McKnight v. Warden, Ohio State Penitentiary Doc. 37

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

GREGORY McKNIGHT,

Petitioner, : Case No. 2:09-cv-059

-vs- : Chief Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

DAVID BOBBY, Warden,

Respondent. :

SUPPLEMENTAL OPINION ON PETITIONER'S MOTION FOR DISCOVERY

This capital habeas corpus case is before the Court on Petitioner's Objections (Doc. No. 34) to the Magistrate Judge's Decision and Order Granting in Part and Denying in Part Petitioner's First Motion for Discovery (the "Order," Doc. No. 31). The General Order of Reference for the Dayton location of court permits a magistrate judge to reconsider decisions or reports and recommendations when objections are filed.

Proposed Juror Depositions

Petitioner objects first to the Magistrate Judges' denial of leave to depose all the jurors and alternates sworn for the trial of this case. He sought those depositions in support of his second, third, fourteenth, and thirty-second grounds for relief which assert pervasive pretrial publicity, pervasive racial bias in Vinton County, a sleeping juror, and failure to follow jury instructions. The Order

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refused to allow juror depositions because "[a]ny testimony from the jurors on how pretrial publicity, racial bias, or failure to properly understand and follow the instructions would be inadmissible under Fed. R. Evid. 606(b)." (Order, Doc. No. 31, PageID 1313.)

Petitioner objects that Rule 606(b) would not prevent jurors from testifying about pretrial publicity or racial bias in the county because their knowledge of these matters "preceded the jury's deliberative process and/or occurred outside the jury room." (Objections, Doc. No. 34, PageID 1337.) Although Petitioner starts at that point, he eventually candidly admits "[d]epositions are essential to establish the extent that this pervasive pretrial publicity prejudiced the jury's assessment of McKnight's guilt or innocence ..." *Id.* at 1339. This puts the proposed depositions squarely back within Fed. R. Evid. 606(b): Petitioner seeks jury testimony to see if publicity or racism affected their verdict. While these are perfectly appropriate subjects for voir dire, they are not proper for post-trial discovery.

With respect to the sleeping juror claim, the Magistrate Judge denied juror and alternate depositions because "[g]iven the layout of most courtrooms, practically everyone else in the courtroom is in a better position to observe the demeanor of a particular juror than are his or her co-jurors and alternates." (Order, Doc. No. 31, PageID 1314.) Petitioner objects that this conclusion was reached "without any evidence" and is "speculative." It is true that the Magistrate Judge has no evidence of the configuration of the jury box in the courtroom where this case was tried – Petitioner presented none. By the phrase "given the layout of most courtrooms," the Magistrate Judge was summarizing his own experience: in all the jury boxes in the United States District Court for the Southern District of Ohio of which I am aware and in the Dayton Municipal Court where I presided for seven years and in all the movies depicting jury trials that I can remember, jurors sit side-by-side in straight rows. Thus while a juror might observe the juror to either side of him nod off, he or she

would be much less likely to observe such behavior in a juror in front or behind him or separated from him by other jurors. Judges, bailiffs, court reporters, witnesses, and spectators are almost always positioned (again, in my experience) to have better eye contact with jurors than are fellow jurors. If Petitioner's counsel has evidence that the configuration of the courtroom in which this case was tried is markedly at odds with the Magistrate Judge's experience, they are welcome to present it.

As a general matter, Petitioner's counsel argue that ultimate admissibility is not the relevant inquiry at the discovery stage of habeas proceedings, citing *Simmons v. Simpson*, 2009 U.S. Dist. LEXIS 122388 (W.D. Ky. Feb. 11, 2009)(Whalin, M.J.)(Objections, Doc. No. 34, PageID 1340). Petitioner's counsel recently made the same argument based on the same authority in another capital case pending before Judge Rice, *Gapen v. Bobby*, 3:08-cv-280. In that case, the Magistrate Judge noted that neither Magistrate Judge Whalin nor Judge David Katz whom he was quoting found that admissibility was irrelevant to discoverability. The Court continues to adhere to the general standard on discovery set forth in the Order, particularly at PageID 1306-1307.

Vinton County Homicide Files

Petitioner also sought to obtain by subpoena all the Vinton County Prosecutor's homicide files from October 19, 1981, to date in support of his claim that the Ohio death penalty system provides inadequate appellate and proportionality review, his Thirty-fifth Ground for Relief. The Magistrate Judge rejected the request on the grounds that "the Sixth Circuit has repeatedly rejected the notion that the Constitution requires proportionality review of the sort for which ... McKnight contends," (Order, Doc. No. 31, PageID 1315, citing *Gapen v. Bobby*, 2011 U.S. Dist. LEXIS 6266

*21 (S.D. Ohio Jan. 24, 2011); *Beuke v. Houk*, 537 F.3d 618 (6th Cir. 2008); *Getsy v. Mitchell*, 495 F.3d 295 (6th Cir. 2007)(en banc); *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000); *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004), *citing Smith v. Mitchell*, 348 F.3d 177, 214 (6th Cir. 2003); *Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003); *Cooey v. Coyle*, 289 F.3d 882, 928 (6th Cir. 2002); *Buell v. Mitchell*, 274 F.3d 337, 368-69 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417, 453 (6th Cir. 2001); and *Greer v. Mitchell*, 264 F.3d 663, 691 (6th Cir. 2001).

The Magistrate Judge also found the request extraordinarily broad. No so, says Petitioner, it is limited only to Vinton County homicide files and there must not be many homicides in Vinton County because McKnight is the only man on death row convicted in Vinton County. That is a far more speculative conclusion than the Magistrate Judge's that most jurors sit in straight rows.

Finally, the Magistrate Judge noted that Petitioner had taken no account of the attorney work product protection which would apply to the Vinton County Prosecutor's files (Order, Doc. No. 31, PageID 1315.) In his Objections, Petitioner notes that the Warden had made no work product objection to this request (Objections, Doc. No. 34, PageID 1346). Of course, the Ohio Attorney General does not represent the Vinton County Prosecutor(s) whose files are sought and does not have standing to raise that objection or to waive it by not raising it.

Conversely, Petitioner notes the Warden suggested these records are available by public records request under Ohio Revised Code § §149.43. The Magistrate Judge believes the Warden's counsel are mistaken in this claim:

> ¶ 3. Information, not subject to discovery pursuant to Crim. R. 16(B), contained in the file of a prosecutor who is prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43 and is specifically exempt from release as a trial preparation record in accordance with R.C. 149.43(A)(4).

> ¶ 4. Once a record becomes exempt from release as a "trial preparation record," that record does not lose its exempt status unless and until all "trials," "actions" and/or "proceedings" have been fully completed.

Syllabus in *State ex rel Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E. 2d 83 (1994). Therefore this objection to the discovery by the Warden would not have been well taken had the request not been rejected on other grounds.

Petitioner's counsel argues there has been no demonstration "that the requested records were compiled in anticipation of litigation ..." (Objections, Doc. No. 34, PageID 1347.) Petitioner is correct that no such demonstration has yet been made, although it is a fair supposition that most prosecutors' homicide files are prepared in anticipation of litigation. If the District Court overrules the Magistrate Judge on this point, it will remain for the Vinton County Prosecutor to make the argument.

Conclusion

Having considered the Petitioner's Objections, the Magistrate Judge remains persuaded that Petitioner should not be permitted to depose the jurors and alternates or to subpoena the homicide files of the Vinton County Prosecutor.

February 19, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge