

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

LADERIAN T. McGHEE,

Plaintiff,

v.

ANTHONY ASHWORTH and
JASON RHODE,

Defendants.

ORDER

09-cv-722-slc

Plaintiff Laderian McGhee is proceeding on an Eighth Amendment claim that defendant Jason Rhode performed an unlawfully invasive search and on a First Amendment claim that defendant Anthony Ashworth retaliated against plaintiff for filing a grievance against Rhode regarding the search. A jury trial is scheduled to begin on February 22, 2011.

Plaintiff has renewed motion for appointment of counsel based on his epilepsy. On December 28, 2010 I denied plaintiff's request for a lawyer without prejudice because he had not sufficiently proved his point, stating:

I will deny plaintiff's motion without prejudice, but I encourage him to renew his motion with more evidence. Plaintiff has submitted a September 1, 2009 letter from a University of Wisconsin neurologist, Dr. Nicholas W. Stanek, MD, stating that plaintiff is epileptic, but that since Dr. Stanek switched his medicine to carbamazepine, plaintiff "has been doing exceptionally well," is "quite happy with his seizure control" and "denies any recurrent seizure." While plaintiff states in his motion that he suffered seizures during a previous trial, he does not state under penalty of perjury that this happened, when these seizures occurred, whether he was using a less effective medication at that time, or what the effects were, during or after the seizure. With his current medication, it is possible that plaintiff will make it through a stressful trial without a seizure. Further, without intending to underestimate the significance of a seizure during trial by a pro se plaintiff, it may be possible for the court and the parties to implement procedures and accommodations

to use if plaintiff suffers a seizure during trial that would protect both sides from prejudice and avoid a mistrial.

If plaintiff renews his motion, he should provide a more detailed history of his epilepsy in an affidavit, including more details about his seizures during his previous trial, what medication (if any) he was taking at that time, what specific concerns he has about his upcoming trial in this court, and whether he is willing to provide a narrow waiver of his patient/physician privilege with Dr. Stanek so that the court could get additional information directly from plaintiff's neurologist.

Dkt. 55 at 1-2.

Plaintiff supports his renewed motion with an affidavit in which he avers that he experienced two seizures during a 2004 trial. Since August 1, 2010, he has had three seizures. During his seizures, he loses consciousness, loses control of his bowels and bladder, remains disoriented after the seizure and ends up with a splitting headache for the rest of the day. The seizures are brought on at least in part by stress, and he believes that conducting a trial pro se will be very stressful. His current medication, carbamazepine, is no longer effective, but he cannot see his neurologist until June 2011. (Plaintiff does not explain why he cannot meet his neurologist for several months, but I encourage him to seek more immediate medical care for his seizures from the health services unit if he has not already done so.)

Also, plaintiff has attached a medical record release authorization form. It is not clear whether plaintiff's medical records will be useful in the fashion envisioned by the court because plaintiff has not seen his neurologist since his seizures recurred. Given that trial is only four weeks away, that plaintiff's sworn testimony that he has suffered three recent severe seizures and that litigating a trial pro se could be stressful enough to trigger another seizure, I will grant his motion for appointment of counsel. Accordingly, I will strike the current schedule and stay

further proceedings in this case in order to locate a lawyer who is willing to represent plaintiff. Plaintiff should be aware that sometimes this takes months to accomplish.¹

A lawyer accepting appointments in cases such as this take on the representation with no guarantee of compensation for his or her work. Plaintiff should be aware that in any case in which a party is represented by a lawyer, the court communicates only with counsel. Thus, once counsel is appointed, the court will no longer communicate with plaintiff directly about matters pertaining to this case. Plaintiff will be expected to communicate directly with his lawyer about any concerns and allow the lawyer to exercise his or her professional judgment to determine which matters are appropriate to bring to the court's attention and what motions and other documents are appropriate to file. Plaintiff will not have the right to require counsel to raise frivolous arguments or to follow every directive he makes. He should be prepared to accept his lawyer's strategic decisions even if he disagrees with some of them, and he should understand that it is unlikely that this court will appoint another lawyer to represent him should plaintiff choose not to work cooperatively with the first appointed lawyer.

¹ During this time the court will follow up on plaintiff's sworn statements in an attempt to verify their accuracy. If there is persuasive evidence that plaintiff has not been forthright in his sworn representations about his condition, then the court will determine what justice requires at that time. At this point, I have no reason to expect that we will reach that juncture.

ORDER

IT IS ORDERED that:

(1) Further proceedings in this case are STAYED pending appointment of counsel for plaintiff. Once the court finds counsel willing to represent plaintiff, the court will advise the parties and hold a status and scheduling conference.

(2) In light of plaintiff's averments regarding recent seizures, and because plaintiff has submitted a recently signed medical disclosure form to the court, *see* dkt. 57-1, the Department of Corrections promptly shall submit under seal (with a copy to the plaintiff), all medical records and any other institutional records and reports from September 1, 2009 to the present date, that relate in any way to plaintiff's epilepsy.

Entered this 24th day of January, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge