IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WAR N. MARION,

ORDER

Plaintiff,

09-cv-723-bbc

v.

JANEL NICKEL, DYLON RADTKE,
CHAD KELLER and BENJAMIN NEUMAIER,

Defendants.

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In this prisoner civil rights case, plaintiff War Marion alleges that defendants Chad Keller and Benjamin Neumaier disciplined him because of a previous lawsuit that he filed, in violation of his right of access to the courts. The parties have filed several motions in limine in anticipation of the trial scheduled for March 21, 2011.

Two of the motions are mirror images of each other. Defendants wish to introduce two of plaintiff's prior convictions as well as two prior convictions of one of plaintiff's proposed witnesses, Tony Merriweather. Plaintiff says that the convictions should be excluded. Under Fed. R. Evid. 609(a)(1), evidence of the conviction of a felony may be admitted to attack a witness's credibility, subject to the limitations of Fed. R. Evid. 403.

However, "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

Plaintiff says that his convictions should be excluded because they are more than ten years old, but he does not identify any particular convictions or their dates. According to defendants, plaintiff has a May 2001 conviction that he is still serving for second degree reckless homicide and a 1992 conviction for operating a vehicle without the owner's consent. Merriweather has convictions from 1989 for first degree sexual assault and aggravated battery while armed, both of which he is still serving.

Defendants acknowledge that more than 10 years have passed since plaintiff was released on his 1992 conviction, but they argue that it is important to show plaintiff's "continued inability to follow the law." Dfts.' Br., dkt. #105, at 2. In Kunz v. DeFelice, 538 F.3d 667, 674 (7th Cir. 2008), the defendant made a similar argument that the plaintiff's convictions "illustrated a consistent pattern of criminality." The court rejected this rationale: "This is propensity by another name . . . and propensity is a forbidden basis for admitting evidence." Id. The 1992 conviction will be excluded.

With respect to the remaining convictions, I will allow defendants to introduce the

fact that plaintiff and Merriweather have felony convictions, but I conclude that the probative value of the nature of those convictions is substantially outweighed by the potential for unfair prejudice under Rule 403. Defendants do not suggest that the issues of this case have anything to do with homicide or sexual assault or that those two crimes are more indicative of credibility than any other felony. Thus, the probative value of the nature of the convictions is low, but the danger of biasing the jury is high because of the seriousness of the crimes.

Plaintiff's other motion in limine is to exclude Merriweather's affidavit at trial. Because affidavits are out-of-court statements, they are hearsay and may not be introduced at trial to prove the truth of the matters addressed in the affidavit. Eisenstadt v. Centel Corp., 113 F.3d 738, 742 (7th Cir. 1997) ("[A]ffidavits . . . are not generally admissible at trial . . .to establish the truth of what is attested."). However, under Fed. R. Evid. 613(a), a party may use any prior statement of witness to impeach that witness's testimony at trial if the testimony is inconsistent with the prior statement. Accordingly, neither side may introduce affidavits as exhibits to prove the truth of a matter in the affidavits, but both sides may use a prior statement of a witness in an affidavit to impeach that witness if he or she testifies at trial.

Defendants have filed two other motions in limine. First, they say that any evidence or argument of other lawsuits should be excluded, with the exception of the 2007 lawsuit

that plaintiff is alleging prompted defendants to retaliate against him. It seems unlikely that any other disputes would be relevant to this case; generally, a plaintiff may not use other lawsuits in which defendants were parties or witnesses to prove his own case. However, it is difficult to rule on this motion now because defendants do not identify other lawsuits that they believe plaintiff might try to raise or the purpose for which they believe he might try to use that evidence. Accordingly, I am denying this motion without prejudice. However, if plaintiff intends to use evidence regarding another lawsuit at trial, he will have to show that it is relevant to an element of his claim and that it is not being used simply to show that defendants are often sued, which would not be permissible under Fed. R. Evid. 404.

Second, defendants ask for the exclusion of any evidence or argument "alleging that defendant Chad Keller retaliated against Marion in his 9-10-08 program review committee hearing." This motion will be granted, but with an important caveat. Defendants are correct that plaintiff is not proceeding on a claim that defendant Keller retaliated against him in 2008. However, if plaintiff has evidence that events at his program review committee hearing support a view that Keller was aware of his 2007 lawsuit (which Keller has denied) or that Keller made statements at the hearing or engaged in conduct suggesting that Keller was displeased with plaintiff because of the lawsuit, then plaintiff is free to submit any admissible evidence he has on that point.

Finally, I note that plaintiff has filed an untitled document in which he seems to be

renewing his request for subpoenas for three unincarcerated witnesses: Debra Wilson, Daniel Bavinick and Roy Davenport. Dkt. #102. However, that request is moot because defendants have notified the court that those three witnesses will be attending the trial without a subpoena. Plaintiff is wrong that he has a "right" to take depositions without paying their costs. Alston v. Pafumi, No. 3:09 CV 1978(CSH), 2011 WL 63420, *1 (D. Conn. Jan. 5, 2011) ("The statute authorizing indigent persons to file an action without prepayment of the filing fee, 28 U.S.C. § 1915, does not authorize the payment of deposition expenses by the court."); Jackson v. Woodford, Civil No. 05 CV 0513-L(NLS), 2007 WL 2580566, at *1 (S.D. Cal. Aug. 17, 2007)("Pursuant to 28 U.S.C. § 1915(a), [p]laintiff's in forma pauperis status entitles him to . . . free service of process by United States Marshals, however, it does not entitle him to waiver of witness fees, mileage or deposition officer fees.") (citations omitted); Murray v. Palmer, No. 903-CV-1010 (DNH/GHL), 2006 WL 2516485, at *4 (N.D.N.Y. Aug. 29, 2006)("a litigant proceeding in forma pauperis does not have a right to a waiver of (1) the cost of a deposition stenographer, (2) the daily attendance fee and mileage allowance that must be presented to an opposing witness under Rule 45 of the Federal Rules of Civil Procedure, or (3) the copying cost of any deposition transcripts.")(footnotes omitted); Tajeddini v. Gulch, 942 F. Supp. 772, 782 (D. Conn. 1996)(denying plaintiff's motion to depose defendants because plaintiff did not indicate how he would pay deposition expenses and in forma pauperis status

does not require advancement of funds by the court for deposition expenses).

ORDER

IT IS ORDERED that the parties' motions in limine, dkt. ##102 and 105, are resolved as follows:

(1) defendants Chad Keller and Benjamin Neumaier may introduce the fact that plaintiff War Marion has a felony conviction and Tony Merriweather has two; any references to the nature or details of these convictions are EXCLUDED;

(2) plaintiff's motion to exclude Merriweather's affidavit is GRANTED IN PART; no party may introduce an affidavit at trial to prove the truth of the matter asserted, but the parties may use affidavits to impeach witnesses under Rule 613;

(3) defendants' motion to exclude evidence of other lawsuits is DENIED WITHOUT PREJUDICE because they have failed to provide enough facts to rule on the motion; however, if plaintiff intends to rely on other lawsuits at trial, he will have to show that the evidence is relevant and admissible under Rule 404;

(4) defendants' motion to exclude allegations that defendant Keller retaliated against

plaintiff at a 2008 hearing is GRANTED.

Entered this 3d day of March, 2011.

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