

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

FILED
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COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
MAR 12 2015
ALAN CARLSON, Clerk of the Court
BY: ~~WILEEN FERRIS~~ DEPUTY 

PEOPLE OF THE STATE OF CALIFORNIA

V.

12ZF0128

SCOTT DEKRAAI

SUPPLEMENTAL RULING

INTRODUCTION

In January of 2014 this defendant filed a series of motions which alleged misconduct on the part of members of the Orange County District Attorney's office and their law enforcement partners. In these motions, the defendant sought several forms of relief. After conducting a lengthy evidentiary hearing related to these allegations, this court issued a written ruling in August of 2014. Later that year, the defendant requested reconsideration of that ruling along with a supplemental evidentiary hearing on the issues involved based upon his belief that he had discovered relevant new evidence. The People ultimately joined in the request for a supplemental hearing and so, despite its initial reluctance to do so, this court commenced that hearing on February 5, 2015. The hearing, which put back into play the defendant's motions 1) to bar the People from seeking a death judgment against him; and 2) to recuse the entire Office of the Orange County District Attorney from further participation in this prosecution, concluded its evidentiary phase on February 19, 2015.

In this Supplemental Ruling, the court confirms its original findings and rulings in all respects except for those that are specifically addressed herein. In addition to the issues on which this court originally ruled, the court will now address these additional questions:

- 1) Has the supplemental evidence, when considered along with all of the other evidence produced during this entire hearing, demonstrated that this defendant has suffered a personal due process violation in the form of outrageous government conduct and/or serious discovery violations which warrant the imposition of any additional trial sanction?
- 2) Does the supplemental evidence, when considered along with all of the evidence produced during this hearing, require the recusal of the entire Orange County District Attorney's office?

MOTION FOR SANCTIONS RELATED TO "OUTRAGEOUS GOVERNMENT MISCONDUCT"

The defense allegation that triggered the supplemental evidentiary hearing was primarily the contention that the defense had developed new evidence suggesting that one or more of the law enforcement witnesses who testified during the initial phase of the hearing lied during that testimony. This

contention focused largely on the testimony of Orange County Sherriff's deputies Seth Tunstall and Ben Garcia.

A brief background statement is necessary to place the current issues into context. The defendant's original prosecutorial misconduct allegations focused on events that occurred in October of 2011, shortly after the defendant's arrest, when he was placed into a particular cell inside the Orange County Jail. In the directly adjacent cell was an active inmate informant. The defendant alleged that he was purposefully placed in that particular cell by law enforcement in the hope that the informant could obtain incriminating statements from him. The People's position was that no improper activity had occurred.

During the first phase of the evidentiary hearing on these motions, the court heard many weeks of testimony which established that law enforcement had engaged in illegal activity in other cases not related to this defendant's case. During the initial testimony of deputies Tunstall and Garcia, they were asked about their experience within the jail as "special handling" deputies, and whether they had been involved in or had any knowledge of any of the alleged misconduct. Both denied any such involvement, and, when examined more specifically, essentially indicated that they had limited recollections of many of these events and no means of refreshing their vague recollections of the relevant events related to this defendant's housing in the jail.

The court is not privy to the exact means whereby the People and the defendant became aware, after the conclusion of the first phase of this hearing, that the Orange County Sheriff has for many years maintained within its jail records system a database known as TRED. Nonetheless, the court has now heard testimony that the TRED system has existed for at least a decade, that classification and special handling deputies access it on a daily basis, and that the TRED records contain significant information about inmate cell movements and the reason for such transfers. During their initial testimony, despite fielding inquiries that should logically have triggered responses about the existence and content of TRED records, neither Tunstall nor Garcia ever mentioned their knowledge and regular use of TRED during the years they worked in the jail.

Deputy Tunstall, during his recent appearance before this court, testified that, despite his belief that TRED records would be the best place to look for information concerning inmate transfers, and his understanding before his original testimony that the reason for this defendant's cell placement was critical to the resolution of the pending motions about which he was testifying, it "never crossed his mind" to look at the TRED records or to reveal their existence to counsel or this court. In response to questions posed by this court, Tunstall testified that TRED access was limited to "classification, special handling, and upper administration." He also told the court that he was never specifically instructed not to mention the existence of TRED records in court, and that he would have discussed them if anyone had specifically asked him about them despite his training that all TRED records were "confidential."

During his supplemental testimony deputy Garcia informed the court that he had reviewed TRED records in preparation for his original testimony because he understood the issues raised by the defendant's motion and the most reliable way to determine "who moved who and why" inside the

Orange County Jail would be to review the inmate's TRED records. Nonetheless, he agreed that, despite this belief and the direct nature of the questions he was asked, he never mentioned the existence of the TRED records during his initial testimony. After offering several possible reasons for this, Deputy Garcia ultimately explained his prior silence by stating "that's the way we were trained."

After listening to their recent testimony, and comparing it to the prior testimony of both deputies, this court concludes that deputies Tunstall and Garcia have either intentionally lied or willfully withheld material evidence from this court during the course of their various testimonies. For this court's current purposes, one is as bad as the other and it is therefore not necessary to engage in the semantical analysis required to determine which of these possibilities has occurred. This court will leave that evaluation to prosecutors employed by the executive branch of government.

What is crystal clear is this. Deputies Tunstall and Garcia were two of the Orange County Sheriff's most experienced classification and special handling deputies. Both worked in the Orange County Jail in those capacities for many years. During those years both became thoroughly familiar with the existence and function of the TRED records system. Each personally made thousands of entries in the TRED system. They understood that inmate moves were documented and often explained on the TRED system. Both testified that a review of an inmate's TRED records would likely be the best way to determine when and why that inmate's housing was changed. Tunstall and Garcia at least generally understood when they were first called to testify on the current motion what the issues to be discussed would be, and that these issues involved inmate movements within the jail. Neither mentioned the existence or content of the TRED records at any time during their initial testimony on the current motions.

To perhaps clarify the record, this is not the first time during this protracted hearing that deputy Tunstall's testimony lacked credibility. This court did not believe the earlier testimony of either Tunstall or deputy district attorney Eric Peterson when they unsuccessfully tried to shift responsibility for a serious discovery breach in another case to the shoulders of a former federal prosecutor.

In making its credibility findings, the court gives substantial weight to the testimony of deputy Jonathon Larson, another Special Handling deputy. Deputy Larson knew and worked with both Tunstall and Garcia. His duties approximated theirs. This court found Larson's acknowledgement of his informant responsibilities straightforward and credible:

Question: "Was one of your jobs to kind of develop informants in the jail, identify them and manage them if they were of assistance?"

Answer: "I would say yes." (Reporter's Transcript, page 6740)

This testimony directly contradicts that of both Tunstall and Garcia on this subject.

The court also found one aspect of deputy William Grover's testimony remarkably candid. Grover was another long time classification and special handling deputy inside the Orange County Jail. Grover knew and worked with both Tunstall and Garcia for many years. Deputy Grover testified that he was trained from "day one...in classification and special handling" (R.T. 6700) that he was never to mention the

existence of the TRED records since they were part of “an internal sheriff’s department secured data system and we don’t discuss it” (R.T. 6701). Grover’s testimony is often inconsistent with the recollections of both Tunstall and Garcia on key issues.

As a result of such testimony, and this court’s evaluation of the demeanor of these witnesses as they testified and the inconsistency of their various sworn statements, the court finds, as stated above, that both Tunstall and Garcia lacked credibility. The court further believes that these sheriff’s deputies, due to their training and experience, intentionally failed to tell anyone outside of a limited number of sheriff’s personnel, at any time, about the existence of the TRED record system, even when such information was called for by questions asked of them under oath in court.

In People v. Guillen (2014) 227 Cal. App. 4th 934, which was discussed by this court in its original ruling, the well-respected presiding justice of Orange County’s local Court of Appeal wrote that a trial court may appropriately dismiss a criminal prosecution based upon a finding of “outrageous government conduct” when such conduct is “so grossly shocking and so outrageous as to violate the universal sense of justice.” Guillen, supra, 227 Cal. App. 4th at p. 1004. That rule may not strictly apply to the current motion, however, since this defendant does not seek the dismissal of any charge. In fact he has entered guilty pleas to all of the serious charges filed against him and does not ask to withdraw his guilty pleas. Rather he asks that this court bar a penalty trial.

It is arguable whether or not the evidence currently before this court related to alleged prosecutorial misconduct reaches the standard of “outrageous government conduct” discussed in Guillen and other cases. What cannot be debated is the fact that serious, ongoing discovery violations continue to occur in this case. This court therefore now elects to impose additional sanctions for these discovery violations, rather than for any broader course of ongoing prosecutorial misconduct. This is consistent with the discretion conferred upon the court by People v. Jenkins (2000) 22 Cal. 4th 900, which was also discussed in the court’s original ruling. Pursuant to Jenkins, this court has “broad discretion” to sanction the People “for discovery abuse” by the prosecution team.

There is no direct evidence before the court to support the suggestion that the District Attorney or any of his deputies was actually aware of the existence of the TRED record system until after the completion of the first phase of this hearing and the court’s initial ruling. But that does not resolve the issue since, for discovery purposes, “(t)he individual prosecutor is presumed to have knowledge of all information gathered in connection with the government’s investigation.” In re Brown (1998 17 Cal. 4th 873, f879, citing United States v. Payne (1995) 63 F. 2d 1200, 1208.

Given the issues raised by the defense motions, the People’s failure to provide the defense with any information whatsoever for nearly two years concerning the existence of the computerized TRED housing records maintained within the Orange County Jail, despite repeated orders from this court to produce just such records, constitutes a serious discovery violation. The defendant argues that his motion to bar the People from seeking the death penalty is the only viable remedy for the ongoing discovery violations that have been demonstrated by the evidence produced during both phases of this hearing since permitting a penalty trial under these circumstances would necessarily invite an “arbitrary

and capricious” verdict. This court respectfully disagrees. This court believes that an appropriate alternative trial sanction can be crafted to prevent just such an unacceptable result. With that in mind the court now imposes the following additional trial sanctions for the serious, continuing discovery violations that have occurred in this case.

Evidence during the People’s penalty trial presentation shall be limited to 1) evidence directly related to the acts committed by this defendant on October 12, 2011; 2) statements made by the defendant before his booking at the Orange County Jail; and 3) victim impact evidence. Any additional aggravating evidence is excluded from the People’s penalty case in chief presentation. Should any counsel feel that this court should reconsider any aspect of this order as a result of developments at trial, before any other aggravating evidence is mentioned in the presence of the jury counsel is ordered to broach the subject with the court outside the jury’s presence. This court believes that such evidence is not likely to produce an “arbitrary and capricious” verdict since it involves only evidence that directly relates to events that the defendant himself has admitted through his own pleas of guilty.

RECUSAL MOTION

As for the defendant’s motion to recuse the District Attorney’s office, the legal rules concerning recusal remain the same as previously discussed. To justify a recusal order, it is the defendant’s burden to demonstrate that 1) the District Attorney has a conflict of interest; and 2) the conflict is “so grave as to make a ‘fair trial’ unlikely.” Haraguchi v. Superior Court (2008) 43 Cal. 4th 706, 713. This court previously ruled that the defendant had failed to meet this burden.

But the evidentiary ground has now shifted. In its original ruling, this court wrote that it had “not lost confidence that the duly elected District Attorney of this county has the ability to competently and ethically complete the prosecution of this serious matter” and therefore denied the recusal request. This ruling was largely based on the court’s conclusion that any prosecutorial misconduct the court found in other cases was not related to the misconduct in this case. Therefore, the prior ruling concluded that “the unrelated misconduct becomes irrelevant to the resolution of the pending motions.” In light of the recent evidence, the court no longer harbors this belief.

In its original ruling, this court expressed concern over the fact that “throughout this pending litigation additional materials that appear to have been subject to this court’s January, 2013 discovery order have continued to emerge.” It is now apparent that the discovery situation in this case is far worse than the court previously realized. In fact, a wealth of potentially relevant discovery material--an entire computerized data base built and maintained by the Orange County Sheriff over the course of many years which is a repository for information related directly to the very issues that this court was examining as a result of the defendant’s motion--remained secret, despite numerous specific discovery orders issued by this court, until long after the initial evidentiary hearing in this case was concluded and rulings were made.

As stated above, there is no direct evidence to suggest that the District Attorney actively participated in the concealment of this information from the defense and the court. Which really just aggravates the entire situation because someone has to be in charge of criminal investigations and prosecutions in

Orange County. At times this may create a conflict of interest between prosecutors bound by their legal and ethical constraints and peace officers who may try to cut legal corners for the sake of expediency or some other purpose. The evidence indicates that such a conflict of interest exists in this case. Under such circumstances it is the District Attorney's responsibility to resolve any such conflict by respecting and protecting the rule of law rather than by ignoring any attempt to compromise a suspect's statutory or constitutional rights. The evidence indicates that such resolution has not occurred in this case.

As the chief law enforcement officer in this county the District Attorney is responsible for the actions of his agents. In this case the evidence demonstrates that some of those agents have habitually ignored the law over an extended period of time to the detriment of this defendant. As a result, after reconsidering the evidence it heard during the initial phase of this hearing along with the recent supplemental evidence, this court has reached the following conclusion.

The District Attorney has a conflict of interest in this case which has actually deprived this defendant of due process in the past. And given this ongoing conflict, the District Attorney's continued participation in this prosecution will likely prevent this defendant from receiving a fair trial in the future. After a period of what can at best be described as benign neglect concerning the actions of his law enforcement partners, the District Attorney cannot or will not in this case comply with the discovery orders of this court and the related constitutional and statutory mandates that guarantee this defendant's right to due process and a fair trial. Therefore, the defendant's motion to recuse the office of the Orange County district Attorney must be and is granted.

This court does not order the District Attorney's recusal as a punitive measure. As the Supreme Court said in People v. Bryan (2014) 60 Cal. 4th 335, 374, recusal "is not a mechanism to punish past prosecutorial misconduct." Recusal is instead a remedial measure designed to insure that any future trial is fair. That is exactly this court's aim in issuing this extraordinary recusal order.

CONCLUSION

Certain aspects of the District Attorney's performance in this case might be described as a comedy of errors but for the fact that it has been so sadly deficient. There is nothing funny about that. In fact what makes the situation here especially disconcerting is that this performance has deprived this defendant, the people of Orange County, and especially the community of Seal Beach, of the timely resolution of this case which all parties deserved. And which should have, could have, and likely would have been achieved but for this performance. Justice delayed has resulted in the denial of justice to all concerned here.

With that thought in mind, this court now answers its own questions:

- 1) The additional evidence presented convinces this court that the defendant has suffered a personal due process deprivation as a result of significant discovery violations which the court was unaware of when it made its initial findings and orders.

As discussed in People v. Guillen, supra, at pages 1003-04, "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the (g)overnment activity in question violates some protected right of the defendant." (Citing Hampton v. United States (1976) 425 U.S. 484, at 490.) Here the court finds that when the People presented false and/or intentionally misleading testimony during this defendant's own motions the defendant's due process rights were violated to his personal detriment. This is so whether or not the prosecution was actually aware that the testimony of any witness was either false or intentionally misleading since the District Attorney is legally responsible for the acts of his agents.

Notwithstanding this finding, in the exercise of its discretion the court elects to impose additional trial sanctions related to the defendant's first motion (the motion to preclude a penalty trial in this matter) on the basis of its finding that serious additional discovery violations have occurred since the court issued its initial ruling. As a result of those discovery violations, the court now orders that, during the People's case in chief presentation during the defendant's penalty trial, evidence will be limited to that which 1) directly relates to the defendant's conduct on October 12, 2011 in Seal Beach; 2) statements the defendant made before he was booked into the Orange County jail; and 3) victim impact evidence. The defendant's specific motion to preclude a penalty trial is denied.

The People contend that People v. Uribe (2011) 199 Cal. App. 4th negates the court's ability to impose additional sanctions. This court respectfully disagrees. The cases are distinguishable, and the Uribe court itself observed that "...when prosecutorial misconduct impairs a defendant's constitutional right to a fair trial, it may constitute outrageous government conduct warranting a dismissal." Uribe, supra, at 841. But today's order dismisses nothing, neither any charge nor any other allegation or enhancement. Nor are the additional sanctions imposed based upon a finding of outrageous government conduct. Rather, these penalty trial sanctions are imposed pursuant to the discretion conferred on this court by the Supreme Court in Jenkins, supra for serious discovery violations.

- 2) The additional evidence forces this court to reconsider its original ruling on the recusal motion. As a result of that reconsideration, this court finds it necessary to recuse the entire office of the Orange County District Attorney.

Even at this late date, after more than two years of concerted effort by a team of OCDA's most experienced prosecutors, the court finds that the District Attorney lacks the apparent ability to achieve compliance with his constitutional and statutory discovery obligations in this case. This chronic failure stems from a conflict of interest on the part of the District Attorney as discussed herein. This conflict of interest has to date deprived the defendant of his right to due process and a fair trial. Unless the situation is corrected immediately, it will continue to do so. The court makes this finding despite the parties' stipulation that, since this court made its pivotal discovery order in late January of 2013, the People have produced over thirty thousand pages of informant related discovery.

In this case, the District Attorney's conflict of interest is not imaginary. It apparently stems from his loyalty to his law enforcement partners at the expense of his other constitutional and statutory obligations. In the face of this conflict of interest the evidence demonstrates that, in this case, the

District Attorney cannot or will not insure compliance by other team members with the orders of this court. The defendant has as a result of this conflict of interest suffered a personal due process violation that has deprived him of a trial for well over two years and will likely continue to do so in the future. As a result, the District Attorney and all of his deputies must be recused.

Despite the foregoing rulings, this court remains fully aware of its obligations to both this defendant and this community. As the court observed in Guillen, critical rights are implicated on both sides.

“The rights of the respective parties here are extremely important ones, namely, defendant’s right to a fair trial and the People’s right to prosecute persons believed to be responsible for the commission of serious crimes.” Guillen, supra, at pages 1006-07, citing Uribe, supra at 857-58.

These potentially competing rights must be fairly and appropriately reconciled in every case, based on the facts of each individual case, if California’s criminal justice system is to remain respected and viable. It is this court’s responsibility to conscientiously engage in that reconciliation process on a case by case basis. With that responsibility in mind, this court finds that the evidence at hand in this case demonstrates that additional trial sanctions must be imposed here. The evidence also requires that the District Attorney and his deputies be relieved of their responsibilities in this matter. Those responsibilities shall immediately be assumed by California’s Attorney General. This case must then proceed deliberately to its just conclusion through a penalty trial during which qualified representatives of the Orange County community will determine the appropriate punishment for the crimes this defendant has admitted committing over three years ago.

The court once again commends litigation counsel for their preparation and presentations during the hearings on this motion.

Dated:

3/12/15



Judge