

2012 WL 12830409

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United States District Court, W.D. Tennessee,
Western Division.

UNITED STATES of America, Plaintiff,
v.
State of TENNESSEE, et al., Defendants,
People First of Tennessee, et al., Intervener.

No. 92-CV-2062-JPM-tmp
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Signed 09/03/2012

Attorneys and Law Firms

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ORDER DENYING DEFENDANTS' MOTION TO STRIKE

Jon P. McCalla, CHIEF U.S. DISTRICT COURT

*1 Before the Court is the Defendants' Motion to Strike the Court Monitor's Testimony and Reports (Docket Entry ("D.E.") 2817). The United States and People First of Tennessee filed responses in opposition to the Defendants' Motion. (D.E. 2839; D.E. 2842.) For the reasons that follow, Defendants' Motion is DENIED.

On August 11, 2011, Defendant State of Tennessee ("the State") filed an Amended Motion to Vacate All Outstanding Orders and Dismiss the Case (D.E. 2737). The Court held an evidentiary hearing regarding the State's Motion on January 3rd and 4th, 2012. At the hearing, the Court Monitor in this case, Dr. Nancy K. Ray, testified as a witness. The State objected to Dr. Ray's testimony at the hearing the admittance of reports prepared by Dr. Ray in accordance with her duties as the Court Monitor. Following the hearing, the State filed the instant motion to strike Dr. Ray's testimony and reports.

The State makes four arguments in support of its Motion to Strike: (1) that Dr. Ray's testimony and reports are irrelevant to issues presented by the State's Amended Motion to Vacate and Dismiss; (2) that Dr. Ray's opinion testimony and reports are inadmissible under Federal Rule of Evidence 702; (3) that Dr. Ray is no longer a neutral agent of the Court; and (4) that the Court should exclude the portions of Dr. Ray's testimony that would discourage state officials from future communications with Dr. Ray.

(1) Whether Dr. Ray's Testimony and Reports are Relevant

Pursuant to Federal Rule of Evidence 401, evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action." At issue in the State's Motion to Vacate and Dismiss is whether the objectives of the litigation have been achieved and a durable remedy is in place. See Horne v. Flores, 129 S. Ct. 2579, 2593 (2009). Also at issue is whether the State has made a reasonable effort to comply with the remedial orders of the Court. See Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 383-84 (1992). Dr. Ray's testimony and reports address the steps the State has taken to ensure the constitutional rights of class members in this case and the State's compliance with the Court's remedial orders. Accordingly, Dr. Ray's testimony and reports are relevant to the Court's determination of the State's Motion to Vacate and Dismiss.

(2) Whether the Court Monitor's Testimony and

Reports are Inadmissible under Rule 702

The State argues that the Court Monitor's testimony and Reports should be excluded because Dr. Ray is not qualified as an expert under Federal Rule of Evidence 702. The expert witness requirements under Rule 702, however, are not applicable to Dr. Ray in her role as the Court Monitor. This Court has never held that Dr. Ray must meet the requirements of Rule 702 in order to testify in the case. The State points to the Court's Order Granting in Part and Denying in Part Defendants' Motion in Limine to Exclude Testimony and Reports from the Monitor or Her Staff (D.E. 2439) in support of its contention that Dr. Ray must qualify as an expert witness. The Order states, however, that Dr. Ray "may testify as to any observations or findings related to compliance and as to the information contained in reports the Court Monitor has generated and distributed as part of her official duties." (*Id.* at 1.) This ruling is consistent with the role of the Court Monitor to evaluate the State's compliance with the Court's remedial orders. (*See, e.g.*, Remedial Order (D.E. 338) 47.) Dr. Ray performed this role at the evidentiary hearing the Court held on the State's Amended Motion to Vacate and Dismiss, testifying as to her observations and findings relating to the State's compliance with the Court's remedial orders.

*2 The State argues that Dr. Ray is unqualified to offer opinions "on most, if not all, of the subjects of her testimony." (Defs.' Mem. in Supp. of Their Mot. to Strike ("Defs.' Mem.") (D.E. 2818) 15.) The Court disagrees. While it is true that Dr. Ray is not a medical doctor, psychiatrist, behavior analyst, or lawyer (*see id.*), this has not prevented the Court from finding that she is competent to perform her task of reporting on the State's compliance with the Court's orders. The State points to portions of Dr. Ray's testimony as demonstrating her lack of expertise. (*Id.* at 15–17.) The State subjected Dr. Ray to vigorous cross-examination on these subjects and had the opportunity to present its own evidence to counter Dr. Ray's testimony and reports. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). The Court, having heard Dr. Ray's testimony, will disregard that evidence which is inadmissible or unpersuasive. *See Berry v. Sch. Dist. of City of Benton Harbor*, 195 F. Supp. 2d 971, 977 n.3 (W.D. Mich. 2002).

The State objects to several opinions rendered by Dr. Ray, arguing that these opinions are unreliable and mistaken. Dr. Ray's testimony and reports concerning the violent and dangerous incidents involving class members, the quality of care in nursing homes and intermediate care facilities, the admission of "at risk" class members, and

the location of community homes, are within the scope of her duties as Court Monitor. The Court finds that Dr. Ray's opinions on these matters are admissible, but will of course evaluate the validity of these opinions based on the data and evidence relied upon by Dr. Ray in forming her opinions. Again, the State subjected Dr. Ray to vigorous cross-examination concerning these opinions and had the opportunity to present its own evidence to counter Dr. Ray's testimony and reports.

(3) Whether Dr. Ray is a Neutral Agent of the Court

The State asserts that the Court must strike Dr. Ray's testimony and reports because she is no longer a neutral agent of the Court. During the evidentiary hearing, Dr. Ray disclosed that she has been retained by the United States Department of Justice as a consultant on two other matters. The Court granted the State discovery regarding Dr. Ray's agreements with the Department of Justice (*see* D.E. 2854), and the Department submitted Dr. Ray's contracts for the Court's review. Having reviewed Dr. Ray's testimony, reports, and contracts with the Department of Justice, the Court finds that Dr. Ray presented her unbiased opinions and observations concerning the State's compliance with the Court's orders. Accordingly, the Court will not strike Dr. Ray's testimony and reports.

This Court ruled previously that Dr. Ray is not governed by the standard set forth in 28 U.S.C. § 455(a). (*See* Order Granting in Part and Den. in Part Defs.' Mot. in Limine to Exclude Test. and Reports from the Court Monitor (D.E. 2558) 21.) Rather, the question "is whether Dr. Ray's [actions] demonstrate that she has aligned herself with any party and is no longer a neutral agent of the court." (*Id.* at 24.) The State asserts that "Dr. Ray's undisclosed, unapproved retention as a paid consultant of a party – now financially beholden and duty bound to the Plaintiff in this case – must be disqualifying." (Defs.' Mem. 25.) The Court agrees that Dr. Ray and the United States should have disclosed Dr. Ray's agreements to consult for the government on other matters and sought the Court's approval. The Court is not persuaded, however, that Dr. Ray's consultant work for the United States on two unrelated matters in any way colored her testimony before the Court. Indeed, the State cannot point to any actual bias exhibited by Dr. Ray in her testimony or reports. To be sure, the State disagrees with many of assertions made by Dr. Ray in her testimony. As this Court, however, has

explained previously:

*3 Dr. Ray's primary responsibility as court monitor is to ensure that the State complies with the court's orders, and by doing so, she protects the rights of the mentally retarded individuals at [Arlington]. For that reason, it is understandable that her actions in connection with her duties as court monitor may appear adversarial to the State and supportive of People First and the United States. That Dr. Ray's interests as court monitor overlap with those of People First and the United States does not render her impermissibly aligned with these parties.

(*Id.* at 25.) At the evidentiary hearing, Dr. Ray fulfilled her obligation to the Court to report on the State's compliance with the Court's remedial orders. The Court finds her testimony to be candid and impartial. Accordingly, striking Dr. Ray's testimony and reports is not warranted.

(4) Whether to Exclude the Portions of Dr. Ray's Testimony That Would Discourage State Officials from Future Communications with Dr. Ray

Lastly, the State asks the Court to exclude portions of Dr. Ray's testimony that may discourage state officials from future communications with Dr. Ray. The Court sees no reason to exclude Dr. Ray's testimony on this basis. Dr. Ray's assessment of the efforts made by state officials to comply with the Court's orders is necessary for the Court to determine whether to grant the State's Amended Motion to Vacate and Dismiss. *See Rufo*, 502 U.S. at 383–84. As the Court emphasized at the evidentiary hearing, it is important that the parties engage in productive conversations with Dr. Ray. Those conversations should be candid, analytical, and constructive. It nevertheless remains Dr. Ray's role to advise the Court of the State's compliance with the Court's orders. That is the role Dr. Ray performed at the evidentiary hearing.

For the foregoing reasons, the State's Motion to Strike is DENIED.

SO ORDERED this 3rd day of September, 2012.

All Citations

Not Reported in Fed. Supp., 2012 WL 12830409