IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TITUS HENDERSON,

ORDER

Plaintiff,

06-C-0012-C

v.

MATTHEW FRANK; PETER HUIBREGTSE; BRIAN KOOL; TRACEY GERBER; J. STARKY; RUSSELL BAUSCH; ROBERT SHANNON; TODD OVERBO; and RICHARD SCHNEITER,

Defendants.

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This case is currently scheduled for trial on March 26, 2007. Plaintiff, a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has submitted a request to wear street clothes at his trial.

The Supreme Court has held that defendants in *criminal* trials have a constitutional right to wear non-prison clothing. Estelle v. Williams, 425 U.S. 501, 504 (1976). One of the rationales for the holding is that prison garb impairs the presumption "so basic to the adversary system" that a person is innocent until proven guilty. In addition, the Court found that "compelling an accused to wear jail clothing furthers no essential state policy."

Id, at 505.

Of course, the relevant considerations in a civil trial involving a convicted prisoner are significantly different. Prisoners do not have a constitutional right to wear particular clothing in civil trials. In fact, they do not have a constitutional right to be *present* at their trial in all instances. Stone v. Morris, 546 F.2d 730, 735 (7th Cir. 2006). Further, both the interests at stake for the prisoner and the potential prejudice are less serious in a civil trial.

This is not to say that a prisoner has no interest in appearing in street clothes in a civil case, particularly in a jury trial. Although it is true that jurors will know that the plaintiff is incarcerated, it is also true that jurors in a criminal case know that the defendant is accused of a crime. Nevertheless, in Estelle, 425 U.S. at 504-05, the Court recognized that a "constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." See also Deck v. Missouri, 544 U.S. 622, 632-33 (2005) (holding that visible shackles may not be used during *penalty* phase of capital case without particularized showing of need for them, even though jury already knows that defendant has been convicted of violent crime). The same is true in civil cases. Even when the plaintiff's status as a prisoner is known, the infamous orange jumper may have an important, if subtle, effect on the way a juror perceives the plaintiff, serving as a "constant reminder" that the prisoner is in a different class from the other litigants and suggesting he is entitled to less respect.

Further, it is a widely held belief that presentation does matter. The way one dresses may help to make a favorable impression on others as well as heighten one's own self-confidence and performance. Leslie L. Davis, Social Cognition and the Study of Human Behavior, Journal of Social Behavior and Personality, Vol. 16, 175-86 (1988) ("[T]he research indicates that the way a person is dressed does indeed affect the first impressions made of that person."). Especially in the context of the courtroom, where lawyers and parties are admonished to dress in a manner that shows respect for the court and the jury, it would be disingenuous to suggest that a party's attire can have no influence on a juror's assessment of that party.

Of course, the prisoner's interest in a fair trial is not the only consideration. Questions of security always loom large in any case arising in the prison context. Even in a criminal trial, the Supreme Court has held that restraining or even gagging a defendant might be constitutionally permissible if the defendant is excessively disruptive. Illinois v. Allen, 397 U.S. 337 (1970).

In this case, however, defendants have made no particularized showing that allowing plaintiff to wear street clothes at trial will pose a security risk. They do not suggest that plaintiff has a history of attempts to escape or smuggle contraband. Compare Meyer v. Teslik, 2006 WL 680995, *1 (W.D. Wis. 2006) (denying request to wear street clothes when prisoner plaintiff had history of escape). They say only that plaintiff was convicted

of a violent crime in 1994 and is housed at the Wisconsin Secure Program Facility. Although these are relevant considerations, I cannot conclude that they are sufficient without more to justify a denial of plaintiff's request.

In some cases, the failure of the defendants to show a risk would not be decisive or even important. For example, if plaintiff were suing only medical providers or officials outside his currently facility, it would not be telling if they failed to present evidence that plaintiff was a security risk. But the defendants in this case include the warden and deputy warden of the Wisconsin Secure Program Facility as well as the secretary of the Department of Corrections. No one is in a better position than they to demonstrate any potential danger that might be presented by allowing plaintiff to wear street clothes. If they cannot show that plaintiff is a risk, I see no reason to deny plaintiff's request.

Accordingly, IT IS ORDERED that plaintiff Titus Henderson's request to wear street clothes at the trial in this case is GRANTED. However, I will reconsider this ruling if defendants adduce additional evidence that a security risk would be presented by allowing plaintiff to wear street clothes. A telephone conference will be held before the magistrate judge on Wednesday, March 21, 2007, at 1:30 to discuss the logistics of plaintiff's request. Counsel for defendants are requested to make arrangements for the call and insure plaintiff's

availability to appear.

Entered this 15th day of March, 2007.

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