

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

GARY MARK WAITE,

09-CV-839-BR

Plaintiff,

OPINION AND ORDER

v.

KEVIN DEMER, ASST. D.A.,

Defendant.

GARY MARK WAITE
#17835637
CRCI
9111 N.E. Sunderland Ave.
Portland, OR 97211

Plaintiff, *Pro Se*

JOHN KROGER
Oregon Attorney General
KATHARINE VON TER STEGGE
Assistant Attorney General
Oregon Department of Justice
1162 Court Street N.E.
Salem, OR 97301-4096
(503) 947-4700

Attorneys for Defendant

1 - OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on Plaintiff Gary Mark Waite's Motion (#30) for Reconsideration. For the reasons that follow, the Court **GRANTS** Plaintiff's Motion but, having reconsidered the matter, the Court adheres to its March 25, 2010, Opinion and Order granting Defendant's Motion for Summary Judgment and dismissing this matter with prejudice.

BACKGROUND

Defendant prosecuted Plaintiff in Multnomah County Circuit Court for Burglary I and several counts of Theft I, Laundering a Monetary Instrument, Identity Theft, and Unlawful Use of a Computer. On April 14, 2009, Plaintiff informed Defendant that he wanted to testify before and read a prepared written statement to the Multnomah County Circuit Court grand jury. Defendant advised Plaintiff that Plaintiff would have to provide a copy of his prepared statement to Defendant and to answer some questions before Plaintiff would be allowed to read any statement to the grand jury.

On April 15, 2009, just before the grand jury convened, Plaintiff met Defendant "in the lobby of the grand-jury room," gave Defendant a copy of the statement he wanted to read to the grand jury, and gave Defendant a medical-release form that only authorized disclosure of protected health information to the

grand jury and the "State of Oregon Public Defender." Defendant had not requested a copy of the medical-release form and was not aware Plaintiff had prepared such a form until Plaintiff handed it to him.

On April 15, 2009, a Multnomah County grand jury indicted Plaintiff for Burglary I and several counts of Theft I, Laundering a Monetary Instrument, Identity Theft, and Unlawful Use of a Computer.

At some point, Defendant provided Plaintiff's medical-release form to Plaintiff's court-appointed counsel as part of discovery.

On July 21, 2009, Plaintiff filed a Complaint in this Court pursuant to 42 U.S.C. § 1983 in which he alleged Defendant and another Assistant Multnomah County District Attorney, Eric Zimmerman, obtained Plaintiff's medical records illegally, used illegal coercion tactics, obstructed justice, and tampered with witnesses in the prosecution of Plaintiff. Plaintiff further alleged Defendant and Zimmerman discriminated against him due to his sexual orientation, threatened Plaintiff for attempting to exercise his constitutional rights, and failed to disclose information to a grand jury to implicate additional suspects in the criminal case.

On July 31, 2009, this Court issued an Order in which it dismissed Plaintiff's Complaint for failure to state a claim on

the ground that his claims "appear to relate to functions intimately associated with the judicial phase of the criminal process," and, therefore, Defendant and Zimmerman were entitled to absolute prosecutorial immunity. The Court, however, permitted Plaintiff to file an amended complaint to cure the deficiencies noted in his Complaint.

On August 13, 2009, Plaintiff filed an Amended Complaint against Defendant and Zimmerman pursuant to 42 U.S.C. § 1983 in which he alleged they violated his rights when they (1) "obtained [P]laintiff's medical records" without Plaintiff's permission in violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d-1, *et seq.*; (2) coerced Plaintiff into not seeking a bail reduction; (3) remained in the grand-jury room during the deliberation process in violation of state law; and (4) failed to bring criminal charges against another individual for assaulting Plaintiff.

On August 21, 2009, the Court issued an Order in which it dismissed all of Plaintiff's claims against Zimmerman as well as Plaintiff's claims that Defendant coerced Plaintiff not to seek a bail reduction, remained in the grand-jury room during the deliberation process, and failed to bring criminal charges against another individual for assaulting Plaintiff on the ground that Zimmerman and Defendant were entitled to absolute prosecutorial immunity for those claims. The Court permitted

Plaintiff's action to go forward against Defendant only on the claim that Defendant obtained Plaintiff's medical records without Plaintiff's permission in violation of HIPAA.

On November 2, 2009, Plaintiff pled "no contest" to five of the thirty-one counts of the indictment in Multnomah County Circuit Court and was found guilty of those counts.

On December 24, 2009, Defendant filed a Motion in this Court seeking summary judgment as to Plaintiff's remaining claim in this matter.

On March 25, 2010, the Court issued an Opinion and Order granting Defendant's Motion for Summary Judgment.

On April 28, 2010, Plaintiff filed a Motion for Reconsideration.

DISCUSSION

In its March 25, 2010, Opinion and Order the Court granted summary judgment for Defendant on the grounds that (1) HIPAA does not contain a provision for a private right of action and (2) Defendant is entitled to absolute immunity for providing Plaintiff's medical-release form to Plaintiff's counsel as part of discovery.

Plaintiff does not point to any evidence on the record or cite any authority that establishes he is not attempting to bring a claim under HIPPA or that Defendant is not entitled to absolute

immunity.

Accordingly, the Court adheres to its March 25, 2010, Opinion and Order granting Defendant's Motion for Summary Judgment.

CONCLUSION

For these reasons, the Court **GRANTS** Plaintiff's Motion (#30) for Reconsideration but, having reconsidered the matter, the Court adheres to its March 25, 2010, Opinion and Order granting Defendant's Motion for Summary Judgment and dismissing this matter with prejudice.

IT IS SO ORDERED.

DATED this 28th day of July, 2010.

/s/ Anna J. Brown

ANNA J. BROWN
United States District