IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE L. CHERRY,

Plaintiff,

OPINION AND ORDER

v.

02-C-71-C

JON LITSCHER and GERALD BERGE,

Defendants.

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In this civil action for declaratory, injunctive and monetary relief, plaintiff Eugene Cherry, a prisoner at the Wisconsin Secure Program Facility (formerly known as Supermax Correctional Facility), alleges that defendants Jon Litscher and Gerald Berge violated his right to be free from cruel and usual punishment under the Eighth Amendment by depriving him of his basic human need for social interaction and sensory deprivation. In addition, plaintiff alleges that defendants violated his right under the Fourth Amendment to be free from unreasonable searches and seizures by searching his cell and his person for no legitimate reason.

Both plaintiff and defendants have filed motions for summary judgment. Because I conclude that plaintiff has failed to show that he is entitled to judgment as a matter of law

or that a reasonable jury could find in his favor with respect to either his Eighth Amendment claim or his Fourth Amendment claim, plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted.

As a preliminary matter, I note that although both parties filed proposed findings of fact, plaintiff did not file responses to defendants' proposed findings of fact. Instead, he filed a document in which he alleges that before he could respond to defendants' proposed findings, his cell was searched and "all evidence pertaining to this case" was confiscated in order to prevent him from prevailing on his motion for summary judgment. He asks that his motion for summary judgment be granted as a sanction.

Plaintiff's motion for sanctions will be denied. He has not identified with any specificity what evidence was taken from his cell or, more important, how he would have used that evidence to respond to defendants' proposed findings of fact. He has filed an affidavit of another inmate who avers that he saw prison officials taking envelopes from plaintiff's cell, but plaintiff has not explained what was in those envelopes. In response to plaintiff's motion, defendants filed an affidavit of Tim Haines, who is the Corrections Unit Supervisor for the unit in which plaintiff is housed. Haines avers that although plaintiff's cell was searched, no legal materials were confiscated from his cell. Instead, Haines avers, officials took from plaintiff's cell a Money, Education and Prisons publication and a mail order form from USA Personals. Although plaintiff submitted his own affidavit in response

to Haines's in which he claims that Haines is "lying," he still does not identify what legal materials were taken from him.

Moreover, plaintiff does not allege that prison officials interfered with his ability to file his own proposed findings of fact or submit evidence to the court that would support his motion for summary judgment. Even if plaintiff had been able to show that all of defendants' proposed findings of fact were disputed or immaterial and I considered only plaintiff's proposed findings of fact, I still could not grant plaintiff's motion for summary judgment. Rather, plaintiff's proposed findings of fact show that no reasonable jury could find in favor of him on his Eighth Amendment claim or his Fourth Amendment claim. Therefore, for the purpose of deciding these motions, I will assume that plaintiff would have disputed all of defendants' proposed findings of fact and I will consider only plaintiff's proposed factual findings.

From plaintiff's proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Eugene Cherry is an inmate at the Wisconsin Secure Program Facility (formerly known as Supermax Correctional Institution) in Boscobel, Wisconsin. Defendant Gerald Berge is the warden. Defendant Jon Litscher is Secretary of the Wisconsin

Department of Corrections.

The vast majority of plaintiff's time at the Wisconsin Secure Program Facility has been spent on Level 1.

A physician has prescribed medication for plaintiff to help him sleep. Before plaintiff arrived at the Wisconsin Secure Program Facility, he never took medication to help him sleep. Plaintiff believes that the reason he cannot sleep is the constant illumination in his cell and noise caused by cell doors.

Between December 1999 and June 2002, various prison officials searched plaintiff's cell numerous times.

OPINION

A. Conditions of Confinement

As a preliminary matter, I note that plaintiff's claim is limited to challenging conditions that existed before March 28, 2002. On that date, I approved a settlement agreement in Jones 'El v. Litscher, 00-C-421-C (W.D. Wis. 2002), which modified the conditions of confinement at the Supermax Correctional Institution that plaintiff is challenging in this action. In approving the agreement, I concluded that it was fair, reasonable and lawful. See Jones El' v. Litscher, 00-C-421-C, Order dated March 28, 2002, dkt. #207, at 8.

Because plaintiff is an inmate at Supermax, he is a member of the class in Jones 'El. See id. Order dated February 15, 2001, dkt. #37, slip op. at 13) (defining class members as "all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin"). Therefore, he is bound by that agreement and cannot obtain injunctive or declaratory relief for those issues covered by the settlement agreement or recover money damages for conditions addressed by the agreement that occurred after the settlement agreement was approved. See United States v. Fisher, 864 F.2d 434, 439 (7th Cir. 1988) (internal citations omitted) ("A consent decree is res judicata and thus bars either party from reopening the dispute by filing a fresh lawsuit. Alternatively, it is a contract in which the parties deal away their right to litigate over the subject matter.") Therefore, I did not consider facts proposed by the parties that referred to conditions in the prison as they existed after March 28, 2002.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." It applies to the states by virtue of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). Confinement in a prison is a form of punishment subject to scrutiny under Eighth Amendment standards. Helling v. McKinney, 509 U.S. 25, 31-32 (1993); Hutto v. Finney, 437 U.S. 678, 685 (1978). Like most other claims under the Eighth Amendment, a claim asserting cruel and unusual conditions of confinement must satisfy a two-part test, with a subjective and an objective

component. Farmer v. Brennan, 511 U.S. 825, 835 (1994). A plaintiff must show both that the conditions to which he or she is subjected are "sufficiently serious" (objective component) and that defendants are deliberately indifferent to the inmate's health or safety (subjective component). Id.

1. Sufficiently serious conditions

The standard for determining whether prison conditions satisfy the objective component of the Eighth Amendment is understandably imprecise. Generally, the inquiry focuses on whether the conditions are contrary to "the evolving standards of decency that mark the progress of a maturing society." Farmer, 511 U.S. at 833-34 (internal quotations omitted). The question has been described alternatively as whether the inmate has been denied "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). To satisfy this test, the deprivation must be "extreme"; mere discomfort is not sufficient. Hudson v. McMillan, 503 U.S. 1, 8-9 (1993). However, " a remedy for unsafe conditions need not wait a tragic event." Helling, 509 U.S. at 33. If a prisoner is being exposed to "an unreasonable risk of serious damage to his future health," this may satisfy the Eighth Amendment's objective component. Id. at 35.

In his complaint, plaintiff alleges that the total combination of the following conditions of confinement at Supermax violated his Eighth Amendment rights: isolation

from contact with other human beings; the intercom system; constant monitoring; constant lighting; lack of sunshine; constant boom of cell doors; remote listening devices; and remote control devices for televisions, water and lights. The Supreme Court has rejected the view that "'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." Wilson v. Seiter, 501 U.S. 294, 305 (1991). Rather, the Court has stated: "*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise–for example a low cell temperature at night combined with a failure to issue blankets." Id. In accordance with Wilson, I granted plaintiff leave to proceed on a claim against defendants that the total combination of isolation from contact with other human beings; the intercom system; constant monitoring; constant lighting; lack of sunshine; constant boom of cell doors; remote listening devices; and remote control devices for televisions, water and lights deprive him of the basic human needs of social interaction and sensory stimulation.

Even considering only plaintiff's evidence, I cannot conclude that a reasonable jury could find that defendant has violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment. To prevail on his claim, plaintiff would have to show initially that he was in fact subjected to the conditions about which he complained. He

would then have to show that, in combination, these conditions deprived him of the basic human need for social interaction and sensory stimulation. However, plaintiff has proposed only ten findings of fact. These proposed findings show that plaintiff is usually on Level 1 and that plaintiff has needed to take medication in order to sleep since arriving at Supermax. These facts are simply not enough to permit a reasonable jury to find that plaintiff's conditions of confinement deprive him of a basic human need for social interaction and sensory stimulation. Plaintiff has provided no evidence of the extent to which he is deprived of social interaction. (Plaintiff proposed a fact that "inmates are isolated from contact with other human beings." Plt.'s Prop. Find. of Fact, dkt. #46, at 2, ¶ 9. However, he does not propose any facts regarding the specifics of his individual situation.) Further, although evidence of sleep deprivation could support a claim that plaintiff is being denied sensory stimulation, plaintiff has adduced no evidence that he is being deprived of sleep, only that he needs medication in order to sleep. Millions of Americans outside prison walls share this problem. Even assuming that plaintiff's conditions of confinement are the reason for his dependency on sleep aids, by itself such dependence does not violate the Eighth Amendment.

Because plaintiff has not met his burden regarding the objective component of the Eighth Amendment test, it is unnecessary to consider whether defendant acted with deliberate indifference to plaintiff's health or safety. Plaintiff's motion for summary

judgment will be denied with respect to his Eighth Amendment claim and defendants' motion for summary judgment will be granted.

B. Searches

It is undisputed that plaintiff's cell has been searched numerous times while he has been an inmate at the Wisconsin Secure Program Facility. (The parties dispute whether plaintiff was also subject to body cavity searches.) The search of a prisoner is unreasonable and thus violates the Fourth Amendment when the need for the search does not outweigh the invasion of the prisoner's personal rights. See Bell v. Wolfish, 441 U.S. 520, 559 (1979).

Even assuming that plaintiff has been searched unreasonably, he has presented no evidence that defendants can be held liable for those searches. The record shows that plaintiff's cell was searched numerous times by various officers but defendants are not among those identified. Although defendants are the prison's warden and the Secretary of the Wisconsin Department of Corrections and thus may have supervisory authority over the officials who searched plaintiff or his cell, the general rule is that, under 42 U.S.C. § 1983, supervisors cannot be held liable for the actions of their employees. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Rather, to establish liability, plaintiff must show that there is an affirmative link or causal connection between the misconduct complained of and the

official sued. Smith v. Rowe, 760 F.2d 360, 369 (7th Cir. 1985); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). In other words, "liability does not attach unless the individual defendant caused or participated in a constitutional deprivation." Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994). Plaintiff has presented no evidence that defendants directed prison officials to search him or that they even knew that plaintiff was being searched. Without such evidence, plaintiff's Fourth Amendment claim cannot succeed. Therefore, plaintiff's motion for summary judgment with respect to this claim will be denied and defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. Plaintiff Eugene Cherry's motion for sanctions is DENIED.

2. Plaintiff's motion for summary judgment is DENIED.

3. The motion for summary judgment filed by defendants Jon Litscher and Gerald Berge is GRANTED. The clerk of court is directed to enter judgment in favor of defendants

and close this case.

Entered this 22nd day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge