

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

ALLEN TONY DAVIS,

Plaintiff,

v.

GERALD BERGE, BOUGHTON,
LINDA HODDY-TRIPP, RANDY HEPP,
VICKIE SHARPE, TIM HAINES
and LOFTHOUSE,

Defendants.

ORDER

01-C-265-C

In an order entered herein on July 29, 2002, I advised plaintiff that I would delay accepting his notice of voluntary dismissal of two of his claims in this lawsuit to insure that he understood that the dismissal would be with prejudice, that is, he will not be able to revive the claims in this lawsuit or any other lawsuit at any other time. I advised plaintiff that if, by August 9, 2002, he had not withdrawn his motion for voluntary dismissal, I would grant his motion. Plaintiff has not withdrawn the motion. Accordingly, plaintiff's claims that he suffered cruel and unusual punishment in the form of constant illumination that deprived him of his sleep and being awakened on an hourly basis without any legitimate

penological justification will be dismissed. With the dismissal of these claims, the state defendants also will be dismissed, as there are no remaining claims against them. The only claim remaining in this suit is plaintiff's claim that defendant Lofthouse was deliberately indifferent to his serious dental needs. Trial of this claim will take place on September 9, 2002. Therefore, in this order I will explain pretrial procedures.

Avoiding Dismissal of the Case

At the trial, it will be the plaintiff's job to prove his claim by a preponderance of the evidence. He must establish proof of the existence of each element of his claim. If he does not put in enough evidence to support his claim, defendant Lofthouse may move the court for a judgment as a matter of law against plaintiff, and the case may be dismissed before the defendant is called upon to produce any opposing evidence.

Constitutional Claim

My tentative view of plaintiff's case is that in order to survive a motion for judgment as a matter of law, plaintiff must prove that

- 1) he had a serious dental need while incarcerated at the Supermax Correctional Institution;
- 2) plaintiff sought treatment for the serious dental need but was unable to obtain it;

3) defendant had personal knowledge of plaintiff's need for medical care but deliberately refused to allow plaintiff to be treated; and

5) plaintiff suffered actual physical injury as a result of defendant's delay in extracting his teeth.

Damages

If the jury finds that plaintiff is entitled to a verdict in his favor, it may award as compensatory damages an amount that will reasonably compensate plaintiff for the injuries or damages sustained as a proximate result of defendant's acts. In order to recover compensatory damages, plaintiff must introduce evidence of physical harm suffered as a result of defendant's actions. If plaintiff presents evidence of physical injury, he may then present evidence of mental or emotional injuries suffered as a result of defendant's actions. If the court permits it, the jury may award punitive damages as a deterrent to defendant.

Evidence

All proof of facts submitted at trial must meet the requirements of the Federal Rules of Evidence. For example, if a party wishes to introduce evidence about the content of a document, he should get a copy of the document, submit it at the time of trial and produce a witness who can testify from his or her own knowledge that the document is what it

appears to be. Or, a party can ask the opposing party to agree that the document is what it appears to be and is accurate. If the opposing party agrees, the first party still must produce the document, but he does not need to call a witness to testify about the document.

Defendant submitted and relied on the following documents at the summary judgment stage. Unless plaintiff objects to authenticity or accuracy, either party may rely on these documents at trial without producing a witness who can testify that the document is what it appears to be and is accurate. I note that plaintiff objected to the relevancy of some of defendant's exhibits at the summary judgment stage; by stipulating to their authenticity, plaintiff does not waive his right to object to their relevancy at trial.

1. Supermax Correctional Institution's dental chart for plaintiff
2. Supermax Correctional Institution's medical chart for plaintiff
3. A progress note by Todd Riley, M.D., dated October 4, 2000
4. A progress note by Kate McQuillan, L.P.N., dated November 19, 2000

The Federal Rules of Evidence also limit the testimony of witnesses. For example, a witness generally cannot give hearsay testimony, that is, the witness cannot testify about someone else's out of court statement, since the accuracy of a hearsay statement cannot be tested by the opposing party.

The Federal Rules also allow only relevant evidence. Any evidence that is offered must pertain to the claim in this lawsuit.

Preparing for Trial

Plaintiff has submitted a “pretrial report” to the court and to defendant's counsel that lists the names of the witnesses he intends to call at trial, together with a short description of the testimony he expects each witness will give and a description of the documentary exhibits he plans to introduce.

Although plaintiff does not list himself as a witness, I presume that he intends to take the stand himself at trial to testify about each of the elements of his claim. Therefore, I will direct the clerk of court to issue a writ of habeas corpus ad testificandum for his attendance at trial. Plaintiff has listed the defendant as a witness, but because the defendant is not required to be present at trial, plaintiff will have to subpoena him unless defendant’s counsel agrees to make him available to be called by plaintiff as a witness at trial.

Also, plaintiff requests writs of habeas corpus ad testificandum for inmates Dennis Jones, Michael Johnson and Robert Sallie. According to plaintiff, each of these witnesses would testify that he himself had dental problems while he was an inmate at the Supermax Correctional Institution and that treatment for those problems was delayed or denied for prolonged periods of time. From plaintiff’s description of the testimony these witnesses would give, it is not possible to infer that any one of them would be able to testify that defendant Lofthouse was personally aware of the witness’s serious dental needs, was personally responsible for scheduling inmates for dental treatment, and deliberately chose

to ignore the witness. Therefore, the testimony appears to be irrelevant to the question whether defendant Lofthouse deliberately delayed or denied plaintiff dental care. Although I will deny plaintiff's request for the issuance of writs of habeas corpus ad testificandum at this time, I will set a deadline within which plaintiff may renew his request, together with a showing that his witness's testimony is linked to the actions or motives of defendant Lofthouse.

Defendant will be required to submit to the court and to plaintiff a list of witnesses and exhibits he intends to introduce at trial. Information on special procedures for calling witnesses is provided in the enclosed memorandum.

ORDER

IT IS ORDERED that plaintiff's motion for voluntary dismissal of his claims that he suffered cruel and unusual punishment in the form of constant illumination that deprived him of his sleep and being awakened on an hourly basis without any legitimate penological justification is GRANTED with prejudice and the complaint is DISMISSED as to defendants Gerald Berge, Boughton, Linda Hoddy-Tripp, Randy helpp, Vickie Shart and Tim Haines.

FURTHER, IT IS ORDERED that plaintiff may have until August 22, 2002, in which to serve and file a renewed request for issuance of writs of habeas corpus ad testificandum

for inmate witnesses, together with a revised description of the nature of the testimony the witnesses will give. Plaintiff should not renew his request unless he can represent to the court that each witness is in a position to testify personally about defendant Lofthouse's knowledge of and response to that witness's own serious dental health care needs.

Finally, IT IS ORDERED that defendant may have until August 22, 2002, in which to submit his list of witnesses and describe the documentary evidence he intends to introduce at trial.

The clerk of court is directed to issue a writ of habeas corpus ad testificandum for plaintiff's attendance at trial, beginning on September 9, 2002.

Entered this _____ day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge