

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

KENYANA LOWERY,)
)
Plaintiff,)
)
v.) 1:21CV85
)
FORSYTH COUNTY SHERIFF'S)
DEPARTMENT, et al.,)
)
Defendants.)

ORDER

The Order, Memorandum Opinion and Recommendation of the United States Magistrate Judge ("Recommendation") was filed with the court in accordance with 28 U.S.C. § 636(b) and, on August 16, 2022, was served on the parties in this action, along with a Roseboro¹ notice of a right to file written objections and the consequences of failing to do so. (Docs. 46, 47.) Plaintiff filed a document denominated "OBJECTION TO THE ORDER MEMORANDUM OPINION AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE." (Doc. 48.) Defendants filed a response. (Doc. 49.)

In his objection, Lowery contends he has a colorable claim that he cannot present in the absence of being appointed counsel and requests that the court "withhold all motions" until a trial is set. (Doc. 48 at 1.) Defendants oppose his request for counsel and argue that Lowery has waived his right to file objections.

¹ See Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975).

(Doc. 49.)

As to Lowery's motion to appoint counsel, which the court considers as a threshold matter, a plaintiff bringing a claim pursuant to 42 U.S.C. § 1983 generally has no right to appointed counsel. Bowman v. White, 388 F.2d 756, 761 (4th Cir. 1968). The court may appoint counsel for a § 1983 litigant "only in exceptional cases." Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975). "Whether the circumstances are exceptional depends on 'the type and complexity of the case, and the abilities of the individuals bringing it.'" Lowery v. Bennett, 492 F. App'x 405, 411 (4th Cir. 2012) (citing Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984), abrogated on other grounds by Mallard v. U.S. Dist. Court for the S. Dist. of Iowa, 490 U.S. 296 (1989)). If the *pro se* litigant "has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him." Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir. 1978).

Lowery has not demonstrated that this is an exceptional case warranting appointment of counsel or that he lacks the capacity to present his claims. No doubt that for well over two years the Covid-19 virus has wreaked havoc on the nation, and jails where pretrial detainees, such as Lowery, have been held have not been immune from its effects. However, Lowery has submitted numerous pleadings, not only in this case, but in another related action. See Lowery v. Forsyth Cnty. Sheriff's Dep't, No. 1:20-CV-888, 2022

WL 939651 (M.D.N.C. Mar. 29, 2022). He has also recited applicable statutory law, and he has remained heavily involved in litigating his own claims. He has not demonstrated that he is incapable of seeking his requested relief without counsel, and for the reasons set out in the Recommendation, his claims are not colorable. He has therefore not demonstrated that appointment of counsel is necessary. Accordingly, his request for the appointment of counsel will be denied.

While the court need not conduct a de novo review of the Recommendation because Lowery has failed to make any objection to any portion of the report or specified proposed findings or recommendations as required by § 636, the court has nevertheless done so. The court's de novo determination is in accord with the Magistrate Judge's Recommendation, which the court therefore adopts.

IT IS THEREFORE ORDERED that the motion to dismiss by Defendants Bobby F. Kimbrough, Jr., Rocky Joyner, B. Warren, C. Warren, L. Ferguson, and C. Whitt (Doc. 29) is GRANTED and the complaint against them is DISMISSED WITH PREJUDICE for failure to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that Defendant WellPath Health Care's motion to dismiss (Doc. 33) is GRANTED and that while service of process is insufficient, the court avoids prolonging the action by alternatively finding that the complaint against it should be

DISMISSED WITH PREJUDICE for failure to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that Defendant B. Williams's motion to dismiss (Doc. 36) and Defendant Judy Lilley's motion to dismiss (Doc. 39) are GRANTED and the complaint is DISMISSED WITHOUT PREJUDICE against those Defendants in their individual capacities for insufficient service of process and DISMISSED WITH PREJUDICE against those Defendants in their official capacity as duplicative of claims against WellPath Health Care, which are being dismissed with prejudice.

 /s/ Thomas D. Schroeder
United States District Judge

September 26, 2022