Coleman v. Bradshaw Doc. 161

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

TIMOTHY L. COLEMAN,

:

Petitioner, Case No. 3:03-cv-299

: District Judge Edmund A. Sargus, Jr.

-vs- Magistrate Judge Michael R. Merz

MARGARET BRADSHAW, Warden,

:

Respondent.

DECISION AND ORDER ON PRODUCTION OF BCI CASE CONVERSATION NOTES

This capital habeas corpus case is before the Court on Petitioner's Motion to Compel Production of documents in the possession, custody, and control of the Ohio Bureau of Criminal Investigation & Identification ("BCI") and BCI's responsive request for a protective order. As ordered by Magistrate Judge Mark Abel and required by Fed. R. Civ. P. 26(b)(5)(A), BCI has produced a privilege log (Doc. No. 128). As further ordered by the undersigned, BCI produced the referenced documents (the "Case Conversation Records") for *in camera* inspection under cover of a November 9, 2009, transmittal letter from Senior Assistant Attorney General Maura O'Neill Jaite (Doc. No.). Petitioner has filed a response to the privilege log (Doc. No. 158). Both the Warden and BCI were afforded an opportunity to respond to Petitioner's position by December 1, 2009, but have foregone the opportunity. Thus the matter is ripe for decision.

In originally granting Petitioner discovery, Judge Sargus wrote that "petitioner seeks access to the raw data and testing information compiled by BCI." (Doc. No. 54 at 18) In granting this

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discovery, he held

> Petitioner's discovery requests in this regard may not lead anywhere, but for the reasons discussed above - namely, the manner in which the discovery ofSapp's DNA in the rape kit or on the beer bottle could substantiate petitioner's claims, the fact that the state trial court granted these discovery requests, and the fact that Bode has been has been discredited - as well as constantly emerging improvements in DNA testing technology that may eventually enable petitioner to glean information from the raw data and testing information that is not currently evident, petitioner has demonstrated to the satisfaction of this Court that information he seeks might reveal or lead to facts that would assist petitioner in proving the essential elements of his actual innocence and *Brady* claims.

Id. Petitioner's actual discovery requests were broader than "raw data and testing information," although Judge Sargus described them as seeking "physical evidence":

> Petitioner's next set of discovery requests involves physical evidence:
>
> 16. Subpoena duces tecum or records deposition of all records relating to the rape kit in the possession of the BCI, the Springfield Police Department, the Clark County Prosecutor's Office, and the Ohio Attorney General's Office.
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> 17. Subpoena duces tecum or records deposition of all records relating to the Colt 45 beer bottle in the possession of the BCI, the Springfield Police Department, the Clark County Prosecutor's Office, and the Ohio Attorney General's Office.

(Id. at 17, quoting Doc. No. 44-1 at 12.) The actual subpoena issued to BCI demands production of "any and all records relating to the rape kit performed on Melinda Stevens" and "any and all records relating to the Colt 45 beer bottle." (Attachment 1 to Doc. No. 61)

Without doubt, the Case Conversation Records are records of BCI relating to the rape kit or the Colt 45 beer bottle and therefore come within the description of items to be produced which is in the subpoena. Petitioner did not limit the scope of the subpoena to the "raw data and testing information" which Judge Sargus found discoverable, but issued a subpoena as broad as had been

requested in his Motion for Discovery.

Having examined the Case Conversation Records *in camera*[1], the Court determines that the subpoena should be quashed to the extent it seeks these documents. None of them constitute or contain "raw data" or "testing information." While they are responsive to the subpoena duces tecum in that they constitute records relating to the case, the subpoena is overbroad in seeking them, given the scope of discovery granted by Judge Sargus.

Even if the Case Conversation Records were within the scope of discovery granted, they would be protected from production by the work product doctrine.

> The work product doctrine "is distinct from and broader than the attorney-client privilege." *In re Antitrust Grand Jury*, 805 F.2d [155] at 163 [6th Cir. 1989] (*quoting United States v. Nobles*, 422 U.S. 225, 238 n. 11, 95 S. Ct. 2160, 2170 n. 11, 45 L. Ed. 2d 141 (1975)). The doctrine is designed to allow an attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . to promote justice and to protect [his] clients' interests." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). So-called "fact" work product, the "written or oral information transmitted to the attorney and recorded as conveyed by the client," *In re Antitrust Grand Jury*, 805 F.2d at 163, may be obtained upon a showing of substantial need and inability to otherwise obtain without material hardship. *See Toledo Edison Co. v. G.A. Technologies, Inc.*, 847 F.2d 335, 339-40 (6th Cir. 1988). However, absent waiver, a party may not obtain the "opinion" work product of his adversary; i.e., "any material reflecting the attorney's mental impressions, opinions, conclusions, judgments, or legal theories." *In re Antitrust Grand Jury*, 805 F.2d at 163-64 (citations omitted).

Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp., 293 F.3d 289, 294 (6th

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[1]The Case Conversation Records consist of twelve pages of handwritten notes (pages 1, 2, 3, 4, 6, 7, 8, 9, 14, 15,16, and 19), all on what appears to be a BCI Case Conversation Record standard form and relating to BCI Case No. 02-12394.

Cir. 2002).

"A party asserting the work product [doctrine] bears the burden of establishing that the documents he or she seeks to protect were prepared 'in anticipation of litigation'" *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006)(quoting *In re Powerhouse Licensing, LLC*, 441 F.3d at 473)[per Charlie Warner, excellent discussion of what "in anticipation" means]. The test is "(1) whether a document was created because of a party's subjective anticipation of litigation, as contrasted with an ordinary business purpose, and (2) whether that subjective anticipation of litigation was objectively reasonable." *Id*. at 594. There is no question that the Case Conversation Records were prepared for ongoing and anticipated litigation, to wit, Petitioner's post-conviction proceedings in the Common Pleas Court and these habeas corpus proceedings which were virtually certain to follow.

While not contesting the "in anticipation of litigation" prong of the test, Petitioner argues these records were not prepared by or for an attorney for the State.

> Moreover, in this instance, they could not have been prepared *for* the Clark County Prosecutor or the Attorney General's Office in anticipation of litigation. This is true because of how this case proceeded in the court below. Coleman moved for DNA testing in state court. (ROW Apx. Vol. 14, pp. 58-62.) In response, the State offered to submit both the beer bottle and rape kit to BCI for testing. (Id. at 157.) By entry, both parties agreed to BCI conducting said testing. (ROW Apx. Vol. 15 p. 120-21.) Resultantly, the testing conducted by BCI was not done *for* either the Clark County Prosecutor or the Attorney General's Office. BCI was not working *for* either party—it was working for all parties to the state court proceedings—Coleman, the Clark County Prosecutor, and finally, the Court of Common Pleas. There is no work product privilege protecting these Case Conversation Records.

(Motion to Compel, Doc. No. 86, at 5, emphasis in original.)

The Court rejects this construction of the relationship among the parties. BCI is a part of the

Office of the Attorney General of Ohio. Ohio Rev. Code § 109.51. The fact that Petitioner's state court motion for post-conviction DNA testing was resolved by Petitioner's having accepted the State's offer to have BCI do the testing does not make BCI any less a part of the Attorney General's Office.

Apart from the question of who BCI was working for in this case, the strong policy reasons behind protecting attorney opinion work product are applicable to these notes. In many cases they reflect the impressions of counsel for the State in this case, Assistant Attorney Generals Maher and Canepa, recorded from conversations with these attorneys by a BCI employee. Attorney opinion work product is not discoverable in any circumstances, absent waiver. *In re Antitrust Grand Jury*, 805 F.2d 155 at 163-64 (6th Cir. 1989).

Accordingly, Petitioner's Motion to Compel production of the Case Conversation Records is denied and BCI's responsive motion for protective order is granted. The Case Conversation Records will be scanned and filed under seal in the Court's ECF system.

December 4, 2009.

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