

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

MICHAEL HAZEL,

Petitioner,

: Case No. 3:13-cv-332

- vs -

District Judge Timothy S. Black
Magistrate Judge Michael R. Merz

WARDEN, Chillicothe
Correctional Institution,

:

Respondent.

**DECISION AND ORDER OVERRULING PETITIONER'S SECOND
OBJECTIONS TO RESPONDENT'S NOTICE OF FILING**

This habeas corpus case is before the Court on Petitioner's second set of Objections¹ (Doc. No. 39) to Respondent's Notice of Filing (Doc. No. 33).

On July 31, 2014, on Petitioner's Motion, the Court ordered Respondent to expand the record, stating:

The other four items Hazel seeks in discovery are the bills of particulars in Clark County Common Pleas Case Nos. 03-CR-592, 09-CR-212, 10-CR-808, and 11-CR-49 (Motion, Doc. No. 26, PageID 2707). Rather than grant Hazel discovery of these items, the Court finds that they are or may be relevant to a decision in this case and therefore ORDERS the Respondent to expand the record by filing copies of these four items not later than August 11, 2014.

(Decision and Order, Doc. No. 32, PageID 2770.)

In response, the Warden's counsel wrote that no bills of particular were filed in Case

¹ The document is not an objection in the sense of a request for review by a District Judge of a Magistrate Judge's order or report under Fed. R. Civ. P. 72. Instead, it is a complaint about the failure, as Hazel sees it, of the Warden to comply with a court order. As such, the Objection is properly dealt with by a Magistrate Judge.

Nos. 03-CR-592, 09-CR-212, 10-CR-808, and 11-CR-49 (Response to Court's Order, Doc. No. 34, PageID 2801-02). Docket sheets were attached to prove that no such bills of particulars had been filed in those cases. Respondent noted that Case Nos. 10-CR-827 and 10-CR-828 had been consolidated with 10-CR-808 and the four bills of particulars in the consolidated cases were filed.

Hazel objected that the Respondent did not file what the Court ordered and should be compelled to do so (Doc. No. 37). The Magistrate Judge overruled the Objections, noting that the Court had no power to compel the State to create bills of particulars which did not previously exist (Doc. No. 38). Hazel now objects again.

Hazel's first objection is that failure to produce these documents is a violation of his rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The Court disagrees. *Brady* covers documents which exist at the time of trial and are either exculpatory or material for impeachment. A bill of particulars is a pleading in a criminal case and not a piece of exculpatory evidence.

Hazel's second objection is that these documents are useful to prove that Clark County Prosecuting Attorney David Wilson's testimony at trial "was fundamentally unreliable." Documents which do not exist cannot prove anything.

To prove that bills of particulars exist in Cases 09-CR-212, 10-CR-808, and 11-CR-49 despite the fact that the docket sheets do not disclose the existence of these documents, Hazel argues the docket sheets filed by Respondent from those cases are "altered and incomplete." He provides no proof of any such alteration.

To prove that bills of particulars exist, the claims the dockets show his counsel made demand for bills of particulars. In examining the docket sheets, the Court finds the following:

Case No. 03-CR-592 On August 28, 2003, Entry on the docket in one filing “Notice of Appearance of counsel for Defendant, plea of not guilty, demand for jury trial, demand for speedy trial, demand for discovery, demand for bill of particulars, and demand for notice of intention to use evidence filed.” (Doc. No. 33-1, PageID 2777).

Case No. 09-CR-212 On March 13, 2009, Entry on the docket in one filing “Notice of appearance of counsel for the Defendant, plea of not guilty, demand for jury trial, demand for speedy trial, demand for discovery, demand for bill of particulars, and demand for notice of intention to use evidence filed.” (Doc. No. 33-1, PageID 2779).

Case No. 10-CR-808 No demand is shown. See PageID 2783-85.

Case No. 11-CR-49 No demand is shown. See PageID 2786-85-7.

Thus as to two of these cases, Hazel misrepresents to the Court what the docket sheets show. In the two earlier cases, the fact that a demand was made does not prove that the prosecutor actually responded with a bill of particulars. There is no constitutional right to a bill of particulars. With respect to Hazel’s argument (PageID 2881) that he was not adequately advised of the elements of the offenses with which he was charged, that argument is waived by his plea of guilty in the 2003 and 2009 cases. *United States v. Lalonde*, 509 F.3d 750, 757 (6th Cir. 2007); *see also Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

Hazel’s second objection is that in fact there was a bill of particulars produced in 03-CR-592. As proof he points to its marking as State’s Ex. 17 at the trial of the consolidated cases now before the Court and quotes extensively from the examination of Mr. Wilson about that exhibit (Second Objections, Doc. No. 39, PageID 2882-85.) Provided the trial exhibits still exist, the State could produce this bill of particulars.

The Court however declines to compel production of that document. The initial order

compelling production of the bills of particulars was done without full consideration of how the standards for discovery in a habeas corpus cases should apply to this particular demand. Instead, the Court found that “they are or may be relevant to a decision in this case” and ordered the record expanded to include them.

The Magistrate Judge has now filed a Report and Recommendations on the merits of this case (Doc. No. 36). The only conceivable relevance of the bill of particulars in Case No. 03-CR-592 would be to show, somehow, that Heather Kunce was not alleged to be the victim in that case or that she was not alleged to be a “family or household member” or that the crime underlying the aggravated burglary was not domestic violence. A great deal of evidence on this question is before the Court already and is discussed in the Report and Recommendations. Much of the evidence was tendered by Hazel in support of his actual innocence claim, but actually shows that Heather Kunce was the victim, that the underlying crime to the aggravated burglary was domestic violence, and that Hazel was the putative father of Kunce’s child. The bill of particulars was marked as a State’s exhibit and Hazel’s attorney, Mr. Marshall, strove mightily to prevent Mr. Wilson from testifying from that document that the underlying offense to the aggravated burglary in 03-CR-592 was domestic violence. Thus it is very unlikely that the bill of particulars in the 2003 case supports Hazel’s position at all, much less enough to overcome the evidence already of record.

Hazel’s Second Objections are OVERRULED.

August 25, 2014.

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