 18, 2023, by the pro se appellant.

3. **LETTER**, filed on October 23, 2023, by the pro se appellant.

4. **RENEW MEMORANDUM IN SUPPORT OF PROCEEDING PLRA MOTION FOR IN FORMA PAUPERIS**, filed on November 20, 2023, by the pro se appellant.

Appendix. (A.3).

5. **PLAINTIFF-APPELLANT PLRA MOTION PROCEEDING IN FORMA PAUPERIS**, filed on November 27, 2023, by the pro se appellant.

This court has carefully reviewed the district court's final order, its order denying appellant Cornell Smith's motion to appeal in forma pauperis, the record on appeal, and Smith's motions papers.

Cornell Smith is not permitted to proceed in forma pauperis under 28 U.S.C. § 1915(g) because he has, on three or more prior occasions, brought an action or appeal that was dismissed on the grounds that it is frivolous or fails to state a claim upon which relief may be granted. In this case, the appellant has not demonstrated imminent danger of a serious physical injury pursuant to § 1915(g). *See Taylor v. Watkins*, 623 F.3d 483 (7th Cir. 2010). Accordingly,

IT IS ORDERED that the motion for leave to proceed on appeal in forma pauperis is **DENIED**.

IT IS FURTHER ORDERED that this appeal is **DISMISSED** for lack of jurisdiction. Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. Smith filed his notice of appeal on July 31, 2023, well after the district court's final order and entry of judgment on November 28, 2022. And there is no other order from which Smith's appeal would be timely. This dismissal does not relieve the appellant of the obligation to pay the filing and docketing fees for this appeal. *Campbell v. Clarke*, 481 F.3d 967, 970 (7th Cir. 2007); *Newlin v. Helman*, 123 F.3d 429, 434 (7th Cir. 1997). The appellant's prison shall remit the fees from his prisoner's trust account, using the mechanism of 28 U.S.C. § 1915(b).

form name: c7_Order_3J (form ID: 177)

APPENDIX (A.2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CORNELL SMITH,

Plaintiff,

v. Case No. 21-C-242

NICHOLAS SANCHEZ,

Defendant.

DECISION AND ORDER

Plaintiff Cornell Smith, a prisoner at Waupun Correctional Institution who is representing himself, is proceeding on an Eighth Amendment failure-to-protect claim against Defendant Nicholas Sanchez based on assertions that he allowed an inmate out of his cell and then watched for several minutes as the inmate attacked Smith.[1] On June 3, 2022, Smith moved for summary judgment, and on June 21, 2022, Defendant moved for summary judgment. The Court will deny Smith's motion, grant Defendant's motion, and dismiss this case.

BACKGROUND

At the relevant time, Smith was an inmate at Waupun Correctional Institution, where Sanchez worked as a correctional sergeant. On July 2, 2017, Sanchez was stationed in the sergeant's cage, which is an area at the front of the unit from which officers can control all doors, view security cameras, handle equipment inventory, and answer emergency calls from inmates.

[1] Smith purports to raise numerous other claims in his response to Defendant's summary judgment motion, but his arguments are irrelevant to the claim at issue in this case, so the Court will not address them in this decision. *See Abuelyaman v. Ill. State Univ.*, 667 F.3d 800, 814 (7th Cir. 2011) ("It is well settled that a plaintiff may not advance a new argument in response to a summary judgment motion." (citations omitted)).

One staff member is required to be stationed in the sergeant's cage at all times. That day, Smith, who was working as a tier tender, was moving the phones down the range for inmate phone calls. Inmate Dontrell Leflore tried to convince Smith to let him use the telephone first, but Smith refused and told him to wait his turn. Dkt. No. 81 at ¶2; Dkt. No. 90 at ¶¶1-2, 4-5, 9.

Smith walked away to retrieve some cleaning supplies. During that time, Defendant opened Leflore's cell door because he needed to talk to him. Leflore was supposed to walk to the sergeant's cage to talk to Defendant. Because Leflore was in general population, it was consistent with prison policy to let him out of his cell unescorted. When Smith returned with the cleaning supplies, Leflore pulled Smith into his cell and began to attack him by punching his head, face, and ribs and squeezing his genitals. Smith fought back and was able to knock Leflore unconscious. Smith then exited Leflore's cell and looked down to see Defendant reading something in the sergeant's cage. Defendant did not know that Leflore had attacked Smith. According to Smith, Leflore then exited his cell half naked and began to chase Smith. Defendant looked up when he heard the commotion and yelled, "Where are you going?" Smith, followed by Leflore, ran down the stairs. Smith asserts that Leflore pushed him into the metal food cart and then began beating Smith with closed fists for about two minutes. Dkt. No. 81 at ¶¶3-8; Dkt. No. 90 at ¶¶10-12, 28.

Defendant asserts that as soon as he noticed Smith and Leflore running down the stairs, he contacted backup via the institution radio, yelling "Fight north cell hall." According to Defendant, officers were able to respond within seconds, but Smith asserts that Leflore attacked him for several minutes before officers intervened. Defendant explains that, consistent with his training, he remained in the sergeant's cage during the incident to control the entrance for responding staff, verify if any other inmates were in the area, and to make sure other inmates returned to their cells to avoid further disruption. Multiple officers directed Smith and Leflore to stop fighting, but when

that was not effective, an officer pepper-sprayed Smith. The inmates stopped fighting and were separated. Dkt. No. 81 at ¶¶8-10; Dkt. No. 90 at ¶¶13-16, 20.

LEGAL STANDARD

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court must view the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (citing *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 812 (7th Cir. 2017)). In response to a properly supported motion for summary judgment, the party opposing the motion must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citations omitted). "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* Summary judgment is properly entered against a party "who fails to make a showing to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Austin v. Walgreen Co.*, 885 F.3d 1085, 1087-88 (7th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ANALYSIS

Smith asserts that Defendant failed to protect him when he let Leflore out of his cell and delayed calling for help once he observed Leflore attacking Smith. Prison officials have a duty under the Eighth Amendment to protect inmates from violence caused by other inmates when they are aware that the inmate faces "a substantial risk of serious harm" and "disregard that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *see also Pierson v. Hartley*, 391 F.3d 898, 903-04 (7th Cir. 2004).

With regard to Defendant's decision to let Leflore out of his cell, Defendant explains that Leflore was in general population and so policy permitted Leflore to be released from his cell unescorted. Defendant explains that Leflore was to report to the sergeant's cage so Defendant could speak with him. Defendant asserts that he was unaware of any animosity between Smith and Leflore and had no reason to believe that Leflore would attack Smith when Defendant released Leflore from his cell. Dkt. No. 90 at ¶30. Smith presents no evidence rebutting Defendant's assertions. Smith did not inform anyone of his disagreement with Leflore over his request to use the telephone and Smith concedes that he was surprised by Leflore's attack. Given that Defendant was not aware that Leflore posed a substantial risk of harm to Smith when he released Leflore from his cell, his decision to do so did not violate the Eighth Amendment. Defendant is entitled to summary judgment on this aspect of Smith's claim.

Moreover, no jury could reasonably conclude that Defendant disregarded the risk Leflore posed to Smith after he noticed Leflore chasing him. Defendant asserts that as soon he noticed Leflore chasing Smith down the stairs, he pressed the emergency alarm button on his radio, which he was wearing on his person, and yelled, "Fight north cell hall." *Id.* at ¶¶8, 13. Defendant explains that, per policy and for security reasons, he stayed in the sergeant's cage to control the door through which responding officers would be entering and to keep an eye on other inmates to avoid further potential disruption. *Id.* at ¶21. Accordingly, the *only* action Defendant could take to protect Smith from Leflore's attack was to radio for help, which he asserts he did immediately upon seeing Leflore chasing Smith.

Smith fails to create a triable issue regarding Defendant's response. He speculates that Defendant must have delayed pressing his emergency button because officers did not immediately intervene to stop Leflore's assault, but Defendant had no control over the speed with which officers responded to his call for help. He had control only over the speed with which he radioed for help,

and he states that he did that immediately. Smith, who was running down the stairs and fending off a violent assault after being pushed into a food cart, Dkt. No. 81 at ¶¶6-7, could not have observed every action taken by Defendant, who was standing ten yards away in a secured space surrounded by steel bars, Dkt. No. 90 at ¶¶3, 15. Accordingly, Smith's assumption about how long Defendant waited before radioing for help is insufficient to rebut Defendant's sworn statement that he pressed his emergency button immediately upon realizing Smith was in danger. *See Lavite v. Dunstan*, 932 F.3d 1020, 1029 (7th Cir. 2019) ("inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion" (citations omitted)). Because the record demonstrates that Defendant immediately radioed for help, the only conclusion a reasonable jury could reach is that Defendant took reasonable measures to abate the risk Smith faced. Defendant is entitled to summary judgment.

Finally, the Court will deny Smith's motion to exclude Defendant's evidence. Dkt. No. 107. Smith accuses Defendant of manufacturing evidence and conspiring with current and former wardens of his institution, but Smith provides no evidence to support his accusations.

CONCLUSION

For these reasons, Smith's motion for summary judgment (Dkt. No. 78) and his motion to exclude Defendant's evidence (Dkt. No. 107) are **DENIED**. Defendant's motion for summary judgment (Dkt. No. 88) is **GRANTED** and this case is **DISMISSED**. The Clerk is directed to enter judgment accordingly.

SO ORDERED at Green Bay, Wisconsin this 28th day of November, 2022.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 22, 2024

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-2490

CORNELL SMITH,
Plaintiff-Appellant,

v.

NICHOLAS SANCHEZ,
Defendant-Appellee.

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

No. 1:21-cv-00242

William C. Griesbach,
Judge.

ORDER

On consideration of the motion for reconsideration filed by plaintiff-appellant on February 12, 2024, and construed as a petition for rehearing, all members of the original panel have voted to deny the petition for panel rehearing.

Accordingly, the petition for rehearing is hereby DENIED.