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

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 3:03-po-002
Also 3:09-cv-017

-vs- Magistrate Judge Michael R. Merz
:

THEODORE SOMERSET,

Defendant.

DECISION AND ORDER

This case is before the Court on Defendant's Motion to Vacate under 28 U.S.C. § 2255 (Doc. No. 83). After evidentiary hearing and briefing by the parties, the Motion is ripe for decision.

Defendant pleads the following grounds for relief:

> **Ground One:** Ineffective assistance of counsel.
>
> **Supporting Facts:** Counsel failed to subpoena critical telephone records and recordings and repeatedly filed motions after the fact.
>
> **Ground Two:** Brady violation.
>
> **Supporting Facts:** United States failed to provide exculpatory telephone recordings.

(Motion, Doc. No. 83, at 5-6.)

Procedural History

More than six years ago, in October 2003, Defendant Somerset was charged by Information with two counts of telephone harassment of Rhonda Maxwell, an employee of the United States at Wright-Patterson Air Force Base.

Ms. Maxwell is a former girlfriend of Mr. Somerset. Their relationship had been before this Court ten years earlier when Mr. Somerset was convicted of criminal damaging for setting her car on fire at the Base. *United States v. Somerset,* 3:94-mj-074. Because of appeals and various post-judgment motions, Defendant did not serve his thirty-day sentence or pay restitution in that case until late 2002, a little more than two months before the crimes charged in this case occurred in January 2003.

Because Defendant failed to respond to the Marshal's efforts to serve a summons, an arrest warrant was issued in November 2003, but not executed until May 2004 (Doc. Nos. 3, 4, 5, 6, 10). Two days after his initial appearance and despite being represented by counsel, Defendant filed a *pro se* Motion to Disqualify the Magistrate Judge, which was denied (Doc. Nos. 13, 14). In July, 2004, Defendant retained attorney Charles Slicer III to replace the Federal Defender and the Court continued the trial at his request (Doc. Nos. 24, 25).

The case was tried to the bench on August 30, 2004 (Doc. Nos. 32, 33) and a written Decision on the Merits was filed October 4, 2004 (Doc. No. 34). After motions for reconsideration and a new trial were denied, Defendant was sentenced on January 5, 2005, to a fine and five years of probation with the condition he serve sixty days confinement (Doc. Nos. 49, 51). Defendant appealed to District Judge Rice who affirmed the conviction on October 12, 2007 (Doc. No. 67). A further appeal to the Sixth Circuit ended in a decision from the bench at oral argument[1] which

[1]The transcribed oral decision of the Court of Appeals is at Doc. No. 96.

affirmed the conviction and sentence, but declined to rule on the two issues raised here on the ground that they were more appropriately dealt with by a § 2255 motion.

As ordered under Rule 5 of the Rules Governing § 2255 Motions (Doc. No. 101), the United States filed an answer (Doc. No. 105) and Defendant filed a reply (Doc. No. 106). Defendant never sought any discovery in the case, despite being prompted by the setting of a deadline (Doc. No. 107). Since the case involves claimed communications by Defendant with his trial counsel which were not part of the record, the Court *sua sponte* set an evidentiary hearing and ordered the parties to identify witnesses they would call (Doc. No. 108). The § 2255 Motion was then tried on October 5, 2009 (Minutes, Doc. No. 116) and became ripe on briefing October 26, 2009, when Defendant's Reply Brief was filed (Doc. No. 121).

Ground One: Ineffective Assistance of Trial Counsel

The governing standard for ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

With respect to the first prong of the *Strickland* test, the Supreme Court has commanded:

> Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689.

As to the second prong, the Supreme Court held:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. *See also Darden v. Wainwright*, 477 U.S. 168 (1986); *Wong v. Money*, 142 F.3d 313, 319 (6th Cir. 1998); *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). *See generally* Annotation, 26 ALR Fed 218.

Defendant asserts a number of deficiencies in Mr. Slicer's performance:

1. Mr. Somerset testified that he asked Mr. Slicer to subpoena the voice recordings of the allegedly harassing messages left on Ms. Maxwell's work telephone at WPAFB. (Evid. Hrg. Tr. at 11.)

2. He also asked Mr. Slicer to subpoena call records relating to Ms. Maxwell's work telephone number. *Id*.

3. He also asked Mr. Slicer to file a motion to dismiss for vindictive prosecution. *Id*. That motion was not filed until after the trial. *Id*. at 32-33.

4. He asked Mr. Slicer to file a motion to recuse the Magistrate Judge. *Id*. at 20-21.

5. Mr. Slicer did not file a motion to exclude oral testimony about the content of the messages to Ms. Maxwell until the morning of trial. *Id*. at 22.

6. At trial, Sergeant Frisk, an Air Force investigator, testified that the callback telephone number left in the messages on Ms. Maxwell's work telephone was 845-9005. Mr. Somerset's home telephone number at the time was 854-9005. After trial, Mr. Somerset asked Mr. Slicer to investigate the number testified to by Frisk as possible support for a

motion for new trial, but Slicer did not do so. *Id*. at 29.

While Defendant's Motion is long on allegations of things Mr. Slicer did not do, even though asked to do them, he has presented no evidence that these failures fell below the standard of professional competence of an attorney defending a misdemeanor case. It is not ineffective assistance of counsel to fail to do everything a client requests or demands. In part the reason for hiring a defense attorney is that he or she has the professional training and experience to choose among the many possible avenues of investigation and argument those which may be effective.

Each area of asserted deficient performance is analyzed in terms of the *Strickland* standard: deficient performance and prejudice.

1. Failure to Obtain the Voice Recordings

It is standard practice in this Court in misdemeanor cases arising at Wright-Patterson Air Force Base that the prosecutor prepares and turns over to defense counsel a discovery packet containing information required to be furnished under Fed. R. Crim. P. 16 at initial appearance or, at the latest, at the pretrial conference. Prosecution of misdemeanor cases in this Court is supervised by Special Assistant United States Attorney James Brubaker who has held that position for more than twenty-five years. Mr. Brubaker has a deserved reputation for honesty and fair dealing with defense counsel in these cases. The facts of this case must be examined against that backdrop.

In this particular case, Mr. Brubaker represented to Mr. Slicer that he had turned over all discoverable information in his possession. (Evid. Hrg. Tr. at 46.) Mr. Slicer's understanding "was that we couldn't obtain those [voice recordings] because they were gone. They were erased sometime before I got involved in the case." *Id*. at 48. He was uncertain at the evidentiary hearing where he learned that information, but it is unlikely it came from anyone other than a government lawyer. *Id*.

Mr. Slicer admitted he did not issue a subpoena for the recordings, accepting the Government's representation that it had produced all discoverable evidence. But there was no proof offered at the evidentiary hearing that a subpoena would have uncovered the recordings. Mr. Somerset conducted no discovery on his § 2255 Motion and did not offer any proof at the hearing about the telephone voice recording system at WPAFB in January, 2003.

Staff Sergeant Jeremy Frisk investigated this case for the Air Force. He was assigned the case on January 27, 2003 (Trial Tr., Doc. No. 33, at 33). On January 29, 2003, he interviewed Ms. Maxwell and "listened to two telephone messages that were left on her voice mail." *Id*. at 34. Ms. Maxwell retrieved those messages by calling her voice mail system. *Id*. Sgt. Frisk testified the first message was "Call 845-9005" and was left at 2:54 A.M. on January 10, 2003. *Id*. at 35. The caller was a male voice. *Id*. at 36. The second message was also "call 845-9005" and was left by a male caller at 5:12 A.M, on January 16, 2003. *Id*. He testified that the voice mail messages were saved at the time he listened to them, but "[a]fter that I do not know sir." *Id*. at 39. He did not record them because he did not have recording equipment with him at the time. *Id*. at 40-41. He did not delete the message and he did not know if it still existed at the time of trial. *Id*. at 41. On redirect he testified that he tried to make a recording of the voice mails, but was unable to do so, that no member of security forces destroyed any copies, and that security forces did not have any copies as of the time of trial. *Id*. at 42.

Thus the trial testimony confirmed what Mr. Slicer had learned earlier: no recordings of the voice mail messages existed as of the time of trial. Thus it was not ineffective assistance for him to rely on the information he received, presumably in discovery, that there were no copies. Issuance of a subpoena would have made no difference in the outcome.

Moreover, there is no proof that the recordings would have been exculpatory. Sgt. Frisk testified he could not identify Mr. Somerset's voice from the voice mails, even though he later talked

to Defendant on the telephone. Thus the identification depended entirely on Ms. Maxwell. Mr. Somerset testified at trial and denied making the calls. He speculates that, if the recordings had been obtained, they could have been submitted to voice analysis and proven not to be his, but he offers no proof that voice print identification could have worked on such short samples. Ms. Maxwell's testimony, on the other hand, is supported by her long acquaintance with Defendant, by the fact that the calls came from Mr. Somerset's cell phone in the very early morning hours, and because the calls fit the pattern of long-term emotional harassment of Ms. Maxwell by Mr. Somerset. It is more probable that the recordings would have been inculpatory rather than exculpatory. There certainly is no proof that there presence would have changed the outcome of the case.

Mr. Somerset's first claim of ineffective assistance of trial counsel is without merit.

2. Failure to Subpoena Ms. Maxwell's Work Telephone Records

Two weeks before trial, Mr. Slicer had subpoenas issued to SBC seeking the call history (incoming and outgoing) on (937) 225-4415 ext. 4101 and (937) 279-1413 and to Verizon for the call history on (937)837-3727, both for the period January 2002, through February 2004 (Doc. No. 27 and Evid. Hrg. Tr. at 12). As Mr. Slicer testified at the evidentiary hearing, it is probable that a member of his staff made typographical error in typing 225 instead of 255 as the exchange number on the first subpoena. As a result, the wrong records were obtained.

Mr. Somerset testified he gave Mr. Slicer the 255-4155 number as Ms. Maxwell's work number (Evid. Hrg. Tr. at 14). He claims he knew the number to subpoena because he had learned it from the Information. (Evid. Hrg. Tr. at 15.) This is obviously untrue because the Information does not contain any telephone numbers. It is likely he knew the number because he had called it before, on more than one occasion.

At the evidentiary hearing, Mr. Katchmer, Defendant's present counsel, adverted to a memorandum dated June 5, 2004, from Mr. Somerset to his first trial attorney, Ms. Bennett, and then to Mr. Slicer, which allegedly contains the correct telephone number. The Memorandum to Ms. Bennett is Exhibit 2 to Defendant's *Pro Se* Objection to Magistrate Judge's Decision on the Merits (Doc. No. 59). It instructs Ms. Bennett to obtain a great deal of discovery:

> [C]oncerning contact between the complainant, the government, US Marshals, and Merz, the decision to prefer charges, copies of the alleged voice mail or tape recordings of alleged calls from me, WPAFB telephone incoming call records for January 10 & 16, 2003, names and contact info for co-workers of complainant between October 2002 and November 2003, and any discussions or evidence or records concerning the loss of property seized in October 6, 1993. . .

(Doc. No. 59-2 at 5.) Contrary to Defendant's assertion (Evid. Hrg. Tr. at 14), there are no telephone numbers mentioned in the memorandum.

The reason Defendant wanted Ms. Maxwell's office telephone records subpoenaed was to determine "whether or not the calls from outside the Base had been made actually from her phone or a co-worker's phone, see if it was fabricated. . . . [To see] if there were even calls at all even made at that time." *Id*. at 35. That would also have been his reason for obtaining the voice recordings. *Id*. at 36.

There is no doubt that a typographical error caused Mr. Slicer to obtain call records for a different number than Mr. Somerset wanted subpoenaed. But there is no evidence that competent counsel would have subpoenaed these records at all. They were at most supportive of Mr. Somerset's theory that the calls came from someone else or were completely fabricated. There is not the slightest evidence to support such a theory. Who else had a motive to call Ms. Maxwell's work phone in the early morning hours and leave Mr. Somerset's call back number? An early morning call from a wrong number is credible, but two leaving Defendant's call back number?

Even if subpoenaing the correct records is something a good attorney would have done,

Defendant has proven no prejudice from Mr. Slicer's failure to do it. Defendant did not present at the evidentiary hearing any proof of what the call records for 255-4155 would have shown had they been obtained.

Mr. Somerset's second claim of ineffective assistance of trial counsel is without merit.

3. The Motion to Dismiss for Vindictive Prosecution

Mr. Somerset asked Mr. Slicer to file a motion to dismiss for vindictive prosecution. Mr. Slicer declined to do so because he did not believe such a motion was justified by the evidence (Evid. Hrg. Tr. at 43.) That argument was eventually made as part of the Motion for New Trial (Doc. No. 37). That Motion was denied both because it was untimely made and also because there was no merit to the vindictive prosecution claim. (Decision and Order, Doc. No. 46). Because there is no merit to the claim, Defendant has not shown that a competent attorney would have filed the motion prior to trial, nor has he shown any prejudice from Mr. Slicer's failure to file it before trial. He has no proof that a timely vindictive prosecution motion would have been granted. This issue was also raised on appeal to Judge Rice who rejected it on the merits (Doc. No. 67 at 12).

Mr. Somerset's third claim of ineffective assistance of trial counsel is without merit.

4. Failure to File Motion to Recuse the Magistrate Judge

Mr. Slicer admitted that Mr. Somerset asked him to file a motion to recuse the undersigned magistrate judge from trying the case and that he declined to do so because "I did not see that there was a legal basis." (Evid. Hrg. Tr. at 43.) Mr. Somerset has not offered any proof that this was not a valid tactical choice on Mr. Slicer's part, nor has he shown any prejudice from failing to file it.

Mr. Somerset had filed a *pro se* Motion to Disqualify early in the case (Doc. No. 13) which the Court rejected with a written decision.

Defendant does not argue this claim at all in his post-hearing briefing, either to show deficient performance or prejudice. The claim that it was error for the Magistrate Judge to refuse to recuse himself was considered on the merits on appeal by both Judge Rice and the Sixth Circuit. Thus Mr. Slicer's omission to file a motion making this claim did not prevent Mr. Somerset from obtaining a ruling on the merits on appeal, based on his *pro se* motion for disqualification.

Mr. Somerset's fourth claim of ineffective assistance of trial counsel is without merit.

5. Failure to File a Motion to Exclude Ms. Maxwell's Oral testimony About the Content of the Recording Until the Morning of Trial

On the morning of trial, Mr. Slicer filed a motion to exclude the testimony of Sgt. Frisk as to the contents of the voicemails under the best evidence rule and as hearsay. Defendant complains that failure to include Ms. Maxwell in that motion permitted her to testify as to the content of the voicemails in violation of the best evidence rule.

Fed. R. Evid. 1002 requires proof of the content of a recording by producing the original. However, Fed. R. Evid. 1004 permits other evidence of the content of a recording if all originals are lost or have been destroyed "unless the proponent lost or destroyed them in bad faith." Sgt. Frisk testified as set forth above about his unsuccessful efforts to make a copy and that the originals were unavailable as far as he knew. The Court found that there was no evidence they were destroyed in bad faith. Thus any best evidence objection would have been unavailing, whether directed to Ms. Maxwell or Sgt. Frisk's testimony.

As important as this point apparently is to Defendant, he never sought leave to conduct any discovery during these § 2255 proceedings. As of the date of this decision, the Court is unadvised

about what likely happened to those voicemails. Perhaps they still exist and would be completely exonerating to the Defendant – yet he made no effort in discovery to find out whether they still exist. Perhaps they would still exist but for a deliberate effort to destroy them. Perhaps Air Force voicemails last forever unless someone erases them. The Court does not know and Defendant has made no effort in this proceeding to uncover the truth of the matter. With no other **evidence**, the Court is left with Sgt. Frisk's testimony, which provides an adequate basis for an exception to the best evidence rule.

Mr. Somerset's fifth claim of ineffective assistance of trial counsel is without merit.

6. Failure to Investigate Telephone Number 845-9005.

At trial Sgt. Frisk testified that each of the voicemail messages consisted of "Call 845-9005." As the Court found at the time of deciding the case on the merits, this constituted a transposition of two digits in the number by Sgt. Frisk. That transposition probably occurred at the time of his testimony in August 2004. When he had investigated the incident in January 2003, he had called 854-9005 and reached Theodore Somerset who had refused to talk to him. It turned out after trial that 845-9005 is a telephone number assigned to a person named Gibson in New Carlisle, Ohio, who at least told Mr. Somerset that he had worked at the Base, as have thousands and thousands of residents of the Miami Valley, including Mr. Somerset, who met Ms. Maxwell there during his employment.

Defendant's argument seems to be that it was deficient performance on Mr. Slicer's part to fail to investigate this other number, rather than accept the most likely explanation that Sgt. Frisk misspoke. The difficulty with this argument is that Mr. Somerset has not shown what additional investigation would have revealed or that it would have been exculpatory. Mr. Somerset never

sought court permission to depose Mr. Gibson to ask if he had called Ms. Maxwell's work telephone in the early morning hours of two separate dates in early January, 2003, and left a call back number. He did not seek to depose Ms. Maxwell to see if she knew Mr. Gibson and could possibly have mistaken his voice for Mr. Somerset's. In sum, he did nothing to prove any prejudice at all from Mr. Slicer's failure to investigate this possible line of inquiry. His claim relies entirely on conjecture.

Mr. Somerset's sixth claim of ineffective assistance of trial counsel is without merit.

Ground Two: *Brady v. Maryland* Claim

In his Second Ground for Relief, Mr. Somerset claims he is entitled to a vacation of the judgment because the United States did not produce the voicemail recordings.

The State has a duty to produce exculpatory evidence in a criminal case. If the State withholds evidence and it is material, the conviction must be reversed. *Brady v. Maryland*, 373 U.S. 83 (1963). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 683 (1985).

There are three essential components of a true *Brady* violation: "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

When dealing with the failure of the state to preserve evidence which could have been subjected to tests which might have exonerated the defendant, there is no due process violation unless the defendant can show bad faith on the part of the police. *Arizona v. Youngblood*, 488 U.S.

51, 57 (1988). In rejecting a *Youngblood* claim earlier in this case, the Court found – and that finding remains undisturbed – that there was no evidence that the voicemail recordings had been destroyed in bad faith. Defendant repeats this finding several times in his brief, albeit without the bad faith limitation, as if it proved the whole of his *Brady* claim. It does not.

The Sixth Circuit declined to decide the *Brady* claim because the record was not fully developed. But nothing has been added to the *Brady* claim since the Sixth Circuit decision, nor has Defendant attempted to add anything to the *Brady* claim. The Court knows no more today about what happened to the voicemail recordings than it did at the time of trial, and no evidence on the point has been added since the time of trial. Sgt. Frisk's testimony at trial – that he did not know what had happened to the recordings – still stands as the whole of the record on this point. The Defendant has failed to prove – indeed, he has not even attempted to learn through discovery since remand – what happened to the recordings.

Nor has Defendant proved the recordings are in any way exculpatory. All we know about the recordings is what was testified to by the only two people we know have heard them, Ms. Maxwell and Sgt. Frisk. What they testified to is in no way exculpatory. It is in fact the whole case against the Defendant. The only "proof" the Court has that the recordings would be exculpatory is Mr. Somerset's claim that voice identification software would show it was not his voice. He has not even offered any scientific support for this proposition.

Because he has not proved that the Government has the recordings or ever had them at any time after he was charged or that the content would be exculpatory, Mr. Somerset's Second Ground for Relief is without merit.

Conclusion

Based on the foregoing opinion, the Motion to Vacate is denied with prejudice and the Clerk will enter judgment to that effect. Because reasonable jurists would not disagree with the conclusions reached in this opinion, Defendant will be denied a certificate of appealability.

The stay of execution of sentence is vacated. Defendant must report to the Probation Office at 9:30 A.M. on Monday November 16, 2009.

November 9, 2009.

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