

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,)
)
 Plaintiff,)
)
 vs.)
)
 STEVEN JACOB,)
)
 Defendant.)

Docket 76

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ORDER

On August 7, 1990 the defendant was convicted by a jury of two counts of murder in the first degree and two counts of the use of a firearm to commit a felony. He was sentenced to life imprisonment on each of the murder convictions and to 6 $\frac{2}{3}$ to 20 years on each of the firearm convictions, all sentences to be consecutive to each other. The defendant appealed the convictions, and in a decision filed January 8, 1993, the Nebraska Supreme Court reversed the convictions and remanded the case to this court for a new trial. Although the defendant presented a number of issues on appeal, the basis for the supreme court's decision was the erroneous admission of statements made by one of the victims at the hospital shortly before her death.

The defendant has filed a "Plea in Bar" and "Amended Plea in Bar" arguing that this court is precluded from carrying out the order of the Nebraska Supreme Court because of prosecutorial misconduct during the initial trial proceedings.

The state has filed a Motion to Strike the "Amended Plea in Bar." This motion was taken under advisement and, on April 20, 1993, the parties agreed that the defendant could proceed with his evidence with respect to the "Amended Plea in Bar" while the Motion to Strike was still under advisement. At the close of the defendant's evidence, the state renewed its

Motion to Strike and moved to dismiss the proceedings for failure to show any prosecutorial misconduct.

Upon the arraignment of an accused, Neb. Rev. Stat. § 29-1817 states:

The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or been convicted, or been pardoned for the same offense; . . .

Obviously, a plea in bar is unavailable to raise the issues put forth by the defendant here. He was "arraigned" on December 13, 1989 and stood mute and the court entered pleas of not guilty, which proceeded to trial. There has been no acquittal nor pardon alleged by the defendant. There has been a conviction which was successfully appealed to the Nebraska Supreme Court who ordered a new trial. Therefore, for the purpose of Section 29-1817, there has been no "conviction." The state's Motion to Strike should be sustained insofar as the pleading filed by the defendant is referred to as a "plea in bar." However, the court will treat such pleading as a motion to dismiss on the grounds of prosecutorial misconduct.

Initially, this court notes that the issue of prosecutorial misconduct was raised by the defendant in his appeal to the supreme court but not ruled upon in their decision.

Although the defendant has submitted a number of authorities which allegedly support his theory, none of them are dispositive of his claim. It does appear to be the rule that in order for prosecutorial misconduct to bar the retrial of a defendant, such conduct must be shown to be motivated by bad faith or done to harass or prejudice the defendant. See United States v. Martin, 561 F.2d 135 (8th Cir. 1977).

The defendant has alleged that certain police reports were withheld by the state with respect to the alleged "dying declarations" of Melody Hopper. The defendant further alleges that upon obtaining these reports, a forensic expert retained by him concluded that Mrs. Hopper was shot while under the bed, and that this is contrary to the statements of the deceased to

Detective Barksdale at the hospital. The defendant argues that had he had such reports prior to the hearing concerning the admissibility of the deceased's "dying delcarations," the trial court would have ruled differently. This allegation is without merit. The agreement between the state and the defendant to furnish reports is dated June 21, 1990, subsequent to the hearings before Judge McGinn on the admissibility of the statements. In addition, the conclusion of the defendant's expert is not conclusive and binding - it merely is his opinion which might or might not be adopted by a trier of fact.

The defendant alleges that the state refused to furnish the defendant with hospital records prior to the preliminary hearing. There is no provision for discovery in a criminal case prior to the preliminary hearing under Nebraska law. Therefore, this allegation is without merit.

The defendant's allegation of perjured testimony offered by the state with respect to the number of times Melody Hopper had been married is not supported by any evidence of perjury, is of no real significance and not material to any issue in the case.

The defendant alleges that the state "permitted" and "coached" the emergency room physician, Dr. John Cherry, to testify falsely. There is no evidence to support this contention and appears to fall into the category of a scurrilous allegation. It is totally without merit.

The defendant contends that the " State permitted Officer Domgard to testify falsely regarding the trajectory of the bullet exiting the west wall of 1811 Urbana Lane." This allegation demonstrates a lack of understanding of human nature and the fact that answers to questions may vary depending upon the wording of the question and the breadth of the questioning. A review of the record on this subject reveals no "false testimony" and the court finds this allegation has no merit.

The defendant's complaint concerning a hospital chart that is alleged to have been altered is of no significance and without merit.

The defendant's contention that he was "silenced" by the state, i.e. prevented from personally being able to raise issues which would enable him to "compromise" both the prosecutor and his own defense counsel, by the state's timing in introducing the results of blood tests on the defendant's jeans is without merit.

The defendant's complaint with respect to an "off the cuff" comment by the prosecutor in the office of the defense counsel with respect to a 9mm gun in the possession of defense counsel is frivolous and without merit.

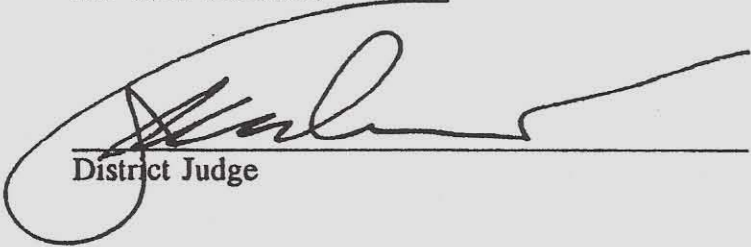
There is no evidence to support the defendant's allegation that a prosecution witness had a prior felony conviction or that the state withheld any such information.

The court finds that substantially all of the defendant's allegations are frivolous, scurrilous and without merit. There is not one shred of evidence to support the bare allegations of prosecutorial misconduct set forth by the defendant.

IT IS ORDERED that the state's Motion to Strike be sustained to the extent that the title of the defendant's pleading "Plea In Bar" be stricken. The pleading, which is a "motion to dismiss," is denied.

Dated June 1, 1993.

BY THE COURT:



District Judge