2-3-2000

Defendant's Brief in Opposition to Plaintiff's Motion to Exclude Testimony from 1954 Coroner's Inquest

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ALAN DAVIS, Special Administrator of the Estate of Samuel H. Sheppard,	:	CASE NO. 312322
	:	JUDGE SUSTER
Plaintiff,	:	
	:	DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE TESTIMONY FROM 1954 CORONER'S INQUEST
v.	:	
STATE OF OHIO,	:	
Defendant.	:	

Defendant, State of Ohio, hereby moves this Court for an order denying Plaintiff's Motion to Exclude all Testimony from 1954 Coroner's Inquest. Plaintiff's brief fails to address why all inquest testimony should be excluded except for the inquest testimony of Dr. Sam Sheppard. The reasons and authorities for denying plaintiff's motion are set forth in the attached brief, which is incorporated by reference.

Respectfully submitted,

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BRIEF

I. FACTS

A. MIS-CITED STATEMENTS BY PLAINTIFF

The Coroner's Inquest into the death of Marilyn Sheppard commenced at 9:00 a.m., July 22, 1954. At the outset, Dr. Samuel R. Gerber stated:

> At this time under the authority vested in me by the statutes of the State of Ohio, I am opening an inquest into the death of Marilyn Sheppard. For those who are assembled here the School Board requests that you do not smoke, and as far as other instructions are concerned I request that the newspaper photographers will take their pictures of the witness at the time that he or she is seated in the chair; not to take pictures during the process of testifying. I also request that persons do not leave the room and come back in indiscriminately. I would like to have complete and orderly decorum. If I do not have complete and orderly decorum I will have that person removed from the room. (emphasis added)(Tr. 3).

Dr. Samuel H. Sheppard was the ninth witness to testify at the inquest. (Tr. 2). His testimony is found between Tr. 189-351. Six witnesses had testified after Dr. Samuel H. Sheppard, when Coroner, Dr. Gerber made the following statement at 1:00 p.m., July 26, 1954, in its' entirety:

> Let the record show that the photographers were told that they could take pictures of the witnesses only at the time they came into the room, and at the time they were leaving, with flashbulbs, and that at no time were they to take flashes during the time the witness was on the witness chair, that there was to be no smoking in this building because of School Board orders, that the people were to conduct themselves accordingly, that the people were to conduct themselves accordingly, or else the room would be cleared of spectators.

> Let the record further show that no remarks will be included in the coroner's record other than those made by the coroner, and the testimony of the witness, and remarks made by the assistant prosecutor Saul Danaceau; that the entire record will be of this fashion. "(emphasis added)" (Tr. 475).

Plaintiff's motion lacks credibility from the outset. Plaintiff miscites Dr. Gerber's statements and takes his statements out of context. Plaintiff's red-herring citation in footnote no.2 alleging Dr. Gerber ordered that no remarks from Dr. Samuel Sheppard's attorney be included in the record based on attorney general opinion 1935 O.A.G. 4837 (attorneys could be present at inquests, but could not object or participate in any way) defies logic and the clear meaning of Dr. Gerber's statements.

Clearly, Dr. Gerber's statements show that he was only trying to keep orderly decorum in the hearing room due to the presence of numerous spectators. (Tr. 3, 475). Moreover, Dr. Gerber had no reason to keep Dr. Samuel Sheppard's attorneys' remarks from the record where pursuant to law, they were not participating in the inquest.

B. CORONER'S DUTIES UNDER THE OHIO REVISED CODE

During 1954 and today, the laws of the State of Ohio governing the Coroner are embodied in the Code between Section 313.01 to 313.99. (Dr. Gerber's testimony, Tr. 3137, 3494).

One of the primary responsibilities of a county coroner has always been to determine the course, manner, and mode of unexplained deaths in the county. R.C. 313.17; 313.19; 1998 Op. Att'y Gen. No. 98-031. To make the required determinations, a coroner has always had broad

authority to gather information and to hold an inquest. Id.; 313.11; 313.17; 1988 Op. Att'y Gen. No. 88-035; 1989 Op. Att'y Gen. No. 89-039.

During 1954, R.C. 313.11 read: "Any person who discovers the body or acquires the first knowledge of the death of any person who died as a result of criminal or other violent means *** or in any suspicious or unusual manner, shall immediately notify the Office of the Coroner of the known facts concerning the time, place, manner and circumstances of such death and any other information which is required by Section 313.01 to 313.22, inclusive, of the Revised Code. (Tr. 3494-3495). Thus, Samuel Sheppard, the husband and witness was required under Ohio law to inform Dr. Gerber of what he witnessed regarding Marilyn's death.

R.C. 313.12, entitled "Notices to coroner of violent, suspicious, unusual or sudden death," reads the same today as it did in 1954: "when any person dies as a result of criminal or other violent means *** or in any suspicious or unusual manner, the physician called in attendance shall immediately notify the Office of the Coroner of the known facts concerning the time, place, manner and circumstances of such death, and any other information which is required to Sections 313.01 to 313.22, inclusive, of the Revised Code (Tr. 3495). Thus, Samuel Sheppard, the Doctor, was also required under Ohio law to inform Dr. Gerber of what he witnessed regarding Marilyn's death.

R.C. 313.17, entitled "Subpoenas, Oath & Testimony of Witnesses" reads the same today as it did in 1954. This is the inquest statute. (Tr. 3497). The first sentence reads: "The Coroner or Deputy Coroner may issue subpoenas for such witnesses as are necessary, administer to such witnesses the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, as principals or accessories before or after the fact, and all circumstances relating thereto." (Tr. 3496). Thus, under Ohio law, Dr. Gerber

had the authority to conduct the Coroner's Inquest into the death of Marilyn Sheppard. Dr. Gerber's inquest was only investigatory in nature and not a trial. Plaintiff's reference to the Cleveland Press editorial calling for an inquest did not negate Dr. Gerber's authority and duty to investigate.

Moreover, while statutory procedure is to be followed in conducting an inquest, the officer conducting the inquest had broad discretion in the manner in which it is conducted. 18 Corpus Juris 228. The inquest is required to be public. Id.; R.C. 313.10.

The record is devoid of any evidence that Dr. Gerber did not follow statutory procedure during the inquest, namely the inquest was and is required to be public. Further, Dr. Samuel Sheppard was not the accused during the inquest. Sheppard v. Maxwell(1966), 384 U.S. 333, 339-40. Dr. Samuel was not entitled to additional rights or exceptions in relation to the other witnesses appearing at the inquest.

LAW AND ARGUMENT

A. SHEPPARD v. MAXWELL, 384 U.S. 333 (1966).

Plaintiff's citation to Sheppard, supra, supports the denial of this motion because the United States Supreme Court did not state that the Coroner's inquest, which was and is allowed under Ohio law, was improper. Further, although Dr. Samuel Sheppard's chief trial counsel was ejected for violating Ohio law and the orderly decorum of the inquest by attempting to place documents in the coroner's record, Dr. Samuel Sheppard had additional counsel present. Id., 339-40. Moreover, it appears that the ejection of Dr, Samuel Sheppard's chief trial counsel did not occur during Dr. Samuel Sheppard's testimony. Id.

B. INTRODUCTION OF INQUEST TESTIMONY OF DR. SAMUEL SHEPPARD *DOES NOT* VIOLATE THE FIFTH AND SIXTH AMENDMENTS.

The coroner's duty is to determine the cause of death when he has acquired jurisdiction. His jurisdiction arises when an individual dies as a result of "criminal or other violent means, or by casualty, suspicious or unusual manner." R.C. 313.12; 1973 Op. Att'y Gen. No. 73-123.

The purpose of an inquest was considered in 1935 Op. Att'y Gen. No. 4837. That opinion states, at p. 1400, as follows:

> The purpose of an inquest is not merely to determine the cause of the death of the deceased party, but also to aid in detecting crime and causing the punishment of the parties guilty thereof * * * . An inquest held by a Coroner is an ex parte proceeding intended by the legislature to be merely an investigation to determine the cause of death of a deceased party, * * * (emphasis added)."

The Opinion further provides that the coroner has no power to hold or detain a person in custody. 1969 Op. Att'y Gen. No. 69-036, held that a coroner cannot apply the law to facts and determine violations of statutes and responsibility of individuals. Thus, it is clear that the role of the coroner in the criminal process is purely an investigatory one, and that he has no power to make legal judgments.

Miranda warnings have been developed as a result of interplay between the Fifth and Sixth Amendments of the U.S. Constitution. The Fifth Amendment states that no one must be a witness against himself, and the Sixth guarantees the right to counsel. Both of these amendments have been held to afford protection against involuntary confessions or incriminatory statements where a person is in the custody of, and being interrogated by, the police. In Miranda, the Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a

person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966).

In considering informal questioning and the appearance of witnesses at an inquest, it must be recalled that the coroner does not have the power to take anyone into custody and his criminal role is purely investigatory. Consequently, the coroner would not be required to give Miranda warnings, except in questioning a person already under police custody. The fact that the witness appears in response to a subpoena or a summons does not mean that the interrogation is custodial. United States v. Maius, 378 F.2d 716 (CA6), cert. den. 389, U.S. 905; 1975 Op. Att'y Gen. No. 75-011.

Plaintiff miscites State v. Carder (1966), 9 Ohio St. 2d 1, which actually held that the Escobedo and Miranda decisions concerning in-custody interrogation apply only to trials begun after dates of those decisions, 1964 and 1966, respectively and are not retroactive. Id., at 5. Moreover, Carder, primarily addressed the holding of Escobedo v. State of Illinois (1964) 378 U.S. 478 which held "statements elicited by police during an in custody interrogation may not be used against the accused at a criminal trial, where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect...(emphasis added)."

Admissions voluntarily made by an accused at a coroner's inquest may be used against him. State v. Sharp (1954) 162 Ohio St. 173 citing Church v. State 179 Miss. 440; State v. Perry 106 S.C. 289; State v. McClurg 50 Idaho 762. (By the great weight of authority, if the testimony is voluntarily given at the Coroner's inquest, admissions of defendant, afterward charged with murder made as a witness at said inquest are admissible (citations omitted).

1. INQUEST TESTIMONY WAS VOLUNTARY STRATEGY

Dr. Samuel Sheppard was an extremely intelligent man. Education can be taken into account regarding waiver of rights and privileges. State v. Mayabb (1958) 316 S.W. 2d 609; State v. Davidson(1990) 558 N.E. 2d 1077; State v. Nicholi (1969) 451 P. 2d 351. Moreover, Dr. Samuel Sheppard had the assistance of more than one intelligent attorney prior to his inquest testimony. These attorneys were present throughout the entire inquest. Sheppard, supra, at 339-40. It would be absurd to think that Dr. Samuel Sheppard and his attorneys did not discuss whether he would testify at the inquest, and what he would testify to at the inquest. If such discussions did not occur, the attorneys would have been ineffective and Dr. Samuel Sheppard would have had no need for their representation. Obviously, counsel advised Dr. Samuel Sheppard to cooperate with the inquest as a matter of strategy. Based on this advice, Dr. Sam Sheppard chose not to exercise his personal privilege of not testifying against himself.

The fact, standing alone, that Dr. Samuel Sheppard was subpoenaed to the coroner's inquest did not make his testimony before the coroner involuntary. Mayabb, supra; State v. McDaniel 80 S.W. 2d 185. He was not under arrest or in custody or under any type of restraint. Nicholi, supra. He was not coerced into giving his testimony. Mayabb, supra. Plaintiff can not credibly argue that Dr. Samuel Sheppard's inquest testimony was not voluntarily given pursuant to counsel's advice.

> Where one is called and sworn as a witness at a coroner's inquest, not then being under arrest, nor accused of crime and testifies as such witness, under oath, his so given statements are regarded as voluntary and may be given in evidence against him on a trial for the murder of the deceased over whose body the inquest is held, even where he was not cautioned as to his rights before

giving his testimony at the inquest. State v. McClurg (1931)(citations omitted).

50 Idaho 762.

Likewise, plaintiff's sole argument that Dr. Samuel Sheppard's inquest testimony was not voluntary because he was subpoenaed to the inquest lacks merit. Clearly, Dr. Samuel Sheppard's testimony, given at the coroner's inquest to which he had been subpoenaed at a time he was not under arrest is admissible.

C. INTRODUCTION OF INQUEST TESTIMONY OF DR. SAMUEL SHEPPARD *WOULD NOT* VIOLATE DUE PROCESS OF LAW.

The following cases and only cases herein, cited by plaintiff are inapplicable to this motion. State v. Newberry (1991), 77 Ohio App. 3d 818 (defendants were not entitled to a hearing upon the rejection of their applications to participate in diversion program); Washington v. Glucksberg (1997), 521 U.S. 702 (asserted right to assistance in committing suicide not protected by due process clause); Gutzwiller v. Fenik (C.A. 6, 1988), 860 F.2d 1317 (denial of university professor's tenure did not violate due process); Palko v. State of Connecticut (1937) 302 U.S. 319 (a statute permitting criminal appeals by the state was challenged under the due process clause).

The following authorities cited by plaintiff in his previous argument, actually show that Dr. Samuel Sheppard's due process rights were not violated at the inquest. 1935 Op. Att'y Gen. 4837 stated:

> An inquest held by a Coroner is an ex parte proceeding intended by the legislature to be merely an investigation to determine the cause of death of a deceased party, and although the finding of the Coroner may be the basis for criminal prosecution, nevertheless

such a hearing is not a trial within the meaning of Section 10 of Article 1 of the Constitution of Ohio, which provides in part:

> * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed; * * * ."

Likewise, In re Groban (1955) 164 Ohio St. 26 which involved a state fire marshal's investigation pursuant to R.C. 3737.13 stated:

> The remaining contention of the appellant is that, if the statute authorizes the exclusion of counsel, it is violative of the provisions of the due process clause of the 14th Amendment to the Constitution of the United States and of the provisions of Section 10 of Article I of the Constitution of Ohio, the latter of which read in part as follows:
>
> 'In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel * * *. No person shall be compelled, in any criminal case, to be a witness against himself * * *.'
>
> As observed by the lower courts, there are several reasons why these provisions are inapplicable to the instant investigation. There is no 'trial' or 'criminal case' pending; there is no 'accused party'; this matter is not pending in 'any court' self-incrimination is not involved, inasmuch as the Fire Marshal agrees that the appellants can not be compelled to testify against themselves; the privilege is personal; * * * .
>
> Hence, it is apparent that the constitutional rights of the appellants have not been violated and that the lower courts were correct in denying the relief sought.

Dr. Gerber's inquest was only an investigation. There was no trial or criminal case pending against Dr. Samuel Sheppard. Likewise, there was no accused party; the right against self-incrimination was not involved at the inquest because the matter was not pending in any court. Dr. Samuel Sheppard chose not to exercise his personal privilege of not testifying against himself. (See supra).

D. OTHER JURISDICTIONS PERMIT INQUEST TESTIMONY.

In a prosecution for murder, evidence given by defendant at the coroner's inquest was admissible. State v. Shiefel (1923) 180 Wis. 186. At a murder trial, the judge did not abuse his discretion in admitting the entire prior testimony of the defendant at an inquest hearing simply because the inquest procedure did not permit cross-examination of a witness. Commonwealth v. Russell G. Labbe (1977), 6 Mass. App. Ct. 73, Defendant's testimony at coroner's inquest held voluntary and admissible at defendant's trial. State v. Anding (1987) Mo. App. LEXIS 4651; State v. Mayabb (Mo. S. Ct. 1958) 316 S.W. 3d 609; State v. McDaniel (Mo. S. Ct. 1935) 80 S.W. 2d 185. See, also, State v. Murdock (Ill. S. Ct. 1968) 39 Ill. 2d 553; State v. Nicholi (Alas. S. Ct. 1969) 451 P.2d 351; State v. McCarbrey (Kan. S. Ct. 1940) 152 Kan. 18.

E. CORONER RECORDS ARE ADMISSABLE AS PUBLIC RECORDS.

R.C. 313.10 provides: "The records of the coroner, made by himself or by anyone acting under his direction or supervision are public records, and such records, or transcripts * * * shall be received as evidence or any criminal or civil court in this state, as the facts contained in such records (emphasis added)."

Coroner records are unquestionably public records. R.C. 313.09 and 313.10; State, ex rel. v. Schroeder (1996) 76 Ohio St. 3d 580; State, ex rel. v. Dayton Newspaper Inc. v. Roach (1984), 12 Ohio St. 3d 100. Coroner records are public records and shall be received as evidence in any criminal or civil court. State v. Mack (Dec. 2, 1993) Cuyahoga App. No. 62366, unreported; Carson v. Metropolitan Life Ins. Co. (1951), 156 Ohio St. 104.

F. INQUEST TESTIMONY IS OTHERWISE ADMISSABLE

Defendant cites the following cases in support of its previous arguments. State v. Van Tassel (1897) 103 Iowa 6 (where defendant appeared voluntarily, and gave his evidence, at an inquest held on the body of his wife, such evidence was admissible on his trial for her murder, for the purpose of impeaching him, and as substantive evidence). State v. Hurley (1889), 46 Ohio St. 320 (state is permitted to interrogate its witness in respect to his testimony at the coroner's inquest which are inconsistent with his trial testimony).

State, ex rel. v. Board of Fire & Police Commissioners (1988) 145 Wis. 2d 504 (prior videotaped inquest testimony was not hearsay and may be used against declarant. It goes without saying that a defendant in a criminal trial may not be called adversely. Nevertheless, the defendant's prior statements can be used against him). Furthermore, Evid.R. 801(D)(2)(a) provides a statement is not hearsay if the statement is offered against a party and is his own statement, in either his individual or representative capacity. Evid.R. 804(A)(4) provides for a hearsay exception where the witness is unable to testify because of death. Accordingly, Dr. Sheppard's inquest testimony is admissible under Ohio Evid. Rule.

CONCLUSION

For all the foregoing reasons, plaintiff's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Defendant's Brief in Opposition to Plaintiff's Motion to Exclude Testimony from 1954 Coroner's Inquest was hand delivered to Terry Gilbert and George Carr, attorneys for plaintiff, this 4th day of February, 2000.

RENO J. ORADINI, JR.
Assistant Prosecuting Attorney