IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STEVEN D. STEWART,

Plaintiff,

v.

C.O. BARR, C.O. MCDANIELS, C.O. STOWELL, BURTON COX, JR., CINDY SAWINSKI and C.O. GOVIER (Male),

Defendants.

ORDER

05-C-293-C

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Plaintiff Steven Stewart is proceeding in this case on his claims that 1) defendants Govier, Stowell and McDaniels violated his First Amendment free exercise and free expression rights when they refused to allow plaintiff to be transported outside the prison unless he removed his braids and combed out his dreadlocks; 2) defendants Cox and Sawinski violated plaintiff's Eighth Amendment rights when they denied him surgical treatment of his rectal mucosa prolapse condition; and 3) defendant Barr violated plaintiff's Eighth Amendment rights by refusing to allow plaintiff to take medication for three days that had been prescribed for gum disease. Now before the court is plaintiff's third motion for appointment of counsel. Plaintiff's first motion was denied because it was filed with

plaintiff's complaint, which was simply too early in the case to allow the court to assess adequately plaintiff's ability to represent himself. Plaintiff's second motion also was denied as premature. At the time he filed it, plaintiff attached several communications from the Nathan Law Office in which Arthur Nathan asked to review plaintiff's medical records to determine whether plaintiff's case was one he would agree to take. The latest of Nathan's communications was dated August 2, 2005, and showed that Nathan had received plaintiff's authorization for release of medical records and was waiting for them to arrive so that he could assess the potential merits of plaintiff's claims.

In support of his third motion, plaintiff states that he has heard nothing further from Mr. Nathan concerning his willingness to represent plaintiff. He states further that he is scheduled "soon" for surgical repair of his rectal prolapse and that he will have a difficult time sitting after the surgery. Primarily, however, he expresses concern about the restrictions on the time he is allowed to visit the law library and his lack of legal expertise.

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir.1993)(quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.1991)). The Seventh Circuit will find such an appointment reasonable where plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other

words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not, however, whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

Even if plaintiff had a lawyer, his chances of success on his First Amendment claim are slim at best. When I granted plaintiff leave to proceed on this claim, I told him that he could not prevail on it if defendants made the rather simple showing that the practice of requiring prisoners to remove braids or dreadlocks before being transported outside the prison walls serves a legitimate penological interest. I noted that the legitimate penological in preventing inmates from hiding contraband in tightly bound hair that could make its way undetected into the prison seemed the obvious reason behind the practice he challenges. Even so, I told plaintiff that I could not dismiss his claim at the outset because I am bound by the court of appeals' instruction in Alston v. DeBruyn, 13 F.3d 1036, 1039-40 (7th Cir. 1994), that district courts must wait to rule on such claims until the defendants put into the record proof of the purpose for the challenged practice.

Plaintiff's Eighth Amendment claims will not be as easily resolved as plaintiff's First Amendment claim. Nevertheless, I conclude that these claims are not so complex that plaintiff cannot prosecute them. In Hudson v. McHugh, 148 F.3d 859, 862 (7th Cir. 1998),

the court of appeals declined to find that it was an abuse of the court's discretion to deny the prisoner plaintiff's request for a lawyer to represent him on his claim that he had been denied epilepsy mediation for 11 days, precipitating a seizure. The court of appeals acknowledged that although prisoner cases raising Eighth Amendment claims of denial of medical care almost always present "tricky issues of state of mind and medical causation," it was reasonable for the court to evaluate the plaintiff to be as competent as any other average pro se litigant to present his case. Id. at n.1.

The challenges plaintiff faces in proving the facts relating to his Eighth Amendment claims are the same challenges faced by every other pro se litigant claiming deliberate indifference to a serious medical need. Like the plaintiff in Hudson, plaintiff will have to prove defendants' state of mind and the medical causation for his injury, if he has one. (For example, at this early stage of the proceedings, there is no evidence in the record that plaintiff suffered any injury as a result of defendant Barr's refusal to allow plaintiff to take medication for three days that had been prescribed for gum disease.) Such proof may well be difficult to come by. But the fact that matters of state of mind and medical causation are tricky to prove is not sufficient reason by itself to find that plaintiff's case presents exceptional circumstances warranting appointment of counsel. If it were, it would be established law that district courts are not free to decline to appoint counsel for pro se litigants raising claims of denial of medical care.

The law governing plaintiff's Eighth Amendment claims has been settled since Estelle v. Gamble, 429 U.S. 97, 103 (1976). It was explained to plaintiff in the order granting him leave to proceed. Plaintiff's inability to make frequent visits to the law library will not interfere with his ability to succeed on his claims. Moreover, with the exception that plaintiff will be temporarily out of pocket while he recovers from his surgery, plaintiff does not appear to lack the physical ability to collect and present evidence in support of his claims. Indeed, the record reveals that he is more capable than the average pro se litigant. His written submissions are clear and reflect his ability to understand what this court has said in its previous orders and to respond appropriately. He has demonstrated an ability to use the discovery tools described in the Federal Rules of Civil Procedure. He has served interrogatories on five defendants and requested the production of documents. If plaintiff has additional questions about court procedure, he is free to ask the magistrate judge for guidance at the preliminary pretrial conference scheduled for September 20, 2005. At that time, the magistrate judge can work with plaintiff to build into the schedule for moving ths case to completion whatever time plaintiff needs to recover from his surgery. As for obtaining evidence in support of his claims, plaintiff has personal knowledge of the medical treatment he received and should be able to obtain access to his own medical records to corroborate this information. His medical records should show how long he was deprived of treatment and what injury resulted, if any. If plaintiff's injury was such that his

symptoms are not beyond a layperson's grasp, he will not need an expert witness. Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004) (citing Ledford v. Sullivan, 105 F.3d 354, 360 (7th Cir. 1997)). Even if plaintiff were to require a medical expert, he suggests no reason why he could not seek out such a professional witness on his own.

In summary, I believe that plaintiff is capable of prosecuting this lawsuit and that having appointed counsel will not make a difference in the case's outcome.

ORDER

IT IS ORDERED that plaintiff's motion for appointment of counsel is DENIED.

Entered this 19th day of September, 2005.

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