

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

EUGENE CHERRY,

Plaintiff,

ORDER

v.

03-C-129-C

THOMAS BELZ and
HENRY BRAY,

Defendants.

This case is scheduled for trial beginning on January 12, 2004. Presently before the court are motions in limine filed by both sides. Plaintiff seeks to exclude several exhibits that defendants wish to introduce at trial: (1) judgments of conviction for plaintiff and his witnesses; (2) two orders from cases in which A'Kinbo Hashim-Tiggs was a party; (3) plaintiff's affidavit dated May 19, 2002, in Cherry v. Litscher, No. 02-C-71-C. Defendants seek to exclude: (1) testimony from Ruth Krymkowski; (2) any reference to Jones 'El v. Litscher, No. 00-421-C; (3) previous orders from this case.

Plaintiff's Motion

As an initial matter, I note that part of plaintiff's motion is now moot. In an order dated January 2, 2004, I denied plaintiff's request to issue writs of habeas corpus ad testificandum for inmates Donald White, A'Kinbo Hashim-Tiggs and Jonathan Cole. Defendants state that they intended to use orders from cases in which Tiggs was a party in order to impeach him. Because Tiggs will no longer be testifying, this part of plaintiff's motion will be denied as moot.

With respect to plaintiff's request to exclude his and his remaining witness's prior convictions, Federal Rule of Evidence 609 permits a party to introduce evidence that a witness has been convicted of a crime. There is an exception if the conviction is more than 10 years old or if the probative value of the conviction is outweighed by unfair prejudice. In making that determination, a district court should consider: (1) the impeachment value of the prior crime; (2) the time of conviction and the witness's subsequent history; (3) the similarities between the past crime and the current alleged misconduct; (4) the importance of the witness's testimony; (5) the centrality of the credibility issue. United States v. Smith, 131 F.3d 685, 687 (7th Cir. 1997).

Credibility is a central issue in this case. Further, the likelihood of unfair prejudice is diminished in a case such as this one because the jury will be aware that plaintiff and his witness are currently incarcerated and have been convicted of a crime. However, I do not

have sufficient facts to make this decision definitively. Defendants have not identified what the convictions are for or how old they are. Accordingly, I will stay a decision on this issue until the final pretrial conference, at which time defendants may explain what evidence they intend to introduce and why the evidence is admissible.

Plaintiff's motion to exclude the affidavit he filed in case no. 02-C-71-C will be denied. Defendants explain that plaintiff averred in his affidavit that he was experiencing signs of mental illness, such as paranoia and hearing voices. These facts would be relevant to challenge plaintiff's credibility. If plaintiff was having difficulties perceiving reality in the recent past, this would support an inference that he was experiencing similar difficulties during the events at issue in this case.

Defendant's Motion

_____ Defendants argue that Ruth Krymkowski should not be allowed to testify at trial because she has no personal knowledge of the events alleged in this case. At the preliminary injunction hearing, Krymkowski testified that during pastoral visits with plaintiff, he told her that he had found sharp objects in his food on several occasions. Defendants are correct that Krymkowski's testimony is hearsay; she did not personally observe any of the incidents that she testified about.

There is an exception to the hearsay rule for prior consistent statements under Fed.

R. Evid. 801(d)(1)(B). However, this exception is limited to rebutting a charge “of recent fabrication or improper influence or motive.” More important for purposes of this case, a prior consistent statement is not admissible unless the party can show that it was made before the witness would have a motive to lie. Tome v. United States, 513 U.S. 150 (1995); United States v. Stoecker, 215 F.3d 788, 791 (7th Cir. 2000). Plaintiff cannot make such a showing because it is undisputed that he had made threats against defendants even before the time he claims to have found needles and staples in his food. Therefore, plaintiff may not call Krymkowski as a witness to repeat the type of testimony she offered at the hearing. However, I will not preclude Krymkowski from testifying altogether. If defendants challenge plaintiff's credibility, which they presumably will, plaintiff could call Krymkowski to testify about her opinion of his truthfulness, if she has one. United States v. Bonner, 302 F.3d 776, 778–81 (7th Cir. 2002).

Defendants' motion in limine will be granted with respect to excluding references to the Jones 'El case and previous orders entered in this case. Jones 'El is not relevant to plaintiff's claim and earlier orders in this case are not evidence. Plaintiff must prove his claim with evidence based on personal knowledge that is related to the events at issue in this

case.

ORDER

IT IS ORDERED that

1. Plaintiff Eugene Cherry's motion to exclude the judgments of conviction for Donald White, A'Kinbo Hashim-Tiggs and Jonathan Cole and orders from Tiggs v. Berge, 01-C-705-C, and Smith v. Litscher, 01-CV-2694 is DENIED as moot.

2. Plaintiff's motion to exclude the judgments of conviction for him and witness Craig Sussek is STAYED until the final pretrial conference.

3. Plaintiff's motion to exclude the affidavit dated May 19, 2002, that he filed in Cherry v. Litscher, No. 02-C-71-C is DENIED.

4. Defendants Thomas Belz's and Henry Bray's motion to exclude any reference to Jones 'El v. Berge, 00-C-421-C or previous orders in this case is GRANTED.

5. Defendants' motion to exclude the testimony of Ruth Krymkowski is GRANTED IN PART. Krymkowski may not testify about statements plaintiff made to her regarding the

events giving rise to this lawsuit.

Entered this 6th day of January, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge