United States District Court

FOR THE DISTRICT OF NORTH DAKOTA

Southeastern Division

CR NO. C77-3003

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff,	*	
	*	**U.S. District Court for the District**
v.	*	**of North Dakota,**
	*	**Southeastern Division**
LEONARD PELTIER,	*	
	*	
Defendant.	*	

VOLUME XXV

Pages 5266-5285

{5266}

SATURDAY AFTERNOON CHAMBERS SESSION

April 16, 1977

(Whereupon, at the hour of 4:18 o'clock, p.m., the following proceedings were had in chambers with counsel, Messrs. Taikeff and Gilbert and Mr. Hultman, being present:)

THE COURT: Is this everybody?

MR. HULTMAN: I can't find anybody else, your Honor. I don't know. I can't speak for Mr. Taikeff?

MR. TAIKEFF: I think we finally whittled things down to reasonable proportions.

MR. HULTMAN: Right.

(Mr. Ellison enters chambers.)

THE COURT: The record may show that two notes have been handed to me, sealed notes handed to me by the Marshal. I have opened them.

The first -- or one of them, I do not know which, first or second -- one note states: Please give us the copy of Mike Anderson's testimony of his activities at the Wanda Siers' home.

Second note: Could we have the transcript of the incident in Canada when Leonard Peltier was caught by the Mounted Police? His first statement was, "I would have shot him out of his boots." What were the next two statements?

Each of these are signed by Dallas Rossow, Foreman.

{5267}

I have reference to Rule 43, Presence of the Defendant.

Rule 43(c) provides that the Defendant need not be present in the following situations:

(3) at a conference or argument upon a question of law.

This seems to be clearly a question of law so unless counsel feel otherwise, I am not asking that the Defendant be present for this discussion.

MR. TAIKEFF: We don't require his presence, your Honor.

THE COURT: Very well.

Well, I guess the Government has the burden of proof. I will let them respond.

MR. HULTMAN: Well, I am not sure, your Honor, again. One of the requests is some statements concerning --

THE COURT: (Interrupting) I might say this: They are asking for a portion of the transcripts, two different parts of the transcript. Of course, we have never had daily copy before, but in the past when I have had requests of this kind, I sent in a note stating that they have to rely on their own recollection.

MR. TAIKEFF: May I ask, your Honor, whether it would be your Honor's intention, if you don't follow the old practice, to read to them in open court the Q's and {5268} A's or to photostat what counsel agree on and the Court approves as the appropriate pages and just send them in?

THE COURT: I just have given it no consideration. If it is decided that this information should be given to them, I have not considered what procedure or form should be followed.

MR. HULTMAN: I think the Government would take the position -- and I am not even sure what it is that we are really talking about, one of those two items, the first one it is fairly obvious, I am not sure what they are talking about on the other one --

THE COURT: (Interrupting) Excuse me. So you may have it in front of you -- (handing). Sometimes it is a little easier. Then you can hand it to Mr. Taikeff.

MR. HULTMAN: All right. I think as a general proposition, the same as the position that the Court took with reference to instructions, that I think it would be generally unfair -- and I don't mean for the Government, I am just speaking in general terms -- that I think like taking a sentence out of context from the entire document that is in evidence would place undue emphasis as to that particular piece of testimony and not having other items that may likewise have a bearing on what that specific item is, so I would take the general position as to any request for a portion of the transcript, that I would {5269} object on the grounds that it would give undue influence to any given part of the transcript.

(Mr. Vosepka enters chambers.)

MR. TAIKEFF: In response to that, your Honor, I can see the basis for being concerned, such as in the case of offering a portion of the document and not allowing the opposing counsel to offer along with it every other relevant portion. However, here we have a case which is not counsel presenting information to a jury, but we have a case of the jury making a specific request, so their attention is apparently focused on something.

It seems to me that at least as far as the first request is concerned, it seems much easier to comply with. I don't know whether Mr. Hultman meant to say that, but that seems to be my present impression. There isn't a great deal of testimony dealing with that particular subject, and it seems that it would be possible to either read to them or duplicate for them that portion of the transcript which relates to that. It's rather narrow. They want Mike Anderson's testimony concerning his activities at the Wanda Siers' home, and I will bet altogether there aren't two pages of testimony on that very subject, maybe three at the most. I think that can easily be complied with, and I would be in favor of letting them have the exact testimony.

{5270}

I don't care whether it is read to them or whether they get it in the form of a photostat.

I would like to look at the second note before I comment on that particular subject.

(Examining) Now, that second note I find ambiguous with reference to this sentence: What were the next two statements?

I don't know whether the jury is asking about the things which were said immediately afterwards or whether they mean "What were the other statements he allegedly said", because there were a series of Canadian witnesses, each of whom testified to one or more statements, so I find the note ambiguous; and I think that perhaps in response to that we could ask them to be more definite about what they mean by the next two statements: do they mean what he said

immediately after he allegedly said, "I would have shot him out of his boots," or do they mean any other additional statement that was next testified to?

Then when they clarify, if it was unambiguous, I would be in favor of giving them the testimony.

THE CLERK: May I make a comment with regard to the request of Canadian statements? Did not the Defendant mark as an exhibit a series of four statements allegedly made by Peltier in Canada?

{5271}

MR. TAIKEFF: Yes.

THE CLERK: Would there be any confusion in their mind, could this be what they are seeking?

MR. TAIKEFF: They are not aware of what was on that piece of paper.

THE CLERK: Other than statements.

MR. TAIKEFF: They don't even know that. They know the piece of paper, after it was marked, was acknowledged by the Government to have been from a governmental source, and they never were told even generally speaking what the subject matter was on that piece of paper. Paragraph 4 was offered, but they are not aware of what it means. They would be clairvoyant if they were.

MR. HULTMAN: I think that's the very problem we get into when we start taking pieces of transcript and so forth, because my conclusion was that what they are referring to is that there were a series of statements that were made by the Defendant in Canada, one of them here they have set out, or words to that general effect. Then they are asking for the next two, and I don't know, Elliot, frankly, from thinking about the record itself, whether there is even one more, let alone two more; and my feeling is a little bit like Ralph has indicated here that maybe they are really thinking about, even though they didn't hear the statements, and that's why they are {5272} asking for them now. They didn't find out what the rest of those statements were, and now they want to know what they were and it is not in evidence.

MR. TAIKEFF: My perception is that you and I essentially agree that that note is ambiguous, doesn't even tell us what they are asking about. I think we should frame a response to that to indicate we don't quite understand what they mean.

MR. HULTMAN: My response totally is, your Honor, I do not believe -- as I indicated, I remain in that posture that they shouldn't receive any transcript.

THE COURT: My position will be that unless counsel on both sides agree, I am not going to read or submit a portion of the transcript to the jury. I am going to make a response to that something to this effect:

As indicated to you in my preliminary instructions, you would hear the testimony of the witnesses but once and you would have to rely on your recollection as to what was said by

individual witnesses. It would not be appropriate for the Court to give you but a portion of the witness' statement.

MR. TAIKEFF: Your Honor, to the extent that your Honor wishes to articulate his position, we believe that your Honor has adequately stated it in those words.

However, we strongly except to your Honor's position {5873} that the jury not be given the testimony again. Quite frankly, your Honor, I have been trying cases for a little more than nine years. I have never anywhere in any state and in any district found the Judge who was unwilling, or had an experience with a Judge who was unwilling, to read or have the court reporter read testimony back to them when they asked for it. It is a novel idea for me.

THE COURT: I never have. I never have read testimony back to a jury when they asked for it.

MR. TAIKEFF: I can never again make that statement, your Honor.

THE COURT: No, you cannot.

MR. HULTMAN: My experience is again the reverse, counsel, of yours. Mine has been the other way, most of the Courts I have been in.

MR. TAIKEFF: It is clear to me one should not spend one's life on the Coast. One must come inland once in awhile.

MR. HULTMAN: It seems to me, your Honor, that once you begin this, then in fairness you would have to give an entire transcript in effect from beginning to end, and that would be almost an impossible situation from that point on.

As I am sure all of us here would agree, that there are some things in the transcript right now, mainly {5274} because of volume and the timeliness, we had to have them so quick, there are even errors in the transcript that we will ultimately agree or disagree on, and that would take an enormous time to do that.

MR. TAIKEFF: May counsel then retire, your Honor?

THE COURT: You may.

MR. HULTMAN: Thank you.

(Whereupon, at 4:32 o'clock, the conference in chambers was closed.)

{5275}

MONDAY AFTERNOON SESSION

April 18, 1977

(Whereupon, at 4:30 o'clock, p.m., the following proceedings were had out of the presence and hearing of the jury, the Defendant being present in person:)

MR. LOWE: May I address the Court, your Honor?

THE COURT: You may.

MR. LOWE: I rise to formally make as strong an objection as counsel may properly make, having due regard and respect for the Court, to what has been reported to me as a ruling by your Honor that excludes the public from this trial at this very important stage.

I have been advised by the Clerk, and I would ask you to correct me if I am wrong on the record. I think the record should reflect this, that upon the recommendation of Chief Deputy Marshal Warren that he thought there would be some kind of security problem, you have decided to exclude the public from this phase of the trial.

I state that this is a strong objection, and I will word it as strongly as I possibly can.

The Sixth Amendment of the United States Constitution states in unambiguous terms: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

The public does not mean the members of the media. It means the public. It is not a mere technical {5276} formality. It is not a mere matter of lip service to the Constitution. It has a very practical effect, for if there is a judgment of conviction by the jury -- and that is one of the possibilities -- one of the things that the accused is entitled to and will insist on today is a polling of the jury; and in polling the jury, again we are not dealing with a lip service or a token matter. We are asking the juror at that moment to search his conscience, if he has truly voted according to his conscience, to state for the record that that is so. For that juror to look into an empty courtroom does not have nearly the effect psychologically and emotionally on that juror to search his conscience as if he had a group of people who had listened to the evidence -- they have been the public, who are in fact today the public. We believe that is a very practical reason why the jury should be confronted with the public and not merely members of the media.

We feel there has not been one shred of evidence that there would be any trouble, any security problem. There has been probably, for a trial involving such a hotly contested political underpinning, less disruption, virtually no disruption. I have never seen such a well-behaved audience in a trial of this magnitude and this length and this serious a charge, involving the {5277} Government against an unpopular group. In the terms of the Government's prediction, a real conflagration, there is no evidence. I think it should be put on the record, if there is any, as to the justification for excluding the public at large.

I note Mr. Peltier's family has been excluded. In addition to that, even if there were security problems, we believe that it is a constitutional mandate that the Court deal with security problems effectively. There are plenty of Marshals around, enough Marshals to handle any difficulty. There has never been, to my knowledge, any reason for excluding the public from the trial, particularly on such an offense.

We strongly object. We believe as a matter of law any proceedings will be void. What the remedy would be, I would not state at this point except it is clearly a violation of the Constitution. I know of no authority to authorize the Court to do that, at least in the absence of any disruption or reason to believe that there would be any such security problem; and I call upon your Honor, first of all, to reverse that ruling, if that is your Honor's ruling, and allow the

public in for this important stage, particularly for the polling of the jury if that becomes necessary; and secondly, if your Honor declines to allow the public into the trial, then I ask {5278} your Honor to make a record as to the reason that your Honor feels that is necessary today, including if it is a report from somebody else, to identify that clearly on the record so that we may have our appellate remedy in event this matter goes to a conviction instead of an acquittal.

THE CLERK: Send for Mr. Warren.

(Court and Chief Deputy Marshal Warren confer.)

THE COURT: In response to the comments of Mr. Lowe, the Court, in the exercise of its discretion, for security reasons and on the specific recommendation of Mr. James Gardner, the Deputy Regional Director of the United States Marshal's service, the public are excluded from the courtroom only during or for the period of time for the reporting of the verdict, and the order of the Court is that they will be excluded. The order will not be changed, and the record may show that in addition to counsel and quite a few representatives of the defense team, including some who have no official standing on the defense team, and several members of the media, I would guess there are about 20 people present in the courtroom or more.

MR. LOWE: May I inquire, your Honor, whether your Honor was just told that that was the recommendation or was told some substantive basis for the recommendation, {5279} that there was some realistic reason, or whether it is an undifferentiated fear of some sort?

THE COURT: I was told by the Deputy Regional Director that they had reason to believe there could be problems.

MR. LOWE: Your Honor, we would like to reserve the right to have an offer of proof to call this Regional Director. I think it is the most outrageous statement by somebody I have ever heard, without any foundation that I am aware of.

I will represent to your Honor that we have had close contact with members of the support group people, that is, the native American people who have been here throughout this trial, that they are absolutely conscious of the requirement for them to maintain order and to have no problems at all because it would possibly affect either this Defendant or might affect other proceedings that will be had in this case; and I represent to your Honor that as far as I am personally aware or have any suspicion of, there would be nothing but the best behavior of anybody that is related to this defense or has been here.

I might add, your Honor, that this is a matter which, I think, your Honor can properly consider, among others, that there are people now who have been here for {5280} three days since the close of the evidence waiting faithfully and in good faith, believing that this was a public trial, and that they would indeed be entitled to be in the courtroom at a public phase in the trial when the verdict was returned. Had these people been told three days ago of this action, at least they would have been able to save the trouble and expense and inconvenience of staying in Fargo instead of returning to their homes. These people are downstairs waiting at the door. I personally observed them at least 20 minutes, 45 minutes ago, waiting to come in. Most of them were native Americans, and they are absolutely -- they are just dumb-founded at why they cannot come in here. I also tell your Honor because I think your Honor would want to consider that, this action by this Court in excluding the public from this trial has confirmed for these native American people the things that they have been saying and suspecting -- in many cases they have been told by others of the American native public -- as to the type of proceedings that Courts handle for Indians. Whether that is something that your Honor would

believe is true, it is certainly something that is appearing, an appearance of impropriety to these people.

I hope your Honor, in weighing all of this, sees fit to let these people in here under proper control by {5281} the Marshal's Service such as we have had through the five weeks we have been in trial.

THE COURT: The request is denied.

The jury may be brought in.

(Whereupon, at 4:40 o'clock, p.m., the jury returned to the courtroom; and the following proceedings were had in the presence and hearing of the jury:)

THE COURT: The record may show that about 3:30 this afternoon the Court received a written note signed by Mr. Dallas Rossow, Foreman, which read as follows:

The jury has reached a verdict and is ready to deliver it.

Mr. Nelson, will you take the verdict?

THE CLERK: The jury will please listen to the verdict as I read it and as it shall be recorded.

As to Count 1, Ronald A. Williams, the jury finds the Defendant guilty of first degree murder.

As to the killing of Jack R. Coler, Count 2, the jury finds the Defendant guilty of first degree murder.

Dated this 18th day of April, 1977.

Signed, Dallas Rossow, Foreman.

Would your Honor like me to poll the jury?

THE COURT: Does the defense desire that the jury be polled?

MR. LOWE: We would, your Honor, subject to my {5282} comments before. We would ask that the public be included when that is done.

THE COURT: The Clerk will poll the jury.

THE CLERK: Dallas Rossow, is this your verdict as I have read it?

JUROR ROSSOW: Yes, it is.

THE CLERK: Mrs. Peter Reiland, is this your verdict as I have read it?

JUROR REILAND; Yes, it is.

THE CLERK: Mrs. Clayton Hokanson, is this your verdict as I have read it?

JUROR HOKANSON: Yes, it is.

THE CLERK: Arlene Josal, is this your verdict as I have read it?

JUROR JOSAL: Yes, it is.

THE CLERK: Ida Mickelson, is this your verdict as I have read it?

JUROR MICKELSON: Yes, it is.

THE CLERK: June Kopp, is this your verdict as I have read it?

JUROR KOPP: Yes, it is.

THE CLERK: Gerald P. Bommersbach, is this your verdict as I have read it?

JUROR BOMMERSBACH: Yes, it is.

THE CLERK: Victoria Haaland, is this your verdict as {5283} I have read it?

JUROR HAALAND: Yes, it is.

THE CLERK: Shirley Klocke, is this your verdict as I have read it?

JUROR KLOCKE: Yes, it is.

THE CLERK: Ralph McKay, is this your verdict as I have read it?

JUROR MCKAY: Yes, it is.

THE CLERK: Mrs. Irene Hoggarth, is this your verdict as I have read it?

JUROR HOGGARTH: Yes, it is.

THE CLERK: Mrs. Beverly Nielsen, is this your verdict as I have read it?

JUROR NIELSEN: Yes, it is.

THE CLERK: Your Honor, the verdict is unanimous.

THE COURT: Very well.

A pre-sentence report is ordered, and sentencing will be set on a date to be determined by the Court.

Members of the Jury, it is now a real pleasure for me to advise that you are discharged and you may return home.

I will just add this: That earlier this afternoon before I knew that you had reached a verdict, and of course, before I had any idea of what your verdict would be, I dictated a letter to each of you expressing the {5284} appreciation of the Court for the service that you have rendered. You will get that letter in the mail. Is there anything more to be presented to the Court at this time, Mr. Hultman?

MR. HULTMAN: The Government has nothing, your Honor.

THE COURT: Mr. Taikeff?

MR. TAIKEFF: No, your Honor.

THE COURT: The Court is adjourned.

(Whereupon, at 4:45 o'clock, p.m., the trial of the above-entitled matter was closed.)

{5285}

REPORTER'S CERTIFICATE

I, ZONA A. McARTHUR, hereby certify that I am one of the duly appointed and acting Official Court Reporters for the United States District Court, District of North Dakota; that I was present In court and so acting during the proceedings had in the above-captioned cause at Fargo, North Dakota, on April 16, 1977, and April 18, 1977; and that the foregoing pages numbered 5266 through 5284 contain a full, true and correct transcription of the shorthand notes taken by me of the proceedings had in chambers on April 16, 1977, and the proceedings in the courtroom on April 18, 1977, had and entered of record at such times and place.