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United States District Court,
W.D. Wisconsin.

Dennis W. GONZALEZ, Plaintiff,
v.
Jon E. LITSCHER, Gerald Berge and Todd T. Overbo, Defendants.

No. 01–C–521–C. | Oct. 22, 2002.

Attorneys and Law Firms

Dennis Gonzalez, pro se.

Jody J. Schmelzer, Assistant Attorney General, Madison, WI, for Defendants.

Opinion

ORDER

CRABB, J.

***1** Presently before the court are the parties' motions *in limine* and plaintiff's motion for a 10 day extension of the trial date in this case.

MOTIONS IN LIMINE

Defendants ask first that two of plaintiff's prior felony convictions be admitted pursuant to Fed.R.Evid. 609(a)(1), which provides that "evidence that a witness ... has been convicted of a crime shall be admitted ... if the crime was punishable by death or imprisonment in excess of one year," assuming its probative value outweighs its prejudicial effect. The convictions defendants seek to have admitted satisfy Rule 609's time requirement, as more than 10 years have not elapsed since the later of plaintiff's dates of conviction or of the release of plaintiff from the confinement imposed for the convictions. *See* Fed.R.Evid. 609(b). Moreover, I conclude that the probative value of admitting these prior convictions is not outweighed by their prejudicial effect. Although the probative value of these convictions is slight, so is their prejudicial effect. Because this is a case in which plaintiff challenges the policies of a prison relating to religious exercise, the fact that plaintiff is a convicted felon hardly comes as a surprise. Plaintiff argues that the convictions should be excluded as irrelevant to the First Amendment claims at issue in this case, but they may be properly used to impeach the credibility of plaintiff's own testimony. *See, e.g., Gora v. Costa,* 971 F.2d 1325, 1330 (7th Cir.1992) ("The idea underlying Rule 609, whether right or wrong, is that criminals are more likely to testify untruthfully."). The fact of plaintiff's prior convictions for party to the crime of armed robbery and battery to law officers or fire fighters with habitual criminality will be admitted pursuant to Rule 609(a)(1), only for the limited purpose of impeachment. No details of the acts underlying the convictions will be admitted.

Defendants move also to admit three additional convictions for issuing worthless checks and theft pursuant to Fed.R.Evid. 609(a)(2), which provides that "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment." Plaintiff's conviction for passing bad checks undoubtedly involved dishonesty, as the statute he was convicted of violating prohibits issuing "any check ... which, at the time of issuance, [the issuer] intends shall not be paid." Wis. Stat. Ann. § 943.24(1) (West 1996). That conviction will be admissible for the purpose of impeachment pursuant to Rule 609(a)(2). *See United States v. Kane,* 944 F.2d 1406, 1412 (7th Cir.1991) (delivering a check knowing it will not be paid is crime of dishonesty under Rule 609(a)(2)). However, defendants have made no effort to demonstrate that plaintiff's theft convictions should be presumed to involve dishonesty or a false statement. *See United States v. Wiman,* 77 F.3d 981, 986 (7th Cir.1996) (upholding district court's refusal to admit misdemeanor conviction for theft of gas under Rule 609(a)(2) in absence of showing that theft involved dishonesty or false statements). Those convictions will not be admitted.

***2** Finally, defendants wish to present evidence relating to three conduct reports plaintiff received as a Wisconsin inmate. In conduct report No. 1143927, plaintiff was found guilty of using intoxicants. In conduct report No. 1206009, plaintiff was found guilty of possessing intoxicants. Finally, in conduct report No. 1351809, plaintiff was found guilty of damage or alteration of property and possession of miscellaneous contraband for altering a braid of sweet grass provided to him as religious property. Defendants seek to have these conduct reports and related documents admitted pursuant to Fed.R.Evid. 404(b). Defendants argue that the conduct reports are evidence of plaintiff's motive or intent for seeking access to items such as a medicine bag, smoking pipe, ceremonial drums and feathers, which defendants maintain could provide plaintiff the opportunity to hide and ingest illegal drugs.

Rule 404(b) provides that "[e]vidence of other crimes,

wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, [or] plan....” The test for admitting other acts evidence was set forth recently in *Okai v. Verfuth,* 275 F.3d 606, 610–11 (7th Cir.2001):

> First, proof of the other act must be directed towards establishing a matter in issue other than the defendant’s propensity to commit like conduct. Second, the other act must be of recent vintage and sufficiently similar to be relevant to the matter in issue. Third, there must be a sufficient amount of evidence for the factfinder to conclude that the similar act was committed. And fourth, the probative value of the evidence must not be outweighed by the danger of unfair prejudice.

As to the first requirement for admitting other acts evidence, this case requires plaintiff to show that his sincerely held religious beliefs require him to have access to a medicine bag, ceremonial drums, feathers and a smoking pipe. Defendants must then articulate a penological interest or interests underlying their refusal to allow plaintiff access to those items. Plaintiff then bears the burden of demonstrating, by a preponderance of the evidence, that defendants’ policy of denying him access to a medicine bag, ceremonial drums, feathers and a smoking pipe is not reasonably related to legitimate penological interests. Defendants may properly introduce each of the conduct reports to the extent they are used to show that plaintiff’s motive in seeking access to the items in question, such as a smoking pipe, involves a purpose other than religious devotion. Similarly, the reports may be introduced to demonstrate the existence of penological interests relating to the prevention of drug use underlying the prison regulations limiting inmate access to religious articles. As for the second and third requirements of the other acts test, the conduct reports in question are of relatively recent vintage, each having been issued in either 2000 or 2002, and they are sufficient to support a finding that plaintiff committed the extrinsic acts alleged in the reports. Finally, the conduct reports are probative of the issues prison administrators must take into consideration in determining which items of religious property inmates will be allowed to possess. As for prejudice, all relevant evidence is prejudicial to at least one party. *Young v. Rabideau,* 821 F.2d 373, 377 (7th Cir.1987). It is only *unfair* prejudice that substantially outweighs the probative value of the evidence that permits exclusion under Rule 403. *Id.* Plaintiff will not be unfairly prejudiced in his bench trial because I am aware that by itself the mere fact that he has been accused of using or dealing drugs in the past cannot serve as the basis for limiting his free exercise rights.

***3** Plaintiff has also filed a motion in limine, in which he seeks only to rebut the arguments in defendants’ motion. I have considered plaintiff’s arguments in deciding defendants’ motion.

MOTION FOR EXTENSION OF TRIAL DATE

Trial of this case is scheduled for October 24, 2002. On October 22, 2002, this court received plaintiff’s motion for a 10–day extension of the trial date in this case. Plaintiff gives two reasons for seeking an extension. First, plaintiff’s “tribal counsel” is in possession of certain exhibits plaintiff wishes to introduce as evidence, including a pipe, feathers and a drum, but will not be in Wisconsin until the end of October. (I assume when plaintiff refers to his “tribal counsel,” he is not suggesting that he now has a lawyer who will represent him at trial. Plaintiff has appeared pro se throughout the course of this case and his motion for an extension of his trial date indicates that his pro se status has not changed.) Second, plaintiff notes that certain Native Americans who will not be called as witnesses nevertheless wish to appear at trial as a “show of support,” but cannot do so until the end of October. These reasons do not warrant an extension of the trial date in this case. In the January 24, 2002 preliminary pretrial conference order, trial of this case was scheduled for October 7, 2002, but was later pushed back to mid-October in order to give the parties sufficient time to prepare for trial in the wake of the court’s September 20, 2002 summary judgment decision. Plaintiff has known that trial of his case would take place in early or mid-October for long enough to make adequate preparations. His request for an extension, which was received less than 48 hours before trial is scheduled to begin, is too little, too late.

ORDER

IT IS ORDERED that

1. Defendants’ motion *in limine* to admit plaintiff’s convictions for party to the crime of armed robbery, battery to law officers with habitual criminality and issuing worthless checks is GRANTED.

2. Defendants’ motion *in limine* to admit plaintiff’s convictions for theft is DENIED.

3. Defendants' motion *in limine* to admit conduct reports Nos. 1143927, 1206009 and 1351809 and their supporting materials is GRANTED.

4. Plaintiff's motion in limine is DENIED to the extent that it is inconsistent with this order.

5. Plaintiff's motion for a 10–day extension of the trial date in this case is DENIED.