2-12-2000

Memorandum Opinion Regarding Motions in Limine (Eberling Other Acts, Pastor Sanders, Prior Acquittal and Proceedings, Coroner Inquest, Opinions as to Guilt/Innocence, Roger Marsters)

Judge Ronald Suster
Cuyahoga County Court of Common Pleas

STATE OF OHIO	)	IN THE COURT COMMON PLEAS
	) SS.	
CUYAHOGA COUNTY	)	CASE NO. 312322

ALAN DAVIS, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OPINION**
	)	
STATE OF OHIO,	)	
	)	
Defendant.	)	

During the week of January 31, 2000, the Court heard argument on a number of motions *in limine* raised by each of the parties. The Court announced its decisions with respect to these motions, either in open court (on February 4, 2000, and on February 11, 2000, respectively) or in written orders (on February 5, 2000 and on February 12, 2000). The decisions on these motions *in limine* are necessarily provisional and can be revisited by the parties during the context of the trial.[1] This Memorandum Opinion is being issued with respect to the decisions announced from the bench on February 11, 2000, in order to provide a more detailed understanding of the Court's rationale.

1. Plaintiff's Motion to Exclude Testimony of Pastor Ernie Sanders

Plaintiff seeks to exclude the testimony of Pastor Ernie Sanders on the basis of the clergyman-penitent privilege. The Court understands that this witness will testify as to certain discussions between Pastor Sanders and certain incarcerated individuals who Pastor Sanders

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[1] Indeed, failure to raise these issues during trial constitutes waiver of the issues on appeal.

visited in his clerical capacity.

I am not persuaded by Plaintiff's blanket assertion that all of Pastor Sanders' anticipated testimony will be privileged. Not every conversation between a cleric and a member of his or her congregation is privileged under O.R.C. 2317.02. *See generally, State v. Bennett,* 1995 WL 276673 (Ohio App. 2d Dist. 1995), unreported. When deposed, Pastor Sanders selectively chose not to answer certain questions on the grounds of privilege while not objecting to others.

Nonetheless, the motion *in limine* is granted because the Court's review of the anticipated testimony indicates that the testimony will be inadmissible hearsay. *See*, Ohio Rule of Evidence 802. While this issue has not been argued by the parties, the Court believes it appropriate to raise this issue *sua sponte*, with regard to this particular evidence.

Should Defendant seek to introduce this evidence for a non-hearsay purpose,[2] or pursuant to an exception to the hearsay rule, it must first seek permission of the Court. At that point, the Court will conduct a hearing outside the presence of the jury if Plaintiff wishes to pursue its objection regarding privilege. At that hearing, the Court will determine if there are any privileged aspects to Pastor Sanders' anticipated testimony.

2. State's Motion to Exclude Evidence of Other Alleged Homicides of Richard Eberling

Defendant seeks to exclude reference to homicides committed or alleged to be committed by Richard Eberling. The State relies on Evidence Rule 404 which generally prohibits evidence of "other acts" to prove that a person acted in conformity therewith at another time.

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[2] The Court notes that the door to admission of this testimony may be opened, for example, by Plaintiff's introduction of a hearsay statement of Richard Eberling. Evid. R. 806.

The Court's research revealed that, as a general propostion, Rule 404 has been applied to civil cases. *See generally, Tschantz v. Ferguson*, 97 Oh. App. 3d 693, 717 (Cuy. Cty. 1994). Whether Rule 404 applies with equal force and to the same extent when dealing with a *non-party's* "other acts" is a closer question, and the Court's research has not found that courts throughout the United States employ a uniform rule of law in this regard, when dealing with Ohio Rule 404 or its federal equivalent. *Compare State v. Simmons,* 1994 Ohio App. Lexis 658 (Clark Cty. App.) (third party's "other acts" must fit as a "signature crime") *with United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991) (other person's "other acts," if relevant, are not precluded by Rule 404 if sufficiently similar). Neither of these cases involved a criminal case where it would appear that failure to admit a third party's "other acts" tending to exculpate the accused would have obvious due process considerations which may not be present to the same, if any, extent in this case.

Whether this Court chooses to follow *Simmons* or *Stevens,* or whether this Court determines that a middle ground is most appropriate,[3] it would appear that, at a minimum, that there must be some nexus shown between Richard Eberling and the Marilyn Sheppard homicide before there can even arguably be a basis for admission of "other acts" evidence regarding Eberling. Otherwise, as Defendant argues, evidence of Eberling's "other acts" will be admissible in every homicide case. At this point, that nexus has not been made because I have heard no evidence in this case and the proffer to this point has been understandably limited. Accordingly, the motion to exclude the testimony is granted to the limited extent that mention may not be

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[3] The parties are encouraged to continue their research on this issue.

made of these "other acts" until the Court is able to see what, if any connection can be demonstrated. Because the Court's initial determination regarding the admissibility of this "other acts" evidence is made pursuant to Rule 104, Ohio R. Evid., it may be made by a detailed proffer outside the presence of the jury. In the meantime, no mention shall be made of these "other acts" without prior approval of the court.

3. Defendant's Motion to Exclude Evidence of Prior Acquittal and Proceedings

Defendant seeks to exclude evidence of the previous legal proceedings regarding Samuel Sheppard. the motion is denied, with leave for Defendant to raise it as individual pieces of evidence are introduced and as testimony is elicited.

However, the Court believes it appropriate to express at this preliminary stage its present view as to the relevance of this line of evidence. In so doing, the Court is not issuing an advisory opinion – rather, the parties should consider the following as *dicta* which will enable them to hone their arguments regarding this evidence when the issues become ripe:

Dr. Sheppard's prior conviction and incarceration are relevant issues in this case; indeed, the facts of his conviction, incarceration and subsequent acquittal are not disputed. Moreover, the respective circumstances surrounding the first trial and the second trial are relevant in the jury's weighing of the testimony in those trials. *Sheppard v. Maxwell*, 384 U.S. 333 (1966), noted that the first trial's publicity problems had a potential impact on *witnesses* as well as jurors. Accordingly, some inquiry in this regard is proper, although this evidence may not become relevant until after trial testimony from the prior trials is introduced.

As for Dr. Sheppard's efforts to set aside his conviction, both through direct appeal and collateral habeas relief, it is not as apparent as to why this is relevant. There is no issue that the

1954 conviction was wrongful in that there was a denial of due process. Whether Dr. Sheppard was wrongfully convicted in 1954 and released on direct appeal (which did not happen), as opposed to whether he was wrongfully convicted and released on a writ of *habeas corpus* some ten years later (which did happen)does not appear to help the jury decide whether Plaintiff has proved its case.

Similarly, forensic or other evidence which was brought to light in the past decade may well be relevant to this case. However, the steps which were taken to find that evidence would not seem to be relevant, unless, possibly, those steps help the jury to be able to evaluate the strength of the newly discovered evidence.

It may very well be that many persons, including the jury, would be interested to know how the Estate of Sheppard endeavored to bring this case to court. However, the investigative and/or legal process *which brings this case to court* does not seem to be relevant to the jury's determination. The fact of the matter is that this case is now in court. Now that this case is here, the jury must decide what evidence is there that Samuel Sheppard was wrongfully convicted and how much weight, if any, does that evidence deserve. To be relevant, evidence of the process by which the evidence was acquired (*i.e.* evidence of the legal and investigative process) must somehow affect the issue of whether Samuel Sheppard was wrongfully convicted. Thus, for example, to the extent that a witness' testimony from the 1954 trial is presented, evidence of any circumstances of the trial which had an effect on that particular witness or which can be demonstrated to have had an effect on all the witnesses, would be relevant -- because the legal process (*i.e.* the circumstances of the trial) would be probative of the credibility of the testimony.

4. Plaintiff's Motion to Exclude Evidence from Coroner's Inquest

Plaintiff seeks to exclude Samuel Sheppard's testimony at the Coroner's inquest on the basis of constitutional considerations of the 5th and 6th Amendment's right to due process and counsel, respectively.

Without reaching the constitutional considerations cited by the Plaintiff, the court is granting the motion at this preliminary stage on the basis of potential hearsay. Samuel Sheppard's testimony at the Coroner's inquest is an out of court statement. The court is not aware of whether those statements are being offered for their truth. If they are, they would appear to be inadmissible hearsay. Samuel Sheppard is not a party to this case; his estate is. As such, Dr. Sheppard is a person in privity to his estate, but he is not his estate. The Ohio Rules of Evidence do not explicitly provide for statements by those in privity to a party, which Dr. Sheppard is, to be admissible against a party. At common law, Ohio recognized such "privity" admissions. *See, e.g. Helman v. P,C,C & St. L Railway Co.*, 58 Ohio St. 400 (1898). However, the codification of the evidence code in 1980 did not explicitly provide for the admissibility of such privity admissions and the legislative history, while not explicit, suggests that this failure to provide an exception for privity admissions was intentional. *See*, Staff Notes, Ohio Rules of Evidence 801(D)(2) and 801(D)(2)(a). *Accord,* Giannelli & Snyder, Evidence, Sect. 801.22 (Baldwin's Ohio Practice Series, 1996) ("Privity admissions are not admissible.").

Because the parties did not address the "privity admission"issue, they will be given the opportunity to address this issue outside the presence of the jury should the State advise that it wishes the Court to revisit this ruling. However, in the absence of additional authority, or in the absence of a proffer as to a non-hearsay basis for admissibility, this evidence will continue to be

inadmissible.

5. Defendant's Motion to Exclude Opinion Testimony of Samuel Sheppard's Guilt or Innocence.

The State seeks to preclude witnesses from testifying as to their respective opinions as to the guilt or innocence of Samuel Sheppard.

Rule of Evidence 702 permits lay witnesses to tender opinions only when those opinions would be helpful to the jury. The Court finds that lay opinions as to guilt or innocence are not helpful to this jury and therefore grants the motion as to the ability of either party to elicit such opinions from lay witnesses on direct examination.

Rules 702 through 704 address expert opinions. Here again, while expert opinion is permitted on ultimate issues in a case, those opinions must still relate to matters beyond the jury's knowledge or perception or else those opinions must dispel a common misconception. The Court finds that expert opinions as to the question of guilt or innocence will not fit this criteria and grants the motion insofar as it relates to expert opinions elicited on direct examination.

As to cross examination, the issue is slightly different. Here, a witness's opinion may be legitimate cross-examination fodder in order to disclose a witness' bias. This probative value must be weighed against the danger of unfair prejudice. *See generally,* Rule 403. Accordingly, if either party wants to elicit such an opinion on cross examination, they should approach the bench before so doing and the matter will be decided on a witness by witness basis. No mention should be made of such an opinion in opening statements.

6. Plaintiff's motion to exclude testimony of Roger Marsters

Plaintiff seeks to exclude the expert testimony of Roger Marsters on the basis of a failure to supply an expert report. The State replies that Dr. Marsters' report is his prior testimony at the 1966 trial. In an abundance of caution, the court will require Dr. Marsters to submit a report within eleven calendar days of today; that report may make reference to the 1966 testimony but must do so with citations to the specific portions of the transcript which Dr. Marsters is incorporating into his report.

7. Defendant's Oral Motion for an Adverse Inference Instruction on Spoliation

After Plaintiff had withdrawn its motion for an adverse inference instruction on spoliation, Defendant moved for such an inference on the basis that certain evidence had been returned to Dr. Sheppard after the 1966 trial and, thus, if subsequently lost or destroyed, should be the basis for an adverse spoliation instruction.

This motion is denied. There is no evidence that, at the time he received materials from the State, Dr. Sheppard would have known that, 20 years later, the state Legislature would provide for statutory relief for wrongful imprisonment. Accordingly, the loss or destruction of evidence would not have been the act of a person attempting to gain an advantage in a lawsuit.

8. Defendant's motion to exclude Exhibits (old numbers) 3, 4, 8, 9, etc.

Defendant has moved to exclude these exhibits which they represent all relate to "other acts" of Richard Eberling. For the reasons already stated in regard to the Eberling "other acts," this motion is granted. The Court will reconsider this motion, and address other relevancy and hearsay issues which may be attendant thereto, if and when Plaintiff establishes a basis for admissibility of the Eberling "other acts."

9. Defendant's Motion to Exclude Exhibits (Old Numbers) 5, 7, and 88

Defendant seeks to exclude several exhibits regarding George Eberling which, upon review, do not appear to relate to any "other acts." Plaintiff has represented that these exhibits are relevant.

The motion *in limine* is denied. The Court will examine the relevancy of the evidence in the context of other evidence presented at trial. In the event, evidence, whether it be these items or others, is not admitted and a party's prior reference to that evidence in opening statement or in questions to witnesses has created confusion in a juror's mind, the Court canl clarify that confusion in its instructions to the jury.

10. Defendant's Motion to Exclude Exhibits (Old Numbers) 65, 66, 67, Etc.

Defendant seeks to exclude exhibits relating to the Durken homicide. For the reasons already mentioned regarding alleged "other acts" of Eberling, this motion is granted.

11. Motion to Compel Production of the Fray Homicide File

The Court will make available for counsel for the Plaintiff those portions of the Fray homicide file which the Court, on the basis of its *in camera* review believes are relevant discovery in this case. A copy of those documents furnished to counsel for Plaintiff will also be given to counsel for Defendant. These are excerpts from an open homicide file. Accordingly, the Court will issue a separate Protective Order on this material which will include the following:

a. No copies are to be made of the documents

b. The documents may not leave the custody of an attorney of record.

c. The documents may not be shown to any person except employees and investigators of the firm of Friedman and Gilbert, all of whom shall review the

protective order before being allowed to see the documents. Review and other use of these documents shall related solely to Plaintiff's preparation of this trial.

d. If Plaintiff needs relief from this order for the limited purpose of additional disclosure, Plaintiff shall contact Defendant and they may informally agree to further disclosure. In the absence of such agreement, or in the event that attorney work product considerations make consultation with Defendant impracticable, the matter should be brought to the court's attention.

e. These materials shall not be introduced into evidence, included in motions or otherwise referred to on the record of this court, without prior disclosure to and agreement by Defendant or without prior court approval.

f. The single copy being furnished to counsel for Plaintiff will be returned to counsel for Defendant following the trial and the exhaustion of all appeals.

Feb 12th 2000
Date

Judge Ronald Suster