UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

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| MORICE ERVIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 2:21-cv-00247-MPB-MJD |
| | ) | |
| PHILLIPS Deputy, | ) | |
| SISCO Deputy, | ) | |
| BELL Deputy, | ) | |
| SHAKEY Deputy, | ) | |
| MOENDS Lt., | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff Morice Ervin is an Indiana Department of Correction inmate. In this action he alleges that he faced unconstitutional conditions of confinement while briefly housed at the Marion County Jail ("MCJ") on two occasions in the spring of 2021. Defendants Marvin Mullins, Ricky Phillips, Jerry Shake, Anthony Bell, and Anthony Sisco have moved for summary judgment.[1] Dkt. [47]. For the reasons below, that motion is **GRANTED IN PART AND DENIED IN PART**.

## I. Standard of Review

A motion for summary judgment asks the Court to find that a trial is unnecessary because there is no genuine dispute as to any material fact and, instead, the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). When reviewing a motion for summary judgment, the Court views the record and draws all reasonable inferences from it in the light most favorable

[1] Plaintiff identified Lieutenant Marvin Mullins as "Moends" and Deputy Anthony Shake as "Shakey" in his complaint. Dkt. 2. Defendants acknowledged in their answer that these defendants' actual last names are Mullins and Shake. Dkt. 17. The **clerk is directed** to change these defendants' names on the docket.

to the nonmoving party. *Khungar v. Access Cmty. Health Network*, 985 F.3d 565, 572–73 (7th Cir. 2021). It cannot weigh evidence or make credibility determinations on summary judgment because those tasks are left to the fact-finder. *Miller v. Gonzalez*, 761 F.3d 822, 827 (7th Cir. 2014). A court only has to consider the materials cited by the parties, *see* Fed. R. Civ. P. 56(c)(3); it need not "scour the record" for evidence that might be relevant. *Grant v. Trs. of Ind. Univ.*, 870 F.3d 562, 573−74 (7th Cir. 2017) (cleaned up).

A party seeking summary judgment must inform the district court of the basis for its motion and identify the record evidence it contends demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

Whether a party asserts that a fact is undisputed or genuinely disputed, the party must support the asserted fact by citing to particular parts of the record, including depositions, documents, or affidavits. Fed. R. Civ. P. 56(c)(1)(A). Failure to properly support a fact in opposition to a movant's factual assertion can result in the movant's fact being considered undisputed, and potentially in the grant of summary judgment. Fed. R. Civ. P. 56(e).

## II.
## Factual Background

Because Defendants have moved for summary judgment under Rule 56(a), the Court views and recites the evidence in the light most favorable to Plaintiff and draws all reasonable inferences in that party's favor. *Khungar*, 985 F.3d at 572–73.

Plaintiff currently is, and has been since 2015, an inmate at Wabash Valley Correctional Facility ("WVCF"). In the spring of 2021, however, he spent two brief stints in the Marion County Jail ("MCJ") while he attended hearings in Marion County on two different petitions for post-

conviction relief challenging his convictions.[2] It is during those two stints that Plaintiff contends he was subjected to unconstitutional conditions of confinement. The first time period was from April 12-26, and the second was from May 17-28. Dkt. 47-5, pp. 10, 12, 24.

When Plaintiff first arrived at MCJ in April 2021, he initially was placed in a clean holding cell. Plaintiff's deposition, dkt. 47-2, p. 82. A day or two later, Plaintiff was moved to cell 4H-9. *Id.* Plaintiff complained about the cell smelling like urine and feces, and visible feces being smeared on the walls and bars and sink, and that the mattress was urine-soaked. *Id.* at 76-80. When Plaintiff arrived at the cell another inmate was attempting to clean it with a wipe, but it was just smearing the mess around. *Id.* at 77. Plaintiff described having an "anxiety attack" while in 4H. *Id.* at 34.

Within another day or two, Plaintiff was moved to a cell in MCJ Block 4B. Due to staffing issues, jail inmates in 4B were allowed to be in charge of recreation time, distributing food, passing out soap, scheduling shower times, and so forth, and those in charge were extorting the other inmates to gain privileges. *Id.* at 89. Also, Plaintiff heard that some of the other inmates in 4B were talking about "flat lin[ing]," i.e., killing him. *Id.* at 93. The cells in 4B were clean. *Id.* at 90. However, because of Plaintiff's fear of the other inmates in that unit, he insisted to Defendant Deputy Phillips that he was suicidal and fearful for his life and wanted to be transferred to a suicide-watch unit. *Id.* Deputy Phillips initially ignored Plaintiff's pleas but did arrange for Plaintiff's transfer less than a day after Plaintiff arrived in 4B after he complained to a mental health worker. *Id.* at 97.

[2] Plaintiff's summary judgment response refers to a third stay in MCJ, in July 2021. However, Plaintiff's complaint was filed in June 2021, and he never moved to amend his complaint to make any claims related to his July 2021 stay at MCJ. The Court will not consider any claims related to July 2021.

Plaintiff was then moved briefly to another holding cell before being moved to a suicide-watch cell, which he believed was in Block 2K. This cell had "feces everywhere with roaches crawling everywhere. You see roaches everywhere crawling all over the bed sheets everywhere." *Id.* at 103. Plaintiff could not recall who escorted Plaintiff to this cell, but he complained about its cleanliness to Defendant Lieutenant Mullins. *Id.* at 104. In response, Lieutenant Mullins had the cell swept; according to Plaintiff, however, there were still feces on the walls and bars and sink and eating area afterwards. *Id.* at 104-05. Plaintiff pointed this out to Lieutenant Mullins, who acknowledged seeing the feces but walked away without doing anything else. *Id.* at 107, 160. Plaintiff was housed in several different suicide-watch units during the remainder of his April 2021 stint in the MCJ, which were all "filthy," according to Plaintiff. *Id.* at 107. Plaintiff asked Deputy Phillips for towels and/or cleaning supplies for his cell(s) but was refused. *Id.* at 115. Plaintiff also asserts he was denied soap to use to wash his hands after defecating. *Id.* at 116. Deputy Phillips gave Plaintiff the option of moving back to Block 4B, but Plaintiff declined for fear for his life. *Id.* at 111-12. All told, based on Plaintiff's deposition and MCJ's records of where he was located, it appears Plaintiff spent 7-9 days in April in cells he claims were filthy and unsanitary.

When Plaintiff returned to MCJ in May 2021, he was immediately placed in the suicide-watch unit after a brief period in a holding cell. *Id.* at 135. Plaintiff claims that while in the holding cell for a matter of hours, he was exposed to another inmate who had recently been exposed to COVID, and another inmate who had Hepatitis A. Dkt. 52, p. 9. However, Plaintiff has presented no allegation or evidence that he caught either disease. Again, Plaintiff asserts that his cell(s) in this unit, other than the initial holding cell, were filthy and covered in feces and urine. Dkt. 47-2, pp. 135-36. As before, Deputy Phillips told Plaintiff that he could go to Block 4B if he wanted, and as before Plaintiff refused. *Id.* at 144-45.

Plaintiff also states that during his May 2021 stay at MCJ, Deputies Shake, Bell, and Sisco would remove apple juice from his and other inmates' meal trays. *Id.* at 138, 148. Supposedly this was done to reduce the chance of inmates having bowel movements and, thus, less chance of feces being thrown about the jail. *Id.* at 138. Plaintiff has presented no evidence as to how the withholding of apple juice from meal trays impacted his nutritional requirements.

After returning to WVCF, Plaintiff had medical visits in which he complained of his legs itching, which he believed to be caused by an infection acquired during his stays in MCJ. A nurse who examined Plaintiff noted "no evidence of infection." *Id.* at 366. Plaintiff has continued to use a non-prescription anti-itch topical cream on his legs since he was in MCJ. *Id.* at 18.

Plaintiff filed his complaint against multiple parties at the MCJ on June 21, 2021. This Court's screening order stated, "Mr. Ervin's Eighth Amendment conditions of confinement claims **shall proceed** against Lt. M[ullins] for failing to take remedial action after learning of the conditions of Mr. Ervin's confinement, against Deputy Phillips for placing him in a contaminated cell, and against Deputies Shake[], Bell, and Sisco for removing food from his tray. All other claims are **dismissed**." Dkt. 9, p. 3. Plaintiff did not move to amend his complaint or identify other claims in his complaint. Defendants have now moved for summary judgment on all pending claims.

## III.
## Discussion

Defendants assert there is a complete lack of evidence that any of them acted with deliberate indifference to Plaintiff's health or safety. Before turning to the merits of those arguments, the Court notes that Plaintiff has attempted to raise multiple issues in his summary judgment response that are beyond the scope of the claims that the Court allowed to proceed in its screening order and/or that are irrelevant to Defendants' summary judgment motion, and which the

Court will not address. First, there are currently no claims before the Court as to whether Plaintiff was improperly disciplined while he was at MCJ. Second, Plaintiff is attempting to relitigate a motion to compel surveillance footage from MCJ, which this Court has already resolved. Dkt. 42. The alleged footage was related in any event to claims that Plaintiff was unable to shower while he was at MCJ, which is beyond the scope of Plaintiff's allowed claims related to the condition of his cells and provision of food. Plaintiff also briefly mentions being deprived of a medication while at MCJ, but again such a claim is not one that is currently properly before the Court.

**A. Conditions of Confinement Generally**

Under the Eighth Amendment, "prisoners cannot be confined in inhumane conditions." *Thomas v. Blackard*, 2 F.4th 716, 720 (7th Cir. 2021) (citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). Prisons must "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of inmates.'" *Farmer*, 511 U.S. at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517 (1984)).

A conditions-of-confinement claim includes both an objective and subjective component. *Giles v. Godinez*, 914 F.3d 1040, 1051 (7th Cir. 2019). Under the objective component, a prisoner must show that the conditions were objectively serious and created "an excessive risk to his health and safety." *Id.* (cleaned up). Under the subjective component, a prisoner must establish that the defendants had a culpable state of mind — that they "were subjectively aware of these conditions and refused to take steps to correct them, showing deliberate indifference." *Thomas*, 2 F.4th at 720. Proving the subjective component is a "high hurdle" that "requires something approaching a total unconcern for the prisoner's welfare in the face of serious risks." *Donald v. Wexford Health*

*Sources, Inc.*, 982 F.3d 451, 458 (7th Cir. 2020) (internal quotations omitted). Neither "negligence [n]or even gross negligence is enough[.]" *Lee v. Young*, 533 F.3d 505, 509 (7th Cir. 2008).

**1. Sanitation Claims**

The Court first addresses Plaintiff's claim that Defendants Mullins and Phillips were deliberately indifferent to unsanitary conditions in which he was housed at MCJ. It is true that inmates cannot expect the cleanliness of a prison to match that of a "good hotel." *See Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988). On the other hand, prisoners are entitled to at least minimally-sanitary living conditions. *See Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989). The cleanliness (or lack thereof) of a prison's living quarters may be actionable if the conditions are "unusually dirty or unhealthy . . . ." *Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994). When considering a claim such as Plaintiff's, the degree of alleged filth must be balanced against the time the inmate was forced to endure it. *See McBride v. Deer*, 240 F.3d 1287, 1291–92 (10th Cir. 2001). "Not surprisingly, human waste has been considered particularly offensive so that courts have been especially cautious about condoning conditions that include an inmate's proximity to it." *Id.* (cleaned up). In *McBride*, the Court found sufficient allegations of unsanitary prison conditions where a prisoner was left in a feces-covered cell for three days before it was cleaned. *Id.* at 1291.

Plaintiff's sworn deposition testimony is sufficient to allow these claims to proceed.[3] The degree of alleged filth is significant, and the length of time Plaintiff was exposed to it is akin to or even longer than in *McBride*. This includes human waste smeared throughout the cells, even in

[3] Defendants seem to suggest that Plaintiff's testimony had to be corroborated in some fashion in order to create a genuine issue of material fact. This is incorrect. A party's "self-serving" sworn testimony need not be corroborated to be considered on summary judgment. *See Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020). And even if MCJ records might contradict some of Plaintiff's testimony about the cleanliness of his cells, that is not dispositive, but merely creates a genuine issue of material fact.

spaces where Plaintiff was expected to eat. Plaintiff complained about these conditions to both Defendants Mullins and Phillips. Lieutenant Mullins's response was to have a cell swept out, which Defendants suggest was an adequate response and that Plaintiff simply had too high standards for cleanliness. But Plaintiff testified that feces remained smeared throughout the cell even after the sweep-out. And when Plaintiff pointed this out to Lieutenant Mullins, he acknowledged seeing the feces but then simply walked away. Plaintiff's testimony indicates that he was not merely being unduly squeamish, but that he pointed out an objectively unreasonable and unsanitary condition of his cell and that Lieutenant Mullins subjectively decided to ignore it.

As for Deputy Phillips, Plaintiff repeatedly asked for cleaning supplies or for his cell(s) to be cleaned but was denied. Deputy Phillips's proposed solution was for Plaintiff to be returned to Block 4B, which Plaintiff acknowledged had clean cells but where Plaintiff feared for his life and was subject to extortion for privileges from the inmates who effectively controlled that cell block. Essentially, if true, Plaintiff was presented with an unacceptable "Hobson's Choice" between staying in an unsanitary cell or fearing for his personal safety. The Court concludes these options were inadequate to discharge Deputy Phillips's Eighth Amendment obligations to Plaintiff. *See Thompson v. Lengerich*, 798 Fed. App'x 204, 209–10 (10th Cir. 2019) (stating that it is improper to force an inmate to choose between hygiene/sanitation on the one hand and personal safety on the other, as either would deprive inmate of humane conditions of confinement).

Defendants also argue that Plaintiff failed to submit any evidence he sustained an injury because of staying in unsanitary cells while at MCJ. Defendants point to a lack of expert testimony

or other evidence, such as documentation in medical records, indicating that Plaintiff actually acquired an infection of some kind while at MCJ.

The Seventh Circuit rejected a similar argument in *Gray v. Hardy*, 826 F.3d 1000 (7th Cir. 2016). In that case, an inmate complained of being forced to stay in an unsanitary cell without access to cleaning supplies. He also asserted that because of these conditions, his asthma worsened, and he developed a skin rash. But, on summary judgment and acting pro se, he did not present any expert medical evidence definitively linking the unsanitary conditions to any adverse health effects. Nonetheless, the Court held "[w]hile it surely would have been better if Gray had been able to locate a medical expert, the fact that he was unable to do so from prison does not in this situation spell the end of his case." *Id.* at 1007. Moreover, the Court noted that depending on the facts and circumstances and a plaintiff's particular vulnerabilities, "'a trier of fact might reasonably conclude that the prisoner had been subjected to harm sufficient to support a claim of cruel and unusual punishment even if he had not contracted a disease or suffered any physical pain.'" *Id.* at 1008 (quoting *Thomas v. Illinois*, 697 F.3d 612, 614 (7th Cir. 2012)). *See also Wiley v. Kirkpatrick*, 801 F.3d 51, 68 (2d. Cir. 2015) (holding that inmate need not show he or she suffered sickness or other ill effects to establish an Eighth Amendment violation based on unsanitary conditions).

Plaintiff testified that he developed an itchy skin condition of some kind after being at MCJ, which he still treats with a topical cream. Also, Plaintiff testified as to his tendency to have anxiety attacks, and in particular while he was at MCJ. The Court concludes that under *Gray*, and noting Plaintiff's pro se status as did the Court in *Gray*, this is enough to proceed with his claims against Defendants Mullins and Phillips with respect to the cleanliness of his cells. The degree to

which Plaintiff sustained injury, and what that might mean for a damages award, is a different issue altogether. *See Gray*, 826 F.3d at 1008.

The Court does conclude that any claims Plaintiff is attempting to pursue related to being briefly exposed to another inmate who had been exposed to COVID, and another who had Hepatitis A, may not go forward. Even if "actual injury isn't a prerequisite for an Eighth Amendment claim, the absence of any cognizable harm certainly suggests an absence of deliberate indifference." *Chapa v. Kenton Cnty. Judge Exec.*, No. CV 21-22-DLB-MAS, 2023 WL 4553602, at *8 (E.D. Ky. July 14, 2023), *appeal dismissed*. *See also Dykes-Bey v. Washington*, 2021 WL 7540173 at *3 (6th Cir. Oct. 14, 2021) (upholding PLRA dismissal, for lack of sufficient allegation of subjective prong on deliberate indifference claim, where the complaint did not "allege that the defendants knowingly housed COVID-19 positive inmates alongside any plaintiff, or even that a COVID-19 outbreak occurred"); *Pugh v. Contra Costa Cnty.*, No. 22-CV-01487-JSW, 2023 WL 8481808 at *3 (N.D. Cal. Dec. 7, 2023) (noting there was a triable issue of fact of whether plaintiff-inmate was injured by defendants' alleged deliberate indifference regarding COVID precautions, where defendants argued plaintiff never tested positive but plaintiff claimed he developed COVID symptoms). Plaintiff's failure to present any evidence or even allege that he caught either COVID or Hepatitis A during his time at MCJ is fatal to his claims on this point.

**2. Nutritional Claims**

The Court now addresses claims against Defendants Shake, Bell, and Sisco for allegedly removing apple juice from Plaintiff's food trays while he was at MCJ. "The Eighth Amendment places both restraints and duties on prison officials, and one of those duties is to ensure that inmates receive adequate food." *Williams v. Shah*, 927 F.3d 476, 479 (7th Cir. 2019) (citing *Farmer*, 511 U.S. at 832). In some cases, "withholding of food may be sufficiently serious to satisfy the

objective component of the *Farmer* test." *Id.* (citing *Reed v. McBride*, 178 F.3d 849, 853 (7th Cir. 1999)). "To assess whether the particular withholding of food meets *Farmer*'s objective prong, a 'court must assess the amount and duration of the deprivation.'" *Id.* (quoting *Reed*, 178 F.3d at 853). To satisfy *Farmer*'s subjective prong, a plaintiff must present some evidence that facility staff knew they were serving inadequate meals. *Id.* at 480.

Plaintiff has failed to present any evidence, aside from his conclusory belief, that removing apple juice from his food trays rendered his meals nutritionally inadequate while he was at MCJ, objectively speaking, nor that Defendants Shake, Bell, or Sisco would have been subjectively aware that they were inadequate. Plaintiff is the nonmoving party, so he receives "the benefit of conflicting evidence and reasonable inferences." *Stockton v. Milwaukee County*, 44 F.4th 605, 614 (7th Cir. 2022). That said, he must "produce evidence sufficient to establish [the] element[s] essential to" his claim. *Id.* "[C]onclusory statements not grounded in specific facts are not enough" to survive summary judgment. *Daugherty v. Page*, 906 F.3d 606, 611 (7th Cir. 2018) (cleaned up).

The Court gave the Plaintiff the summary judgment benefit of the doubt with respect to his sanitation claims, but it cannot do so with respect to his nutrition claims. The facts before the Court are wholly unlike those in *Reed*, which Plaintiff relies upon. In that case, the inmate presented sufficient evidence to survive summary judgment where he had multiple serious health conditions and prison officials withheld food from him on many occasions for three to five days at a time. 178 F.3d at 853-54. Here, by contrast, there is no evidence of a complete withholding of food or that any meal ever was missed entirely, but simply that one item on the tray, a beverage, was withheld. There is no evidence as to what else was on the tray, nor any evidence suggesting that

even if it was deficient, that Deputies Shake, Bell, or Sisco would have known it was. As a matter of law, there is insufficient evidence to proceed against these Defendants on these claims.

## IV.
## Conclusion

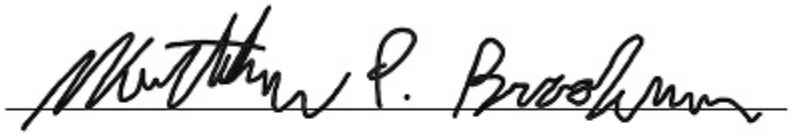
The Defendants' motion for summary judgment, dkt. [47], is **granted in part and denied in part**. No evidence supports any claims against Defendants Shake, Bell, or Sisco going forward, and all claims against them are dismissed. The **clerk is directed** to terminate Defendants Shake, Bell, and Sisco as defendants on the docket. No partial final judgment shall issue at this time.

As to Defendants Mullins and Phillips, Plaintiff's claims against them related to the sanitariness of his cells at MCJ shall proceed. Those claims will be resolved through settlement or at trial.

The Court intends to recruit counsel to represent Plaintiff through the remainder of the action. The **clerk is directed** to include a form motion for assistance recruiting counsel with Plaintiff's copy of this order. He will complete and return the form or notify the Court that he wishes to continue without a lawyer **no later than March 29, 2024**. The Magistrate Judge is requested to set the matter for a telephonic status conference once recruited counsel has appeared or if Plaintiff does not pursue a request for counsel.

**IT IS SO ORDERED.**

Dated: February 28, 2024



Matthew P. Brookman, Judge
United States District Court
Southern District of Indiana

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