

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

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STEVEN D. STEWART,

Plaintiff,

v.

C.O. BARR,

Defendant.

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ORDER

05-C-293-C

This case is presently scheduled for trial to begin the week of August 21, 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. Presently before the court is plaintiff's "Motion for Subpoenas/Affidavit of Steven D. Stewart," which does not appear to have been served on counsel for the defendant, Adrian Dresel-Velasquez. Therefore, I am sending counsel a copy of the submission, together with a copy of this order. Plaintiff is cautioned that in the future, the court will not consider any document he files that does not show clearly that he has sent a copy to opposing counsel.

In his motion, plaintiff asks that the court request the United States Marshal to serve

four individuals with subpoenas to appear at the trial of this case. The four individuals are Doctor Boston, Nurse Pat Reid, Nurse Gaye and defendant Jared Barr. Earlier, plaintiff asked for subpoenas for these intended witnesses and, in an order dated June 21, 2006, I granted the request and directed the clerk of court to send four blank subpoena forms to plaintiff. The record reflects that the clerk complied with this request on the same day. In the June 21 order, I advised plaintiff that if he was unable to arrange for a person over the age of 18 to serve the subpoenas on the defendant, Dr. Boston and Nurses Reid and Gaye, he could 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. I advised him also that his motion would have to be supported with an affidavit in which he avers

- 1) The witness refuses to testify voluntarily; and
- 2) 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
- 3) 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 is \$40, mileage is \$.44.5 per mile, and the per diem or room and meal rate for Madison is \$99.)

In his affidavit, plaintiff avers that he has been unable to arrange for a person at least 18 years of age to serve his subpoenas and that he is prepared to tender to the United States Marshal checks or money orders made out to each individual subpoenaed in an amount sufficient to cover the daily witness fee and mileage. (The trial of this case is not expected to last more than one day.) However, plaintiff does not aver that he has attempted to learn whether any one or more of his witnesses will testify voluntarily. Instead, he contends that “there is no way I can get in touch with the state witnesses to know if they will testify voluntarily, I don’t have enough time.”

I am not persuaded that plaintiff does not have enough time to contact counsel for the defendant to ask whether defendant Barr, Dr. Boston, or Nurses Reid and Gaye will be attending the trial and whether counsel would make any one or more of these individuals available for plaintiff to call as a witness without the need for a subpoena. Even if defendant does not plan to bring Dr. Boston or Nurses Reid and Gaye as witnesses for defendant’s case, I am not convinced that plaintiff did not and does not have time to write to these individuals to ask whether they will appear voluntarily. He has known now for nearly a month what steps he was required to take before this court would consider a request for the United States Marshal’s assistance in serving his subpoenas. Trial is still five weeks away, yet it appears that plaintiff does not wish to make any effort to contact his witnesses to determine their willingness to appear voluntarily. Before asking the U.S. Marshals Service to incur the cost

of serving subpoenas on plaintiff's witnesses, I need plaintiff's assurance that the witnesses are unwilling to appear voluntarily.

#### ORDER

IT IS ORDERED that plaintiff's motion that the court direct the United States Marshals Service to serve subpoenas on the defendant, Dr. Boston and Nurses Reid and Gaye is DENIED without prejudice.

If, by August 7, 2006, plaintiff advises the court that he has contacted defense counsel to ask whether he would make available any of the witnesses plaintiff has named without the need for a subpoena, and, if defendant is not planning to call Dr. Boston and Nurses Reid and Gaye as defense witnesses, that plaintiff has contacted these proposed witnesses, and that he has learned that the witnesses are unwilling to testify voluntarily, he may renew his motion and I will consider it promptly.

Entered this 17th day of July, 2006.

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