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

JEFFREY E. OLSON,

Plaintiff,

v.

DONALD MORGAN, RANDY SCHNEIDER and LILLIAN TENEBRUSO,

Defendants.

OPINION AND ORDER

11-cv-282-slc

This is a civil rights action brought pursuant to 28 U.S.C. § 1983 for alleged constitutional violations committed by various officials at the Columbia Correctional Institution against plaintiff Jeffrey Olson. Olson's allegations stem from an incident on March 28, 2011, in which he was injured during a fight with his cellmate, Thomas Russell. On June 25, 2012, I entered an order granting summary judgment in defendants' favor on Olson's claims that defendant Tenebruso failed to provide him with adequate medical care after the fight and that defendant Schneider issued a retaliatory conduct report against him. However, with respect to Olson's claim that defendants Schneider and Morgan violated Olson's Eighth Amendment rights by failing to protect him from the attack, I stayed the motion and directed these defendants to submit additional information regarding what, if anything, they knew about Russell's disciplinary record and the reason for his placement in segregation at the time he was celled with Olson on the DS-2 unit in 2011. Dkt. 84.

Defendants Schneider and Morgan have now submitted affidavits showing that, contrary to the broad, unfounded allegations plaintiff made in his summary judgment submissions, Russell did not have a violent history or a history of problems with other inmates, nor were defendants aware of information that would have alerted them that Russell should have had his own cell. Accordingly, because there is no evidence to support Olson's allegation that Russell

was a "known violent offender," Olson cannot succeed on his theory that Russell should not have been double-celled at the time of the attack.

Also unsuccessful is Olson's primary theory of his case, namely, that Schneider and Morgan had to have appreciated the risk that Russell posed to Olson because Olson specifically informed them of this risk. This theory fails as to Morgan because Olson has produced no admissible evidence showing that Morgan knew before the attack that there were any problems between Olson and Russell. As for Schneider, although the evidence shows that he was aware of facts that suggested that Russell might harm Olson, he took reasonable actions in response to those facts. Accordingly, no jury could find he was deliberately indifferent to Olson's safety.

Finally, Olson has filed a motion for reconsideration of the June 25 order granting summary judgment in favor of Tenebruso.[1] Dkt. 98. Because nothing in the motion convinces me that I committed a plain error of law or fact in deciding Tenebruso's motion for summary judgment, Olson's motion for reconsideration will be denied.

Some preliminary comments about the facts are in order. In the first summary judgment order, dkt. 84, I made findings concerning most of the facts that are material to Olson's failure-to-protect claim; those facts are incorporated herein by reference. My order directing defendants to submit additional information was limited to information regarding Russell's disciplinary and psychological history and the defendants' role, if any, in the decision that Russell was eligible for double-celling. Defendants did not limit their additional submissions to that directed by the court but gratuitously included additional proposed findings of fact regarding matters already

[1] In his motion, Olson also asks the court to reconsider its grant of summary judgment to defendant Morgan. However, this court did not grant summary judgment to Morgan; it granted summary judgment to Tenebruso on the denial of medical care claim and to Schneider on the retaliation claim. Nothing in Olson's reconsideration motion addresses the retaliation claim. Accordingly, in deciding the motion, I have examined only that portion of the June 25 order relating to the claim against Tenebruso. To the extent Olson *is* seeking reconsideration on the retaliation claim, he has waived his right to such relief by failing to develop any argument or present any evidence regarding that claim. *Garg v. Potter*, 521 F.3d 731, 736 (7th Cir. 2008) (explaining that undeveloped arguments are waived).

found as fact by the court in its first order. This was inappropriate: the court had not invited and was not permitting defendants–or Olson–to amplify the record on other factual matters. The court's only goal was to learn whether there was any evidentiary support for Olson's pivotal allegations about Russell's prison history and Olson's suggestion that Russell should not have been eligible for double-celling. The parties already had had a full opportunity to make their factual record on the other points. Accordingly, I have disregarded defendants' proposed findings of fact (and Olson's responses) that venture beyond that limited issue.[2]

From the defendants' supplemental proposed findings of fact and Olson's responses on the issue on which the court requested input, I find the following additional facts to be material and undisputed for the purposes of the instant motion:

FACTS

When an inmate arrives at Columbia Correctional Institution, he is reviewed by the institution's psychological services staff and security staff to determine if he is a possible candidate for double-celling. In this case, plaintiff Jeffrey Olson arrived at Columbia in November 2008 and was determined to be eligible for double-celling. Neither defendant Morgan nor defendant Schneider participated in this eligibility decision regarding Olson. Likewise, Thomas Russell was deemed eligible to share a cell when he was screened in April 2010. Again, neither defendant Morgan nor Schneider participated in this decision regarding Russell.

Before the March 28, 2011 fight with Olson, Russell did not have a conduct history involving assaultive behavior toward inmates or staff. Russell's history consisted of four conduct

[2] Specifically, I have not considered Defendants' Supplemental Proposed Findings of Fact Nos. 16-21 and 27-31.

reports that involved disrespectful or disobedient behavior. None of these incidents had resulted in serious disciplinary action.

Russell arrived on the DS-2 unit on March 21, 2011, having been transferred there from general population because of an incident in which he refused to move from one cell to another when ordered to do so by a correctional officer. Defendant Schneider did not work on the DS-2 unit that day and was not involved in the decision to place Russell and Olson together in a cell. That decision would have been made by the unit staff on duty that day.

An inmate's eligibility for cell-sharing is commemorated in a computerized data base that the officers can access on each unit. This database is updated regularly to reflect changes in status. At the time of the fight between Olson and Russell in March 2011, the data base would have shown that both inmates were eligible to be double-celled.[3] There is no rule against double-celling inmates while they are in segregation status, although the nature of the conduct that causes an inmate to be placed in segregation often makes a double-cell arrangement inappropriate.

Defendant Schneider does not recall receiving any reports about Russell being violent prior to the incident between Russell and Olson on March 28, 2011.

OPINION

I. Motion for Summary Judgment by Morgan and Schneider on Failure-to-Protect Claim

A. Legal Standard

The Eighth Amendment imposes upon prison officials a duty to protect prisoners from violence at the hands of other prisoners. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

[3] Olson asserts that Russell should have had a single cell because Russell asked to be placed in protective custody. However, Olson has not introduced any evidence to support his assertion apart from Russell's hearsay statement, which is not admissible evidence. Fed. R. Evid. 801, 802. Further, even if Olson could show that Russell *had* asked for a protective custody placement, Olson has presented no evidence that either Morgan or Schneider was aware of Russell's request, much less obliged to grant it.

However, because it is only the "unnecessary and wanton infliction of pain" that implicates the Eighth Amendment, a prisoner cannot establish a constitutional violation merely by showing that he was injured at the hands of another. *Id*. at 834. Instead, he must show that prison officials were "deliberately indifferent" to his health and safety. *Id*.

To establish that a prison official was deliberately indifferent to his safety, a prisoner must prove that the official not only was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, but also that the official drew that inference. *Id.* at 837. Stated differently, "the inquiry is not whether individual officers *should have* known about risks to [the inmate's] safety, but rather whether they *did* know of such risks." *Grieveson v. Anderson*, 538 F.3d 763, 775 (7th Cir. 2008) (emphasis in original) (citing *Farmer*, 511 U.S. at 842-43). In addition, a prison official who actually knew of a substantial risk to inmate health or safety but took reasonable steps to avert it does not violate the Eighth Amendment, even if the harm ultimately was not averted. *Farmer*, 511 U.S. at 844.

To be entitled to a trial on his failure-to-protect claim, then, Olson must adduce evidence sufficient to warrant a reasonable juror answering "yes" to these three questions: 1) Did Olson face a substantial risk of harm from Russell? 2) Did Morgan or Schneider know that Olson faced this risk? 3) If so, did Morgan or Schneider personally disregard this risk? *Grieveson*, 538 F.3d at 775.

As an initial matter, I reject Olson's suggestion that the mere location of his confinement—a segregation unit in one of Wisconsin's maximum-security prisons—is sufficient in itself to prove that Morgan and Schneider knew he faced a substantial risk of harm from another inmate. As the Court of Appeals for the Seventh Circuit has explained,

> [P]risons are dangerous places. Inmates get there by violent acts, and many prisoners have a propensity to commit more. Guards cannot turn away persons committed by the courts; nor do individual guards have any control over crowding and other

> systemic circumstances. All that can be expected is that guards act responsibly under the circumstances that confront them.

Riccardo v. Rausch, 375 F.3d 521, 525 (7th Cir. 2004). The Eighth Amendment, after all, offers protection against cruel and unusual "punishment," and whether "an injury inflicted by fellow prisoners . . . is 'punishment' depends on the mental state of those who cause or fail to prevent it." *McGill v. Duckworth*, 944 F.2d 344, 347 (7th Cir. 1991); *see also Farmer*, 511 U.S. at 837 ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"). Perhaps Olson might be able to establish defendants' requisite mental state if Olson were able to show that fights between double-celled inmates occur so frequently in the DS-2 unit at CCI that Schneider and Morgan were bound to know that putting two inmates in a cell together more likely than not result would in one assaulting the other. *Farmer*, 511 U.S. at 842-43; *Riccardo*, 375 F.3d at 527. But because Olson has not introduced any evidence of this sort, the focus must be on whether there is any evidence—*apart* from the inherent dangers in the DS-2 unit—from which to conclude that Schneider or Morgan was subjectively aware that Olson faced a substantial risk of harm from Russell.

B. Morgan

Olson has failed to submit sufficient admissible evidence from which a jury could find that Morgan actually received notice of Russell's threatening behavior and subjectively appreciated that Olson faced a substantial risk of harm from Russell. Morgan denies having received any notice from Olson about Russell until *after* the fight occurred on March 28. Although Olson asserts in his affidavit that he wrote to Morgan on March 26, 2011, he has not produced copies of his correspondence or even summarized its content; all he says is that he wrote to Morgan "regarding Inmate Thomas Russell." Even accepting Olson's testimony that he sent a letter, his vague assertion that he "complained" to Morgan is simply not specific

enough to support an inference that Morgan understood from this complaint that Russell posed a substantial threat to Olson's safety *before* the attack. Further, Morgan's role as the supervisor of the DS-2 unit does not make him liable for the actions of his subordinates. There is no concept of supervisor strict liability under § 1983. *Harris v. Greer*, 750 F.2d 617, 618 (7th Cir. 1984).

As noted in this court's June 25, 2012 order, Olson's summary judgment submissions hinted at another theory of liability against Morgan, namely, that he participated in the decision to classify Russell as a "double cell" inmate and that he did so knowing that Russell posed a risk to other cellmates because Russell had a violent prison history as well as a history of refusing "psychotropic" medications. As defendants' requested supplemental submissions make clear, however, Olson's allegations (which he failed to support with any admissible evidence) are baseless. Although there may have been occasions when Russell failed to take his medication, Russell did not have a history of violence or assaultive behavior in prison. In any case, Morgan did not participate in the decision to classify him as eligible to share a cell.

Accordingly, because Olson has failed to present any evidence showing that Morgan was aware of facts from which an inference could be drawn that Olson faced a substantial risk of serious harm from Russell or that Morgan drew that inference, I am granting summary judgment in favor of Morgan on this claim.

C. Schneider

I must assume for summary judgment purposes that Olson's version of the facts is correct: that Olson told Schneider that Russell had not been taking his medications and heard voices that told him to attack people, that Olson twice had "tried to swing off" on him and that Olson feared another such attempt. As the Court of Appeals for the Seventh Circuit has explained, however, "[t]he Constitution does not oblige guards to believe whatever inmates say." *Riccardo*,

375 F.3d at 527. "[P]risoners may object to potential cellmates in an effort to manipulate assignments, or out of ignorance; thus although a protest may demonstrate risk it does not necessarily do so." *Id*. A guard need not credit a prisoner's assertions of fear of harm from his cellmate where there are no objective indicators to substantiate those assertions. *Id*. at 528.

In *Riccardo*, for example, Riccardo had objected to sharing a cell in the segregation unit with an inmate named Juan Garcia, who was a member of the Latin Kings gang. Before the cells were locked for the night, Riccardo sought out the guard on duty, Lt. Rausch, and told him that he believed that the Latin Kings had a "hit" out on him and that he feared for his life if celled with Garcia. Rausch told Riccardo that there was no place else to put either inmate for the night and that he could not refuse housing while in segregation. Rausch then brought both Garcia and Riccardo back to the cell and asked each, in turn, if he had a problem with the other; Riccardo shook his head in the negative. Rausch accepted Riccardo's non-verbal assertion and placed him the same cell with Garcia; that was Rausch's last contact with Riccardo. Two nights later, Garcia compelled Riccardo to perform oral sex. The trial court upheld the jury's verdict that Rausch had subjected Riccardo to cruel and unusual punishment by celling him with Garcia. *Id*. at 523, 525.

The Court of Appeals reversed, finding that no reasonable jury could find that Rausch knew or deliberately disregarded the fact that his actions subjected Riccardo to a substantial risk of serious harm. *Id*. at 527. First, the court noted that in spite of Riccardo's initial assertion of fear from Garcia, Rausch was entitled to credit Riccardo's second, contradictory statement when he indicated that he did not have a problem sharing a cell with Garcia. *Id*. The court also pointed out that Rausch knew two additional facts that supported his decision: 1) Garcia was himself in segregation for protection *from* the Latin Kings and therefore could not be deemed a

gang enforcer; and 2) Garcia had not been disciplined in prison for any acts of violence or sexual assault. *Id*.[4]

Following *Riccardo*, I conclude that no reasonable jury could find that Schneider subjectively appreciated but disregarded a substantial risk of harm to Olson from Russell. First, as should be plain from the discussion above concerning Morgan, there is no merit to Olson's unsupported allegation that Russell had a violent prison history and that Schneider knew about it. Second, Schneider did not ignore what Olson told him. Rather, he attempted to discern whether there were any objective indicators to support Olson's assertion: Schneider asked the regularly-assigned officers to the DS-2 unit whether they had noticed any problems between Olson and Russell or with Russell taking his medications and was told no, they had not. Even then, Schneider directed the officer responsible for distributing prisoner meds to make sure that Russell took his medication, since Olson had flagged Russell's failure to medicate as the source of his threatening behavior. When Schneider did not hear back from that officer, he reasonably assumed that Russell had taken his medication that evening.

Schneider's act and omissions do not come close to establishing that he consciously disregarded a known risk to Olson's safety. To the contrary, the precautions Schneider took were reasonable in light of the information he had at his disposal concerning Russell and Olson. *Accord Grieveson*, 538 F.3d at 777 (proving deliberate indifference requires more than showing of negligence or even gross negligence; officer must have acted with equivalent of criminal recklessness). About the only other action Schneider could have taken was to have

[4] It is unclear whether the majority would have reached the same conclusion regarding Rausch's appreciation of risk had these objective facts not been in the record and the only fact was Riccardo's denial of having a "problem" with Garcia when Rausch confronted the inmates with this question. The district court and Judge Williams, who dissented, found ample evidence in the record from which the jury could have concluded that Rausch's decision to question Riccardo in front of Garcia was not a reasonable way to abate the potential danger to Riccardo. *Riccardo*, 375 F.3d at 532 (Williams, J., dissenting).

accepted Olson at his word and removed Russell from the cell merely upon Olson's say-so. As *Riccardo* makes clear, however, the Eighth Amendment did not require this course of action. Accordingly, Schneider is entitled to summary judgment on this claim.

II. Motion for Reconsideration on Denial of Medical Care Claim

In the June 25 order, I granted defendant Tenebruso's motion for summary judgment on Olson's claim that she violated his rights under the Eighth Amendment by failing to provide him with adequate medical care for the injuries he sustained in the fight with Russell, finding no evidence in the record to show that Olson had a serious medical need or that, if he did, to show that Tenebruso was aware of it before April 14, 2011. In his motion for reconsideration, Olson appears to dispute this finding, asserting that defendants have in their possession or know about written communications sent by Olson to the Health Services Unit and Tenebruso dated March 29, March 30, April 2, April 3, April 5, April 6, April 7, April 9 and April 10, 2011, which would "directly impeach the testimony of Tenebruso." Mot. for Reconsideration, dkt. 98, at 1. Olson has not attached copies of these communications, he has not sworn to having sent them to defendants, and he has not described their contents. Olson simply accuses defendants of having failed to produce them during discovery. The only "evidence" that Olson has attached to his motion are copies of handwritten pages that he alleges are excerpts from his own daily journal during the relevant time frame, but he does not point out specific passages or explain what is in them that shows that this court erred.

Courts may grant Rule 59(e) motions "to alter or amend the judgment if the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record that clearly establishes a manifest error of law or

fact." *In re Prince*, 85 F.3d 314, 324 (7th Cir.1996). This rule "enables the court to correct its own errors and thus avoid unnecessary appellate procedures." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996).

Olson has not presented any new evidence, much less explained why such evidence was not available to him at the time he responded to Tenebruso's motion for summary judgment. As explained in the June 25 order, 2012 Olson cannot create a genuine dispute of fact simply by his own say-so in a motion or brief; to defeat defendants' summary judgment motion, he was required to point to admissible evidence showing that he informed Tenebruso of facts alerting her that he had a serious medical need before April 14. Op. and Order, June 25, 2012, dkt. at n.5. Even on reconsideration, Olson has failed to submit this type of evidence.

Rather than make a pointed argument, supported by newly-discovered evidence, as to why this court erred, Olson simply repeats his blanket accusations of discovery misconduct against defendants that he made in the initial summary judgment proceeding. As explained in the June 25, 2012 order, however, it is much too late these sorts of objections. *Id*. at 2-3. Before his response to the summary judgment motion was due, this court gave him specific instructions regarding what he needed to do if he continued to have problems with defendants' discovery disclosures. *See* March 21, 2012 Order, dkt. 67, at 2. Olson did not heed these instructions. As a result, the evidence, if it exists, is not in the record.

ORDER

IT IS ORDERED that:

1. Defendants' motion for summary judgment, dkt. 51, is GRANTED as to plaintiff's claim that defendants Schneider and Morgan failed to protect him from the March 28, 2011 attack by his cellmate, Thomas Russell.

2. Plaintiff's motion for reconsideration, dkt. 98, is DENIED.

3. All remaining motions are DENIED as moot.

4. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 23rd day of July, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge