

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

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STEVEN D. STEWART,

Plaintiff,

ORDER

v.

05-C-293-C

C.O. BARR,

Defendant.  
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In this civil action, plaintiff Steven D. Stewart, a prisoner at the Waupun Correctional Institution, contends that defendant Barr acted with deliberate indifference to his serious medical needs when he confiscated plaintiff's prescription medication on January 13, 2005. Now before the court is plaintiff's fifth motion for appointment of counsel, which will be denied.

In his motion, plaintiff catalogues his ongoing medical problems, which are undeniably numerous. According to plaintiff, he has undergone several medical procedures in recent weeks and is scheduled for surgery sometime in the near future. Plaintiff states specifically that he "does not want trial cancelled." Instead, he asks for appointment of counsel, whom he believes would "make a difference in this case." I disagree.

As I have explained in previous orders, no complicated legal preparation is necessary in this case. The issues are simple and relate purely to credibility. Plaintiff alleges that defendant Barr confiscated plaintiff's prescription medication for no reason on January 13, 2005; Barr denies the allegations. The jury will listen to the testimony and decide whom it believes.

Although the simplicity of this case militates against appointment of counsel, there is a procedural matter that requires prompt attention. In his most recent submission, plaintiff alleges that he never received the blank subpoena forms which were enclosed with the court's June 21, 2006 pretrial order. Plaintiff has submitted a copy of a letter he sent to defendant's counsel on July 20, 2006, asking whether defendant, Dr. Boston, or Nurses Reid and Gaye would testify voluntarily for plaintiff or whether they required service of subpoenas from the United States Marshall's Service. It does not appear that defendant has responded to plaintiff's request.

There are several problems with the manner in which witnesses have been disclosed in this case. First, I note that although the deadline for disclosing trial witnesses was June 19, 2006, defendant filed no witness disclosures. In the normal course of events, the failure to timely disclose witnesses would bar those witnesses from testifying at trial. Perhaps defendant does not intend to testify. If he does, he will have to obtain plaintiff's stipulation to the untimely disclosure or convince the court that he had good cause for failing to make

a timely disclosure. Given the fact that plaintiff wishes to call defendant to testify as part of his own case, stipulation might be easily reached, rendering service of a subpoena unnecessary.

That leaves plaintiff's request for service of subpoenas on Dr. Boston and Nurses Gaye and Reid. It is unclear why plaintiff believes these witnesses are necessary to his lawsuit. On summary judgment, I found it undisputed that following dental treatment, plaintiff had been given a prescription for medication that remained valid on January 13, 2005. Under Fed. R. Civ. P. 56(d), facts found undisputed on summary judgment are "deemed established" for trial. Therefore, plaintiff need not call his proposed medical witnesses for the purpose of establishing that he had a valid prescription on January 13, 2005. It is difficult to imagine for what other purpose plaintiff might wish to call these witnesses, and I am unwilling to put the United States Marshals Service through the expense and inconvenience of serving witnesses whose testimony may be irrelevant. Unless plaintiff can demonstrate a need for the testimony of these witnesses, his request to have the United States Marshals Service serve subpoenas on them will be denied.

Because trial is quickly approaching, it is necessary to resolve the matter of trial witnesses promptly. No later than August 8, 2004, defendant is to inform the court and plaintiff whether he intends to appear as a witness and whether he will testify voluntarily for plaintiff. If defendant advises the court that he will appear as a trial witness and make

himself available to testify for plaintiff, I will assume that plaintiff will stipulate to his untimely disclosure, since such an agreement would spare plaintiff the cost of subpoenaing defendant. If defendant informs the court that he does not intend to appear as a witness or testify voluntarily for plaintiff, I will provide plaintiff with a blank subpoena form at that time and will direct the marshal to serve plaintiff's subpoena on defendant. Plaintiff may have until August 8, 2004, in which to inform the court whether he still wishes to call Dr. Boston, Nurse Gaye or Nurse Reid at trial, and if so, what relevant testimony he believes each will offer.

#### ORDER

IT IS ORDERED that

1. Plaintiff's motion for appointment of counsel is DENIED.
2. Defendant may have until August 8, 2006, to inform the court and plaintiff whether he intends to appear as a witness and whether he will testify voluntarily for plaintiff.
3. Plaintiff may have until August 8, 2004, in which to inform the court whether he still wishes to call Dr. Boston, Nurse Gaye or Nurse Reid at trial, and if so, what relevant

testimony he believes each will offer.

Entered this 31st day of July, 2006.

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