

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

ANTHONY D. TURNER,

Plaintiff,

OPINION AND
ORDER

v.

05-C-508-C

DERRICK ESSER and SGT. MICKELSON,

Defendants.

In this civil action for injunctive, declaratory and monetary relief, plaintiff Anthony D. Turner contends that defendants Derrick Esser and Sgt. Mickelson violated his rights under the Eighth Amendment when defendant Mickelson sexually assaulted plaintiff during a pat search and defendant Esser failed to prevent the sexual assault.

The case is before the court on defendants' motion for summary judgment, which was filed on May 11, 2006. The motion will be granted because no reasonable jury could conclude from the evidence that defendants violated plaintiff's Eighth Amendment rights during the pat search at issue.

On May 16, 2006, the court sent the parties a briefing schedule, giving plaintiff until

June 12, 2006, to oppose defendants' motion. Plaintiff has not responded to the motion. Therefore, in determining the material and undisputed facts, I have considered defendants' proposed findings of fact only. From these proposed facts I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Anthony D. Turner is a Wisconsin state inmate housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendants Derrick Esser and Sargent Mickelson are employed at the Wisconsin Secure Program Facility as a corrections officer and corrections sergeant, respectively.

When an inmate at the Boscobel facility is removed from his cell, officers restrain him and conduct a pat search. Inmate searches are critical to the security of the institution because they help to identify contraband possessed by inmates and allow such contraband to be confiscated before the inmate is moved from one location to another.

On April 4, 2005, plaintiff was transferred from the Echo Unit to the Foxtrot Unit. Defendants and an Officer Hassell assisted with the transfer. Defendant Mickelson conducted a pat search after plaintiff was removed from his cell and before he was transferred. Plaintiff was agitated during the search and made derogatory comments and threats towards defendant Mickelson and stated, "Watch where you put your hands."

Defendant Esser and Officer Hassell held plaintiff while defendant Mickelson conducted the search. During the search, defendant Mickelson did not inappropriately fondle or grab plaintiff's penis or buttocks or otherwise harass or humiliate plaintiff. Neither defendant laughed at plaintiff during the search. After defendant Mickelson completed the search, defendant Esser and Officer Hassell escorted plaintiff to the Foxtrot Unit.

DISCUSSION

The Court of Appeals for the Seventh Circuit has held that a search of a prisoner may violate the Eighth Amendment. Calhoun v. Detella, 319 F.3d 936 (7th Cir. 2003). In assessing whether a search of a prisoner's person violates the Eighth Amendment, the court of appeals has applied a standard similar to that of excessive force. In other words, a plaintiff must show that the search was "conducted in a harassing manner intended to humiliate and inflict psychological pain." Calhoun, 319 F.3d at 939. Prison officials are certainly permitted to touch, pat down and search a prisoner in order to determine whether the prisoner is hiding anything dangerous in his person. Whitman v. Nestic, 368 F.3d 931, 934 (7th Cir. 2004). I granted plaintiff leave to proceed in this action because he alleged in his complaint that defendant Mickelson had grabbed his buttocks and fondled his penis during the search; such actions would not advance any legitimate security interest. As I explained in this court's order dated March 22, 2006, to prevail against defendant

Mickelson plaintiff had to prove that defendant Mickelson touched him in way that actually entailed *grabbing* his buttocks and *fondling* his penis. Plaintiff's claim against defendant Mickelson fails because there is no evidence that defendant Mickelson grabbed, fondled or touched plaintiff inappropriately. Therefore, plaintiff's claim against defendant Esser fails also. Windle v. City of Marion, Indiana, 321 F.3d 658, 663 (7th Cir. 2003) (quoting Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994)) (state actor liable for failing to prevent another state actor from committing constitutional violation if he "had a realistic opportunity to intervene to prevent the harm from occurring.>"). Defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that defendants Derrick Esser's and Sgt. Mickelson's motion for summary judgment is GRANTED.

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

Entered this 7th day of July, 2006.

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