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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1727

FILED

APR 10 1991

KENNETH GIBBS, #F8070,
Appellant

By Michael E. Kunz, Clerk
Dep. Clerk

v.

MIKE CHURNER, individually and in his
official capacity as a Correctional
Officer at Graterford Prison,
Appellee

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 89-00618)

District Judge: Honorable Edmund V. Ludwig *file*

Submitted Under Third Circuit Rule 12(6)
March 12, 1991

PRESENT: MANSMANN, HUTCHINSON and WEIS, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the
United States District Court for the Eastern District of
Pennsylvania and was submitted under Third Circuit Rule 12(6) on
March 12, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the district court entered September 4, 1990, be and the same is hereby affirmed. No costs to be taxed.

ATTEST:


Clerk

DATED: March 18, 1991

Certified as a true copy and issued in lieu of a formal mandate on April 9, 1991

Test: 

Clerk, United States Court of Appeals for the Third Circuit.

NOT FOR PUBLICATION

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(Opinion Filed **MAR 18 1991** , 1991)

MEMORANDUM OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

Kenneth Gibbs (Gibbs) appeals an order of the United States District Court for the Eastern District of Pennsylvania in favor of appellee, Michael B. Churner (Churner). Gibbs filed this appeal after the district court entered judgment for Churner following a jury verdict against Gibbs on his 42 U.S.C.A. § 1983 (West 1981) claim that Churner had violated Gibbs's

constitutional rights by beating him on December 2, 1988. Gibbs is a prisoner at the Pennsylvania State Correctional Institution at Graterford, Pennsylvania. Churner was a guard employed by the state at that penal institution. The alleged beating happened when Churner was escorting Gibbs back to his cell following an argument about Gibbs's right to be shaved during a scheduled haircut.

Gibbs's complaint also included § 1983 claims arising out of what Gibbs said was a consistent pattern of racially motivated, deliberate harassment, provocation and physical and emotional abuse that he said Churner visited upon him between May and December of 1988.¹ The district court had earlier granted Churner summary judgment on Gibbs's harassment claims, holding that they did not rise to the level of constitutional violations. Gibbs does not directly claim that the district court erred in granting summary judgment in this respect. In addition, the complaint alleged two pendent state law battery claims, one based on the December 2 beating claim and another based on a spitting incident alleged to have occurred on November 1, 1988. The district court did not submit these state law battery claims to the jury.

Gibbs seeks a new trial. He argues that the district court erred in refusing to submit the two pendent state law

1. Gibbs also sought to enter into evidence information about a March 19, 1989, incident where Churner ordered Gibbs to leave a shower and Gibbs refused. However, Gibbs did not rely on this incident as a basis for his complaint.

battery claims to the jury. Gibbs contends that the court's failure to exercise pendent jurisdiction over the battery claim arising out of the November 1 incident was erroneous because it arose out of the same general set of operative facts as his constitutional claim concerning the December 2 incident. He also contends, with respect to the December 2 incident, that the district court's refusal to submit the battery claim to the jury amounted to a holding that a prisoner is not permitted to bring a common law battery claim against a correctional officer. Finally, Gibbs argues that the district court committed prejudicial error when it refused to permit him to cross-examine Churner about a case in which Churner was suspended from his job without pay. The suspension, ultimately reversed on appeal, was based on alleged deficiencies in a report Churner had filed about an incident between another guard and a prisoner that occurred in another prison.

I.

The district court had subject matter jurisdiction over Gibbs's federal claims pursuant to 28 U.S.C.A. §§ 1331 and 1343 (West Supp. 1990) and his state law claims were asserted in federal court under the doctrine of pendent jurisdiction. Because the district court's order denying Gibbs's motion for a new trial after entering judgment for Churner and against Gibbs on the § 1983 claim relating to the December 2 incident finally

disposed of the last of Gibbs's claims, we have appellate jurisdiction pursuant to 28 U.S.C.A. § 1291 (West Supp. 1990).

II.

After carefully considering all of Gibbs's arguments, we will affirm the district court's entry of judgment for Churner on the December 2 constitutional claim, as well as its refusal to submit Gibbs's other claims to a jury and its discretionary ruling denying Gibbs the right to cross-examine Churner about the unrelated conduct that initially led to his suspension.

At the time the incidents which led to this case arose, Gibbs was a Pennsylvania state prisoner held at the state prison at Graterford. During part of 1988, he was housed in the prison's E Gallery, a restrictive housing area used for disciplinary custody. Churner was the correctional officer in E Gallery for the 6:00 a.m. to 2:00 p.m. shift during most of this time. Gibbs and all other prisoners housed in E Gallery must remain in their cells for about twenty-two hours a day.

At first, according to Gibbs, Churner had a good reputation among the prisoners, but all too soon that changed and he became confrontational and provocative with inmates, especially inmates who were black. Gibbs, who is black, claimed that Churner, who is white, singled him out for particular dislike. He says that Churner began harassing him as early as May 12, 1988, by filing a false inmate misconduct report in which Churner claimed that Gibbs had threatened him. Gibbs says this

was the first in a series of false reports over the next several months. Gibbs construed them as a concerted effort by Churner to have Gibbs suffer lengthy disciplinary custody. Gibbs said that additional false reports were filed on various dates, specifically November 1 and December 2, 1988, and that at various times Churner denied Gibbs medical attention, refused to let him clean his cell and refused his request for such necessities as a towel, soap and a drinking cup.

According to Gibbs, the hostility between Churner and him intensified on November 1, 1988, when Churner spit in Gibbs's face during the serving of a meal. The abuse continued, according to Gibbs, on December 2, 1988, when Churner threatened Gibbs and then beat him without provocation by slamming a heavy metal door in his face and repeatedly ramming Gibbs's head into the walls and floor of an empty cell. Nevertheless, Gibbs's ultimate injuries were minor.

Needless to say, Gibbs's version of the events was hotly contested. Churner denied all of Gibbs's allegations and contended that it was Gibbs and not he who had instituted the campaign of harassment. Churner also asserted that it was Gibbs who had initiated the assaults on November 1 and December 2 and indeed that it was Gibbs who spit in Churner's face on November 1, an incident which led to one of Churner's misconduct reports against Gibbs.

We have reviewed the record and concluded that the evidence before the jury was sufficient to support Churner's

version of the December 2 incident. Indeed, Gibbs does not claim otherwise. Instead, he argues that the jury might have found otherwise if he had either been permitted to cross-examine Churner about the reporting incident that led to Churner's earlier brief suspension without pay or if the jury had been permitted to hear testimony about the November 1, 1988, spitting incident. He speculates that the jury might also have found for him on his state law battery claims if the district court had not incorrectly withdrawn them from the jury. Gibbs says specifically that the district court erred in refusing to instruct the jury on the state law battery claim concerning the November incident because it arose from the same common nucleus of operative fact as the December incident. He also argues that failing to instruct the jury about the battery claim based on the December incident essentially eliminates any cause of action for battery a prisoner would have against a corrections officer.

A.

We review the district court's refusal to permit Gibbs to cross-examine Churner about an unrelated suspension incident for abuse of discretion. See United States v. Adams, 759 F.2d 1099, 1110 (3d Cir. 1985), cert. denied, 474 U.S. 906 (1986). Gibbs argues that Federal Rule of Evidence 608(b) required the district court to allow him to cross-examine Churner concerning this incident.

Federal Rule of Evidence 608(b) relates to evidence of specific instances of conduct and reads, in material part:

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness.

Here, the district court chose to exercise its discretion by precluding cross-examination on Churner's suspension. Because the district court, in exercising the discretion the rule gives it, was entitled, under Federal Rule of Evidence 403, to consider such factors as the nature of the previous conduct, the importance of the testimony and the possible effect on the jury if the conduct is divulged, it is useful to set forth the facts about the incident that Gibbs wanted to present to the jury, as those facts appear in the record.

Churner's suspension arose out of an incident in which another guard, Dennis Brumfield, allegedly mistreated an inmate of the Chester County Prison on January 30, 1989. The suspension occurred after Churner was reprimanded for minimizing the seriousness of the incident in his written report and during questioning by the Pre-Disciplinary Conference Committee. The suspension letter does not state Churner told an outright lie, but reprimanded him for minimizing the seriousness of the

incident and for "failure to report this incident accurately and to cooperate fully in [the] investigation." Appellant's Appendix (App.) at 149. An appeal has since removed it from Churner's record.

In its ruling, the district court said any probative value that the disciplinary letter may have had was substantially outweighed by the danger of unfair prejudice and jury confusion, citing Federal Rule of Evidence 403.

We cannot say that the district court abused its discretion in refusing to permit cross-examination on this unrelated incident. The district court apparently thought that the incident did not reflect a lack of veracity generally or specifically and also that cross-examination about it would have been unduly prejudicial because the jury could have unfairly concluded that Churner's conduct in not reporting fully the incident of arguable abuse by another officer evidenced a general propensity on his part to mistreat prisoners. Obviously, the suspension incident is not relevant for that purpose. Because Churner's appeal from the suspension, apparently pending at the time of the trial, has since been disposed of favorably to him, see Appellee's Supplemental Appendix (Supp. App.) at 80-92, Churner could not now be cross-examined about this incident even if we were to grant a new trial.

B.

The district court's decision to withdraw the state law battery claim concerning the December 2 beating incident from the jury presents a question of law. See Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Therefore, we will exercise plenary review over that issue. The district court withdrew the December 2 battery claim from the jury because it thought that Pennsylvania law concerning common law battery by a guard against a prisoner requires the prisoner to prove the same elements as the constitutional tort. Churner, on appeal, claims that Pennsylvania law grants correctional officers who batter prisoners sovereign immunity. We do not need to pass on Churner's argument. The constitutional tort and the state common law battery are so closely intertwined in this particular case and the elements of both so closely connected that we do not believe the district court erred in refusing to submit Gibbs's common law battery claim to the jury as a claim separate from his constitutional claim.

In this connection, the district court said:

The distinction, if any, between the constitutional violation and the state tort would appear, in these particular circumstances, to be immaterial. There is no precedential basis in state law for defining the custodial duty of a prison guard to an inmate without utilizing the same factors as are inherent in 8th Amendment analysis. Also, under the facts presented, the issue was credibility. If, as [Gibbs] contended, he was attacked and beaten up by the guard, his claim was constitutionally actionable.

Under [Churner's] version of the facts, [Gibbs] was the aggressor and [Churner] acted in reasonable self-defense - in which event there was no liability under state tort law.

App. at 158-59.

There may be cases in which a prisoner is unable to establish an Eighth Amendment claim but could nevertheless show a common law battery. This is not one of them. Accordingly, we perceive no error in the district court's refusal to submit separately to the jury Gibbs's claim for common law battery arising out of the December 2 incident.

C.

Gibbs does not contest the district court's determination that the November, 1988, spitting incident did not rise to the Eighth Amendment level of cruel and unusual punishment. He argues simply that the pendent claim for battery arising out of the November incident was so closely related to the December 2 incident that the district court abused its discretion in refusing to exercise pendent jurisdiction over it. See Ambromovage v. United Mine Workers, 726 F.2d 972, 990 (3d Cir. 1984).

In declining to decide the common law claim relating to the November 1 spitting incident, the district court explained that it did not arise from the same occurrence as the alleged assault of December 2, 1988 and "discretionary factors of

convenience, judicial economy and fairness militate[d] against exercising jurisdiction." App. at 155.

Gibbs says: "Surely it is no strain of reasoning to conclude that a spitting and a beating involving the same two people and separated by only 31 days arise from a 'common nucleus of operative fact' between the state claim and the federal constitutional claim." Brief for Appellant at 23.

Gibbs's argument confuses the district court's power to exercise pendent jurisdiction with an obligation to do so. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Here, the district court chose not to do so. We think it acted within its discretion in making that choice.

III.

For these reasons, we will affirm the order of the district court.

TO THE CLERK:

Please file the foregoing memorandum opinion.

William D. Hutchinson
Circuit Judge