

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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UNITED STATES OF AMERICA :
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v. :
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ELENA RUTH SASSOWER, :
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Defendant. :
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Action No. M-4113-03

Wednesday, December 3, 2003
Washington, D.C.

The above-entitled action came on for a trial before
the HONORABLE STEPHEN G. MILLIKEN, SENIOR JUDGE, in
Courtroom Number 217, commencing at 2:01 p.m.

APPEARANCES:

On Behalf of the Government:

AARON MENDOLSOHN, ESQ.

On Behalf of the Defendant:

PRO SE

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P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Everyone will remain seated,
3 come to order.

4 MR. MENDOLSOHN: Good afternoon.

5 THE DEPUTY CLERK: The Court is once again in
6 session.

7 THE COURT: I left the bench not too long ago
8 fully intending to start this hearing at 2 o'clock. I got
9 to my desk and, lo and behold, I found a good thick
10 submission that had been dropped off by the defendant so I
11 took pains to review that. I did allot a half an hour to
12 this hearing and I want to give it fully so we'll go to 20
13 minutes of 3 before I resume in the trial that otherwise
14 occupies me.

15 Now, I really thank the parties for submitting
16 fascinating material and I gathered that a great deal of
17 it was sprung on an unsuspecting judge at an earlier
18 hearing and so I enjoyed having the opportunity to
19 thoroughly review this file, in particular, the pending
20 motion for sanctions and to compel discovery. I also took
21 pains to review what is a slimmer brief from the United
22 States and I have questions for each of the parties, some
23 for the Government, some for the defense, and there are
24 some things just from reading your papers about which I am
25 very clear so I will give you some rulings as we go so

1 that we can use our time effectively.

2 First, for the Government, you made a rather
3 bold statement. I should stop and call the case,
4 shouldn't I?

5 MS. SASSOWER: Yes.

6 THE COURT: Yes, let's do that, go by the book.
7 United States of America v. Elena Ruth Sassower, if I
8 pronounced it correctly, misdemeanor 4113-03.

9 MR. MENDOLSOHN: Your Honor, good afternoon,
10 Aaron Mendolsohn for the United States.

11 THE COURT: Yes.

12 MS. SASSOWER: Elena Sassower, defendant, pro
13 se.

14 THE COURT: Welcome.

15 MR. GOLDSTONE: I'm Mark Goldsone (phonetic
16 sp.), I'm advising Ms. Sassower.

17 THE COURT: Thank you.

18 MS. REED: And Your Honor, Julie Reed (phonetic
19 sp.) for the United States, as well.

20 THE COURT: Thank you. So that I appreciate the
21 relationship between pro se accused and counsel, as an
22 advisor, were you put upon Ms. Sassower by some judge or
23 did you come at her inclination?

24 MR. GOLDSTONE: The latter, Your Honor.

25 THE COURT: All right, fair enough. So you are

1 sort of --

2 MS. SASSOWER: For a \$5,000 retainer, Your
3 Honor.

4 THE COURT: Well, that's a secret. You have the
5 right to some privileges here.

6 Now, let me go back to the questioning of the
7 prosecution, if I may. You made a statement that under
8 Rule 16, and this is on page two, paragraph three, that
9 Superior Court criminal Rule 16(A)(1)(C) limits discovery
10 to those items, quote, "within the possession, custody or
11 control of the Government," bracket, and "which are
12 intended for use by the Government as evidence in chief at
13 the trial or were obtained from or belong to the
14 defendant." There is a glaring omission in that
15 statement, isn't there?

16 MR. MENDOLSOHN: Your Honor, would you like us
17 to stand when we respond to you?

18 THE COURT: You don't have to. I don't want to
19 put form over substance. I want to get to the heart of
20 this and get this case ripe for trial so that people don't
21 have to come bouncing in and out of court every two
22 seconds.

23 MR. MENDOLSOHN: Your Honor, unfortunately, I'm
24 not aware of the glaring omission.

25 THE COURT: Material to the preparation of the

1 defense case. You cite it later. You quote the rule a
2 little bit more fully but there was no elipses in that so
3 there are things that may have nothing to do with your
4 intention in your case-in-chief or have been seized from
5 the defendant but may be independently of interest to her
6 and material, and of course, that word material bears the
7 finding and I'll get to Ms. Sassower on that front later.

8 Also, you talk about the disinclination the
9 Government has, which Ms. Sassower claims is all manner of
10 deceit but what, you know, when I take the heat out of it
11 and just throw some light on this, this is a pretty
12 familiar type of discovery dispute. I mean, each case is
13 unique, but it's typical that the Government doesn't
14 always see things the way the defense does and that there
15 are competing positions under the law.

16 You say that she's not entitled to the
17 disciplinary records of citizen complaints or any of the
18 background of these police officers because it's
19 inadmissible and you cite Akers (phonetic sp.) and I think
20 you cite M. W. G. as well at the top of page five. It's
21 certainly true that, in the context of Akers which I
22 believe was really other crimes evidence to show that the
23 officer was bad and the first aggressor and it would have
24 set up a defense of self defense, and the Court said, no
25 way, you don't get to do that because it would be

1 inadmissible and therefore, not producible, it's not
2 material in the sense that it's not really competent
3 evidence. But that doesn't cut against some of the
4 authority (indiscernible) of some other cases which say,
5 really, if you have something that shows a bias and, in
6 part, and when I summarize these 1,000 pages I may
7 mischaracterize something so forgive me. But the gist of
8 it is, if you have a police force that under instructions
9 of superiors is profiling an individual who is here to
10 petition her government for the redress of grievances, and
11 they are not going to give her a chance to get in a
12 hearing room and they are not going to give her a chance
13 if she does get in a hearing room to speak, and they are
14 not going to give her a chance, basically, to discharge
15 her civil rights, and she says that she, that action is
16 taken against her because people are biased against her
17 and she wants the personnel record of a police officer who
18 has previously arrested her and who may well be a witness
19 in this case, who may be clearly involved in the
20 circumstances giving rise to the arrest, why isn't she
21 entitled under a bias theory and to support this sort of
22 malicious prosecution theory, why isn't she entitled to
23 have that information to develop her defense or, at least,
24 to have you go look for it and produce it for
25 (indiscernible) inspection by a judge?

1 MR. MENDOLSOHN: Your Honor, we believe that
2 there is no indication from any of the evidence that we
3 are in possession of --

4 THE COURT: When you say we, do you mean you and
5 the Capitol Police and the United States Government --

6 MR. MENDOLSOHN: I mean --

7 THE COURT: -- or do you mean the United
8 States --

9 MR. MENDOLSOHN: -- the United States Attorney's
10 Office.

11 THE COURT: All right, but that duty of
12 discovery devolves upon your support of law enforcement
13 agencies as much as it does to you so your duty of
14 inquiry --

15 MR. MENDOLSOHN: You and I --

16 THE COURT: -- doesn't end at your file.

17 MR. MENDOLSOHN: We were not aware and we do not
18 believe that there are any biases in this case.
19 Therefore --

20 THE COURT: Your belief is irrelevant. The
21 question is, does something exist that would support, say
22 just a wholesale bias cross-examination of an officer who
23 hates your accused, personally.

24 MR. MENDOLSOHN: And my answer is, not that I'm
25 aware of and --

1 THE COURT: All right, but is that awareness
2 after diligently inquiring of Capitol Police?

3 *MR. MENDOLSOHN: I have spoken with several
4 Capitol Police officers. I have spoken with members of
5 the Senate Judiciary Committee and there was no indication
6 from any of my conversations with them that there was a
7 specific bias against this defendant. Moreover --

8 THE COURT: Do you know whether there is any,
9 and you can answer this, you know, yes or no without going
10 into substance, but have you made a cause to be made a
11 search of complaint records to determine if, indeed, there
12 is a complaint by this accused against an officer who was
13 involved or attending her arrest in the cases in the
14 circumstances giving rise to the trial?

15 MR. MENDOLSOHN: With respect to the incident in
16 this case or prior incidents?

17 THE COURT: Prior incidents and in relation to
18 an officer, either the arresting officer. I think it is
19 Jenkins (phonetic sp.) and Binnatti (phonetic sp.),
20 Sergeant Binnatti were the two names that I read.

21 Again, forgive me, because I only got this
22 material recently and I stayed up last night reading it,
23 but my understanding is that this defendant claims that
24 the allegations by the United States that Jenkins arrested
25 her is not true. That Sergeant Binnatti was involved and

1 Sergeant Binnatti has an ax to grind. Sergeant Binnatti
2 had her arrested previously and contrary to the
3 regulations, the Capitol Police had her detained when she
4 should have had citation of release. She's building a
5 case that Sergeant Binnatti is biased against her, these
6 police are all working in concert to get her. That's part
7 of a defense she's considering. She doesn't have to
8 reveal her defense but she is saying, if there is
9 ammunition that I can gather to build that case, I'm
10 entitled to look at it and then make some tactical
11 decisions as to what to do about it.

12 So there is an example. If you've got a
13 citizen's complaint filed by her that Binnatti violated
14 Capitol Police regulations by arranging for her detention
15 as opposed to citation release in connection with a prior
16 incident, she's entitled to have that and you've got to
17 get it.

18 You have the protection of asking that those
19 materials be delivered to the Court for in camera
20 inspection and reviewed to see to any healthy redaction.
21 But, okay, there, when you take a lot of heat, because,
22 frankly, I'm about to tell the defendant that all the
23 allegations of deceit and refusal, that's not, that's not
24 relevant, and the sanction of dismissal or other grave
25 sanctions of exclusion of evidence, that's not pertinent.

1 What's pertinent is a 16(D)(2) remedy of Court ordered
2 discovery. That's what has to happen, and this case, if
3 it's going to be maintained, has to be prosecuted by
4 serious inquiry into those areas which could, not from
5 your perspective or from what your client's witnesses
6 believe, your client ultimately the people, right? But
7 it's what putting on those rose-colored glasses and
8 imagining the world from the perspective of the defense,
9 what could possibly court the kinds of allegations she's
10 making? That's what has to be gathered and submitted.

11 So if, for example, she is a representative of
12 an organization that's about cleaning up the judiciary,
13 she wants to fight to prevent a second circuit appointment
14 and she wants to be heard and there is a public hearing
15 organized to that effect, and hearings regularly allow for
16 people to speak and she wants to get up and say, well, I
17 was there to speak and lo and behold, here I am pounced
18 on. I was just starting to speak. I didn't even hear the
19 speaker call for quiet. I didn't hear anything. I was
20 just trying to discharge my citizenly opportunity to
21 petition the Government for redress of grievances and so,
22 if there are communications whether from offices
23 represented in Congress to police or, you know, target
24 this woman, intercept her, arrest her, she gets to have
25 that specific to these circumstances. And you have to ask

1 for that specific to these circumstances and you have to
2 review it specific to these circumstances and you have to,
3 under the Akers case, which I know you've read 100 times,
4 resolve all bouts in favor of discovery. That was the
5 Supreme Court's command. And that's what has to happen
6 vis-a-vis the, what you can glean or what I could glean on
7 a day's reading, are challenges to the Government. And
8 you see this all the time in prosecutions.

9 People in defense mount a good offense and
10 prosecute the prosecutors and prosecute the prosecutor's
11 agents and prosecute the prosecutor's witnesses. She's
12 not doing any different than painstaking defense counsel
13 does in, probably, the majority of the cases heard in the
14 trial by the Court.

15 This material is a little more complicated, a
16 little more paper voluminous and some of the accusations
17 are a little overblown, but we've got to take the emotions
18 out of it and have it go in that fashion.

19 So that's my charge on reading the papers to the
20 Government, all right? Talk to the Capitol Police. See
21 what records they maintain on her, see what communications
22 they got about her in this instance, and get any history
23 of complaints of police misconduct against this defendant
24 for potential bias cross-examination. And I order that
25 produced for in-camera inspection in chambers, delivered

1 to the law clerk on my left who has heroically volunteered
2 to undertake to receive them and I need that by, well, how
3 soon can we have this case in trial? January, February or
4 March? Name the day.

5 MS. SASSOWER: It's been scheduled for trial on
6 January 14th, Your Honor.

7 THE COURT: Is that the right time frame or do
8 you want more time?

9 MS. SASSOWER: I believe that we have to resolve
10 the discovery issues appropriately.

11 THE COURT: What does the Government think?
12 What if I made the date for production of these documents
13 to the Court January 14th and then had trial, say, in
14 March? Far away from any person's possible leave or
15 Federal holiday. Put it off in the end of February or the
16 beginning of March, well after President's holiday, that
17 kind of thing. Does that make more sense?

18 MR. MENDOLSOHN: We would defer to your
19 judgment.

20 THE COURT: I think that makes sense. Let's do
21 that. And then I'm going to, because we ought to try this
22 case one time, just right, under law. And the trial event
23 is going to come down to a fairly well crystallized set of
24 events. So that the defendant doesn't get every
25 communication on the Hill and be allowed to rummage

1 through it. Clearly not. You get to make inquiries,
2 discover what you can, determine what you think is
3 properly producible to the Court in camera under the
4 guidelines I've given you, and there will be a review. If
5 there is a determination to disclose, it'll go to the
6 defendant early in February if not late January and I'll
7 give notice to the Government after that which is
8 disclosed. Then, looking at the calendar, I'm going to
9 suggest, if the President's holiday is the 16th of
10 February, anyone in the room object to the following
11 Monday the 23rd of February? If that's bad, I can go to
12 the 1st of March.

13 MS. SASSOWER: May I --

14 THE COURT: Ms. Sassower?

15 MS. SASSOWER: May I be heard, Your Honor?

16 THE COURT: We've got a lot to talk about, but
17 first, that's the trial date while I'm on that subject.
18 Is the 1st better than the (indiscernible)?

19 MS. SASSOWER: My counsel indicates that the 1st
20 would be preferable for him.

21 THE COURT: All right, 1st of March. That gives
22 plenty of time for folks to get this right.

23 MR. MENDOLSOHN: Your Honor? If I may?

24 THE COURT: Yes, sir.

25 MR. MENDOLSOHN: In the Government's defense, we

1 did have, I did have extensive meetings with a counsel for
2 the United States Capitol Police and during those
3 conversations we discussed Ms. Sassower's discovery
4 request and we went through them one by one and we, in all
5 good faith, produced all of the documents that we had with
6 respect to this case.

7 THE COURT: All right, hear me out. By reading
8 your materials, and I said I have cast, you know, this
9 conception of deceit and misconduct and all and I'm about
10 to go over that with the defense, that's so much heat.
11 The light that needs to be shined on this process of
12 gathering materials, I'm humbly suggesting, no, in fact
13 I'm ordering and ruling, is because of a miscast.

14 If you look at the law through what's in the
15 possession of the files of the Office of the United States
16 Attorney, which you are telling me you haven't entirely,
17 but if you look at the discovery obligation of the
18 disciplinary records only on other crimes evidence or
19 prior conduct under the Akers line of authority and not
20 under Shere (phonetic sp.) and things that go to bias and
21 credibility, than you haven't done the search with the
22 right glasses on. That's what I'm going to say. So put
23 this under a magnifying glass and take time, and you may,
24 you may say, you know, respectfully, to the law
25 enforcement superior with whom you are dealing, you know,

1 I don't want you to tell me what you think we should be
2 working on. I really need to have the personnel records
3 of Sergeant Binnatti to see if there is a complaint by
4 this defendant against him, all right? And go over that.

5 And, for example, and then run her name in some
6 computers, some search functions, and find out where it
7 pops up.

8 Do some independent work. And I don't know if
9 there is any, I mean, in some ways I was reading her
10 papers and it suggested she was sort of blocking the
11 hearing room altogether. I gather it's the Government's
12 view that she is live on video in the hearing room getting
13 removed. And so I don't know what there is, if anything,
14 to the suggestion that there was some engineering of law
15 enforcement behavior by some Senator's staff.

16 So, you have to at least inquire. You know, did
17 somebody say, look, I'm a Senator and that person is not
18 coming to my hearing and tell the police, I don't care how
19 you do it, get rid of her. All right? And, as an
20 example, I mean, she's going to make a claim that she
21 didn't do anything wrong, and that, in fact, the charge is
22 manufactured and, in fact, the charge is so thin, let me
23 see if I can find it. Have you got your Gerstein handy?
24 Let me see if it's in the file.

25 MS. SASSOWER: Excuse me --

1 THE COURT: Here.

2 MS. SASSOWER: -- it's Exhibit H1.

3 THE COURT: I see, it's right handy where these
4 documents ordinarily appear in any criminal trial
5 prosecution. When you read it, it's an amended Gerstein.
6 After the Senator called for order, the defendant
7 continued to shout. It wouldn't take long for a person,
8 it certainly didn't take me but a second to think, ahh,
9 there. Based on what was originally reported by the
10 officers, they didn't have probable cause to arrest her.
11 When they talked to a prosecutor, their representations
12 were amended. Now they've built sufficient prosecution.
13 So clearly I'm right that I was arrested for nefarious
14 motives and reasons. And now I'm being pressed because
15 prosecutors are supporting the police authorities and I
16 really never did anything wrong in the first place. And
17 if I have access to documents to show that they were out
18 to get me before I even step on the Capitol grounds, that
19 proves that they were going to get me removed,
20 incarcerated at all costs because they want to suppress me
21 and I live in a police state. This is fascism, this in
22 not America and she gets to do all that, all right?
23 That's her defense or it could be. I'm not saying it is
24 because she doesn't have to settle on one but it could be
25 and one hard to think about. So you have to see, was

1 there some, we are going to get her kind of communication.
2 And if that's true, she's entitled to have you deliver
3 that to me.

4 Then there may be a further hearing to determine
5 issues of materiality and some of that will get done on
6 the day, I've set this on a Monday for the following
7 reasons. This is a jury trial, right?

8 MR. MENDOLSOHN: Yes.

9 THE COURT: All right. Monday in the Superior
10 Court, civil judges gobble up all the jurors and do so
11 promptly. In any case, it's going to have a few minutes
12 of preliminary issues, this case is going to have a few
13 minutes of preliminary issues, right? So you are probably
14 going to spend Monday, in some sense, working on the
15 motions in liminae that are going to come in because the
16 next thing that's going to come from the Government as
17 often comes in cases arising from claimed acts of civil
18 disobedience which may be a defense we'll describe more as
19 a legitimate petition for redress of grievances if there
20 is even that acknowledgement. You are going to say, look,
21 here are the parameters of trial, she is in a hearing
22 room, she is disorderly, she is removed. And so the trial
23 is limited to a determination of whether she acted in a
24 way that interfered with the conduct of the Congress and
25 that's a very time-limited and content-limited event.

1 It doesn't matter whether she is talking about
2 judicial appointments, fur is murder, the war in Iraq,
3 right to life, all of those things have to be stricken,
4 Judge, all right? And then you may also want to file a
5 motion in liminae saying we have surrendered to the Court
6 for in camera inspection the following materials, but we
7 respectfully suggest, Your Honor, that they shouldn't be
8 turned over to the defense because the defendant hasn't
9 made a showing of materiality as to how she could possibly
10 use the record of Sergeant Binnatti when Sergeant Binnatti
11 isn't even a witness for the Government. So there is
12 going to be some of that kind of stuff and some of that
13 will accompany your submission to the Court and some of it
14 may get finally wrestled to the floor, figuratively,
15 because there will be no physical violence, but wrestled
16 to the floor, you know, really on the eve of selection of
17 the jury.

18 You know, the trial judge is going to be making
19 some evidentiary choices about what's in, what's out under
20 some pretty complicated principles of law. And I think
21 the bias calls are not going to be simple.

22 So then, I think I'm going to let you speak. Do
23 you have a 30 second piece before I turn to the defendant
24 and tell her where she is way off base and where she needs
25 to focus her work?

1 MR. MENDOLSOHN: Your Honor, we do have some
 2 issues with respect to something you just brought up and
 3 that is, motions in liminae. We did, earlier today, file
 4 a motion to the Court in liminae and I'd like to --

5 THE COURT: That's the one thing I haven't
 6 gotten yet. Could you --

7 MR. MENDOLSOHN: I'll hand a copy to the Court
 8 and to defense counsel.

9 THE COURT: All right.

10 MS. SASSOWER: Defendant.

11 THE COURT: Would the defense like time to
 12 respond to this writing?

13 MS. SASSOWER: (No audible response.)

14 THE COURT: All right. I'm grant you until the
 15 end of December to respond. The very thing I just said.

16 MR. MENDOLSOHN: Your Honor, might we also have
 17 time to respond to Ms. Sassower's motion that was filed
 18 with the Court today?

19 THE COURT: Sure, the end of December. I hope
 20 amidst the press of the holidays and all these motions and
 21 back and forth you enjoy some of the essence of the New
 22 Year's celebration. But you'll be busy in the interim
 23 because this case grows wonderfully complex. All right.

24 MR. MENDOLSOHN: There is --

25 THE COURT: There is another question?

1 MR. MENDOLSOHN: We have six, approximately six
2 documents that Ms. Sassower communicated, it includes
3 communications documents that she has sent, I believe, to
4 the United States Senate Judiciary Committee over the
5 course of a certain period of time. Now, a couple of
6 weeks ago those documents were sent to me because Ms.
7 Sassower, I don't want to misrepresent anything Ms.
8 Sassower would say, but perhaps we could resolve who
9 should have those six documents before we finish this
10 hearing today.

11 THE COURT: You would like her to take them to
12 New York?

13 MR. MENDOLSOHN: I brought them to Court today
14 because those boxes, unless Ms. Sassower can identify
15 anything exculpatory in those boxes relevant to the case
16 at hand, I do not want to have those in my possession.
17 They include, they are her documents. She should have
18 them. The United States Senate Judiciary Committee no
19 longer needs them and unless she can pinpoint some
20 documents in there that are relevant and exculpatory --

21 THE COURT: Are they uncopied originals?

22 MR. MENDOLSOHN: Your Honor, I personally did
23 not review those documents because I wasn't certain that
24 it would be appropriate for me to do so.

25 THE COURT: Well, you may have to. That will be

1 your choice. We all live in a world where there are
2 choices and consequences, right?

3 Now, question. Ms. Sassower, do you keep copies
4 of everything that you send to the Government?

5 MS. SASSOWER: I try, Your Honor.

6 THE COURT: Are you confident that every, you
7 are going to take these boxes to New York and check if you
8 are not sure. So, the question is, do you have copies of
9 everything that you have sent to the Government?

10 MS. SASSOWER: Your Honor, these are original
11 documents that were presented to the Senate Judiciary
12 Committee in support of the opposition.

13 THE COURT: Do you intend to introduce any of
14 them into evidence?

15 MS. SASSOWER: All of them.

16 THE COURT: All right, then they are your
17 exhibit and you may keep the originals. If you want the
18 Government to have copies because they are entitled to
19 copies of any documents at such time as the law calls upon
20 you to serve the copies, that's fine. But, you can
21 certainly copy them all at Kinko's and leave them with
22 your local counsel and make arrangements for the
23 Government to have copies, but each party will retain
24 their own exhibits.

25 Now, is there more from the Government before I