IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DON JOHNSON, DWAYNE COX,
DANIEL JONES, FERDINAN RIVERA
and ANDRE AVERY,

ORDER
01-C-0257-C

Plaintiffs,

v.

CINDY O'DONNELL, Inmate Complaint Reviewer;
JON E. LITSCHER, Secretary of D.O.C.;
PETER HUIBREGTSE; GERALD BERGE,
Warden; VICKI SHARPE and TIM HAINES,

Defendants.

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In an order dated July 18, 2002, I denied plaintiffs' request for leave to proceed on their claim that their Eighth Amendment rights were violated by the lack of adequate exercise at the Supermax Correctional Institution. Also, I also denied plaintiffs' request for leave to proceed on a claim that the totality of the conditions of their confinement at Supermax violated the Eighth Amendment prohibition against cruel and unusual punishment. Plaintiffs are now represented by counsel, who has moved under Fed. R. Civ. P. 60(b) for relief from the portion of the July 18 order that denied plaintiffs leave to

proceed on these two claims. Counsel argues that because plaintiffs were pro se at the time they filed their complaint, they were unable to set out their claims clearly enough to pass initial screening. Plaintiff's Rule 60 motion is accompanied by a motion to amend the complaint to add factual allegations supporting the claim of denial of adequate exercise. Plaintiffs believe that if the court allows them to proceed on a claim that they are denied adequate exercise, this additional alleged unconstitutional condition of confinement will successfully revive their claim that the total conditions of confinement at Supermax amount to an independent Eighth Amendment claim. Plaintiffs have not submitted a proposed amended complaint with their motion to amend that would replace the original complaint. Instead, they have described in their motion to amend the full text of the proposed amendment they wish to make.

I will deny plaintiffs' Rule 60 motion because that rule applies to final orders and the July 18 order is not a final order. However, I construe plaintiffs' motion to include a motion for reconsideration of those portions of the July 18 order that denied plaintiffs' request for leave to proceed in forma pauperis on their claims that they were denied adequate exercise and that the total conditions of their confinement at Supermax violates their Eighth Amendment rights. On reconsideration, I conclude that plaintiffs should have been granted leave to proceed in forma pauperis on their claim that their inability to exercise violates their Eighth Amendment rights, and I will vacate that portion of the July 18 order that denied

plaintiffs' request for leave to proceed on that claim. I will deny plaintiffs' renewed request for leave to proceed on a claim that the totality of the conditions of their confinement violates the Eighth Amendment because the addition of the claim of lack of exercise in plaintiffs' complaint does not succeed in making out an independent claim that plaintiffs' Eighth Amendment rights are being violated by a combination of conditions of confinement at Supermax. Finally, I will deny plaintiffs' motion to amend the complaint to add factual allegations concerning their claim of denial of adequate exercise, both because the factual allegations plaintiffs wish to add to the complaint are not significant in the determination whether plaintiffs have stated an Eighth Amendment claim with respect to this claim and because I am granting their motion for reconsideration of the July 18 order with respect to this claim, making amendment of the complaint unnecessary.

Plaintiffs' Rule 60 Motion

Plaintiff relies on Rule 60 to request reconsideration of the decision to deny plaintiffs leave to proceed in forma pauperis on their claims that their Eighth Amendment rights are being violated by their inability to adequately exercise at Supermax and by the total conditions of their confinement at Supermax. However, Rule 60 applies to a "*final* judgment, order, or proceeding." The July 18 order did not dismiss all of plaintiffs' claims, so it is not a final order. Nevertheless, a district court has inherent authority to reconsider

nonfinal orders at any time before the entry of judgment. Ross v. County of Lake, 764 F. Supp. 1308 (N.D. Ill. 1991); see Marconi Wireless Telegraph Company of America v. United States, 320 U.S. 1, 47-48 (1943); Diaz v. Indian Head, Inc., 686 F.2d 558, 562-63 (7th Cir. 1982). Therefore, I construe plaintiffs' motion under Rule 60 for relief from the July 18 order to include a motion for reconsideration of those portions of the July 18 order that denied plaintiffs' request for leave to proceed in forma pauperis on their claims that they were denied adequate exercise and that the total conditions of their confinement at Supermax violates their Eighth Amendment rights.

Motion for Reconsideration

In their original complaint, plaintiffs alleged that little sunlight or air from the outside comes into the exercise facility and there is no exercise equipment in the room. They also alleged that the exercise facility is very small, 14 feet by 20 feet by 17 feet. The allegations plaintiffs propose to add are: (1) plaintiffs are required to choose between using the law library and the recreation facility; (2) there is no outside recreation; (3) plaintiffs are denied adequate exercise for long periods of time; and (4) the plaintiffs' "health is severely threatened, if not diminished" by the inadequate recreational facilities.

The first new proposed fact alleged by plaintiffs does not make their claim stronger. The Court of Appeals for the Seventh Circuit has stated that forcing inmates to choose

between exercising and using the law library is not a constitutional violation unless prisoners are denied exercise *because* they exercised their right to seek access to the courts. Walker v. Thompson, 288 F.3d 1005, 1008 (7th Cir. 2002). Plaintiffs allege only that they were forced to choose, not that they were retaliated against for using the library.

The allegation regarding outside recreation also adds little. Although the lack of outside recreation was not alleged expressly in the original complaint, the complaint implied that plaintiffs' exercise was limited to the exercise facility, which is indoors. The court of appeals has previously rejected the argument that inmates have a constitutional right to outdoor exercise. Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997).

The last two newly alleged facts are only slightly more significant. In the July 18 order, I relied on Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988), in concluding that plaintiffs had failed to state an Eighth Amendment claim regarding inadequate exercise. In Harris, the court of appeals found no Eighth Amendment violation when an inmate spent four weeks in segregation and was not permitted outside recreation but was allowed to move about his segregation cell and could have exercised by jogging in place, engaging in aerobics or doing pushups in his cell.

As plaintiffs now point out in their motion, the prisoner in Harris was only *temporarily* restricted to exercising in cramped surroundings for a few weeks. Plaintiffs allege that they are restricted to a small area for as long as they are confined at Supemax. Although I could

have inferred this from the allegations in the original complaint, I did not draw the inference in the July 18 order. I believe this was an oversight. The court of appeals has emphasized that although severe short-term restrictions on prisoners' ability to exercise are constitutional, long-term deprivations may violate the Eighth Amendment, at least where there is no legitimate penological reason for the deprivation. Compare Harris, 839 F.2d at 1236; Caldwell v. Miller, 790 F.2d 589, 601 (7th Cir. 1986) (Eighth Amendment not violated when inmate was denied exercise for thirty days), with Delaney v. Detella, 256 F.3d 679, 686 (7th Cir. 2001) (inmate stated a claim under the Eighth Amendment when he was denied out-of-cell exercise for six months); Antonelli v. Sheehan, 81 F.3d 1422, 1432 (7th Cir. 1996) (holding that inmate who alleged that he was placed in an environment the size of "small house trailer" with 37 other inmates for seven weeks stated a claim under the Eighth Amendment); see also Watts v. Ramos, 948 F. Supp. 739, 746 (N.D. Ill. 1996) (defendants not entitled to qualified immunity when they denied plaintiff out-of-cell recreation for one year).

It is true that the cases concluding that the Eighth Amendment may have been violated were based on a denial of *out-of-cell* exercise and plaintiffs in this case are given the opportunity to exercise outside their cell in the exercise facility. However, there is nothing magical about out-of-cell exercise in itself. In essence, plaintiffs' complaint is that the exercise facility provided at Supermax is little better than the cells themselves. If plaintiffs

are unable to exercise meaningfully in the space provided, then it makes little difference whether they are restricted to their cells or are permitted to use the exercise facility.

The court of appeals has stated, "[l]ack of exercise may rise to a constitutional violation in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened." Antonelli, 81 F.3d at 1432; see also Helling v. McKinney, 509 U.S. 25, 35 (1993) (holding that Eighth Amendment may be violated when a prisoner's "future health is unreasonably threatened"). I cannot say at this stage of the proceedings that the exercise facility was not sufficient to maintain plaintiffs' health. Therefore, I conclude that plaintiffs' original complaint states a claim upon which relief may be granted on a claim that plaintiffs were denied adequate exercise. Although plaintiffs did not allege that their health was threatened in their original complaint, it is unnecessary to require plaintiffs to amend their complaint to add this allegation. The court of appeals reiterated recently that a plaintiff is not required to "plead the facts that if true would establish . . . that the claim was valid. All that need be specified is the bare minimum facts necessary to put the defendant on notice so that he can file an answer." Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (citations omitted). Thus, although injury is an element of plaintiffs' claim, the original complaint alleged sufficient facts to put defendants on notice so that they could file an answer.

Because I have concluded that plaintiffs have stated a claim upon which relief can be

granted, I will vacate the portion of the July 18 order that denied plaintiffs leave to proceed on a claim that their right to adequate exercise under the Eighth Amendment was violated and permit them to proceed on that claim. Plaintiffs allege that defendants Jon Litscher, Cindy O'Donnell, Peter Huibregtse, Gerald Berge, Tim Haines and Vicki Sharpe all knew that plaintiffs were being denied adequate exercise, had the power to stop the constitutional violation and failed to act. I will assume at this stage that each defendant was personally involved in the alleged constitutional deprivation and they each acted with deliberate indifference for plaintiffs' health and safety. Sanville v. McCaughtry, 266 F.3d 724, 740 (7th Cir. 2001); Jackson v. Illinois Medi-Car, Inc., 300 F.3d 760 (7th Cir. 2002). Plaintiffs already are proceeding on other claims in this lawsuit against defendants Litscher, O'Donnell, Huibregtse, Berge and Haines. However, the July 16 order dismissed defendant Vicki Sharpe. Therefore, plaintiffs will have to serve Vicki Sharpe with their complaint pursuant to Fed. R. Civ. P. 4.

In addition to seeking reconsideration of the portion of the July 18 order dismissing their claim regarding inadequate exercise, plaintiffs ask that the court reconsider the dismissal of their totality of conditions claim. Although plaintiffs do not articulate with clarity the grounds for reconsideration, I presume they believe that if the lack of exercise claim is revived, the totality of conditions claim should be revived as well. Plaintiffs' motion will be denied with respect to this claim. The court's rejection of a totality of conditions

claim in the July 18 order was not premised on the rejection of plaintiffs' claim that they lacked meaningful exercise. Rather, I concluded: "Combining the lack of exercise equipment and limited use of the telephone claims with plaintiffs' other conditions of confinement claims does not permit the inference that these conditions together have a mutually enforcing effect that produces the deprivation of a separate identifiable human need, such as the need for human contact and sensory stimulation." This conclusion is not altered by granting plaintiffs leave to proceed on a lack of exercise claim. Plaintiffs have not challenged the conclusion that the conditions complained of do not have a mutually enforcing effect on an identifiable human need so I will deny plaintiffs' renewed request for leave to proceed in forma pauperis on their claim that the total conditions of their confinement violate their Eighth Amendment right to be free from cruel and unusual punishment.

ORDER

IT IS ORDERED that

1) Plaintiffs' motion to alter or amend a final order pursuant to Fed. R. Civ. P. 60 is DENIED as unnecessary;

2) Plaintiff's renewed motion for leave to proceed in forma pauperis on their claim that respondents Litscher, O'Donnell, Huibregtse, Berge, Haines and Sharpe violated their Eighth Amendment rights by denying them adequate exercise is GRANTED; that portion

of the July 18 order that denies plaintiffs leave to proceed on this claim is VACATED, as is the dismissal of defendant Vicki Sharpe.

3) The clerk of court is requested to send a copy of plaintiffs' complaint to the attorney general's office for service on defendant Sharpe.

4) Plaintiff's renewed motion for leave to proceed in forma pauperis on their claim that the total conditions of their confinement at Supermax Correctional Institution violates their Eighth Amendment rights is DENIED; and

5) Plaintiffs' motion to amend their complaint is DENIED as unnecessary.

Entered this 12th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge