United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Judge Zagel	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CR 888	**DATE**	April 14, 2010
CASE TITLE	UNITED STATES OF AMERICA v. ROD BLAGOJEVICH, et al.		

DOCKET ENTRY TEXT:

Motion by Sun Times Media LLC, Associated Press, and Chicago Tribune Company to intervene and for immediate access to the *Santiago* proffer filed under seal (295) is granted.

STATEMENT

I have examined written submissions respecting the pretrial proffer of evidence in support of the prosecution's representation that there is enough evidence of the existence of a conspiracy that admission of alleged co-conspirators' statements is warranted under a well-known exception to the rule against hearsay evidence. *See* Fed. R. Civ. P. 801(d)(2)(E), and *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1987). The proffer was filed under seal so that objections to its public disclosure could be made. The two defendants have filed papers urging redactions. The redactions sought would cover those portions of the proffer that, it is represented by the prosecution, contain transcriptions of excerpts of certain recorded conversations. The rationale for the redactions are two. The first is that the inclusion of a part of the recording (rather than all the recording) could give the public an incorrect impression of the evidence. The second is that release of a printed excerpt within forty-eight days of the start of trial proceedings could contaminate the jury pool. There is no challenge to the accuracy of the written transcription of the recordings.

In order to determine whether the preconditions for admission of the alleged co-conspirators' statements are met, it is necessary for me to consider the transcriptions, so the substance of the statements will be considered by me in ruling whether the preliminary showing of admissibility has been made. Redaction of material which is not considered in reaching a decision is generally permissible on a variety of grounds. Indeed the rules provide for striking certain kinds of material.

Redaction, in cases where the redacted words are relevant to the case and considered in reaching a decision, is still permitted but discouraged. *See In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) ("Information that is used at trial or otherwise become the basis of decision enters the public record.") (citation omitted). The case for redaction has to be proven not presumed. It is not proven here. If the excerpt of a conversation would have a different meaning if more of the conversation were to be reproduced, the defendants here can reproduce it if either believes that the additional language would help defeat the claim of admissibility made

by the prosecution. They too may make preliminary filings under seal and suggest redactions if either believes such redactions are justified under law. But it is clear that the remedy to the objection that a portion of a statement may be misleading to the public (and the jury pool) is not redaction but disclosure of the omitted portion. This is true as well when the objection is not that some words had been edited out but rather that another conversation diminishes or destroys the prosecutorial value of the words cited by the Government.

Disclosure of written material a month and a half before the beginning of trial does not come close to presenting a significant threat that a fair jury cannot be found. The experience of the courts in cases which attract significant news coverage has shown that pretrial news reporting is an overstated menace to fair jury trials.

The kind of person who would qualify as a juror even includes, as the Supreme Court has said, a person who has an opinion of the guilt or innocence of the accused so long as that person can put aside that opinion and decide the case on the evidence presented in the courtroom. *See Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). This rule should come as no surprise. Few of us have gone through life without often discovering that which we firmly believed to be true was in fact false. Those who do have firm opinions that cannot be set aside are usually honest enough to say so. The convinced partisan who denies bias in order to serve on a jury is, ordinarily, seen by court and counsel for what he or she is. More importantly, most people do not retain detailed knowledge of what they read in newspapers or what they hear and see in electronic media. Part of this stems from the sheer volume of media today. Part of it stems from the fact that what is reported seldom has a direct bearing on the lives of those who hear it. It may be interesting to find out that large non-native snakes have been found in the Everglades, but it is not important to the vast majority of Americans, and this is why such stories are not endlessly repeated. There is no urgent need to retain much of what the media reports.

The events which are the subject of this case are not those which make a lasting impression on the mind of readers. The words in papers and magazines and the words read by an anchor on radio or television will not be retained in significant detail by members of the public.[1] I expect that many members of the jury pool will have an impression about the case to be tried. Many have such impressions even now. I do not expect that the printed words in the proffer reprinted or read aloud by news readers will affect the ability of a significant number of potential jurors to comply fully with the rule that they must decide the case on the basis of the evidence heard in court without any reliance on whatever they remember that they read in or saw on the news.

For the foregoing reasons, the motion by Sun Times Media LLC, Associated Press, and Chicago Tribune Company to intervene and for immediate access to the *Santiago* proffer filed under seal is granted.

[1] I do not consider here whether a different standard should apply to release of actual recordings containing the voices of parties to a litigation. It is possible that the impact of such recordings might be far greater than standard news reporting. In any event, no actual recordings have been offered in support of a request for ruling. Such recordings have thus far played no role in any judicial decisions in this case.