IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

VS. : CP-14-CR-2421-2011
CP-14-CR-2422-2011

GERALD A. SANDUSKY :

MEMORANDUM AND ORDER

June 4, 2012.

The Defendant has filed a motion asking that I direct the Commonwealth to permit him to copy all juror information collected by the Office of Attorney General in its preparation for jury selection.

He asserts that "it is fundamentally unfair and a violation of his due process and equal protection rights under both our state and federal constitutions" if the Commonwealth has used its "unlimited investigative, financial, and governmental resources" to collect juror background information and does not share it with him. (Defendant's Motion, para. 19).

In support of his request for information "which he believes may be in the possession of the Commonwealth" (para. 24) (emphasis added), he has attached to his motion an anonymous letter containing what is purported to be an account of what information the Commonwealth has collected. The Defendant argues that although the letter is anonymous it bears some indicia of credibility because attached to it is a copy of a letter which was attached to the jury pool list when it was distributed to counsel.

In reply, the Commonwealth denies that it had its "investigators improperly peering into their (jurors') private lives." (Commonwealth Response, p.2). The Commonwealth argues that any information it has collected is no more "than what any diligent defense attorney would collect." (ftn. 2); that its background material is protected from disclosure by the work product privilege; and the Defendant's motion is factually baseless.

Defense counsel asks that I schedule a hearing on his motion to permit him to inquire whether or not the Commonwealth has collected information which should be provided to the defense. In an exchange of e-mails between the Court and counsel, defense counsel acknowledges, as I understand it, that he believes the anonymous letter is credible but he can produce no witness who can testify in support of the allegations of his motion. Instead, he proposes to call as a witness an attorney for the prosecution, as on cross-examination, and inquire about the collection of any such juror background information.

The first question to be addressed is whether an anonymous letter to defense counsel asserting how the Commonwealth has used its investigative, governmental and financial resources triggers the right to have a hearing to permit defense counsel to investigate whether the statements in the letter are true.

The act of filing a motion does not necessarily entitle a party to a hearing. Rule 575(A)(2)(c) of the Pennsylvania Rules of Criminal Procedure (Pa.R.Crim.P.) requires any motion to "state with particularity the grounds for the motion" and "the facts that support each ground." Subsection (g) continues that

"If the motion sets forth facts that do not already appear of record in the case, the motion shall be verified by the sworn affidavit of some person having knowledge of the facts, or by the unsworn written statement of such a person that the facts are verified subject to the penalties for unsworn falsifications under the Crimes Code...."

In short, a motion filed by counsel must be supported by allegations of fact backed up with some credible basis to believe the allegations to be true. Otherwise the court and counsel can be engaged in chasing chimeras.

The defense motion is not supported by either verification or affidavit regarding the truth of the underlying facts it alleges, as required by Pa.R.Crim.P. 575. Therefore, I will decline to hold a hearing at which defense counsel would attempt to develop facts to support his allegations. The design of the Rules intends that counsel must have some factual basis to support a motion before it is filed and not attempt to develop those facts after it is filed.

The Commonwealth further argues that any juror background information it had developed is protected by the "attorney work product privilege" and need not be turned over to the defense.

It is "black letter law" and requires no citation to authority to state that a court is not required to hold a hearing when the facts alleged in the petition, even if proven to be true, would not entitle the petitioner to the requested relief. Even if the facts as alleged in the defense motion were correct, I do not believe, under the current state of the law, that the Defendant would be entitled the relief he

seeks – access to the Commonwealth's jury research – because the defense simply has no constitutional due process right to get the information.

Jury background information, at least to the extent the defense asserts it has been collected by the Commonwealth in this case, is subject to the work product privilege.

There is very little case law on point, and much of it predates the modern view that the Commonwealth has a duty under Brady v. Maryland[1] and its progeny, as embodied in our Rules of Criminal Procedure, to disclose certain types of information.[2]

The work product privilege was established in Hickman v. Taylor, 329 U.S. 495 (1947) in recognition that in preparing a client's case it is necessary for an attorney to maintain a "certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Id. at 510-511. An attorney's collection of jury background material clearly falls within the category of "work product" under Pennsylvania law. Pa.R.Crim.P. 573 (G); Commonwealth v. Kennedy, 876 A.2d 939 (Pa. 2005).

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[1] 373 U.S. 83 (1963).

[2] The cases have more historical interest than precedential value. Commonwealth v. Caplan, 192 A.2d 984 (Pa. 1963); Commonwealth v. Foster, 280 A.2d 602 (Pa. Super. 1971); Commonwealth v. Smith, 326 A.2d 60 (Pa. 1974); Commonwealth v. Schowalter, 332 A.2d 456 (Pa. Super. 1974); Commonwealth v. Galloway, 352 A.2d 518 (Pa. Super. 1975). They demonstrate, however, how far the law has come in requiring counsel to share information to avoid surprise at trial and facilitate preparation. "....the taboo against the 'fishing expedition' has yielded increasing to the proposition that the ends of justice require a wider availability of discovery than in the past." McCormick on Evidence, 6th ed. p. 166.

But categorizing material as "work product" does not necessarily mean it is not discoverable by opposing counsel under Sixth Amendment due process considerations. The work product privilege is not absolute. "It is an intensely practical one, grounded in the realities of litigation in our adversary system." United States v. Nobles, 422 U.S. 225, 238 (1975).

One must ask, therefore, whether it transcends due process to permit the prosecutor to develop juror information that a defendant cannot afford to produce on his own? As a practical matter, this is the question that underlies the defense motion. The question implicates an examination of the boundaries of due process, but the boundaries of due process are not easily fixed. Due process is not a static concept; it evolves over time. Nevertheless, the Defendant has cited no case law to support his request.

The desire to collect information about prospective jurors has gone on from the days of the origins of the jury system. It is part of our human nature to want to know something about the people who will be making judgments that affect us – political officials, sports referees, judges, and certainly jurors, among others. Indeed, it may be argued that counsel, in fulfilling their duty of candor to the Court, have a duty to make some level of inquiry, either before or during voir dire, regarding whether prospective jurors are qualified under the law to serve.[3]

Our system of justice depends on a jury composed of citizens who take an oath to "well and truly" try the matter before them. As a society, we rely on our fellow citizens to reach a verdict based on the evidence presented in the

[3] 42 Pa.C.S. 4502

courtroom. While it may be theoretically helpful to have background information that might be used to predict how a particular juror might view the issues in a particular case, and then apply that knowledge to select jurors perceived to be favorable to one side or the other, the practical fact is that jurors are not automatons.

We should not lose sight of the fact that the social dynamic of the jury tends to subsume individual opinions into the collective analysis of the whole, thereby lessening the impact of any one juror and decreasing the importance of knowing with precision their individual backgrounds. Indeed our faith in the jury system is predicated on that premise.

A juror's opinions are shaped by many things: life experiences, age, sex, marital status, education, employment, among others – but ultimately our society's faith in the jury system rests on the sure confidence that the jury's collective judgment is shaped by the deliberative process of sifting and sorting evidence that has been presented in a courtroom according to the longstanding law of evidence, and guided by the judge's instructions about the application of the law.

Jurors enter into their deliberations carrying with them not just their own unique life experience, but also their shared experience during the trial. As a result, the jury becomes a unique social institution and takes on a life of its own. The individual opinions of its independent members become melded into a collective expression of the community's wisdom – the jury's verdict.

Each side in a trial rightfully attempts to select jurors it thinks will bring some unique perception, experience, or understanding to that side's theory of the case, and hoping the juror will be helpful to it in some way. Predicting, however, how any one person will vote in the jury room is far from an exact science, and, therefore, refusing to order the Commonwealth to share such information cannot be said to be fundamentally unfair. As a result, even if the Commonwealth collected the information in this case in the manner the defense asserts and which the Commonwealth denies, I do not believe that the information is constitutionally required to be turned over to the defense; and the motion asking me to do so will be denied.

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ORDER

AND NOW, June 4, 2012, in consideration of the foregoing Memorandum, and upon consideration of the Defendant's Motion to Compel the Commonwealth to Provide Defendant with Requested Pre-Trial Discovery Materials, filed May 30, 2012, and the Commonwealth's Response, it is ordered as follows:

Motion denied.

By the Court:

John M. Cleland, S.J.
Specially Presiding