UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NAM DANG, by and through his Power of Attorney, VINA DANG,

Plaintiff,

v. Case No. 6:14-cv-37-Orl-31TBS

DONALD P. ESLINGER, in his official capacity as the Sheriff of Seminole County; OLUGBENGA OGUNSANWO, M.D.; SANDRA WILT, L.P.N.; BRENDA PRESTON-MAYLE, R.N.; ALECIA SCOTT, L.P.N.; SHARYLE ROBERTS, L.P.N.; and MARTHA DENSMORE, R.N.,

Defendants.
_____/

ORDER

This case comes before the Court on Defendant Sheriff's Motion for Protective Order with Respect to Plaintiff's Rule 34 Request to Enter Jail and Inspect, Photograph and Video-Record. (Doc. 81). For the reasons that follow, the Sheriff of Seminole County's motion will be **GRANTED in part and DENIED in part**.

Background

Plaintiff was arrested by Seminole County Sheriff's officers and transported to the John E. Polk Correctional Facility in Sanford, Florida. (Doc. 1, ¶¶ 8, 10). By the fourth day of his incarceration, he was exhibiting symptoms of meningitis. (Id., ¶ 9). Plaintiff was seen multiple times by jail medical staff who allegedly failed to test for or diagnose his condition, and asserted that he was faking his symptoms. (Id., ¶¶ 14-30). After a delay of at least 25 days, Plaintiff was transported to the emergency room at

Central Florida Regional Hospital where he was diagnosed with cryptococcal meningitis. (Id., ¶ 37). Plaintiff alleges that because of the delay in his treatment, he has suffered chronic, permanent, and irreversible damage to his cognitive and communicative functions, dementia, expressive aphasia, loss of vision, loss of hearing, and seizure disorder. (Id., ¶ 38). He brings this action pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, the violation of his civil rights by the Sheriff and the doctor and nurses responsible for his medical care in the jail. (Doc. 1).

Counsel for Plaintiff sent the Sheriff a notice pursuant to FED. R. CIV. P. 34 stating their intent to inspect, photograph, and videotape the jail's mental health housing unit ("D-Pod") and the medical unit where Plaintiff was housed in January and February 2012. (Doc. 81 at 7). The notice states that counsel also intend to inspect the surveillance equipment used to watch or otherwise observe detainees housed in D-Pod and the medical unit. (Id.). Upon his receipt of the notice the Sheriff interposed three objections. (Doc. 81 at 9). First, that the notice is defective because it does not give the Sheriff 30 days in which to respond. Second, the notice otherwise does not comply with the procedure specified in Rule 34. (Id., at 9-10). Third, if the proposed inspection and recording is permitted, it will implicate significant jail security and operational procedures that are confidential and entitled to protection. (Id., at 10). The Sheriff subsequently filed the pending motion in which he argues that the Court should issue a protective order. Plaintiff filed a response in opposition to the Sheriff's motion, and on January 15, 2015, the Court held a hearing on the motion, which is now ripe for decision. (Docs. 86, 98).

Legal Standards

The Federal Rules of Civil Procedure adopt a liberal approach toward discovery, with the aim of ensuring that "civil trials in the federal courts [are] no longer ... carried on in the dark." Hickman v. Taylor, 329 U.S. 495, 501 (1947); see also Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958) ("[A] trial is not a sporting event, and discovery is founded upon the policy that the search for the truth should be aided."). To this end, parties in federal litigation "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). Information need not be admissible at trial to be discoverable, so long as "the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id.

Rule 34 provides, *inter alia*, that a party can serve a request within the scope of Rule 26(b) on another party to "permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it." FED. R. CIV. P. 34(a)(2). A request to inspect property: (1) "must describe with reasonable particularity each item or category of items to be inspected;" (2) "specify a reasonable time, place, and manner for the inspection and for performing the related acts;" and (3) "specify the form or forms in which electronically stored information is to be produced." FED. R. CIV. P. 34(b)(1)(A), (B), and (C). "The party to whom the request is directed must respond in writing within 30 days after being served." FED. R. CIV. P. 34(b)(2)(A). The response should address

each item or category and state that inspection and related activities will be permitted, or object and state the reason for the objection. FED. R. CIV. P. 34(b)(2)(B).

While the scope of discovery in federal court is broad, it is not unlimited. On a showing of "good cause," a court may enter a protective order to protect a party or non-party "from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1). A court considering a motion for protective order must balance the interests of the requesting party in obtaining the information against the responding party's (or a third party's) interest in avoiding annoyance, embarrassment, oppression, or undue burden. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985). The party seeking a protective order bears the burden of showing good cause for limiting discovery. Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc., 231 F.R.D. 426, 429–30 (M.D. Fla. 2005). Meeting this burden requires "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." Id. at 430 (citing United States v. Garrett, 571 F.2d 1323, 1326 n. 3 (5th Cir. 1978)).

When a party has shown that a protective order is warranted, a court has broad discretion in crafting one. See FED. R. CIV. P. 26(c)(1)(A)–(H) (a protective order may, among other things, forbid discovery, specify the terms on which discovery will occur, prescribe a particular method of discovery, limit the scope of discovery, or limit access to materials disclosed in discovery). The court should exercise its discretion to craft a protective order that, to the extent possible, honors the interests of all relevant parties and the "'liberal spirit of the [Federal] rules.'" Adkins v. Christie, 488 F.2d 1324, 1331

(11th Cir. 2007) (quoting Burns v. Thiokol Chem. Corp., 483 F.2d 300, 305 (5th Cir. 1973)); see also Bridge C.A.T. Scan Associates v. Technicare Corp., 710 F.2d 940, 944–45 (2d Cir. 1983) ("Rule 26 ... is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's processes."), quoted with approval in Williams v. City of Dothan, Ala., 745 F.2d 1406, 1416 (11th Cir. 1984).

Discussion

Before addressing the substance of the Sheriff's objections, the Court will consider whether the evidence is discoverable under Rule 26. The Sheriff does not contend that the information Plaintiff seeks to obtain is not discoverable. But, the Sheriff does suggest that "there is no cause for" inspection of the jail's surveillance system because no video recording of Plaintiff during January and February of 2012 exists. (Doc. 81, p. 3). The Sheriff also suggests, parenthetically, that "it is hard to see why video-recording of the jail is necessary to obtain relevant evidence."

Plaintiff, in his response, explains the basis for his inspection request as follows:

> A key issue in this case is the observation of [Plaintiff] while he was housed in D-Pod (mental health unit) and the medical unit. [Because] no surveillance video of [Plaintiff] has been produced, ... it is imperative that Plaintiff and his experts have an opportunity to view the layout of the "pods" [Plaintiff] was placed in to evaluate the extent and ability that correctional officers could observe [Plaintiff].... If correctional officers relied upon the video surveillance to complete the visual checks of [Plaintiff], it is critical to know exactly what they could observe from the surveillance system.

(Doc. 86, pp. 2-3).

The Court finds that Plaintiff's inspection request does seek relevant information that is discoverable under Rule 26. Seeing the inside of the jail and understanding how the jail surveillance system works (or at least how it worked when Plaintiff was confined there) will help Plaintiff's expert prepare his or her report. While Plaintiff's expert may be able to prepare a report without this information, in that case the report may be less thorough and also less reliable. Moreover, the test for discoverability is relevance, not strict necessity. Butler v. Oak Street Mortgage, LLC, No.06-80604-CIV, 2006 WL 5519070, at *3 (S.D. Fla. Dec. 22, 2006).

The Court also finds that the information Plaintiff seeks in not protected by any privilege. Defendant points to two statutes and an opinion of the Attorney General of Florida exempting information relating to security systems from open public records laws. (Doc. 81, p. 3 (citing Fla. Stat. s 281.301, 119.071(3); Fla. Att'y Gen. Op. 2004-28, 2004 WL 1398434, at *4)). These authorities do not create a privilege protecting such information from discovery or use in civil litigation. But, they certainly buttress the concerns voiced by the Sheriff about keeping the operation of the jail's surveillance system confidential.

As explained above, the Court may, upon a showing of good cause, limit access to discoverable information to prevent "annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c). The Sheriff expresses several concerns about Plaintiff's inspection request. First, the Sheriff worries that a site inspection of the jail will "impact[] legitimate security and operational issues at the jail." (Doc. 81, p. 1). He adds that an inspection of the medical and mental health units is

especially problematic "with respect to jail security and inmate privacy because of the nature of the inmates and the jail operations that are conducted [there]." (Doc. 81, p. 2). The Sheriff explains that the "intrusion" of "lawyers, photographers, videographers or other agents of plaintiff's counsel" into these units will "interfere with the daily work" of jail employees and "implicate[] issues of inmate privacy that are entitled to protection under various health confidentiality laws, as well as in a general sense. (Id.). And, the Sheriff maintains that vacating inmates from these units to accommodate the requested inspection "would be a significant undertaking for jail staff." (Id.). To minimize this intrusion, Plaintiff will be limited to three representatives at the site inspection: a lawyer, an expert witness, and a photographer/videographer.

Regarding Plaintiff's request to inspect the jail's surveillance system, the Sheriff asserts that "[t]he operation and placement of the jail video surveillance system is sensitive information." (Doc. 81, p. 2). He also argues that Florida statutes restricting access under open public records laws to information relating to security systems owned by public entities reflect "a sound policy of protection from disclosure [that] should be given great weight by this Court." (Doc. 81, p. 3).

The Court is admittedly skeptical of some of the concerns expressed by the Sheriff regarding the site inspection. The undersigned has taken walking tours of a large county jail and the largest of all the federal prisons and is unaware of his presence (or the presence of his law clerks in the case of the federal tour), disruptinig operations. In addition, Plaintiff's photographer or videographer will hardly be the first outsider to conduct photo or video-recording inside of a correctional institution. Many

jails and prisons have allowed members of the news media to enter their facilities to film and take photographs. Television series like MSNBC's Lockup and USA's Lockdown have filmed in facilities ranging from super-maximum security prisons like California's Pelican Bay to jails like Rikers Island in New York. See IMDB, Lockup (TV Series 2005–), available at http://www.imdb.com/title/tt0446847/; IMDB, Lockdown (TV Series 2007–), available at http://www.imdb.com/title/tt0996991/. Federal Bureau of Prisons regulations recognize "the desirability of establishing a policy that affords the public information about its operations via the news media" and contemplates visits to federal prisons by members of the media to "insure a better informed public." 28 C.F.R. § 540.60. Granted, correctional institutions exercise a great deal of control over how these visits are conducted, and reasonable sheriffs and wardens can disagree over the value of media access to jails and prisons. But what these examples do show is that a visit by an outsider, even one armed with a camera, need not create an unbearable or unmanageable security problem for a correctional institution.

The Court is sympathetic to the Sheriff's concerns about inmate privacy. Confinement is unpleasant enough without the added indignity of being recorded or photographed without one's consent. In recognition of this fact, the Federal Bureau of Prisons prohibits members of the media from photographing or videotaping an inmate without the inmate's consent. 28 C.F.R. § 540.62(b). If anything, jails should guard the privacy of detainees even more jealously, since many people in jail have not been convicted of anything. On the other hand, the Court does not regard the mere presence of visitors as a particularly substantial intrusion into inmate privacy.

Moreover, inmates in detention facilities have a reduced expectation of privacy while incarcerated, see Bell v. Wolfish, 441 U.S. 520, 556–57 (1979), and the intrusion caused by photo and video recording, when conducted under a confidentiality agreement or order, is not significantly greater than that caused by the routine searches and inspections inmates face as an "inherent incident[] of [their] confinement," id. at 537. Still, Plaintiff acknowledges the Sheriff's concern for inmate privacy and has offered to conceal the faces of inmates caught on camera. This strikes the Court as a sensible resolution of this issue and one that also makes sense to protect jail personnel who do not consent to have their faces shown in photographs and videos.[1]

The details of how a jail's video surveillance system operates is plainly information that is best kept confidential. An inmate who knows where the cameras are poses a greater security threat than one who does not for a number of reasons. For one, the inmate will know where he can conduct activity that violates jail policies or even state or federal laws and stand a chance of getting away with it. In the event of a riot, inmates who know where the cameras are may try to obstruct or disable them. Finally, an inmate who knows the location of the cameras and corresponding display monitors will be better able to anticipate responses of jail staff to different situations than one who does not.

[1] The Sheriff also makes an unexplained assertion that the visit may "implicate" privacy issues under unspecified "health confidentiality laws," but this claim is far too vague for the Court to intelligently evaluate.

The Florida statutes limiting public access to security system information add force to the Sheriff's argument on this point. "State rules [limiting disclosure] may illustrate important ... interests, and 'a strong policy of comity between the state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.'" King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988). While the state statutes at issue here simply limit public access under open records laws and do not create an evidentiary privilege, they do reflect a policy judgment of the Florida legislature that information about public entities' security systems is something that is best kept a secret. The Court is inclined to uphold that policy, provided it can do so without undermining federal substantive or procedural law.

The discovery Plaintiff seeks without question implicates the Sheriff's legitimate interests in institutional security and inmate privacy. At the same time, the requested discovery is important to the preparation of Plaintiff's case. Photographs and videotapes of areas where Plaintiff was held may help the jury better understand the events at issue in the case. And, as explained above, without a site visit and an understanding of how the jail's video surveillance system works, Plaintiff's expert will not be able to offer a fully informed opinion. It is worth noting that at the hearing, the Sheriff's lawyer acknowledged that he had visited the site, and that he could not say whether the Sheriff's expert would be permitted to conduct the same sort of site visit Plaintiff is requesting for his expert. A jury, in weighing the opinions of the experts, would be entitled to consider the fact that the Sheriff's expert based his opinion on

more complete information than the Plaintiff's expert. Not only would this hamper Plaintiff in the preparation of his case, it would be manifestly unfair.

Given Plaintiff's substantial interest in conducting the requested inspections, barring Plaintiff from obtaining this discovery would be inappropriate. The Sheriff certainly has an interest in keeping information that may be exposed by the inspections out of the public eye, but "[c]onfidentiality is not a basis for withholding [discoverable] information ... if it can be protected by a protective order ... restricting access to [that] information." Covad Communications Co. v. Revonet, Inc., 258 F.R.D. 5, 11 (D.D.C. 2009). While the Sheriff has amply demonstrated his interest in keeping sensitive security-related information out of the public eye and protecting the privacy of inmates, he has not shown that these interests cannot be adequately protected by an order permitting Plaintiff to discover the pertinent information but requiring that it be kept confidential.

The Sheriff's own presentation at the hearing suggests that his interests can be sufficiently protected by an order allowing the requested discovery but requiring that Plaintiff's attorneys, expert(s), and agents keep the information confidential. At the end of the hearing, counsel for the Sheriff requested the opportunity to disclose pertinent information about the jail's video surveillance system "*in camera*," by which he meant "in the presence of the Court, court personnel, and counsel for the other parties."[2] After the Court instructed opposing counsel to keep the information

[2] Sometimes, "*in camera*" can mean in the presence of the Court, to the exclusion of opposing counsel. *In camera* inspections of this nature may occur, for example, when the Court is resolving a dispute over whether a particular document is privileged.

disclosed in this "*in camera*" proceeding confidential, the Sheriff's lawyer explained relevant aspects of the jail's video surveillance system. This suggests that the Sheriff's concern, at least when it comes to security matters, is not in keeping the information out of the hands of Plaintiff's lawyers and experts, but in keeping it out of the public eye.

As an alternative to a site inspection, the Sheriff proposes that an employee of the jail take photographs of the areas where Plaintiff was confined and provide them to Plaintiff under a confidentiality order. The Sheriff argues that this remedy is the same as the one crafted by the United States District Court for the Eastern District of Michigan in Napier v. County of Washtenaw, No. 11-CV-13057, 2013 WL 1395870 (E.D. Mich. Apr. 5, 2013). The Sheriff's characterization of Napier is not entirely accurate. In Napier, the plaintiff's attorneys requested to "inspect and photograph" a jail cell where plaintiff was held, as well as the video surveillance systems in place in that area. Id. at *11. While a site inspection occurred; the county's agent, rather than the plaintiff's attorneys' agent, took the photographs. Id. The county insisted on an order protecting the confidentiality of the photographs before turning them over to the plaintiff. Id. The court granted the county's motion, directing the parties to submit a proposed protective order limiting the use of the photographs to the litigation and requiring the photographs to be filed under seal if filed with the Court. Id. If anything, Napier undermines the argument that Plaintiff should not be allowed to conduct a site inspection of the relevant parts of the jail. Likewise, since the Court will require that a confidentiality agreement be in place before the site inspection, rather than after the

site inspection as in Napier, it is hard to justify requiring Plaintiff to rely on the Sheriff's agent to take video recordings and photographs, rather than bringing his own photographer/videographer.

Conclusion

The Sheriff has legitimate concerns with Plaintiff's proposed site inspection. However, the Sheriff's fears can be adequately addressed by this Order and a confidentiality agreement. To the extent that the Sheriff has any lingering concerns despite the entry of this Order and the making of an appropriate confidentiality agreement the Court finds that they do not outweigh Plaintiff's interest in preparing his case and the liberal policy of the discovery rules that trials should be a search for the truth and not a sporting event. Accordingly, the Court will **GRANT** Defendant's motion to the extent that:

(1) Prior to any site inspection, the parties shall make and enter into an appropriate confidentiality agreement. If they are unable to agree on the form and content of the agreement, they can bring their dispute to the Court for resolution.

(2) No more than one lawyer, one expert, and one photographer/videographer may conduct the site inspection on Plaintiff's behalf.

(3) The faces of all non-consenting persons shall be blocked out in any photographs or videos made during the site inspection.

In all other respects, the Sheriff's motion for a protective order is **DENIED**.

DONE AND ORDERED in Orlando, Florida, on January 20, 2015.

THOMAS B. SMITH
United States Magistrate Judge

Copies to all Counsel