

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Steven S. Brown,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 2:07-cv-13
	:	
Warden Voorhies, et al.,	:	JUDGE FROST
	:	
Defendants.	:	

ORDER

Plaintiff Steven S. Brown has requested this Court to order the United States Marshal to serve subpoenas duces tecum upon Judge Guy Reece, the law firm of Kegler, Brown, Hill & Ritter, the Director of the Ohio State University Medical Center, the Franklin County Commissioners, the Ohio Department of Rehabilitation and Correction, and an unnamed court reporter. Mr. Brown attached to his request copies of the subpoenas for the county commissioners, Judge Reece, the Kegler firm, the Director of OSUMC, and the ODRC, but did not attach a copy of any subpoena for the unnamed court reporter. The attached subpoenas list the particular documents or objects sought to be produced, but do not require the attendance of any witnesses.

I. Plaintiff's Motion for Service of Subpoenas

Rule 45(b) of the Federal Rules of Civil Procedure requires that, before a subpoena which commands the production of documents or tangible things is served, notice must be provided to each party. Mr. Brown asserts that such notice was given, but he failed to sign both his motion and certificate of service. Despite such obvious defects, the Court will consider his request for service of subpoenas.

Mr. Brown is proceeding in forma pauperis. 28 U.S.C. §1915(d) provides that "[t]he officers of the court shall issue

and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." The Marshal's Service is required under this provision to serve an indigent party's subpoena duces tecum, but under certain circumstances, a district court may relieve the Marshal's Service of its statutory duty to make service. See 9A Federal Practice and Procedure §2454 (3d ed.).

The Court will exercise its discretion to relieve the Marshal's Service of serving the subpoena on Judge Reece. A similar subpoena was previously served on Judge Reece who responded that none of the documents and videotapes sought by Mr. Brown were in his possession or control. Judge Reece also asserted a claim of privilege as to any of his handwritten notes taken during Mr. Brown's state-court proceedings. On the basis of this response, Judge Frost denied Mr. Brown's attempt to enforce that subpoena. There is no reason to believe that service of a second subpoena on Judge Reece would produce a different result.

The Court also will not order the Marshal's Service to attempt service of a subpoena on the unnamed court reporter. Mr. Brown has not submitted such a subpoena or provided any identifying information concerning the court reporter.

The Court will, however, order the Marshal's Service to serve the subpoenas duces tecum on the Franklin County Commissioners, the law firm of Kegler, Brown, Hill & Ritter, the Director of the Ohio State University Medical Center, and the Ohio Department of Rehabilitation and Correction. The Court notes that the fees for one day's attendance and the mileage allowed by law need not be tendered because the subpoenas do not require the attendance of any of the named persons or representatives. See Fed.R.Civ.P. 45(b)(1).

II. Plaintiff's Motion for Relief from Expert Witness Fees

In addition to his request for service of the subpoenas, Mr. Brown filed a motion for relief from expert witness fees. He states that he would like to depose and call as witnesses the inspectors employed by the State of Ohio who reported on conditions at the Franklin County jail, but cannot pay the deposition expenses or expert witness fees which will be required.

Although indigent plaintiffs have a right of access to the courts, there is no constitutional requirement to waive expert witness fees. Johnson v. Hubbard, 698 F.2d 286, 288-89 (6th Cir), cert. denied, 464 U.S. 917 (1983). There is also no statutory requirement that the government or the defendant pay for an indigent prisoner's discovery efforts. Smith v. Yarrow, 78 Fed.Appx. 529, 544 (6th 2003). Furthermore, both the Third Circuit and the Fifth Circuit have specifically held that 28 U.S.C. §1915 does not provide for a district court either to pay or waive fees for an expert witness. Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987), cert. denied, 485 U.S. 991 (1988); Pedraza v. Jones, 71 F.3d 194, 196 (5th 1995). Accordingly, the Court determines that it lacks authority to waive expert witness fees.

III. Disposition

Based on the foregoing reasons, the Court grants in part and denies in part Mr. Brown's Request for Service of Subpoenas by the United States Marshal (#196) consistent with this Order. The Court denies Mr. Brown's Motion for Relief from Expert Witness Fees (#199).

IV. Procedure for Objections

Any party may, within fourteen (14) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. Fed. R. Civ. P. 72(a). The motion must specifically designate the order or part in question

and the basis for any objection. Fed. R. Civ. P. 7(b). Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. Eastern Division Order No. 91-3, pt. I., F., 5. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a); 28 U.S.C. §636(b)(1)(A).

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.3.

/s/ Terence P. Kemp
United States Magistrate Judge