

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

LARRY J. BROWN,

Plaintiff,

v.

BELINDA SCHRUBBE, PAUL
SUMNIGHT and CYNTHIA THORPE,

Defendants.

ORDER

10-cv-129-bbc

In an order signed on July 13, 2011, I granted the motion for summary judgment filed by defendants Belinda Schrubbe, Paul Sumnicht and Cynthia Thorpe on plaintiff Larry Brown's Eighth Amendment claims. I found that defendants were entitled to judgment on plaintiff's claims that defendants were deliberately indifferent to his serious medical needs when they withheld various comfort items he uses to treat his headaches and back and neck pain, and refused to set up an appointment with a neurologist. Plaintiff later filed what I construed to be two notices of appeal, and in a September 13, 2011 order, I granted plaintiff's motion to proceed in forma pauperis on those appeals, stating:

A district court has authority to deny a request for leave to proceed in forma pauperis under 28 U.S.C. § 1915 for one or more of the following reasons: the litigant wishing to take an appeal has not established indigence, the appeal is

in bad faith or the litigant is a prisoner and has three strikes. § 1915(a)(1),(3) and (g). Sperow v. Melvin, 153 F.3d 780, 781 (7th Cir. 1998). Although plaintiff has three strikes, he alleges that he is in imminent danger of serious physical harm. In addition, I do not intend to certify that his appeals are not taken in good faith. Therefore, I will grant plaintiff's request to proceed in forma pauperis with his appeals.

Dkt. #93. (Since that time, the Court of Appeals for the Seventh Circuit has issued an order concluding that plaintiff did not intend to file two notices of appeal from the same order. It dismissed one of the documents construed as a notice of appeal and waived the filing fee for that notice of appeal.)

Now defendants have filed a motion for reconsideration of the September 13, 2011 order granting plaintiff leave to proceed in forma pauperis on appeal, arguing that the July 13, 2011 order granting summary judgment negates plaintiff's request as a "three-striker" under 28 U.S.C. § 1915 to proceed on his appeal under the imminent danger exception.

Defendants cite a recent court of appeals' decision regarding a similar prisoner case litigated in this court. Almond v. Pollard, 2011 WL 4101460 (7th Cir. Sept. 15, 2011).

In that case the court of appeals stated: The defendants then filed their own motion for summary judgment, which the district court granted in March 2011. The court concluded that Almond lacked evidence that Pollard and Zwiers had been involved in the treatment of his back pain. And, the court continued, the undisputed evidence refuted Almond's allegation that Dr. Heidorn had been indifferent. . . . Despite this ruling, however, Judge Crabb allowed Almond to proceed IFP in this appeal when he asserted that his back pain continued to go untreated. . . . The court did not find that Almond was in imminent danger; instead, the court reasoned that he was "not barred by his three-strike status" because he continued "to allege that he is in imminent danger of serious physical injury because of the lack of medical treatment."

That conclusion highlights a defect in this appeal from the grant of summary judgment. Nothing changed during the three weeks between the dismissal of Almond's lawsuit and the filing of his application for IFP; Almond simply repeated his rejected allegation that his untreated back pain was causing "life-threatening harm." Yet Judge Crabb already had concluded that an abundance of evidence presented during the lawsuit refuted Almond's claim that his back pain was being ignored, so the court should not have credited his assertion of imminent danger and allowed him to skirt the three-strikes bar.

Id. at 2-3.

Plaintiff's response does not discuss his imminent danger status but rather focuses on his lack of legal supplies and cancellation of his legal loan as well as his continuing belief that the court is biased against him. The simple fact that plaintiff was able to file this submission shows that he had the ability to respond to defendants' motion, so I will not consider his legal loan argument. Nor will I consider his assertions of this court's bias, which I have discussed in previous orders and rejected.

At any rate, it is unclear what substantive argument plaintiff would have been able to put forward because the present case is almost identical to Almond. In the July 13, 2011 order, I concluded that plaintiff had been receiving regular medical care from defendant Sumnicht and that "the fact that defendant Sumnicht has not pursued the type of treatment that plaintiff prefers does not mean that Sumnicht has violated his Eighth Amendment rights." Also, I concluded that because defendant Sumnicht's underlying treatment decisions did not violate the Eighth Amendment, plaintiff lacked any support for his claims that defendant Schrubbe had violated his rights by relying on those decisions in conducting a

review of his comfort items as part of the Special Needs Committee or that defendant Thorpe had violated plaintiff's rights by ruling against him in her review of his inmate grievances. Id. Because I have already concluded that there is "an abundance of evidence" refuting plaintiff's claims that defendants acted with deliberate indifference by withholding certain comfort items and refusing to set up an appointment with a neurologist, I should not have allowed plaintiff leave to proceed in forma pauperis under the imminent danger standard. Accordingly, I will grant defendants' motion for reconsideration and deny plaintiff's motion for leave to proceed in forma pauperis on appeal.

This means that plaintiff cannot proceed with his appeals without prepaying the \$455 filing fee unless the court of appeals gives him permission to do so. Under Fed. R. App. P. 24, he has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. Plaintiff must include with his motion, an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), with a statement of issues he intends to argue on appeal. Also, he must send along a copy of this order. Plaintiff should be aware that he must file these documents in addition to the notice of appeal he has filed previously. If he does not file a motion requesting review of this order, the court of appeals may choose not to address the denial of leave to proceed in forma pauperis on appeal. Instead, it may require him to pay the full \$455 filing fee before it considers his appeal further. If he does not pay the fees within the deadline set, it is possible

that the court of appeals will dismiss the appeal.

ORDER

IT IS ORDERED that

1. The motion filed by defendants Belinda Schrubbe, Paul Sumnicht and Cynthia Thorpe for reconsideration of the court's September 13, 2011 order granting plaintiff Larry Brown's motion to proceed in forma pauperis on appeal, dkt. #94, is GRANTED.

2. Plaintiff's request for leave to proceed in forma pauperis on appeal, dkt. #85, is DENIED. The clerk of court is directed to insure that plaintiff's obligation to pay the \$455 fee for filing an appeal is reflected in the court's financial records.

Entered this 27th day of December, 2011.

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