U.S.C.A 09-30106

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
vs.	)
	)
ALFRED WAHTOMY,	)
	)
Defendant-Appellant.	)
	)

ANSWERING BRIEF OF THE UNITED STATES
Appeal from the United States District Court
for the District of Idaho
U.S.D.C. CR-08-096-E-BLW
The Honorable B. Lynn Winmill, Chief District Court Judge

THOMAS E. MOSS
United States Attorney

MICHELLE R. MALLARD
Assistant United States Attorney
801 East Sherman, #192
Pocatello, Idaho 83201
(208) 478-4166
Counsel for Plaintiff-Appellee
United States of America

Robert K. Schwarz
Federal Defenders Service
of Idaho
350 North 9th Street, Suite 300
Boise, Idaho 83702
(208) 388-1600
Counsel for
Defendant-Appellant

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. The judgment appealed from is final. This Court has jurisdiction over final orders under 28 U.S.C. § 1291. Defendant's appeal is from a judgment of conviction. The district court judgment was entered on March 11, 2009. The notice of appeal was timely filed on March 11, 2009.

Alfred Earl Wahtomy ("Defendant" or "Wahtomy") is currently incarcerated with the Bureau of Prisons at LaTuna FCI, with a sentence satisfaction date of October 26, 2020.

STATEMENT OF THE ISSUE

Whether Wahtomy's due process rights were violated when the district court quashed the subpoena issued to Tribal Court Judge Rosaphine Coby.

STATEMENT OF THE CASE

This is a criminal case in which Wahtomy claims that the district court violated his due process rights by quashing a subpoena issued to Shoshone-Bannock Tribal Court Judge Rosaphine Coby (hereafter "Tribal Judge Coby").

On April 23, 2007, an indictment was filed charging the defendant, Alfred Wahtomy, with one count of aggravated sexual abuse and one count of assault

resulting in serious bodily injury. ER 1-2.[1]

Before trial, Wahtomy subpoenaed Tribal Judge Coby and other Tribal Court officials. ER 6-7. The subpoena required Tribal Judge Coby's testimony at a hearing on defendant's motion to suppress evidence from a search warrant. Subsequently, motions to quash the subpoenas were filed by the Government and by the Shoshone-Bannock Tribe. ER 188. A hearing was then held to determine whether the subpoenas should be quashed. ER 5. Wahtomy withdrew all the subpoenas except for the one issued to Tribal Judge Coby. ER 10-11. The district court granted the Government's and the Tribe's motions, quashed the subpoena issued to Tribal Judge Coby, and issued a written decision. ER 18 and 67.

On November 17, 2008, a jury trial commenced on a superseding indictment and continued for four days. ER 190-191. The jury found Wahtomy guilty on both counts. ER 177. Wahtomy was sentenced to 172 months imprisonment on Count One and 120 months imprisonment on Count Two. ER 178. Wahtomy then filed this appeal challenging the court's order quashing Tribal Judge Coby's subpoena. ER 183.

STATEMENT OF FACTS

On March 22, 2008, in the late evening hours, Wahtomy; his girlfriend, T.P.; and T.P.'s cousin, Martin Derou Auck (hereafter known as "Auck") were drinking at

[1]"ER" refers to the Defendant-Appellant's Excerpts of Record.

Wahtomy's home on the Fort Hall Shoshone-Bannock Indian Reservation. SER 11-12.[2] Wahtomy and T.P. began arguing. SER 12. Wahtomy began beating T.P. with a jack handle and large wooden dowel. SER 12-13. Amidst the beating, Wahtomy raped T.P. with the dowel. SER 13. As a result of the beating, T.P. was bleeding from the mouth, nose, ears, and genital area. SER 14, 24. She sustained serious bruising over her face, arms, torso, buttocks and legs. SER 17, 19, and 34. Wahtomy or Auck took T.P.'s cell phone from her that night. SER 15, 17.

The next morning, Wahtomy told T.P. that they were all going to the Jet Stop convenience store. SER 18. When they arrived, T.P. went to a clerk and asked her to call the police. SER 18. T.P. told the clerk that Wahtomy had raped her and Wahtomy and Auck had beat her up the night before. SER 4, 18. The clerk called the police who immediately responded. SER 4, 18.

When patrol officers from Fort Hall Police Department arrived, T.P. was taken to a hospital. SER 18. Patrol officers spoke to Wahtomy and Auck and arrested them for intoxication. SER 6, 9. Detective Joe Roberts of the Fort Hall Police Department obtained search warrants for Wahtomy's residence and vehicle from Tribal Judge Coby. ER 30-31. Evidence relating to the crime was obtained during the search. ER 41-42. When interviewed later, Wahtomy admitted the rape and assault. SER 51-52.

[2]"SER" refers to the Government's Supplemental Excerpts of Record.

Prior to trial, Wahtomy filed a motion to suppress evidence obtained from the search warrant. ER 187. Wahtomy issued subpoenas to several Tribal authorities to testify at the hearing on the motion to suppress. ER 6-7. The government and the Shoshone-Bannock Tribe both filed motions to quash the subpoenas. ER 188.

A hearing was held on the motions to quash. ER 5. The defense withdrew all the subpoenas except for the one issued to Tribal Judge Coby. ER 10-11. At the hearing, Wahtomy proffered that Tribal Judge Coby was his ex-stepdaughter. ER 8. The trial court quashed the subpoena against Tribal Judge Coby and issued a written decision. ER 18, 67. The motion to suppress was denied after a hearing and is not being appealed. ER 189.

The crime was committed on the Fort Hall Shoshone-Bannock Indian Reservation. SER 11. The Reservation has between 2,000 and 3,000 residents. ER 13. The tribe has about 5,000 enrolled members. ER 13. "In a sense everybody is related in some degree." ER 13.

SUMMARY OF ARGUMENT

The district court quashed a subpoena issued to the Tribal Court Judge who signed the search warrant authorizing a search of Wahtomy's residence. Defendant's subpoena was issued to compel Tribal Court Judge's testimony at a hearing on Wahtomy's motion to suppress. Wahtomy argues on appeal that quashing of the

subpoena was a violation of right to compulsory process and therefore a violation of the Due Process Clause.

The district court found that Wahtomy did not make a plausible showing that the testimony he sought would be relevant, material or vital to his defense. The district court's finding was not an abuse of discretion because Wahtomy could not articulate what testimony he sought from the Tribal Court Judge.

Wahtomy also argues on appeal that he had a general due process right to inquire into the Tribal Court Judge's qualifications to issue search warrants. There is no such due process right. Further, Wahtomy was offered the opportunity to obtain that information informally and rejected it.

ARGUMENT

Standard of Review

Abuse of discretion is the standard of review applied to a district court's decision to quash a subpoena. *United States v. George*, 883 F.2d 1407, 1418 (9th Cir. 1989); *United States v. Polizzi*, 801 F.2d 1543, 1551 (9th Cir. 1986); *Donoghue v. Orange County*, 848 F.2d 926, 931 (9th Cir. 1987). Due process claims are reviewed *de novo*. *United States v. Lewis*, 979 F.2d 1372, 1374 (9th Cir. 1992); *United States v. Bahamonde*, 445 F.3d 1225, 1228 (9th Cir. 2006).

I. WAHTOMY'S DUE PROCESS RIGHTS WERE NOT VIOLATED

WHEN THE DISTRICT COURT QUASHED A SUBPOENA ISSUED TO TRIBAL JUDGE COBY

A. **Wahtomy's right to compulsory process was not violated because he did not make the required "plausible showing" that the witness' testimony would have been relevant, material and vital to his defense.**

Wahtomy claims that his due process right to compulsory process was violated when the district court quashed the subpoena directed at Tribal Judge Coby who issued the search warrant for Wahtomy's residence. Appellant's Opening Brief 8. He argues that because the tribal judge was Wahtomy's ex-stepdaughter, he had the right to subpoena her and examine her to determine whether or not she was "neutral and detached" as required by the Fourth Amendment to the Constitution. This argument is not supported by established case law.

The Supreme Court has stated that "[t]he Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining *witnesses in his favor*.'" *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (italics in the original). The Supreme Court requires that the defendant "must at least make some plausible showing of how [a witness'] testimony would have been both material and favorable to his defense." *Valenzuela-Bernal*, 458 U.S. at 867.

Wahtomy's ultimate goal was to show that Tribal Judge Coby was not a neutral

and detached magistrate. However, this assertion was purely speculative. Wahtomy hoped that questioning Tribal Judge Coby might lead to facts that would be helpful to him. Wahtomy proffered that the judge was his ex-stepdaughter. He did not proffer any reason why that fact would have indicated she was not a neutral and detached magistrate.

"The Supreme Court has found an impermissible lack of neutrality in cases where the particular magistrate was also involved in law enforcement activities, had a pecuniary interest in the outcome of his decision, or had 'wholly abandoned' his judicial role." *United States v. Heffington*, 952 F.2d 275, 278 (9th Cir. 1991). Wahtomy did not make any proffer on any of the three areas *Heffington* cites as impermissible bases for lack of neutrality. Neither does Wahtomy now allege in any way that Tribal Judge Coby was involved in law enforcement activities, had a pecuniary interest in the outcome of her decision, or had "wholly abandoned" her judicial role.

Wahtomy does not argue that the ex-stepdaughter relationship would be material and relevant to his defense. Nor does Wahtomy claim that the relationship alone constitutes a plausible showing that the judge was not neutral and detached. Wahtomy made no proffer as to whether he had ever met the judge, whether they had a good or a bad relationship or any relationship at all, how long ago the relationship

existed, whether the judge should have been aware of the relationship, or whether there was any reason why she might have been biased for him or against him.

As the trial court stated, "The Sixth Amendment does not guarantee the Defendant the right to embark on an unfocused fishing expedition." ER 69. Yet Wahtomy is claiming that the relationship alone "entitle[s] him to make *further inquiry* on the matter of his personal relationship with Tribal Judge Coby." Opening Brief of Appellant 14, italics added.

The *Heffington* case refutes Defendant's position and is very similar to the case at bar. In *Heffington*, the defendant complained that the magistrate issuing the search warrant in his case had represented a co-defendant in a prior criminal case and was thus not neutral and detached. *Heffington*, 952 F.2d at 278. In addition, the *Heffington* case also occurred in a rural area. *Id.* at 277 and 279.

This Court noted in *Heffington* that there was a "suggestion that [the judge] might have received confidential information [about] . . . the evidentiary facts at the warrant hearing. . ." *Id*. at 279. However, the Court stated that it was "reluctant to accept this . . . speculation as fact because '[the defendant] never offered to tell the trial court or this court what confidential information he thought [the judge] had acquired in connection with the previous case . . ." *Id*. at 279.

Just as in *Heffington*, Wahtomy is alleging that there *might* be some facts that

exist that *may* bear on whether Tribal Judge Coby was neutral and detached but he has failed to elucidate what those facts might be. This Court has already rejected that approach to disqualifying a magistrate in *Heffington*. The Court stated that "[h]ere the appearance [of partiality] clearly is not so 'extreme' that it constitutes a constitutional violation." *Id*. at 279.

Neither is the tenuous prior relationship cited by Wahtomy between himself and Tribal Judge Coby "so extreme" that it alone constituted a constitutional violation. This Court determined that even where an appearance of partiality may exist in rural counties, it is "not prepared to disqualify small-town judges on demand." *Id*. at 279. Further, this Court stated that "[a]lthough [the judge] may not have been the best possible 'neutral and detached' magistrate . . . to issue the search warrant, we find no constitutional defect in the warrant he issued." *Id*. at 280.

The *Heffington* Court noted that the trial court below made a harmless error analysis, finding that "it was clear that any magistrate would have found probable cause for a warrant." *Id*. at 279. Notably, Wahtomy has never claimed that the warrant at issue lacked probable cause, in spite of many invitations by the district court to do so. ER 21, 22, and 23. Wahtomy has not claimed at the trial court level or here on appeal that probable cause was lacking in the search warrant issued by Tribal Judge Coby.

Wahtomy made no proffer of what the judge's testimony would have been.

Like the defendant in *Heffington*, Wahtomy would like this Court to speculate on what facts *might* exist. Because Wahtomy made no proffer of what the judge's testimony would have been, it is impossible to find that he made a plausible showing that her testimony would have been material and favorable to him or that she was not neutral and detached.

B. WAHTOMY'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY HIS FAILURE TO ASCERTAIN TRIBAL JUDGE COBY'S QUALIFICATIONS.

1. **Tribal Judge Coby's qualifications are not relevant to due process concerns but nevertheless were available to him**.

Wahtomy claims that he was deprived of his due process rights because the district court would not allow him to examine Tribal Judge Coby to determine her qualifications to issue a search warrant. Appellant's Opening Brief 15, 16, and 19. Wahtomy argues that tribal courts do not have the same safeguards as state courts and thus he should be allowed to inquire into how Tribal Judge Coby was selected and what her qualifications are. *Id*. Wahtomy implies with his argument that only lawyers or those trained in the law should be allowed to issue search warrants. *Id.* at 17-18. Essentially he argues that there is a constitutional right to inquire into the qualifications of any trial court judge issuing a search warrant. Wahtomy provides no legal support for this argument.

The Supreme Court stated that ". . . it has never been held that only a lawyer or

judge could grant a warrant, regardless of the court system or the type of warrant involved." *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972). "[W]e do reject today . . . any per se invalidation of a state or local warrant system on the ground that the issuing magistrate is not a lawyer or judge." *Shadwick*, 407 U.S. at 352. The Supreme Court reasoned that "[o]ur legal system has long entrusted nonlawyers to evaluate more complex and significant factual data than that in the case at hand, [arrest warrants for those accused of driving under the influence]." *Id.* at 351-352.

Wahtomy's complaint that he has suffered a due process violation is even less supportable when the record is reviewed. The trial court stated,

> The tribe stands ready, as I understand it, to provide them informally information about the selection process that maybe (sic) involved with tribal judges. . . . Are you indicating the tribe would be willing to provide them informally the same kind of information that they would be able to obtain from the public record if it were a state court judge involved?

ER 13.

The Tribal attorney responded,

> Yes. . . . The law and order code does contain specific provisions that outline the qualifications for the associate judges in tribal court; the chief judge of the tribal court. I offered to obtain that and asked defense counsel if that is what he was looking for. I could not get a description of what facts are being sought in this case.

ER 13-14.

The Tribal attorney also noted,

> I attached to our reply brief a letter[3] that confirmed conversations that I had with [defense counsel] where we asked him what facts are you seeking to establish, and perhaps we can help you confirm those facts and obtain the government's stipulation to establishing those facts so that you can move forward with whatever legal theory you think applies to those facts without the necessity of hauling in tribal court judges . . .

ER 11, SER 1-2.

In its Memorandum Decision and Order, the district court stated:

> Wahtomy argues that the Tribes have blocked his ability to collect evidence to satisfy his burden to make a plausible showing. The Court disagrees. The record reveals that Tribal counsel offered to stipulate to facts but that defense counsel did not follow through on that offer.

ER 73.

So while Wahtomy now complains that his due process rights were violated because the district court would not compel Tribal Judge Coby to testify about her qualifications to issue a search warrant, he declined that very information when it was offered to him.

2. **There is no due process right to inquire into the qualifications of a judge who issues a search warrant**.

Wahtomy cites *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (exclusion of evidence and refusal to allow cross examination of witness against the defendant violated due process); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (denial of

[3]The letter provided to defense counsel is not a part of the record below but is provided here for reference.

defendant's right to confront and cross examine witnesses against him violated Sixth Amendment); *Alford v. United States*, 282 U.S. 687, 692 (1931) (defendant's right to cross examine witness against him violated); and *United States v. Alvarez-Lopez*, 559 F.2d 1155, 1155 (9th Cir. 1977) (defendant has right to full and robust cross examination of witness against him) as support for his argument that he had a due process right to inquire into Tribal Judge Coby's qualifications. All of these cases deal with the unquestioned right to cross examine the witnesses against a defendant. None of them deal in any respect with the situation at bar - the proposed compelled testimony of a Tribal Court Judge whose only involvement in the case was issuing a search warrant.

Converting the undisputed right to cross examine into a right to examine the judge who issued a search warrant is untenable. The district court judge stated that

> . . . frankly I cannot think of a more dangerous, slippery slope than to allow - whether it's a state court judge or a tribal judge - to permit the defense to then go into the qualifications of the judge issuing the warrant. Are we then going to require that they attend Yale Law School or Stanford Law School or perhaps attending a lesser law school is not adequate.

ER 19.

The district court judge also stated that

> I am very, very concerned with the idea that we would compel every state or tribal court judge every time there are warrants, find their way into a federal court proceeding if they have to come hand in hand and give their curriculum

> vitae to the judge so I can pass - so I can determine whether they pass muster as a good enough judge to hear this. I really think that is a huge stretch. . . . I think it would really create a terribly dangerous precedent to subject state or tribal court judges to that same kind of scrutiny.

ER 12.

Wahtomy was not deprived of any due process right when he was denied the right to compel Tribal Judge Coby to testify regarding her qualifications to be a Tribal court judge. No such right exists. Case law emphasizing the right to cross examination cannot be extrapolated to confer a right to examine the qualifications of any judge who issues a search warrant. Further, Wahtomy was offered the opportunity to ascertain Tribal Judge Coby's qualifications and rejected that opportunity.

CONCLUSION

The district court did not violate Wahtomy's due process rights by quashing the subpoena issued against the judge who issued the search warrant. The government respectfully requests that this Court affirm the judgment.

RESPECTFULLY SUBMITTED this 8th day of September, 2009.

THOMAS E. MOSS
United States Attorney

/s/
MICHELLE R. MALLARD
Assistant United States Attorney

STATEMENT OF RELATED CASES

There are no related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32 (e)(4), I certify that the answering brief is

__X___ Proportionately spaced, has a typeface of 14 points or more and contains __3860_____ Words, or is

_____ Monospaced, has 10.5 or less characters per inch and

____ Does not exceed 40 pages (opening and answering briefs)

Or 20 pages (reply briefs), or

____ Contains ____ words

September__8__, 2009 _____/s/_____

Pamela Groves

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I certify that I hand-delivered or mailed, postage-paid, a copy of the BRIEF OF APPELLEE to defense counsel.

I certify that the foregoing is true and correct.

Dated this 8th day of September, 2009.

/s/
MICHELLE R. MALLARD
Assistant United States Attorney