IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RAYNARD JACKSON,

OPINION and ORDER

Plaintiff,

07-cv-656-bbc

v.

JOAN GERL, GARY BOUGHTON, DANE ESSER, T. BROWN, J.T. BROWN, LARRY JOHNSON, MICHAEL SHANNON, JEFF REWEY, THOMAS TAYLOR, VICKY MANDERFIELD, RICHARD SCHNEITER, PETER HUIBREGTSE, DR. COX, DR. LAMAR, R. HABLE, S.D. HABLE, CAPTAIN GARDNER, T. SAWINSKI, JOHN SHARPE, KELLY TRUMM, T. LANSING, MS. THESING, TOM GINZKE, RICK RAEMISCH, JOHN BETT, STEVE CASPERSON, DAN WESTFIELD, MARION HARTMANN and MATTHEW FRANK,

Defendants.

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In this civil action brought under 42 U.S.C. § 1983, plaintiff raises several constitutional claims related to the use of a grenade against him in his cell at the Wisconsin Secure Program Facility in Boscobel, Wisconsin on March 26, 2005. In an order dated

March 19, 2008, I screened plaintiff's complaint and allowed him to proceed on many of his claims. However, I stayed a decision on one of plaintiff's excessive force claims because I could not determine from the complaint whether it was viable. Specifically, plaintiff had not provided sufficient information about the identity of the correctional officers involved in an allegedly unconstitutional strip search. Therefore, I directed him to file an addendum including that information.

Now before the court are several filings by plaintiff, including the requested addendum, additional claims that plaintiff apparently wishes to include in his complaint, a motion for reconsideration regarding my characterization of claims on which plaintiff was permitted to proceed as well as claims on which he was denied leave to proceed and a motion for appointment of counsel.

A. Requested Addendum

I turn first to the addendum that plaintiff was directed to submit. Plaintiff contends that the strip search performed by "defendants" following the use of the grenade on March 26, 2005 was abusive and violated the Eighth Amendment. He stated in his complaint that defendant Joanne Gerl directed the search and that other defendants participated in it. When I screened plaintiff's complaint, I determined that these allegations supported an Eighth Amendment claim against defendant Gerl and might support claims against the other,

unidentified officers as well. However, because plaintiff referred to these officers collectively and did not identify the individuals responsible, I instructed him to file an addendum to his complaint "in which he identifies and describes the conduct of each of the respondents he believes is liable for the strip search. For example, did they conduct the search or take part in the use of excessive force themselves? Were they present during the incident and failed to intervene?"

In his addendum, plaintiff states that during the strip search, defendants C.O. Rewey and C.O. Taylor held him by the shoulders and applied "pain compliance techniques" when plaintiff was doubled over in pain. In addition, he asserts that defendant C.O. Shannon shackled him to the door and kept him shackled there while defendant Esser "sexually assault[ed]" him. Defendant Gerl watched as this took place and defendant J.T. Brown recorded it. As discussed in the March 19 order, it is possible that the manner in which defendants Rewey, Taylor, Esser and Shannon conducted the search violated plaintiff's constitutional rights and that plaintiff should have been allowed an opportunity to comply with a visual search before defendants resorted to a manual search. He will be permitted to proceed on claims against them. Next, plaintiff states that defendant J.T. Brown stood by as the search occurred and recorded the events; as a result, she may be liable for her failure to intervene, assuming she had a reasonable opportunity to do so. Therefore, plaintiff will be permitted to proceed on this claim against defendant J.T. Brown as well.

B. Proposed Amendments

In his addendum, plaintiff has included two new claims. Therefore, I construe the addendum to include a motion to amend the complaint and will deny it. First, plaintiff asserts that immediately before he filed this lawsuit in mid-November 2007, an officer Scullion and defendant Esser subjected him to a strip search on October 26, 2007, in retaliation for preparing this lawsuit. Next, he asserts that on January 11, 2008, after he filed the lawsuit, defendant Shannon confiscated legal mail containing discovery requests that plaintiff was trying to send to Dennis Jones-El, a prisoner who has been helping plaintiff with this lawsuit. Because defendant Shannon and the unit sergeant refused to return plaintiff's legal mail, plaintiff refused to return his food tray at dinner time. As a result, a cell extraction team and incapacitating agents were used to remove plaintiff from his cell. The incapacitating agents used by the cell extraction team irritated plaintiff's asthma.

There are at least two reasons why plaintiff's motion to amend his complaint to add these claims must be denied. First, plaintiff's proposed amendments are not included in an amended complaint that can be substituted for the original complaint, as would be required before I could accept an amended complaint as the operative pleading in this case. They have been written more in the nature of addendums to the original complaint, adding new claims and new defendants. Because it would be far too confusing for the court and the

litigants to work with pleadings consisting of several documents scattered throughout the file, it is this court's policy to require an amended complaint to be a document that stands on its own.

Second, from plaintiff's own allegations, it is a near-certainty that plaintiff did not exhaust his administrative remedies with respect to either of the incidents he raises in the amendment until after he filed his original complaint in this court. In fact, the January 11 incident did not occur until well after plaintiff filed his complaint. It is settled law in this circuit that a prisoner cannot cure a failure to exhaust his administrative remedies before bringing suit by filing an amended complaint after he has exhausted his administrative remedies. In Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999), the Court of Appeals for the Seventh Circuit held that a suit brought in federal court by a prisoner before administrative remedies have been exhausted must be dismissed. A district court lacks "discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment." Id. In Ford v. Johnson, 362 F.3d 395, 398-99 (7th Cir. 2004), the court held that a lawsuit is "brought" within the meaning of the exhaustion statute "when the complaint is tendered to the district clerk."

Although failure to exhaust administrative remedies is an affirmative defense, it is permissible to take into account the lack of exhaustion when considering whether to allow an amended complaint to be filed. No purpose is served in allowing an amendment that will

have to be dismissed promptly. Because plaintiff has raised claims in his proposed amended complaint that it appears certain he failed to exhaust before he filed his original complaint, he may not amend his complaint to assert the claims. If he wants those claims considered, he will have to file a new lawsuit raising them.

C. Motion for Reconsideration

Plaintiff asks that I reconsider several determinations included in the March 19 order. Plaintiff's first three arguments require little discussion. The first two relate to my characterization of his Eighth Amendment claims against defendants Esser, Taylor, Shannon, Rewey, and T. Brown regarding their involvement in the use of a grenade in plaintiff's cell during the cell extraction on March 26, 2005. In his motion for reconsideration, plaintiff contends that defendants' involvement was more significant than suggested in the analysis included in the screening order and that I failed to consider his "corporal punishment" claim under the Eighth Amendment. As for plaintiff's first argument, I note that he is proceeding on his Eighth Amendment claims of excessive force against these defendants. If he has evidence of their direct involvement in any unconstitutional acts, he will be free to prove this at a later stage in the case; my characterization of their involvement in the screening order does not affect plaintiff's claims in the slightest. Plaintiff's second argument is without merit as well. I did consider all of plaintiff's arguments and determined that he stated a claim of

excessive force under the Eighth Amendment.

Plaintiff's next argument is that I should not have dismissed his state law claims, brought under Wisconsin criminal statutes and the state constitution. He contends that 28 U.S.C. § 1367 compels the court to exercise supplemental jurisdiction over these claims. Plaintiff misreads the screening order. I dismissed plaintiff's state law claims for failure to state a claim upon which relief may be granted, not because I declined to exercise supplemental jurisdiction over them. As I noted in the March 19 order, plaintiff may not pursue claims brought under Wisconsin criminal statutes because only the state of Wisconsin has the authority to prosecute a crime. Cf. Maine v. Taylor, 477 U.S. 131, 136 (1986). He may not pursue his claims brought under the Wisconsin constitution because there is no independent cause of action against the defendants for these alleged violations.

Finally, I turn to plaintiff's motion for reconsideration with respect to his claim that defendant Burton Cox was deliberately indifferent to his serious medical needs. This is a close call. When I screened plaintiff's complaint, I found that even if plaintiff's knee condition constituted a serious medical need, he had pleaded facts regarding defendant Cox's care of him that are inconsistent with deliberate indifference. Specifically, plaintiff alleged in his complaint that he injured his knee when the grenade went off and that his doctor, defendant Cox, had been treating the pain associated with the injury, but refused to refer plaintiff to a specialist. In the March 19 order, I explained to plaintiff that his disagreement

with defendant Cox's decision not to refer him to a specialist did not support a claim of deliberate indifference, because disagreements about the choice of treatment are not actionable under the Eighth Amendment.

In his motion for reconsideration, plaintiff clarifies his allegations. He states that although defendant Cox has treated his knee pain, he refuses to take steps to treat and repair the underlying injury and that the pain treatment he is receiving is inadequate. Although plaintiff's allegations remain vague, they are minimally sufficient to state a claim at this early stage of the lawsuit. If plaintiff's knee may be repaired and if, until it is, it will remain painful or will deteriorate, then it is possible that defendant Cox's refusal to take steps to insure that plaintiff receives such repair *could* be evidence of his deliberate indifference to plaintiff's serious medical needs. Therefore, I will vacate my earlier dismissal of this claim and defendant Cox and allow plaintiff to proceed on this claim against defendant Cox. However, I will caution plaintiff again that "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).

D. Motion for Appointment of Counsel

Finally, plaintiff requests that the court appoint counsel to represent him in this lawsuit. This motion, along with the other filings in the case, was prepared by Dennis Jones-El, a prisoner who has been assisting plaintiff with this lawsuit from the outset (apparently with assistance from Jones-El's brother Jesse Jones, who is also incarcerated). According to Jones-El and plaintiff, plaintiff has prepared none of the documents submitted to the court.

In deciding whether to appoint counsel, I must first find that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Plaintiff has submitted this information.

However, this is not the end of the inquiry. In resolving a motion for appointment of counsel, a district court must consider both the complexity of the case and the pro se plaintiff's ability to litigate it himself. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). It is too early to determine whether this is a factually difficult case. The events plaintiff describes in his complaint involve numerous defendants, but relate to a handful of distinct episodes. Legally, this case is a routine case raising issues of excessive force and failure to provide medical care. The law is well-settled with respect to both. As for the excessive force claim, the court will weigh evidence regarding the safety threat perceived by

the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. As for the medical care claim, the relevant factors include whether 1) plaintiff had a serious health care need; 2) defendants knew plaintiff needed care; and 3) despite their awareness of the need, defendants failed to take reasonable measures to provide the necessary care.

The final inquiry is whether plaintiff is able to litigate these claims himself. Plaintiff reads at an eighth grade level and states in an affidavit that he cannot litigate this case himself because he "know[s] nothing of how to litigate a case" and has "never represented [himself]." To the extent that plaintiff contends he does not have the required legal knowledge to litigate his case, this is a common plight of every pro se plaintiff. As Judge Rovner noted in her concurring opinion in Pruitt, 503 F.3d at 663,

> [r]equests for counsel typically are made by plaintiffs . . . at the outset of litigation, and at that stage district judges frequently, and with good reason, will deny those requests. The motions are often generic and identify no circumstance other than the plaintiff's lack of legal knowledge and ability—a disadvantage nearly all unrepresented litigants share—in support of the request.

This is precisely the argument plaintiff makes.

At this early point in the lawsuit, it is impossible to evaluate plaintiff's ability to litigate it. The fact that plaintiff reads at an eighth grade level may present difficulties for

him in pursuing this case. But there is no evidence in the record about plaintiff's abilities other than his reading level because, as he and Jones-El aver, he has prepared none of the documents that are now before the court. This makes it nearly impossible to gauge his ability to comprehend legal issues and present facts. Clearly, Jones-El and Jones are capable of doing both; indeed, they prepared a lengthy complaint, addendum and motion for reconsideration, all of which were successful in part. Because nothing in plaintiff's motion or in the record thus far indicates that he lacks the ability to litigate this case on his own, I will deny plaintiff's motion for appointment of counsel at this time, without prejudice.

ORDER

IT IS ORDERED that

1. Plaintiff Raynard Jackson is GRANTED leave to proceed on his claims that defendants Rewey, Taylor, Esser, Shannon and J.T. Brown conducted an unconstitutional manual body cavity search when examining plaintiff after he was removed from his cell on March 26, 2005.

2. Plaintiff is DENIED leave to amend his complaint to include claims regarding alleged retaliatory incidents that occurred on October 26, 2007 and January 11, 2008.

3. Plaintiff's motion for reconsideration, dkt. #11, is GRANTED IN PART AND DENIED IN PART. Plaintiff's motion is GRANTED with respect to his claim that

defendant Cox was deliberately indifferent to his need for repair of his knee injury following the use of the grenade on March 26, 2005. Defendant Cox is reinstated as a defendant in this case. Plaintiff's motion is DENIED in all other respects.

4. Plaintiff's motion for appointment of counsel, dkt. #15, is DENIED without prejudice to him renewing it at a later date.

IT IS FURTHER ORDERED that

1. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

2. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

3. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint, his addendum and motion for reconsideration, the March 19, 2008 screening order and this order are being sent today to the Attorney General for service on the state defendants.

Entered this 30th day of April, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge