

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTIAN PETERSON,

Defendant.

OPINION AND ORDER

12-cr-87-bbc

Believing that it may obtain information to determine whether defendant Christian Peterson committed perjury in his affidavit in support of his request for the appointment of counsel at government expense, the government seeks an order unsealing the affidavit. In addition, it seeks leave to review any supporting documentation provided by defendant in support of his affidavit and a transcript of any hearing held on the matter. The file contains no such documentation or transcript so I will focus on the affidavit, which is docketed as dkt. #16 and again as dkt. #21 and bears a handwritten notation by United States Magistrate Judge Stephen Crocker to the effect that counsel should be appointed. Other than bearing different dates added by the magistrate judge, the two documents appear to be identical.

I conclude that because the criminal proceedings in this court have come to end and because defendant has no right to file a false affidavit in support of his request for counsel

at government expense, the government is entitled to view defendant's affidavit.

BACKGROUND

Defendant was arraigned in this court on October 16, 2012. At the time he was represented by privately retained counsel, Dean Strang. On January 31, 2013, Strang wrote the court to alert it to the possibility that defendant might be retaining new counsel if he disagreed with Strang's legal opinion. Dkt. #11. (Strang did not say what the opinion was, but did say that he had encouraged the defendant to hire new counsel promptly. *Id.*) On February 25, 2013, defendant filed his financial affidavit with the court; the magistrate judge found that counsel should be appointed at government expense. Two days later, Strang informed the court that defendant would be represented by the Federal Defender Services of Wisconsin. Dkt. #17.

OPINION

The case law on the government's motion is sparse. The government has cited United States v. Kahan, 415 U.S. 239, 243 (1974), a case in which a former immigration inspector was tried for receiving gratuities for official acts and perjury before the grand jury. The Court approved the district court's decision to allow the government to put in evidence at trial that the defendant had not disclosed the existence of certain bank accounts held for his children. It distinguished the case from others in which it had not allowed the government to put in evidence of statements made in support of a motion to suppress, saying that it had

done so to preserve the defendants' constitutional rights; in the case before it, it held that "the incriminating component of respondent's pretrial statements derives not from their content but from [Kahan's] knowledge of their falsity." Kahan, 415 U.S. at 243. The opinion offers little guidance for this case, in which the question is whether the government can unseal an affidavit, not to use the information at trial but to pursue a separate prosecution after all the trial proceedings have been concluded.

In opposition, defendant cites two cases raising questions about the disclosure of documents submitted in support of a request for court-appointed counsel. Both involved requests from newspapers seeking public release of documents. Neither provides much guidance in this case, but only the second could be read as supporting a denial of the government's motion. In In re Boston Herald, Inc., 321 F.3d 174, 179-80 (1st Cir. 2003), the Court of Appeals for the First Circuit upheld the district court's decision to deny newspapers access to such documents, at least until the defendant had exhausted his appeals, on the ground that disclosure would unduly intrude on the privacy of the defendant and his family.

In United States v. Gonzales, 150 F.3d 1246, 1259 (10th Cir. 1998), the court of appeals considered the question of media access as it related to documents submitted in support of requests for appointment of counsel at government expense, as well as to documents showing how much counsel charged the government for their own work and for expert witnesses and investigators. The court found that no right of access to such materials existed but that the district court had discretion to release the Criminal Justice Act vouchers

showing the total amounts expended for defense after the defendants had been sentenced. It held that the district court should not release the sealed materials submitted in support of the requests for appointed counsel. Although the court was not considering whether the government could gain access to the information, as opposed to the media, it wrote that if disclosure meant that the government could bring new charges against a defendant or other individuals, such actions “would ultimately decrease the information the court could use to make a decision, would hinder the court’s fact-finding ability . . . and would, therefore, impede its ability to correctly decide whether and how much assistance to grant the defendant.” Id.

Defendant relies on Gonzales, but argues also that allowing his affidavit to be unsealed could be seen as retaliation by the government for exercising his constitutional right to trial. The government agrees that it would be inappropriate to use defendant’s statements directly against him in its case-in-chief or as a basis for new charges that are not related to perjury or false statement, 18 U.S.C. § 6002, but it contends that it has the authority to use the information in the affidavit to prosecute defendant for false statements he made in his affidavit. After all, it says, the affidavit requirement is there for a purpose: it imposes a requirement on the affiant to make truthful statements and threatens prosecution if he does not do so.

The most helpful guidance on this question comes from Vol. VII, § 210.40.20, of the Guide to Judiciary Policy published by the Administrative Office of the United States Courts, which provides as follows:

(g) The prosecution and other interested entities may present to the court information concerning the person's eligibility, but the judicial inquiry into financial eligibility must not be utilized as a forum to discover whether the person has assets subject to forfeiture, or the ability to pay a fine, make restitution, or compensate another person under the Victim/Witness Protection Act or other purposes not related to the appointment of counsel. **Such determinations, if appropriate, must be made at other stages of the proceedings in which the person seeking counsel is a party.**

(Emphasis added.)

According to the government, its request comes within the guide's instructions because it is not seeking information from the affidavit for any of prohibited purposes set forth in the Guide, but only to determine whether the statements made in the affidavit are true, as defendant swore they were. Defendant offers little to refute the government's position. He does argue that the government has not adduced sufficient evidence to support its motion to unseal, but the government identified in its initial brief, dkt. #199, evidence that defendant had income from a number of sources in 2013 that might have enabled him to pay for all or a portion of the costs of counsel. This is sufficient to meet the burden it must meet to require unsealing. Whether the information in the affidavit supports a finding of falsity is a question to be decided in the future, if the government decides to pursue a prosecution for false statements under 18 U.S.C. §§ 1621 or 1623.

ORDER

IT IS ORDERED that plaintiff United States of America's motion to unseal defendant's affidavit in support of his request for counsel at government expense, dkts.

##16 and 21, is GRANTED.

Entered this 5th day of December, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge