

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 presently scheduled for trial on July 17, 2006, on plaintiff's claim that on January 13, 2005, defendant Barr confiscated medication from plaintiff's cell that had been validly prescribed to control plaintiff's pain from gum disease and pulled teeth. In an order dated May 2, 2006, I addressed plaintiff's motion for writs of habeas corpus to bring to trial as witnesses inmates Eric Gomez and Barry Ball. I called plaintiff's attention to this court's written Procedures for Calling Witnesses to Trial, which was attached to the magistrate judge's preliminary pretrial conference order entered on September 20, 2005. In particular, I advised plaintiff that the procedures require that before a writ of habeas corpus ad testificandum will issue, the moving party must make a showing that the prospective witness is willing to attend trial and has actual knowledge of relevant facts. Because plaintiff's

request was not accompanied by any affidavit that satisfied those requirements, his motion was denied as premature.

Now plaintiff has filed a new motion “for the production of these witnesses, witnesses list subpoena,” together with copies of his numbered trial exhibits and copies of affidavits from inmates Eric Gomez, Barry Ball and a D. Hamidullah As-Saffat. In this motion, plaintiff renews his request for writs of habeas corpus ad testificandum for Gomez and Ball, asks that a writ issue for inmate D. Hamidullah As-Saffat and seeks the issuance of subpoenas for Doctor Boston, Nurse Pat Reid, Nurse Gaye and defendant Jared Barr. Plaintiff explains that his request that these individuals serve as his witnesses at his trial is being sent later than permitted under this court’s witness procedures because he was transferred from the Wisconsin Secure Program Facility to the Waupun Correctional Institution on May 30, 2006, and was separated from his property, including his legal papers, until June 15, 2006. Because plaintiff’s inability to submit timely requests for subpoenas and writs of habeas corpus ad testificandum appears to have been outside his direct control, I will accept plaintiff’s late motion and rule on his requests.

In his affidavit, Eric Gomez avers that he was housed in the cell next to plaintiff on January 13, 2005, and that he witnessed defendant Barr’s confiscation of plaintiff’s medication and heard defendant Barr respond to plaintiff’s claim that his medication was not expired with the statement, “Yes they are by me.” Because Gomez avers that he saw and

heard what happened between defendant Barr and plaintiff on January 13, 2005, a writ of habeas corpus ad testificandum will be issued for his appearance at trial.

In his affidavit, Barry Ball states that on January 13, 2005, he was housed in the same cellblock as plaintiff on January 13, 2005 and that he could see and observe from his food trap “the events described in the affiant’s original affidavit submitted to [plaintiff] for court review.” I understand Ball to be directing the court to the affidavit plaintiff submitted in opposition to defendant’s motion for summary judgment from him (dkt. #50), in which he describes the confiscation of plaintiff’s medication and a verbal exchange between plaintiff and defendant Barr concerning the medication’s expiration date. Although cumulative testimony is not allowed, the testimony of Ball may corroborate the testimony of Gomez or plaintiff. Therefore, I will issue a writ of habeas corpus ad testificandum for inmate Ball’s appearance at trial.

Plaintiff’s request for a writ of habeas corpus for inmate D. Hamidullah As-Saffat will be denied. As-Saffat avers in his affidavit that he was an eye-witness on January 13, 2005 to

persistent attacks by the meaning of Wisc. Adm. Code DOC 310.03(6), (12), and (14). When John Doe Barr, a low ranking corrections officer, demoted Stewart from his level 3 status under his own and willful authority, it caused a colossal effect of infringements: constitutional violations; settlement agreement violations . . . privilege loses; and subsequently, his WSPF status was inadvertently extended beyond what is projected in the settlement agreement as reasonable; two years. In that, John Doe Barr infelicitously

seized Stewart's dental medication and various of other essentials once in Stewart's possession during a cell search, January 13, 2005, that was prompted by John Doe Barr as a result of reprisal against Stewart, January 13, 2005, for speaking out on behalf of Eric "Guido" Gomez, January 13, 2005. . . And although John Doe Barr was informed to contact the dentist and or HSU to confirm the legitimacy of Stewart's medication that was appropriate for service, January 13, 2005, the follow-up request was nonetheless ignored by the infelicitous servicer, John Doe Barr.

Because As-Saffat does not indicate how he was in a position to witness first-hand the January 13, 2005 incident between defendant Barr and plaintiff and because his testimony would, at most, be cumulative of the testimony of witnesses Ball, Gomez, and plaintiff, I will deny plaintiff's request for issuance of a writ of habeas corpus ad testificandum for inmate As-Saffat.

I turn then to plaintiff's request for the issuance of subpoenas for Doctor Boston, Nurses Reid and Gaye and defendant Barr. Pursuant to Rule 45(a)(3), the clerk of court shall issue signed but blank subpoenas to a party requesting it, who is responsible for completing the subpoenas before service. Pursuant to Rule 45(b)(1), service of a subpoena shall be made by delivering a copy of the subpoena to the person to be subpoenaed and providing to that person the fees for one day's attendance at trial 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 . . ."). District courts do not have statutory authority to advance or waive

witness fees for indigent litigants. Armstead v. MacMillan, 58 Fed. Appx. 210 (7th Cir. 2003).

Although plaintiff may be unable to arrange for service or to compel the attendance of witnesses because of his indigence, I will direct the clerk of court to issue the requested subpoenas. As noted above, plaintiff is responsible for arranging for service of his subpoenas. Service may be made by any person at least 18 years old who is not a party to the lawsuit. A check or money order made payable to the person to whom the subpoena is addressed must accompany the subpoena. Current rates for witness fees and mileage costs are set out below. Any potential witness receiving a subpoena from plaintiff unaccompanied by the witness fee and mileage costs may move to quash the subpoena and the court would be bound to grant such a motion.

According to this court's witness procedures (another copy of which is enclosed to plaintiff with this order), if plaintiff is unable to obtain the services of an individual over the age of 18 to serve his subpoenas, he may file a motion with the court asking that service be effected by a United States Marshal, deputy United States Marshal or other person or officer specially appointed by the court to serve the subpoena. Such an appointment is proper only when the plaintiff is authorized to proceed in forma pauperis, Collins v. Gorman, 96 F.3d 1057 (7th Cir. 1996), as plaintiff is in this case. However, in order to insure that the marshal will have sufficient time to serve subpoenas if plaintiff's request is granted, the

procedures require that plaintiff file his motion at least four weeks in advance of trial and that he support the motion with an affidavit in which he avers

- The witness refuses to testify voluntarily; and
- He has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action; and
- No later than two weeks before trial, he will tender to the marshal or other individual serving the subpoena a check or money order made payable to the witness in an amount necessary to cover the daily witness fee and the deponent's mileage, as well as costs for room and meals if the witness's appearance at trial will require an overnight stay. Current rates for daily witness fees and mileage are as follows: \$40 daily witness fee and \$.44.5 per mile.

As is clear from the procedures plaintiff is to follow for obtaining the issuance of trial subpoenas, if the trial date remains scheduled for July 17, plaintiff may not have time to take the steps he is required to take in order to serve subpoenas on Dr. Boston, Nurses Gaye and Reid and defendant Barr. As noted earlier, plaintiff's failure to act within the necessary time line for requesting witnesses appears to have been caused by his transfer from the Wisconsin Secure Program Facility to the Waupun Correctional Institution on May 30, 2006, and the interruption to his access to legal papers relating to this case for more than two weeks following the transfer. In light of these circumstances, fairness dictates that the trial date be

moved to allow plaintiff a reasonable opportunity to secure the attendance of the witnesses he desires at trial.

ORDER

IT IS ORDERED that

1. The July 17, 2006 final pretrial conference and trial dates are RESCINDED. The final pretrial conference will take place at 8:30 a.m. on Monday, August 21, 2006 and the trial will commence at 9:00 a.m. that same date.

2. Plaintiff's request for issuance of a writ of habeas corpus ad testificandum for inmate D. Hamidullah As-Saffat is DENIED;

3. Plaintiff's request for issuance of writs of habeas corpus ad testificandum for inmates Barry Ball and Eric Gomez is GRANTED. The clerk of court is requested to issue writs of habeas corpus ad testificandum for the attendance of these witnesses at trial on August 21, 2006. Both witnesses are presently incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin.

4. The clerk of court is requested to issue four subpoena forms to plaintiff for his use

in connection with the trial scheduled in this action for August 21, 2006.

Entered this 21st day of June, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge