



2-3-2000

Defendant's Brief in Opposition to Plaintiff's Motion to Exclude Testimony of Pastor Ernie Sanders

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ALAN DAVIS, Special Administrator
of the Estate of Samuel H. Sheppard,

Plaintiff,

v.

STATE OF OHIO,

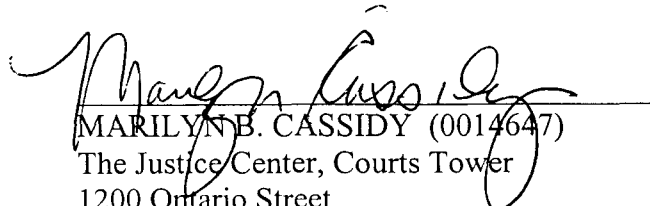
Defendant.

: CASE NO. 312322
:
: JUDGE SUSTER
:
: DEFENDANT'S BRIEF IN
: OPPOSITION TO PLAINTIFF'S
: MOTION TO EXCLUDE
: TESTIMONY OF PASTOR
: ERNIE SANDERS
:
:

State of Ohio, by and through counsel, William D. Mason, Cuyahoga County Prosecutor, and Assistant Prosecutor Marilyn Cassidy, submits herewith its brief in opposition to plaintiff's motion to exclude the testimony of Pastor Ernie Sanders. The grounds for this motion are, first, that Plaintiff has no standing to assert privilege, and second, that the privilege applies to communications made in the course of religious counseling, all as is set forth in the memorandum attached hereto and expressly incorporated herein by reference.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County, Ohio



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ATTORNEYS FOR DEFENDANT

MEMORANDUM IN SUPPORT

INTRODUCTION

Plaintiff has moved to exclude the testimony of Pastor Ernie Sanders. Plaintiff has no standing to assert the privilege. Moreover, privilege applies to communications made to a clergyman in the course of religious counseling. Observations by a clergyman and communications outside of religious counseling are not privileged. Pastor Sanders is well situated to determine what communications between him and his client(s) are privileged, and he has testified in deposition to matters he deems not privileged.

LAW AND ARGUMENT

R.C. 2317.02 Privileged Communications and Acts

The following persons shall not testify in certain respects:

...

(C) A member of the clergy, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination or sect when the member of the clergy, rabbi, priest, or minister remains accountable to the authority of that church, denomination or sect, concerning a confession made, or any information communicated to the member of the clergy, rabbi, priest or minister for a religious counseling purpose in the member of the clergy's rabbi's priest's, or minister's professional character; however, the member of the clergy, rabbi, priest or minister may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust.

Ohio case law is clear that only communications made by a parishioner to his clergyman in the course of religious counseling are privileged. . The privilege has traditionally related to

confessions of a penitent to a clergyman. *In re Estate of Soeder* (1966), 7 Ohio App. 2d 271. See also *Radeck v. Schuckardt* (1976), 50 Ohio App.2d 92. Other conversations taking place between clergy and parishioners do not necessarily fall within the privilege and are not protected. *State v. Bennett*, 1995 WL 276763, (Ohio App.2 Dist. 1995), unreported.

In the instant case, Ernie Sanders was pastor to Richard Eberling and Jack Fisher while they were at the Orient Correctional Institution. That fact does not render every communication between them privileged. Sanders testified at deposition that he learned from Eberling and Fisher that fellow inmate Robert Parks was trying to “beat a confession out of him [Eberling] to the Marilyn Sheppard murder. Deposition of Sanders page 22. Sanders also observed bruises on Eberling. Sanders learned from Jack Fisher that Parks beat Eberling prior to Eberling’s death. Sanders learned also that Samuel Sheppard admitted to Fisher that he murdered Marilyn Sheppard. Deposition of Sanders p. 28, 32. The substance of conversations unrelated to religious counseling and matters observed by Sanders on a visit are not privileged and Sanders may testify.

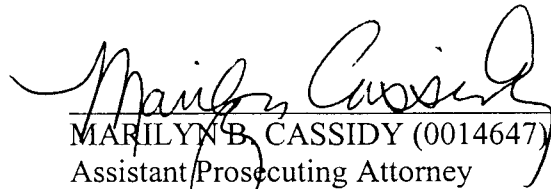
Finally, it is noteworthy that Pastor Sanders declined to testify at deposition regarding certain matters, which he considered to be privileged. (Sanders Deposition page 26,40.) Sanders, as a clergyman is well situated to determine what matters are of a religious counseling nature, and which were not. In the alternative, the court may conduct an evidentiary hearing to determine the permissible parameters of Sanders’ testimony.

CONCLUSION

Pastor Ernie Sanders has already testified at deposition regarding certain facts and observations that he learned from visits with Eberling and Fisher and he should be permitted to testify at trial. Only Eberling, Fisher, or Sanders would have standing to assert the privilege set forth in RC 2317.02 (C). As a final alternative, the court may conduct an evidentiary hearing to determine the existence and the scope of any clergy-client privilege.

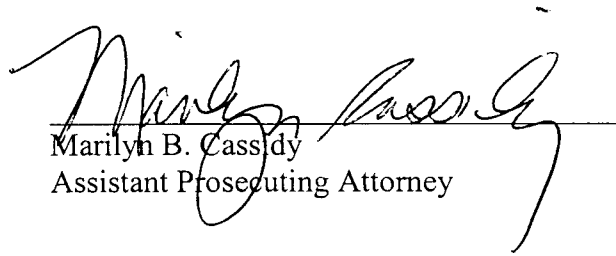
Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
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CERTIFICATE OF SERVICE

A copy of the foregoing Defendant's Brief in Opposition to Plaintiff's Motion to Exclude Testimony of Pastor Ernie Sanders was served upon Terry Gilbert and George Carr, attorneys for plaintiff, this 3rd day of January, 2000, via ordinary U.S. mail at 1370 Ontario Street, Suite 1700, Cleveland, Ohio 44113.


Marilyn B. Cassidy
Assistant Prosecuting Attorney