

Brock R. Belnap #6179
Washington County Attorney
Ryan Shaum # 7622
Deputy Washington County Attorney
178 North 200 East
St. George, Utah 84770
(435) 634-5723

RECEIVED
OCT 30 PM 3:42
ORDERED FILED
30 Oct 07
A

WASHINGTON COUNTY FIFTH DISTRICT COURT
STATE OF UTAH

STATE OF UTAH,
Plaintiff,

vs.

WARREN STEED JEFFS,
Defendant.

MEMORANDUM IN OPPOSITION TO
MOTION FOR CONFIDENTIAL AND
PRIVILEGED PHYSICIAN CONTACT WITH
PATIENT

(Filed Under Seal)

Criminal No. 061500526

Judge James L. Shumate

Defendant's motion seeks confidential contact with his "personal physician" and others "for the purpose of obtaining medical diagnosis and treatment." Motion p. 3. Because detainees may not select or direct their medical care while in custody, the State objects to the defendant's motion.

I. The Defendant Has No Legal Right to Outside Medical Diagnosis and Treatment

Purgatory Correctional Facility ("PCF") is responsible for providing and determining the medical care and treatment of individuals in its custody. Estelle v. Gamble, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). The courts have consistently held that "one of the

incidences of incarceration is loss of the privilege to demand the medical care of the prisoner's choice and submission of his medical needs to the practitioners made available by the penal institution" and that an inmate has no constitutional right to treatment of the inmate's choice. Apodaca v. Ommen, R.N. et al, 807 P.2d 939, 943 and 944 (Wyo. 1991), citing a long list of cases from the 1st, 2nd, and 9th Circuit Court of Appeals, and Coppinger v. Townsend, 398 F.2d 392,394 (10th Cir. 1968). To allow inmates or detainees to dictate their care places an intolerable burden on correctional officials' ability to administer their facilities.

While a defense team and its experts may privately meet with the defendant for whatever litigation purposes may be appropriate, the defendant's motion goes far beyond that and seeks the Court's intervention **"for the purpose of obtaining medical diagnosis and treatment."** Defendant's Motion p. 3.

The defendant cites no authority for departing from United States Supreme Court precedent that "affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients. Courts will 'disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment . . . [which] remains a question of sound professional judgment.'" Gomm v. DeLand, 729 F. Supp. 767, 779 (D. Utah 1990), citing Estelle v. Gamble, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), and Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977).

II. Because PCF Is Providing Exceptional Care, Defendant Has No Right To Seek Outside Diagnosis and Treatment

The government has a constitutional obligation to provide adequate medical care to those whom it incarcerates. West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 2258, 101 L. Ed. 2d 40 (1988). PCF is meeting those obligations in every respect regarding the defendant. Here is an example of the care provided to the defendant during the past two weeks:

- Seen by Dr. Judd LaRow, M.D., PCF Physician
- Seen regularly by John Moyes, LCSW, Southwest Mental Health
- Seen regularly by John Worlton, LCSW, PCF staff
- Seen by Dixie Regional Medical Center E.R. Physician – Dr. Barnett
- Seen by Dr. Stephen B. Seager, ICH Psychiatrist at request of PCF
- Seen by PCF Nurses, ½ to 1 hour rotation – vitals, diet, etc.
- Continual one-on-one direct observation by PCF staff

The quality of care provided in this case far exceeds that which would justify court intervention. To show otherwise, the defendant “must establish by a preponderance of the evidence (1) that a [prison] officer knew of the prisoner’s serious medical condition and (2) deliberately or intentionally acted or refused to act in response to that condition, (3) and that such conduct caused the harm or unnecessary pain and suffering complained of.” Gomm v. DeLand, 729 F. Supp. 767, 778 (D. Utah 1990), citing Estelle v. Gamble, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), and Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704 (11th Cir. 1985).

In this case, the defendant cannot and does not make a deliberate indifference argument because his medical care far exceeds that minimal standard.

III. Because Defendant's Doctors Are Not Entitled to Provide Medical Diagnosis and Treatment at PCF, They Are Not Entitled To Confidential Access to the Defendant For that Purpose.

The State and PCF have cooperated with the defense team and given unprecedented access to outside medical personnel at the defense team's request. Contrary to policy and prior practice, PCF did not object to giving Dr. Warner access to the defendant and admitted Dr. Barlow under the belief that the Court had so ordered. Members of PCF's staff have also personally spoken with both Dr. Warner and Dr. Barlow and have offered to provide PCF's medical records and to consult with the defendant's doctors regarding treatment.

But, for legitimate penological reasons, PCF has to draw the line at "unsupervised" contact "for the purpose of obtaining medical diagnosis and treatment." Motion p. 3. Failing to object would undermine PCF's legitimate penological interests in safety, security, and the orderly administration of its facility.

Safety. PCF has legal responsibility for the safety of its inmates and its visitors, which include the defendant and his doctors. According to the best judgment of correctional professionals at PCF, the presence of trained correctional personnel is necessary when there is any physical contact between an inmate and a civilian.

Security. Because PCF is a secure facility, it has law enforcement obligations regarding any interactions that occur between inmates and civilians. In this case, Dr. Barlow is not only the defendant's "personal physician" with whom the defendant "enjoys a comfortable, trusting

relationship," he is also a member of the defendant's religious community. During Dr. Barlow's previous visit with the defendant, PCF staff were concerned that the nature of the visit was less one of medical assessment than religious communication.

Orderly Operation of the Facility. Allowing outside physicians to render medical treatment and care will significantly impact the orderly operation of the facility. Outside physicians are not familiar with PCF's protocols and procedures. PCF's medical staff may be faced with treatment orders from outside physicians that conflict with treatment orders from PCF physicians. Such a situation is untenable. If this precedent were established, all detainees would arguably have the ability to pick and choose their medical care providers.

V. The Defendant Is Candid With PCF Medical Staff And Requests Their Assistance

The purported justification underlying defendant's motion for treatment and diagnosis by his private doctors is that "the defendant is unlikely to be candid and otherwise share information and communicate with a physician if jail personnel are present." Motion, p. 2 ¶ 6.

This allegation is simply untrue. The Defendant regularly discusses his medical condition with PCF medical personnel. The defendant discusses his medical condition with PCF nurses and asks questions about his treatment and medication. On several occasions, the defendant has requested to speak to John Moyes and has done so frequently and in depth.

The suggestion that PCF's medical care is inadequate because the defendant will not communicate candidly is incorrect. However, even if it were true, that allegation does not

support a finding of deliberate indifference to the defendant's medical care sufficient to justify the Court's intervention in PCF's medical treatment of the defendant.

VI. The Defendant's Motion is Untimely


This is an issue of a significant importance to Purgatory Correctional Facility and other correctional institutions. Defendant's motion and memorandum were served on counsel for the State at about 4:00 p.m. the day before a hearing on the motion was scheduled for 9:00 a.m. This opposing memorandum was drafted with essentially no notice. If the Court has any inclination to grant the defendant's motion, the State objects on the ground that the motion is untimely under Rules 2 and 12 of the Utah Rules of Criminal Procedure. The State requests sufficient time to adequately brief all the issues and the opportunity for a full evidentiary hearing.

CONCLUSION

The State objects to defendant's motion for "unfettered" access by defendant's private doctors "for the purpose of diagnosis and treatment" at PCF. By law, the jail is solely responsible for the defendant's diagnosis and treatment and the Court should not intervene absent a finding of deliberate indifference, which the defense has not even argued.

To the extent the defendant wishes to consult with his attorneys and their experts for any appropriate litigation purpose, he is entitled to such privileged communications. However, his motion seeks confidential communication and access for diagnosis and treatment. On that point, the law is clear that the defendant has no right to such special accommodation. Therefore, the motion should be denied.

Respectfully submitted this 8th day of February, 2007,


 Brock R. Belnap
 Washington County Attorney

CERTIFICATE OF DELIVERY

I hereby certify that, on the 8th day of Feb, 2007, I caused a true and correct copy of the foregoing document to be served as follows:

Walter F. Bugden, Jr.
 Tara L. Isaacson
 Bugden & Isaacson
 623 East 2100 South
 Salt Lake City, UT 84106
(via facsimile & 1st Class mail)

Richard A. Wright
 Wright Judd & Winckler
 Bank of America Plaza
 300 South Fourth Street, Suite 701
 Las Vegas, NV 89101
(via 1st Class mail)

