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

GARY A. SMITH,

Plaintiff,

v.

SHERIFF ROBERT SPODEN,
DR. BUTLER,

Defendants.

OPINION AND ORDER

12-cv-96-wmc

Plaintiff Gary A. Smith brings this action under 42 U.S.C. § 1983 against the Rock County sheriff and a doctor at the Rock County Jail. Smith alleges that defendants deprived him of his Eighth Amendment right to be free from cruel and unusual punishment by (1) denying him medical treatment after he experienced a stroke and (2) denying him the specific diet prescribed for him by a physician after his stroke. The court must now determine whether his proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). After examining the complaint, the court concludes that Smith may proceed on his claim against defendant Dr. Butler, but not against Sheriff Spoden. Also before the court are a motion for a temporary restraining order (TRO) and a motion to appoint counsel pursuant to 28 U.S.C. § 1915, both of which will be denied at this time.

ALLEGATIONS OF FACT[1]

At the time the complaint was filed, plaintiff Gary Smith was confined at the Rock County Jail, located in Janesville, Wisconsin. On January 18, 2012, he experienced a transient ischemic attack (TIA), a type of "mini stroke," and was taken to the Mercy Hospital's emergency room in Janesville. This was Smith's second TIA, the first of which also occurred while he was confined at the Rock County Jail. At this visit, Mercy Hospital allegedly advised Rock County that Smith needed to: (1) receive follow-up care by their physicians on January 19, (2) see a primary care provider within one week, and (3) begin physical therapy for foot paralysis he apparently developed as a result of the TIA. According to Smith, he was never allowed follow-up care with Mercy, but instead saw Dr. Butler, the jail doctor, two weeks after the incident. Dr. Butler also declined to give Smith further medical treatment or provide him physical therapy.

Although it is unclear from his pleadings whether prescribed by a Mercy doctor or Dr. Butler, Smith was also prescribed a low-fat, low-carbohydrate, 2g sodium diet. Nevertheless, these dietary needs were never accommodated. In addition, Smith did not receive the medication that had been prescribed by the Mercy physicians until a week after the incident. Finally, Smith suffered persistent severe pain in his left foot, ankle and leg stemming from the paralysis in his foot.

As a result of the above, Smith claims Rock County denied him medical care by a physician who would take his condition seriously enough to treat him as prescribed by

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously, and hold the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Smith alleges, and the court assumes for purposes of this screening order only, the following facts.

Mercy Hospital and to order further tests to discover the underlying cause of his recurrent mini-strokes. He seeks money damages for his pain and suffering, termination of the offending medical staff, and an injunction requiring that the Rock County sheriff and medical staff give him proper medical attention.[2]

OPINION

I. Screening

The Eighth Amendment does not require that prisoners receive "unqualified access to health care." *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) (quoting *Hudson,* 503 U.S. at 9 (1992)). Still, the government has an obligation to provide adequate medical care to those whom it incarcerates. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

To establish a legally cognizable § 1983 claim under the Eighth Amendment, a prisoner must allege (1) an objective deprivation of his or her right to minimally civilized incarceration (as judged by "contemporary standards of decency"), *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992); and (2) that prison authorities subjectively acted with deliberate or callous indifference or reckless disregard to this constitutional right, *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991). *See also Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Sanville v. McCaughtry*, 266 F.3d 724, 733 (7th Cir. 2001).

Inadvertent failure to provide treatment for a plaintiff or negligent medical care is insufficient to state a claim under § 1983. *Estelle*, 429 U.S. at 106. Accordingly, the court

[2] Smith was released from custody July 10, 2012 and currently resides in Janesville.

must determine (a) whether Smith's alleged injury can be considered objectively serious and (b) whether any defendant is alleged to have acted in a way evidencing deliberate indifference.

A. Nature of Injury

"A condition is objectively serious if failure to treat it could result in further significant injury or unnecessary and wanton infliction of pain." *Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999); *see also Sanville*, 266 F.3d at 733-34. Here, Smith alleges that his TIA left him with severe pain stemming from the paralysis of his foot. He also was not afforded the opportunity to follow up with any physician for treatment of his recurring strokes. Finally, Dr. Butler is alleged to have failed to (1) give Smith medication prescribed to him by emergency room doctors immediately following a TIA; and (2) follow up with any diagnostic or symptomatic treatment. If not apart, then put together this lack of conduct is plausibly alleged to have caused Smith further, significant injury and created unnecessary infliction of pain.

B. Deliberate Indifference

Next, the court must determine whether Smith's allegations are sufficient to proceed with his claims that Dr. Butler or Sheriff Spoden were deliberately indifferent to his medical problems.

1. Dr. Butler

Although Smith does not allege explicitly that Butler purposely and deliberately withheld treatment, he has alleged enough facts to show that his failure to provide treatment might have been the product of more than inadvertent failure or negligence. Crediting Smith's version of events, he was prescribed medication and ordered to begin a physical therapy regimen and follow-up with physicians at Mercy Hospital. Nevertheless, Dr. Butler failed to give him the medication that presumably was in his keeping, refused physical therapy, refused Smith's prescribed diet and refused Smith's attendance at any follow-up appointments.

An inference of deliberate indifference may arise where prison officials refuse to follow an outside specialist's orders or recommendations. *Gil v. Reed*, 381 F.3d 649, 663-64 (7th Cir. 2004). At this early stage in the proceedings, Smith's allegations against Dr. Butler are sufficient to state a claim of deliberate indifference to his medical needs under the Eighth Amendment. Therefore, he will be allowed to proceed on that claim.

2. Sheriff Robert Spoden

Although Smith alleges sufficient facts against Dr. Butler to state a claim that his Eighth Amendment rights were violated, the same cannot be said with respect to the allegations concerning Sheriff Spoden. In order for a plaintiff to proceed on a 42 U.S.C. § 1983 claim, a plaintiff must allege that one or more defendants *acted* with deliberate indifference to his serious medical needs. *Santiago v. Walls*, 599 F.3d 749, 758 (7th Cir. 2010); s*ee also Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969) (plaintiff must allege at

least some connection between his legally protected interest and the contested official action).

Here, Smith included Spoden as a defendant, but did not allege any facts tending to show that Spoden took a part in the denial of Smith's medical needs, let alone that he acted with deliberate indifference. It is not enough that Spoden, as sheriff, was in charge of the prison or had oversight of Dr. Butler at the time of the event; he must have played a role in the event itself. *Matthews v. City of East St. Louis*, 675 F.3d 703, 708 (7th Cir. 2012) (Section 1983 requires personal involvement, and the doctrine of *respondeat superior* liability—vicarious liability—is inapplicable). Accordingly, Smith's claim against Spoden will be dismissed.

II. Motion for Temporary Restraining Order

Smith moved for a TRO to force defendants to provide medical care for him and to comply with his prescribed diet. If a prisoner is transferred to another prison, his request for injunctive relief against officials of the first prison is moot unless "he can demonstrate that he is likely to be retransferred." *Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. Ind. 1996) (quoting *Moore v. Thieret*, 862 F.2d 148, 150 (7th Cir. 1988)); *see also Lehn v. Holmes*, 364 F.3d 862, 871-72 (7th Cir. 2004). Because Smith is no longer in the county's custody at all, his motion for a TRO is moot and will, therefore, be denied.

III. Motion to Appoint Counsel

Finally, Smith moved for the court to appoint counsel on the grounds that he was an incarcerated individual with minimal funds and little access to legal materials. The court is not required under 28 U.S.C. § 1915(d) to appoint counsel for litigants proceeding *in forma pauperis*, and pro se litigants have no constitutional right to counsel for civil cases. *See Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006). In any case, because Smith has been released, he is better positioned to access legal documents, seek legal aid, and obtain his own counsel. Smith also has shown competence until this point in the proceedings to represent himself by filing articulate and thorough complaints and motions, and by following up with the status of the case. His motion to appoint counsel is denied without prejudice to Smith renewing his motion later in the proceedings.

ORDER

IT IS ORDERED that:

(1) Plaintiff Gary Smith's request to proceed on a § 1983 claim for Eighth Amendment violations against Dr. Butler (dkt. #1) is GRANTED.

(2) Plaintiff Gary Smith's request to proceed on a § 1983 claim for Eighth Amendment violations against Sheriff Robert Spoden (dkt. #1) is DENIED and Spoden will be dismissed from the complaint.

(3) Plaintiff Gary Smith's motion for a temporary restraining order (dkt. #7) is DENIED.

(4) Plaintiff Gary Smith's motion to appoint counsel (dkt. #12) is DENIED without prejudice.

(5) The summons and complaint are being delivered to the U.S. Marshal for service on defendants.

(6) For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregards any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or defendant's attorney.

(7) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

(8) Plaintiff is obligated to pay the unpaid balance of his filing fee.

Entered this 19th day of September, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge