

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

SHAROME ANDRE POWELL,

Plaintiff,

v.

SERGEANT FINK, LIEUTENANT DURDIN
and CORRECTIONAL OFFICER KOPEHAMER,

Defendants.

ORDER

06-C-58-C

This case is scheduled for trial October 2, 2006, on plaintiff's claim that defendants Michael Fink, Tracy Durdin and Augustus Kopehamer used excessive force against him in violation of the Eighth Amendment when they slammed his head into a shower door on July 8, 2005. Now before the court is plaintiff's request for writs of habeas corpus to bring to trial as witnesses inmates Willie Brisby and Joshua Morales and for subpoena forms for Linda O'Donovan, a prison records custodian, and defendants Fink, Kopehamer and Durdin. Because O'Donovan's testimony is unnecessary and Morales's testimony would be cumulative, plaintiff's motion will be denied with respect to those proposed witnesses. I will stay a decision whether to issue a writ of habeas corpus ad testificandum for inmate Brisby

until September 18, 2006, in order to permit plaintiff to inform the court whether Brisby is willing to testify voluntarily. Finally, with respect to defendants, I will issue blank subpoena forms to plaintiff for his use in the event defendants are unwilling to testify voluntarily for plaintiff at trial. However, before arranging for service of the subpoenas, plaintiff should consult with defendants' counsel to determine whether defendants will testify voluntarily.

A. Brisby and Morales

Plaintiff has requested writs of habeas corpus ad testificandum for inmates Brisby and Morales, contending that each has relevant testimony to offer in this case. In support of this request, plaintiff has referred the court to Brisby's and Morales's affidavits, dkt. ##21 and 22, in which the proposed witnesses recount in detail what each overheard of plaintiff's altercation with defendants on July 8, 2005. For all practical purposes, the affidavits are carbon copies. Both witnesses aver that they heard the same words from the same defendants in the same order and manner as did the other. Notably, neither witness *saw* defendants use any force against plaintiff. Although I agree that the witnesses' testimony is relevant insofar as it corroborates plaintiff's version of events, it would be unnecessarily cumulative for plaintiff to introduce testimony from both proposed witnesses. Therefore, I am inclined to grant plaintiff's request for a writ of habeas corpus ad testificandum for

inmate Brisby and deny his request with respect to inmate Morales.

However, one obstacle stands in the way of granting plaintiff's request for a writ for inmate Brisby. As this court's written Procedures for Calling Witnesses to Trial make clear, parties wishing to call an incarcerated witness to trial must either: (1) submit an affidavit in which the proposed witness or plaintiff avers that the witness is willing to appear voluntarily to testify on the party's behalf or, (2) at least four weeks before trial, submit completed subpoena forms to the United States Marshal and obtain from this court a writ of habeas corpus ad testificandum for the incarcerated inmate. Plaintiff has not submitted any affidavit in which he or inmate Brisby indicates that Brisby is willing to testify voluntarily, and, if Brisby is not a voluntary witness, plaintiff has not completed the necessary subpoena form for him. If Brisby is unwilling to testify voluntarily, it is too late for plaintiff to ask the United States Marshal to subpoena him now. However, if plaintiff submits the necessary affidavit showing that Brisby is willing to testify voluntarily, I will issue the writ. Plaintiff may have until September 18, 2005, in which to submit an affidavit from Brisby or himself indicating Brisby's willingness to testify voluntarily. Plaintiff should note that if he avers Brisby is a voluntary witness, he must state when and where Brisby advised plaintiff of his willingness to testify. If he fails to do so, his request for a writ of habeas corpus ad testificandum for Brisby will be denied.

B. O'Donovan

Plaintiff has requested a subpoena form for Linda O'Donovan, the prison records custodian, whom he asserts will "verify documents" relating to the case. Plaintiff does not need O'Donovan's live testimony to authenticate any records or documents he plans to introduce at trial. Assuming the records plaintiff wishes to introduce were created in the regular course of prison business and O'Donovan is the records custodian, as plaintiff asserts, then all plaintiff need do is obtain O'Donovan's affidavit to that effect. Fed. R. Evid. 902(11). There is no need for her to testify in court.

C. Fink, Durdin and Kopehamer

Finally, plaintiff wishes to obtain blank subpoena forms in order to call defendants Fink, Durdin and Kopehamer as adverse witnesses at trial. Under Fed. R. Civ. P. 45(a)(3), the clerk of court must issue signed but blank subpoenas to any party requesting them. The party remains responsible for completing the subpoenas before service. Under Rule 45(b)(1), service of the subpoena shall be made by delivering a copy of the subpoena to the person being subpoenaed and providing that person with the fees for one day's attendance at trial and the mileage allowed by law. (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 \$134.) 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.

Had plaintiff sought to obtain forms at an earlier point in this case, he could have asked the court to order the United States Marshal to serve the subpoenas for him because of his indigency. However, at this late date, there is no time for plaintiff to complete his forms, return them to the Marshal’s Service with the applicable fees and allow time for service of the completed subpoenas on defendants. Plaintiff has three choices: he may secure defendants agreement to testify voluntarily, he may arrange for service of a subpoena on them by any person who is at least 18 years old and who is not a party to the lawsuit or he may simply cross-examine any defendant who testifies at trial.

In order to save himself the expense of subpoenaing defendants, plaintiff may wish to contact counsel for defendants to ask whether defendants Fink, Durdin and Kopehamer will be attending the trial as suggested by defendants’ witness list 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. If counsel is unwilling to do so, plaintiff has two options. First, he may complete the blank subpoena forms enclosed with this order and arrange for a person over 18 to serve the subpoenas. If he does so, a check or money order for witness fees made payable to the person to whom the subpoena is addressed must accompany the subpoena.

Plaintiff's second option is to forgo calling defendants as adverse witnesses and instead settle for cross examining them at trial if they are called as witnesses by defendants' counsel. However, plaintiff should remember that if he does not put in enough evidence to prove each element of his claim through his own testimony and the testimony of his witnesses, defendants may move the court for judgment as a matter of law against plaintiff, and the court may dismiss his case before defendants are called upon to produce any opposing evidence, including their own testimony.

ORDER

IT IS ORDERED that

1. A decision on plaintiff's request for issuance of a writ of habeas corpus ad testificandum for inmate Willie Brisby is STAYED. Plaintiff may have until September 18, 2006 in which to provide the court with an affidavit showing Brisby's willingness to testify voluntarily on plaintiff's behalf. If plaintiff fails to submit such an affidavit by September 18, 2006, plaintiff's request will be denied.

2. Plaintiff's request for a writ of habeas corpus ad testificandum for inmate Joshua Morales is DENIED.

3. The clerk of court is requested to issue three subpoena forms to plaintiff for his

use in connection with the trial scheduled in this case for October 2, 2006.

Entered this 7th day of September, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge