

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

- - - - -

DONALD LEE BRUSHWOOD,

Plaintiff,

v.

JON E. LITSCHER, Secretary (DOC),
THOMAS G. BORGAN, Warden,

Defendant.

- - - - -

ORDER

00-C-357-C

To give plaintiff an opportunity to submit proof of administrative exhaustion, I stayed a decision whether to allow plaintiff Donald Lee Brushwood to proceed under 28 U.S.C. § 1915A on his claim that defendants were deliberately indifferent to his serious medical needs when they transferred him to an out-of-state facility in violation of the Eighth Amendment. On August 9, 2000, plaintiff filed a document titled “Motion for reconsideration and motion in support of plaintiff’s brief regarding preventive measures to complete exhaustive remedies.” In this document, plaintiff appears to contend that I failed to address his claim that his rights under the due process clause of the Fourteenth Amendment were violated by either the Clerk of the District Court for the Eastern District of Wisconsin or the Clerk of the Court of Appeals

for the Seventh Circuit when a habeas corpus petition and appeal he filed in those courts were dismissed on the mistaken belief that plaintiff had failed to pay the filing fee. Although I included a summary of plaintiff's allegations about the dismissal of his habeas corpus petition in my earlier order, I did not construe the allegations as raising any kind of constitutional claim. Even if I had, I would have had to dismiss the claim immediately because it is legally frivolous, that is, it does not raise any actionable claim. First, plaintiff does not allege that either of the defendants he names was personally involved in causing his petition to be dismissed. Personal involvement is a necessary element of a claim brought under 42 U.S.C. § 1983. Moreover, plaintiff cannot bring a challenge in this court to the adverse action of another district court or to an action taken by the Court of Appeals for the Seventh Circuit because this court does not have the power to review the decisions of those courts. If plaintiff believes a decision of the Eastern District of Wisconsin court is wrong, his recourse is to take an appeal to the court of appeals. If plaintiff disagrees with the court of appeals' decision, his recourse is to appeal to the United States Supreme Court. He cannot ask another lower court to review those decisions. Plaintiff's request for reconsideration of the July 24, 2000 order will be denied.

In the July 24 order, I directed plaintiff to submit proof that he had exhausted his administrative remedies with respect to his claim that defendants were deliberately indifferent to his serious medical needs when they transferred him to an out-of-state facility that was

unable to meet his treatment needs. Plaintiff has failed to submit any proof that he filed an administrative complaint about this action. In any event, plaintiff provides new allegations in his latest submission to the court that indicate that even if he had exhausted his administrative remedies, he does not have a valid Eighth Amendment claim. Plaintiff alleges that the contract between the Wisconsin Department of Corrections and the private prison in Tennessee required the Tennessee prison to provide necessary medical treatment to plaintiff. This indicates that even if defendants knew that plaintiff had a serious medical need, they were not deliberately indifferent in transferring him to the Tennessee prison when the Tennessee prison was obligated by contract to provide plaintiff with medical treatment. Plaintiff also alleges a fact that he omitted earlier, which is that the persistent swelling on the right side of his neck had not been diagnosed as cancer at the time he was transferred. Plaintiff contends now that had he not been sent to Tennessee, the cancerous tumor might have been diagnosed earlier by the medical staff at Fox Lake Correctional Institution. This allegation suggests that defendants did not know the severity of his medical needs when he was transferred and provides another reason for dismissing plaintiff's Eighth Amendment claim against defendants. See American Nurses' Association v. State of Illinois, 783 F.2d 716, 724 (7th Cir. 1986) (“[a] plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded”).

ORDER

IT IS ORDERED that:

1. This action is DISMISSED with prejudice pursuant to 28 U.S.C. § 1915A(b)(1) for plaintiff's failure to state a claim upon which relief may be granted; and
2. A strike will be recorded against plaintiff pursuant to § 1915(g).

Entered this 21st day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge