IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DATHAN BEAN,

ORDER

Plaintiff,

04-C-447-C

v.

SANDRA HAUTAMAKI, JEFFREY P. ENDICOTT and KELLY MUESKI,

Respondents.

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In this case which is scheduled for trial on Tuesday, September 6, plaintiff Dathan Bean claims that he was terrorized by his placement in a cell with inmate Oskar McMillian and that defendants owe him damages because they turned a blind eye to McMillian's dangerousness and disregarded the risk McMillian posed to plaintiff's safety. Although plaintiff admits that McMillian never assaulted him, he claims that he suffered headaches, the effects of sleep deprivation and weight loss because of defendants' refusal to remove McMillian from his cell. The curious aspect of this case is that McMillian has been acting as plaintiff's jailhouse lawyer through every aspect of this lawsuit. Now, in a document titled "Motion for Consideration of Professional Counsel Appointment for Jury Trial

Representation," McMillian, under Bean's signature, requests reconsideration of this court's order of August 24, 2005, denying Bean's second motion for appointment of counsel. Alternatively, plaintiff asks that McMillian be allowed to sit at his table during the trial so that McMillian can continue to help him with his case. Finally, he requests that McMillian be granted a writ of habeas corpus ad testificandum so that he can testify on plaintiff's behalf at the trial, that he be allowed to amend his witness list to show the defendants as his witnesses and that he be issued subpoenas for the defendants' appearance at trial. All of these requests will be denied except plaintiff's request to amend his witness list.

Nothing in plaintiff's renewed motion for appointment of counsel convinces me that I erred in denying his earlier requests for counsel. Although inmate McMillian claims to have drafted every document submitted by plaintiff for filing in this case, plaintiff asserts only that he lacks an understanding of the legal process. He does not suggest that he has a mental impairment that prevents him from reading and understanding the orders issued by this court and, in particular, the order explaining trial procedures. He simply believes himself to be at a disadvantage because he does not have licensed counsel. That may be true, but plaintiff's lack of legal education does not constitute extraordinary circumstances warranting the appointment of counsel. I am convinced that plaintiff is capable of taking the stand at trial to explain what happened to him physically while he was sharing a cell with McMillian, what defendants knew about McMillian's dangerousness and whether defendants

ignored serious risks to plaintiff's safety.

Plaintiff's alternative request to allow inmate McMillian to sit next to him at counsel table during trial also will be denied. Plaintiff seems to have forgotten that earlier in this case, he moved for a preliminary injunction to be separated from McMillian and supported the motion with declarations made under penalty of perjury in which he and inmate McMillian averred that McMillian is mentally ill and that McMillian has to fight off voices telling him to murder plaintiff. This court has no intention of allowing plaintiff and McMillian to be seated next to each other during the trial of this case and provide McMillian the opportunity to make good on his threats of harm.

Plaintiff's request for a writ of habeas corpus ad testificandum for inmate McMillian also will be denied. In this court's Procedures for Calling Witnesses to Trial, which was enclosed to plaintiff with the magistrate judge's preliminary pretrial conference order, plaintiff was informed of the procedure to use in requesting incarcerated witnesses. In particular, the procedure states,

> An incarcerated witness who agrees voluntarily to attend trial to give testimony cannot come to court unless the court orders the warden or other custodian to permit the witness to be transported to court. This court will not issue such an order unless it is satisfied 1) that the prospective witness is willing to attend; and 2) that the prospective witness has actual knowledge of relevant facts.

Although plaintiff has not submitted an affidavit from McMillian indicating his

willingness to attend trial, I will assume from the fact that McMillian is writing plaintiff's motions that he has agreed to attend the trial voluntarily. Nevertheless, plaintiff has made no showing that McMillian can testify to any facts relevant to this case. According to plaintiff, McMillian is a terrorist. Plaintiff does not need to put McMillian on the stand to prove this point. His job will be to prove how McMillian affected his physical and mental well-being during the time he was housed with him. McMillian can be of no help to him on this issue. Furthermore, plaintiff does not need McMillian to prove what defendants did or did not know about his dangerousness. Presumably, plaintiff has obtained through discovery documentation of McMillian's history of violence and defendants' knowledge of that history. He is free to introduce his documentary evidence at trial.

Plaintiff's request for the issuance of subpoenas for the defendants in this case will be denied because the request is untimely. This court's Procedures for Calling Witnesses to Trial provides that if a prospective witness is not incarcerated and he or she refuses to testify voluntarily, "no later than two weeks before trial, the party must prepare and submit to the United States Marshal a subpoena for service by the Marshal upon the witness." (Emphasis in original.) Pursuant to Rule 45(b)(1), service of such a subpoena shall be made by delivering a copy thereto to such person and if the person's attendance is commanded by tendering to that person the fees for one day's attendance and the mileage allowed by law. This requirement applies to plaintiff even though he is indigent. McNeil v. Lowney, 831

F.2d 1368, 1373 (7th Cir. 1987); 28 U.S.C. § 1915(d) (witnesses shall attend as in other cases . . ."). A litigant's constitutional right of access to the courts does not include a waiver of witness fees so that an indigent plaintiff can present his case fully to the court. McNeil v. Lowney, 831 F.3d at 1373. The daily witness fee is $43, and mileage to and from the court would have to be calculated at 40.5 cents per mile.

Plaintiff does not say that he has been unable to secure the voluntary attendance of the defendants at trial and defendants' witness list shows that defendants will be there. It may be that defendants' counsel will agree to allow plaintiff to call defendants to the stand during his case-in-chief. Even if he does not, however, plaintiff's request for subpoenas has been made too late to allow the Marshal to arrange for service of them on the defendants before trial and plaintiff has failed to tender the necessary witness fees for such subpoenas, Therefore, I will direct the clerk of court to refrain from issuing blank subpoena forms to plaintiff.

Finally, although plaintiff's ability to question defendants during his case-in-chief is entirely dependent on the good will of defendants' counsel, I will allow plaintiff to amend his witness list to include defendants as plaintiff's potential witnesses.

ORDER

IT IS ORDERED that

1. Plaintiff's "Motion for Consideration of Professional Counsel Appointment for Jury Trial Representation" is DENIED.

2. Plaintiff's motion that inmate Oskar McMillian be allowed to sit at plaintiff's table during the trial of this case is DENIED.

3. Plaintiff's request for a writ of habeas corpus ad testificandum for Oskar McMillian is DENIED.

4. Plaintiff's request for permission to amend his witness list to add defendants Sandra Hautamaki, Jeffrey Endicott and Kelly Mueski is GRANTED.

5. The clerk of court is directed to refrain from providing plaintiff blank subpoena forms for defendants because his request his untimely.

Entered this 1st day of September, 2005.

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