

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

STEVEN D. STEWART,

Plaintiff,

ORDER

v.

05-C-293-C

C.O. BARR,

Defendant.

This case is scheduled for trial the week beginning July 17, 2006, on plaintiff's claim that defendant Barr acted with deliberate indifference to his serious medical needs when he confiscated plaintiff's prescription medication. In an order dated May 2, 2006, I denied plaintiff's "Motion for Witnesses to be Brought to Court for Trial" because he had not submitted affidavits from his proposed witnesses, inmates Eric Gomez and Barry Ball, showing that the prospective witnesses were willing to attend his trial and had actual knowledge of relevant facts.

Now before the court is plaintiff's renewed motion for writs of habeas corpus ad testificandum for inmates Gomez and Ball. In support of his motion, plaintiff has submitted affidavits in which Gomez and Ball indicate their willingness to testify on plaintiff's behalf.

In addition, both inmates confirm that defendant Barr confiscated plaintiff's prescription medication on January 13, 2005. Gomez avers:

On 1-13-05 Capt. Carol Caldwell came to my cell door for I wasn't eating. At this time me and Mr. Stewart were conversing on the treatment that prisoners were getting from staff here at WSPF. As well how they were playing with his medication on the cart by denying him and so forth by J. Govier, Barr, etc. And this occurred around 7:45 a.m.; an [sic] then at about 10:00 a.m. they demoted Mr. Stewart for the conversation he had with me for Captain ordered the demotion. When they demoted him they took his medication claiming they had expired, but Mr. Stewart stated, "No their [sic] not, call the dentist or HSU." C.O. Barr stated, "Yes they are, by me." It was his meds for he had just had his teeth pulled and for his gum disease.

Dkt. # 51, at 2. Similarly, Ball avers:

On many occasion [sic] around January 13, 2005, after Stewart had several tooth [sic] pulled, and was having problems receiving his medication when requested. One day after the above incident another prisoner named Gomez was having problems with Echo officers, Mr. Stewart spoke up about the situation. And a few minutes later he was pulled from his cell and demoted, had his property and medication taken, when he asked the officer why he was taking the medication, the officer said it was expired. Stewart did his best to explain that he had just retrieved it and that the paperwork was in his cell.

Dkt. # 50, at 2.

Although both inmates corroborate plaintiff's version of events, neither of them explains how he is aware of the facts he avers. If the proposed witnesses' knowledge of events is a result of their first hand knowledge, then their testimony would be admissible in court. However, if they only know what happened to plaintiff because plaintiff told them what happened or because they learned it from another second hand source, their testimony

would not be admissible. Fed. R. Evid. 801(c). Because Gomez's and Ball's affidavits do not provide a sufficient basis for concluding that they have relevant and admissible testimony to offer, I will deny plaintiff's motion for a writ of habeas corpus ad testificandum for each of these proposed witnesses.

Should plaintiff submit timely affidavits from Gomez or Ball demonstrating that either or both of these inmates has firsthand knowledge of the events to which they propose to testify, I will reconsider plaintiff's motion at that time. To demonstrate firsthand knowledge, Gomez and Ball would have to aver facts in an affidavit revealing how each proposed witness was in a position to observe what occurred between plaintiff and defendant and what, if anything, each of them heard or saw.

ORDER

IT IS ORDERED that plaintiff's motion for writs of habeas corpus ad testificandum for inmates Eric Gomez and Barry Ball is DENIED.

Entered this 11th day of May, 2006.

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