

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

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JAMES G. DUDGEON,

Plaintiff,

v.

JOHN FIORELLO,

Defendant.

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ORDER

06-C-563-C

In this civil action, plaintiff James G. Dudgeon contends that defendant John Fiorello violated his constitutional rights when he failed to conduct a preliminary hearing following plaintiff's detention for alleged violations of his parole. It is before the court on plaintiff's motion for appointment of counsel.

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993) (quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Court of Appeals for the Seventh Circuit will find such an appointment reasonable where the plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does]

the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not, however, whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

As noted above, plaintiff alleges in his complaint that he was denied procedural due process when defendant failed to provide him a preliminary hearing following his detention for violating the conditions of his supervised release. Both parties have moved for summary judgment. Each agrees that plaintiff did not get a preliminary hearing. However, the case will turn on the question whether plaintiff admitted to violating one or more of the conditions of his release shortly after his detention. Defendant says plaintiff signed a statement on January 6, 2005, admitting having violated certain conditions of his release. Certified copies of the statement and the conditions have been submitted as evidence in support of the motion. If the documents prove that plaintiff admitted his violation of one or more of the conditions of his release, the case will be ended. From plaintiff's other filings in this case, I know him to be fully competent to respond to defendant's proposed findings of fact and the evidence defendant submitted. Having a lawyer will make no difference.

In Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004), the court of appeals reiterated a view it has held for at least 15 years that denying a request for appointment of counsel will constitute an abuse of discretion if it would result in fundamental unfairness infringing on the plaintiff's due process rights. It found such a fundamental unfairness to exist in Gil,

because Gil's status as a Colombia national created serious language barrier problems for him that rendered him incapable of litigating his case in light of the complexities of applying state law and rules of evidence to his claims under the Federal Tort Claims Act and federal law and rules of evidence to his Eighth Amendment claim.

Plaintiff is not similarly situated to Gil. Federal case law and evidentiary rules govern his claim. Plaintiff speaks, writes and understands English. He should face no obstacles in gathering the evidence he needs to prove his case, if such evidence exists. In other words, plaintiff's case is not exceptional, nor are his circumstances. If this case goes to trial, plaintiff will receive written instruction about the manner in which the trial will be conducted and what he will be expected to prove. In sum, I believe that plaintiff is capable of prosecuting this lawsuit and that having appointed counsel will not make a difference in the case's outcome. Therefore, his motion for appointment of counsel will be denied.

#### ORDER

IT IS ORDERED that plaintiff's motion for appointment of counsel is DENIED.

Entered this 5th day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge