

NA 07-0003-C H/H Marion v Town of Corydon [2]
Judge David F. Hamilton

Signed on 10/22/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TRENT MARION,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 4:07-cv-0003-DFH-WGH
)	
THE TOWN OF CORYDON, et al.,)	
)	
Defendants.)	

ENTRY ON MOTION TO STRIKE AFFIDAVIT FROM APPELLATE RECORD

Plaintiff Trent Marion has filed an appeal of this court's final judgment against him on his claims for excessive force at the conclusion of the high speed chase. Marion has included in the appellate record his affidavit, which he submitted for the first time after the court had granted the pending motions for summary judgment on March 20, 2008, but before the court entered final judgment for all defendants on June 3, 2008. Defendants Town of Corydon, Harrison County, and the individual officers of those local governments have moved to strike Marion's affidavit from the appellate record. Rule 10(e) of the Federal Rules of Appellate Procedure provides that if any difference about whether the record truly discloses what occurred in the district court, the issue must be submitted to the district court for resolution. Pursuant to Seventh Circuit Rule 10(b), defendants have filed their motion with this court.

The court denies the motion to strike and leaves to the Court of Appeals the determination whether the affidavit deserves to be considered. Including Marion's affidavit ensures, in the terms of Rule 10(e), that "the record truly discloses what occurred in the district court." See *United States v. Elizalde-Adame*, 262 F.3d 637, 641 (7th Cir. 2001) (purpose of Rule 10(e) is "to ensure that the record on appeal accurately reflects the proceedings in the trial court (thereby allowing us to review the decision that the trial court made in light of the information that was actually before it)").

Plaintiff's affidavit was part of the evidence before this court, though he did not submit it at the proper time. In the June 3, 2008 entry on plaintiff's motion to reconsider, this court explained that plaintiff had submitted his affidavit too late to affect the resolution of the motions for summary judgment that had been granted on March 20, 2008. *Marion v. Corydon*, 2008 WL 2557476, at *2 (June 3, 2008). The court stands by that conclusion. On appeal, however, plaintiff's arguments would not be comprehensible without consideration of the affidavit that was filed so late. Because the affidavit was actually filed in this district court, though late, the affidavit should not be stricken from the appellate record.

So ordered.

Date: October 22, 2008

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

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