

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARZO BARBARO : CIVIL ACTION
 :
 v. :
 :
 DONALD T. VAUGHN, et al. : NO. 96-8661

MEMORANDUM ORDER

This is a habeas corpus action pursuant to 28 U.S.C. § 2254. Petitioner has filed a Motion to Alter or Amend and grant Relief from Judgment or for Reconsideration.

The essence of petitioner's motion is a request that the court review and reject the finding of the Magistrate Judge regarding the respective credibility of conflicting testimony by petitioner and his trial counsel, and then grant his previously denied counseled habeas petition. Petitioner's habeas counsel did not press the credibility issue in his objections to the Magistrate Judge's report. Petitioner has since retained new counsel who filed the instant motion.

Despite the absence of a specific objection, the court did review the record and did note in its decision the apparent reasonableness of the Magistrate Judge's determination. Nevertheless, the court retrieved the hearing transcript and reexamined it with a particular eye to the points asserted by new counsel in support of the contention that the testimony of

petitioner's trial counsel, Allan Sodomsky, "lacks the ring of truth."¹

The court does not discern in Mr. Sodomsky's testimony the purported "hostility" to petitioner. Moreover, even if he felt some hostility it does not follow that such "betrayed a probable lack of candor." One may naturally feel some hostility toward another who accuses one of professional dereliction without disregarding an oath to give truthful testimony.

It is not inherently incredible or incompetent for a defense attorney, particularly one who believes his client is guilty, to review discovery material and to probe for weaknesses in and assess the strength of the government's case before committing his client to a version of the underlying events or evaluating the prudence of calling him to testify. The court has in a variety of criminal cases encountered highly skilled defense attorneys who indicated that a decision on whether a defendant would testify would not be made until the prosecution had rested.

The court cannot agree that Mr. Sodomsky's testimony that he advises but does not dictate to clients regarding tactical decisions "betrays either a fundamental ignorance of the rules of professional conduct that govern the practice of criminal defense or a lack of candor in his answers before

¹ Counsel does not point to facial expressions, physical composure or anything about the witness not discernible from the transcribed record.

Magistrate Judge Welsh."² Except for certain fundamental decisions, a defense lawyer need not defer to his client's views on trial tactics or strategy.³ It does not follow that a lawyer is precluded from conferring with a client whose liberty is at stake about trial tactics and honoring the wishes of an insistent client in that regard, where doing so is consistent with counsel's professional and ethical responsibilities. Moreover, the particular decision which was the focus of this testimony was one which ultimately is a defendant's to make.⁴

Mr. Sodomsky's testimony that he concluded the tape recorded voice of "Cerniso" was that of petitioner is not incredible even as to portions which were in Spanish. Petitioner's voice was "very distinctive" and voice recognition may well turn on resonance, intonation or timbre. It is uncontroverted that Mr. Sodomsky even obtained ex parte use of the courtroom to play the tapes to see how they would sound at trial to the jury. It is difficult to find other than that Mr. Sodomsky made an earnest and informed conclusion that a jury

² Mr. Sodomsky had been an assistant district attorney for 3½ years before starting a private criminal defense practice 8 years ago.

³ See Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996); Gov't. of the Virgin Islands v. Weatherwax, 77 F.3d 1425, 1433 (3d Cir. 1996).

⁴ Mr. Sodomsky's testimony regarding trial tactics and dictating to clients was given in the context of responses to questions about defendant's decision not to testify.

would recognize "Cerniso" as petitioner were they to hear him testify.

Petitioner's current counsel has skillfully parsed each bit of testimony and pounced upon each nuance or variation in phraseology in an effort to foster the impression that Mr. Sodomsky was untruthful. This is simply not the impression of the court, however, from a review of the transcript as a whole. Regarding the credibility of the witnesses, petitioner's hearing counsel stated "[y]ou've heard both sides on direct examination and cross-examination and I have been before this Court a number of times and you're very perceptive."⁵ The able Magistrate Judge perceived that Mr. Sodomsky testified truthfully regarding petitioner's decision not to testify and this court does as well.⁶

⁵ Petitioner's hearing counsel is a skilled and experienced defense attorney. He has been a member of the bar of this court for almost 16 years and has served as appointed CJA counsel for a decade.

⁶ Petitioner fairly notes that his aggressiveness in interjecting statements at his habeas hearing does not establish that he had the confidence or audacity similarly to assert himself at his trial four years earlier in 1993. It is not, however, entirely irrelevant or inappropriate for the Magistrate Judge to note such conduct, particularly when petitioner acknowledged that he discharged his first attorney because of disagreements before retaining Mr. Sodomsky in 1992. In any event, this is not something on which the court relied in assessing the credibility of the witnesses.

Except insofar as the court's willingness to reexamine the testimony in light of new counsel's arguments may be viewed as "reconsideration,"⁷ petitioner's motion will be denied.

ACCORDINGLY, this day of January, 1998, **IT IS HEREBY ORDERED** that petitioner's Motion to Alter or Amend Judgment and for Relief from Judgment or Reconsideration (Doc. #16) is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.

⁷ In so doing the court does not suggest that the presentation of objections or arguments which could have been but were not made prior to judgment is a sound basis for relief under Rule 60(b) or 59(e).