IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

	)	
	)	Master Docket Case No. 19-cv-01717
In re: WATTS COORDINATED	)	
PRETRIAL PROCEEDINGS	)	Judge Andrea R. Wood
	)	
	)	Magistrate Judge Sheila M. Finnegan
	)	

Plaintiffs' Reply In Support Of Their Motion For A Protective Order To Prohibit Defendants From Asking Plaintiffs About Uncharged Alleged Criminal Activity

The Plaintiffs represented by Loevy & Loevy filed a 7-page motion for a narrow a protective order to prohibit Defendants from fishing for information about uncharged alleged criminal conduct that occurred, if at all, years after the events at issue in these coordinated cases. Dkt. 124. The motion established that a protective order is appropriate because questions on that topic serve no proper purpose.

Defendants' response, which includes a somewhat lengthy discussion of irrelevant issues that are not in dispute, fails to demonstrate any proper purpose for the questions about which Plaintiffs seek a protective order. The Court should grant Plaintiffs' motion.

Introduction

As explained in Plaintiffs' motion, each Plaintiff in the coordinated cases alleges that they were framed by Defendants, who were part of a corrupt group of Chicago police department officers operating in the Ida B. Wells housing

development. As of today, Defendants' illegal acts have led to nearly 100 convictions being vacated, and each Plaintiff has received a certificate of innocence.

Although Plaintiffs did nothing to deserve their wrongful convictions, they recognize that by filing lawsuits they are exposing themselves to questioning at depositions that is personal and that may not be relevant or admissible. That is why, as explained in Plaintiffs' motion, they are prepared to answer questions relating to any of their convictions or arrests, or even uncharged conduct that may have occurred during the years when Plaintiffs lived at or visited Ida B. Wells, i.e., the time period when their wrongful arrests took place.[1]

As explained below, if Defendants have a good faith basis to believe that a Plaintiff has engaged in heavy drug use that may have affected his or her memory, Defendants should have some leeway to explore that issue, including whether the drug use is ongoing. Defendants should not, however, be permitted to fish for information about other potentially illegal activity that is unconnected to this

[1] Although Defendants do not suggest that Plaintiff's counsel did anything improper by instructing Mr. Thomas to not answer questions, in a footnote, they do point to one small excerpt of Mr. Thomas' deposition transcript to suggest that he refused to answer a question because he believed it was irrelevant. Dkt. 138 at 3 n.4. Not so. The snippet that Defendants cite was a small part of an extended discussion held during the deposition (both on and off the record) and during subsequent meet and confers. Plaintiffs do believe that the questions are irrelevant, but that was not the basis for instructions not to answer. Counsel for Mr. Thomas made clear during the discussions at the deposition and in the subsequent meet and confer that he was instructing Mr. Thomas not to answer because he believed a protective order was appropriate under the substantive standard provided for in the Rules of Civil Procedure. Even the brief excerpts that Defendants included with their brief show that the objections were made so that the parties could address them with the Court, which is the appropriate procedure under the rules, and which Plaintiffs promptly did when it became clear that they could not come to a complete agreement during the meet and confer process. Counsel for Defendants do not argue otherwise.

litigation and that occurred, if at all, years after the conduct at issue in the litigation. Such questions have no reasonable possibility of leading to admissible evidence and will instead only serve to "unreasonably annoy[], embarrass[], or oppress[]" Plaintiffs. *See* Fed. R. Civ. P. 30(d).

Argument

Plaintiffs' motion established good cause for a limited protective order pursuant to Federal Rules of Civil Procedure 26 and 30. Defendants' response largely addresses topics that are not at issue, including lines of questioning that both sides agree they may pursue during depositions. When Defendants do address the merits, they make largely generic, overbroad arguments about the need for damages discovery and the possibility that asking about recent uncharged possible criminal activity may reveal ties between the Plaintiffs and other witnesses. Neither ground provides a reasonable basis for Defendants to ask questions about the limited topic at issue.

Defendants also assert that Courts should not issue protective orders to relieve parties from having to decide whether to invoke their rights under the Fifth Amendment. Plaintiffs did not argue otherwise. If Defendants ask Plaintiffs questions that are not designed solely to harass, embarrass, or oppress Plaintiffs, and a particular Plaintiff believes he or she needs to assert their Fifth Amendment rights in response to such a question, then they will do so. But that does not mean Defendants should have unlimited leeway to seek out irrelevant information that that might cause Plaintiffs to take the Fifth when the information has no reasonable possibility of leading to admissible evidence.

I. Plaintiffs have not exposed themselves to unlimited questioning about possible illegal activity that occurred, if at all, after Plaintiffs' arrests merely by filing a lawsuit and seeking damages.

Relying primarily on *Cobige v. City of Chicago*, 651 F.3d 780, 784 (7th Cir. 2011), Defendants assert that a "plaintiff's prior and subsequent criminal activity is relevant to any emotional damages he claims to have suffered." Dkt. 138 at 5. More specifically, Defendants argue that they must be permitted to question Plaintiffs about recent potential uncharged criminal activity because Plaintiffs argue they were framed many years ago, which harmed their reputations. Dkt. 138 at 6-7. *Cobige*, however, is not nearly as broad as Defendants suggest, and it does not warrant Defendants' proposed line of questioning.

Cobige was a wrongful death case in which the plaintiff, "who was 27 when his mother died, testified that she had been a friend as well as a parent, a bulwark of support and a role model throughout his life." *Cobige*, 651 F.3d at 784. The decedent in *Cobige* was also a heroin addict who had been incarcerated for nearly eight straight years before she died, and who was still incarcerated when she died. Her son was 27 when she died, which means that he would have been 19 or 20 years old when her last stretch of incarceration started. *Id.* at 784. Given the plaintiff's testimony about his mom's active role in his life, the Seventh Circuit in *Cobige* determined that plaintiff's description was incomplete, such that defendants were entitled to present a more fulsome story to the jury. *See id.*

The Seventh Circuit has subsequently explained that *Cobige* has a limited reach, and in doing so rejected arguments similar to the one that Defendants advance here. Namely, the Seventh Circuit has explained that the type of broad reading of

Cobige that Defendants advocate "would seemingly permit any civil-rights plaintiff's criminal history to come in on the issue of emotional-distress damages, no matter how tenuous a connection the evidence has to the issue of damages or how central a role emotional distress plays during the plaintiff's case," which is not permissible. *See*, *e.g.*, *Nelson v. City of Chicago*, 810 F.3d 1061, 1068–69 (7th Cir. 2016) (internal quotation omitted).

Cobige does not justify Defendants' position. Asking a Plaintiff who was arrested in the early 2000's if he or she may have recently engaged in unknown criminal activity, for which there was no arrest or conviction, is not remotely the same as allowing a defendant to rebut incomplete testimony that suggested a decedent was actively involved in someone's life on a daily basis when the decedent was actually incarcerated. Defendants do not make a meaningful effort to argue otherwise.

Nor do the other cases Defendants cite mandate a different result. For example, the court in *Bovey v. Mitsubishi Motor Mfg. of Am. Inc.*, 00-1402, 2002 WL 820670, at *1 (C.D. Ill. Apr. 3, 2002), held that a defendant was entitled to conduct a mental health examination of a plaintiff who intended to call multiple mental-health treaters as witnesses at trial. The *Bovey* court did not suggest that defendant had an unlimited right to probe into every aspect of plaintiff's life. And in *EEOC v. Kim and Ted, Inc.*, No. 95 CV 1151, 1996 WL 26871, at * 2 (N.D. Ill. Jan. 22, 1996), the court largely addressed drug use that occurred around the time of the alleged incidents. Plaintiffs do not seek a protective order on such questions. The unpublished *EEOC* decision appeared to agree that with respect to the specific plaintiffs, long-term drug

use was also potentially relevant for emotional distress damages, but it offered no analysis for that conclusion, and Defendants do not explain why that conclusion should apply to the Plaintiffs in the *Watts* coordinated proceedings.

In short, although Defendants make a number of assertions that attempt to put Plaintiffs in a bad light, they have not explained why a Plaintiff would be entitled to lower damages for their wrongful conviction if he or she used drugs or committed some other crime many years after their wrongful conviction. Rather, Defendants simply discuss the general categories of damages that the Plaintiffs are seeking and then briefly discuss two Plaintiffs in particular – Mr. Thomas and Lionel White Sr. As Defendants note, Mr. White has multiple drug-related arrests, but Plaintiffs are not seeking a protective order to prevent questioning at depositions about arrests, and so Mr. White's arrests are not relevant to deciding Plaintiffs' motion.

Finally, Defendants are wrong when they assert that Plaintiffs are merely "[s]pouting boilerplate and conclusory objections," and have therefore failed to demonstrate that a protective order is warranted. Dkt. 138 at 14-15. To the contrary, Plaintiffs' motion explains how a narrow, specific issue that Defendants seek to explore has no reasonable possibility of leading to admissible evidence and will serve to harass, embarrass, or oppress Plaintiffs rather than to learn relevant information. Defendants have failed to effectively refute Plaintiffs' contentions, and so the Court should grant Plaintiffs' motion.

II. If Defendants have a good faith basis to believe that a particular Plaintiff may have memory issues because of drug use, the Court should allow limited questions regarding that issue.

Defendants also claim that drug use may impact an individual's memory, and they specifically make that point with respect to White Sr. and Mr. Thomas. Dkt. 138 at 13. Although it may be true in the abstract that heavy drug use can impact memory, Defendants offer no evidence that it is true for either of those Plaintiffs or any other Plaintiff. Mr. White and Mr. Thomas have for years been consistent in describing how they were framed. So too for other Plaintiffs. The theoretical possibility that a Plaintiff's memory may be impacted by drug use does not warrant Defendants' request to ask unlimited questions about recent, uncharged alleged criminal activity.

That said, Plaintiffs acknowledge that a witness' memory is relevant, and if Defendants have a good faith basis to believe that a Plaintiff has used drugs in a way that might have affected his or her memory, the Defendants should be permitted to ask a limited number of questions to probe that issue. For example, if a Plaintiff has drug arrests or convictions (other than convictions that have been reversed and for which they have received certificates of innocence), Defendants would be permitted to ask some questions to determine the extent of Plaintiff's drug use, if any, including asking about recent drug use. But Defendants should not be permitted to ask those questions if they have no good faith basis to believe that Plaintiffs have used drugs in a way that might affect their memory, any more than the Plaintiffs should be allowed to routinely ask the Defendants a series of questions to determine whether

Defendants might have memory issues from possible drug use (or other broad questions about whether Defendants ever committed an unrelated crime).[2]

To be clear, this limited questioning should not include other areas about uncharged potentially illegal activity that Defendants want to explore, such as *who* a Plaintiff may have purchased drugs from, whether the Plaintiff sold drugs, and whether the Plaintiff may have engaged in other uncharged potentially illegal acts. Those topics have nothing to do with memory or any other issue in the coordinated cases, and instead serve to embarrass, harass, or oppress Plaintiffs in violation of the Federal Rules of Civil Procedure.

III. Defendants' proposed questions are not related to the claims or defenses in this case.

Defendants' brief includes a short discussion about why they believe that their proposed questions are relevant to the parties' claims or defenses, but that argument is undeveloped and should be rejected. *See* Dkt. 138 at 9-10. Namely, Defendants assert that they should not have to take Plaintiffs at their word when they claim that Defendants framed them. That is true as a general matter, but Defendants do make a meaningful effort to explain how or why questions about uncharged criminal activity that occurred 15-20 years after the wrongful convictions at issue in this case will help them dispute Plaintiffs' testimony about the wrongful conviction, other than making a bald assertion that the Court should not rule on 404(b) evidence at this

[2] Plaintiffs acknowledge that the parties may reasonably disagree about whether Defendants have a good faith basis for a question about drug use, and they anticipate that both sides will be able to work through this issue cooperatively on a case by case basis during the depositions.

stage. Their position is particularly attenuated given that Plaintiffs do not seek to bar deposition questions about convictions or arrests.[3]

Plaintiffs agree that the Court should not issue a ruling on 404(b) evidence at this stage, and they did not and are not asking for any such ruling. Plaintiffs seek only a limited protective order that will prevent Defendants from fishing for information about uncharged, possible criminal activity that has no connection to this case whatsoever and occurred, if at all, years after the incidents at issue. Such an order is particularly appropriate here given that there is no realistic possibility that the evidence about *uncharged conduct* that Defendants seek to discover will be admissible, as even *arrests* are routinely excluded at trial. *See*, *e.g.*, *Nelson*, 810 F. 3d at 1067 (7th Cir. 2016) (reversible error to admit the arrest record of a civil rights plaintiff because "the probative value of such evidence is so overwhelmingly outweighed by its inevitable tendency to inflame and prejudice the jury against the party-witness that total and complete exclusion is required in order that the right to trial by a fair and impartial jury may not be impaired") ; *Gregory v. Oliver*, 2003 WL 1860270, at *1 (N.D. Ill. April 9, 2003) ("Arrests that have not led to convictions are classic candidates for exclusion under [FRE] 404(b)").

[3] Defendants make a reference to Plaintiffs' 404(b) witnesses and seem to suggest that 118 is too many. Neither side has asked the Court to limit 404(b) witnesses at this stage, and the Court should not do so. Indeed, considering there are approximately 60 cases, Plaintiffs have only disclosed an average of two 404(b) witnesses per case.

IV. Ben Baker's relationship with Jamar Lewis is not relevant to deciding this motion.

Defendants devote multiple pages to an irrelevant discussion of Plaintiff Ben Baker's relationship with Jamar Lewis, another Plaintiff in the coordinated proceedings. Dkt. 138 at 11-13. The Court should disregard this section of Defendants' brief for two reasons.

First, as Defendants acknowledge, Plaintiffs have not moved for a protective order on this topic, and so it is not relevant to the pending motion. Dkt. 138 at 12. Namely, Plaintiffs have not asked the Court to bar questions about arrests or convictions. If a particular issue arises during Mr. Baker's deposition that requires Court assistance, the parties should address that issue then.[4]

Second, Defendants' redacted discussion of FBI documents on page 12 of their brief is inaccurate. Defendants discuss something that they claim is described in FBI documents, but they do not actually cite or attach any FBI documents. Rather, they cite to a discovery response that Mr. Baker gave in a criminal case in 2004, which

[4] This is not the only irrelevant issue that Defendants raise, and which the Court should disregard. For example, Defendants assert that at times, Plaintiffs spend approximately half of a day of a Defendant deposition addressing background topics. Plaintiffs do not understand Defendants to actually be raising a complaint about the time that Plaintiffs have used for Defendant depositions (and instead appear to be responding to Plaintiffs' assertion that Defendants spent more time than was necessary addressing irrelevant instances from Mr. Thomas' distant past). From Plaintiffs' perspective, although Plaintiffs are moving for a limited protective order, they believe that both sides have been reasonable in using their time at depositions. Plaintiffs were not asking the Court to put a limit on the time that Defendants can spend on any particular topic. Plaintiffs were merely making the point that they had allowed Mr. Thomas to answer an extensive amount of questions on topics that they do not believe are relevant, and that Mr. Thomas did not refuse to answer questions merely because he believed they were irrelevant. In any event, considering many of the Defendants are named in upwards of 20 or more cases, using half one day at a deposition to address background issues for those cases is hardly unreasonable.

merely identifies Mr. Lewis as a witness. Plaintiffs are unaware of any FBI documents that match up with Defendants' description.

V. Plaintiffs should not be forced to invoke their Fifth Amendment right to remain silent when faced with irrelevant questions.

Finally, Defendants take issue with Plaintiffs' argument that they should not be forced to choose between truthfully answering irrelevant, harassing questions, on the one hand, or invoking the Fifth Amendment, on the other hand. Specifically, Defendants assert that Plaintiffs, like any other party, should "evaluate whether truthful answers to questions potentially subject them to criminal liability," and that a protective order at this stage is unnecessary because Plaintiffs can move *in limine* to bar introduction of evidence at trial. Dkt. 138 at 16-17.

Plaintiffs agree that if Defendants ask relevant questions that are not improper under Rule 30, and truthful answers to those questions might subject a Plaintiff to criminal liability, then the Plaintiff will have to choose between answering or invoking his or her Fifth Amendment rights. But there is no justification for requiring that choice when the questions are irrelevant and serve only to harass, annoy, or embarrass the Plaintiffs.[5]

[5] *U.S. Election Corp. v. Microvote Corp.*, 51 F.3d 276, 1995 WL 156561, *6 (7th Cir. 1995), which Plaintiffs relied on and in which the Seventh Circuit held that the district court did not err in refusing to inform jury that plaintiff invoked Fifth Amendment in response to irrelevant questions asked during discovery, shows that it is not always proper to make parties choose between answering questions and invoking their Fifth Amendment rights. It does not stand for the proposition that parties should get unlimited irrelevant discovery merely because a party can later move to bar evidence from being introduced at trial.

Conclusion

For the reasons stated in Plaintiffs' motion and above, the Court should grant Plaintiffs' motion for a protective order.

Respectfully submitted,

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