

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LARRY BRACEY,

Plaintiff,

v.

JAMES GRONDIN, C.O. HUNT,
THOMAS TAYLOR and C.O. MURRAY,

Defendants.

ORDER

10-cv-287-bbc

This is a prisoner civil rights lawsuit brought under 42 U.S.C § 1983 in which plaintiff Larry Bracey alleged that defendants James Grondin, Thomas Taylor, Eric Hunt and Jennifer Murray used excessive force against him. After a trial at which plaintiff was represented by counsel, a jury returned a verdict in favor of defendants, finding that none of them used excessive force against plaintiff. Now before the court is plaintiff's motion for a new trial. Dkt. #178. (After plaintiff's trial counsel filed the motion for a new trial, another inmate filed a notice of appeal and motion to proceed in forma pauperis on plaintiff's behalf. Dkt. ##179, 180. Plaintiff's counsel filed a motion to withdraw the appeal, dkt. #183, as well as a motion to voluntarily dismiss the appeal with the court of appeals. The court of appeals dismissed the appeal on February 6, 2012. Thus, the motion to proceed in forma pauperis on appeal and the motion to withdraw the pro se notice of

appeal will be denied as moot.)

Plaintiff's only argument in support of his motion for a new trial is that the court erroneously refused to provide an adverse inference instruction to the jury regarding the spoliation of evidence by defendants. Specifically, plaintiff contends that because the security staff at the Wisconsin Secure Program Facility intentionally destroyed videotape evidence of defendants' use of excessive force against plaintiff, the jury should have been instructed that they could infer that the videotape would have supported plaintiff's version of events.

I will deny plaintiff's motion. A plaintiff is entitled to a new trial "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks [the court's] conscience." Davis v. Wisconsin Department of Corrections, 445 F.3d 971, 979 (7th Cir. 2006) (internal quotations omitted). Thus, a new trial may be necessary if "the verdict is against the weight of the evidence . . . the damages are excessive, or . . . for other reasons, the trial was not fair to the party moving." Kapelanski v. Johnson, 390 F.3d 525, 530 (7th Cir. 2004) (internal quotations omitted).

Plaintiff has not shown that he is entitled to a new trial because he has not shown that he was entitled to an instruction regarding spoliation. The Court of Appeals for the Seventh Circuit has explained that "[a party's] destruction of or inability to produce a document, standing alone, does not warrant an inference that the document, if produced,

would have contained information adverse to the [party's] case.” Park v. City of Chicago, 297 F.3d 606, 615 (7th Cir. 2002). Rather, “to draw such an inference, the [party] must have destroyed the documents in bad faith.” Id. Thus, “[t]he crucial element is not that evidence was destroyed but rather the reason for the destruction.” Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008) (quoting Park, 297 F.3d at 615). See also Trask–Morton v. Motel 6 Operating L.P., 534 F.3d 672, 681 (7th Cir. 2008) (“bad faith” is prerequisite to imposing sanctions for the destruction of evidence); Fed. R. Civ. P. 37(e) (“Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”). “A document is destroyed in bad faith if it is destroyed for the purpose of hiding adverse information.” Faas, 532 F.3d at 644 (citation omitted); see also Norman–Nunnery v. Madison Area Technical College, 625 F.3d 422, 428 (7th Cir. 2010).

The only evidence in the record related to destruction of the videotape evidence supports defendants’ position that the video was erased as part of the routine operation of Wisconsin Secure Program Facility’s video system and that individual corrections officers did not participate in the decision whether to preserve video footage. Aff. of Gary Boughton ¶¶ 6, 10. There is no evidence that defendants Grondin, Taylor, Hunt or Murray had any part in operating the video system or destroying the video footage of the relevant incidents. Although plaintiff contends that defendants could have “affirmatively intervened” to stop

the routine destruction of the videotapes, plaintiff cites no evidence to support this assertion. Further, plaintiff cites no legal authority for the proposition that defendants had an obligation to “affirmatively intervene” under the circumstances.

In sum, because plaintiff did not adduce evidence that defendants destroyed the videotape in bad faith, he has not shown that he was entitled to an adverse inference jury instruction or that he should be granted a new trial. Park, 297 F.3d at 616 (concluding that district court did not abuse its discretion in declining to give adverse inference instruction because plaintiff “failed to adduce evidence that the City, in bad faith, declined to produce” records at issue). Therefore, plaintiff’s motion for a new trial will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff Larry Bracey’s motion to withdraw the pro se notice of appeal, dkt. #183, and motion to proceed in forma pauperis on appeal, dkt. #180, are DENIED as moot.
2. Plaintiff’s motion for a new trial, dkt. #178, is DENIED.

Entered this 23d day of February, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge