

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.) No. 05-CR-00344-01-W-ODS
)
GARY EYE,)
)
 Defendant.)

**MOTION TO DISMISS THE INDICTMENT ON GROUNDS OF SELECTIVE
PROSECUTION IN VIOLATION OF THE DUE PROCESS AND EQUAL
PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION
OR ALTERNATIVELY FOR AN ORDER GRANTING DEFENDANT'S
REQUEST FOR ADDITIONAL DISCOVERY ON THIS ISSUE
WITH SUGGESTIONS IN SUPPORT**

Defendant has been charged with depriving the victim in this case of his civil rights by shooting him in violation of 18 U.S.C., Section 245. This prosecution was initiated by a request from the United States Attorney for this District to the Justice Department for authorization to proceed under Section 245. That Section provides in part:

No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

Defendant is alleged to have shot the victim because of his race. The victim was an African American and the defendant is Caucasian.

Defendant submits that the United States has purposely and

deliberately singled out defendant for prosecution because the alleged offense is a white on black crime while at or near the same time frame the United States has ignored crimes of equal or greater dastardliness where the offense involves racially motivated black on white crime (See Exhibit A, attached hereto).

The Attorney General and United States Attorneys are vested with broad discretion to enforce the Nation's criminal laws. Wayte v. United States, 470 U.S. 598, 607 (1985). Defendant readily concedes that in the more routine case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

On the other hand, a prosecutor's discretion is "subject to constitutional constraints." United States v. Batchelder, 442 U.S. 114, 125 (1979). The equal protection component of the Due Process Clause of the Fifth Amendment imposes such a constraint to the extent that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," Oyler v. Boles, 368 U.S. 448, 456 (1962). Also see Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

To establish an equal protection violation i.e. selective

prosecution, the defendant must show that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." Oyler, supra, at 456. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. Ah Sin v. Wittman, 198 U.S. 500 (1905). Ah Sin. The rule has since been applied to federal prosecutions and the United States Executive Branch as well. United States v. Armstrong, 517 U.S. 456 (1996). Armstrong, like An Sin, places a requirement on the defendant to demonstrate a showing of failure to prosecute similarly situated individuals.

Insofar as granting discovery, Armstrong holds:

The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law. . . . As the three-judge panel explained, "[s]elective prosecution' implies that a selection has taken place." 21 F.3d, at 1436.

Defendants are alleged to have committed the charged offense in March of 2005. Charges of murder in state court were dismissed after federal indictment and the case was turned over to the United States Attorney There is no indication that the local prosecutor was incapable of going forward.

Exhibit A is a news report from November 24, 2005 that provides a disturbing account of the brutal and random killing of

a suburban white male by two black males who were bored and went out hunting for someone to kill. There was some speculation that this crime may have been in retaliation for the acts charged in this indictment. There has been no apparent attempt by the United States Attorney to pursue this offense as a federal civil rights hate crime even though it carries the strongest presumptive earmarks of one.

When Eye and Sandstrom were indicted the United States Attorney was quoted in an office press release as saying: "Every citizen has the right to walk down any street in America, free from fear of attack because of their race or color. We will prosecute those who resort to violence and deny that right to their fellow citizens." Notwithstanding this rather strong pronouncement, no federal action or involvement has been pursued to date in the case of the two black suspects involved in the murder of Robert W. Osborn who was brutally shot in the back of the head while riding his bicycle home from work. The case remains a state case in Jackson County Circuit Court.

Defendant acknowledges that he has a heavy burden to carry to establish a due process and equal protection violation. However, given the very limited use of this statute in this district and the obvious similarities between the two sets of circumstances, Mr. Eye submits that he has made a sufficient showing to warrant discovery on the issue and a hearing.

Defendant

submits that the United States Attorney and the Justice Department should be ordered to produce the following:

1. All internal memorandums, letters, emails, and other documents between the Justice Department and the United States Attorney concerning the request and subsequent authorization to proceed with prosecution under 18 U.S.C. 245 in this case.
2. All similar documents listed in paragraph 1, if such exist, with respect to any request for prosecution or declination in the cases of Rapheal L. Willis and Fabian Brown (See Exhibit A).
3. Any internal Justice Department policy memorandum, letter or manual authored by the Justice Department or Executive Branch that sets forth criteria and standards to be applied by the Attorney General or his subordinates in making the apparent subjective determination required by the certification portion of 18 U.S.C. 245.
4. Justice Department statistical data as to the number of times that a Section 245 prosecution has been authorized in a black on white setting versus a white on black setting.

Defendant submits that he is entitled to this limited

discovery based on a demonstration of two clearly different standards applied in this district and likely nation wide.

WHEREFORE, defendant moves the Court for an Order directing the United States to produce the discovery requested herein

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri through use of the Electronic Court Document Filing System on March 17, 2006.

/s/
JOHN R. OSGOOD

EXHIBITS

Kansas City Star
Kansas City Star, The (MO)
November 24, 2005
Random killing defies answers
Author: KEVIN HOFFMANN
CHRISTINE VENDEL
Section: News
Page: A1
Index Terms:
News

Article Text:

They were bored and wanted to kill someone, prosecutors contend. And so the two men packed themselves into a four-door Honda Civic and, according to authorities, brought along a shotgun as they tracked their prey.

For a while, authorities said, the two thought about killing a woman they saw driving alone.

But then Robert W. Osborn rode past on his bicycle, heading home from work.

After shooting twice and missing, they fired a third shot into the back of Osborn's head, killing him.

Then they drove off.

Those chilling allegations were leveled Wednesday as authorities charged one man with murder in Osborn's death and searched for another still on the loose.

And officers are looking into whether there were similarities between this case and other shootings in recent months that may also have been random.

The Jackson County prosecutor's office charged Rapheal L. Willis, 19, with first-degree murder and armed criminal action. He was arraigned in Jackson County Circuit Court and ordered held without bond.

In court records, prosecutors allege that Willis drove the Honda while another man fired the shotgun.

No one else has been named as a suspect nor charged in the case. But police Wednesday sent out a media alert saying that they are searching for 20-year-old Fabian Brown and want to question him about the shooting. Officers said he was known to be armed and should not be approached.

Anyone who knows Brown's whereabouts is asked to call the TIPS Hotline (816) 474-TIPS (474-8477).

Kansas City police on Wednesday said they are looking into whether the killing of Osborn is similar to another murder and at least two other random shootings this year. Investigators suspect that those crimes, too, were committed for "fun."

Police declined to release specific information about the other

crimes while the other suspect in the Osborn killing remained at large. No charges had been filed in connection with those other crimes.

Investigators said! they had been told that Sunday's killing and other shootings may have been videotaped on a camera or cell phone. Police have not found any tapes.

Kansas City police said Willis was arrested Monday night on an unrelated weapons charge. While police were questioning him about that charge, the conversation turned to Sunday's murder and police began questioning him about the killing.

Authorities said that information they gathered after arresting Willis painted a picture of cold-blooded, uncaring killers. The killers, they said, didn't even take anything from Osborn.

"This was a completely random murder, and they were just looking for someone to kill," said Kansas City police Sgt. David Bernard. "...Their first plan was they were going to find a house, ring the doorbell and, whoever answered the door, they were going to shoot."

Deputy Jackson County prosecutor Jim Kanatzar said all of Kansas City's 114 homicides this year have been tragic and horrible, but in Osborn's case, "the only way to describe it is complete indifference for human life."

Bernard said that after Willis was arrested, he gave police a statement that indicated he knew something about the Osborn slaying. Police initially thought he could have been a bystander. But, Bernard said, as they learned more, the officers came to believe he was present.

Based on information they'd gathered, police obtained a warrant, and tactical officers on Tuesday went to a house near 39th Street and Oakley Avenue to search for the suspected shooter. The man was not there.

According to a court filing, Willis told police he was with another man Sunday who repeatedly said he was bored and wanted to kill someone. About 5:15 a.m., court papers indicate, the two men were driving near U.S. 40 and Noland Road when they saw the lone woman driver.

They plotted to rob and kill her, the documents say, but then they spotted Osborn pedaling west on 47th Street near Norfleet Road. Osborn, 43, was headed home after finishing his job as a stocker at the Hy-Vee store at U.S. 40 and Noland Road.

According to court documents, Willis told police that he stopped the car and the other man got out and fired the shotgun at Osborn, but missed. The other man became angry, Willis told police, and the two men drove past Osborn. Again, the court documents say, the man fired a second shot, again missing.

They drove farther, and the gunman got out and hid behind a tree, according to the court documents. When Osborn passed, the gunman fired one more shot, striking Osborn in the back of the head. Willis told police the man approached Osborn, kicked his body,

and seeing no response, got back into the car. Then the two men fled, the documents say.

According to the court filing, the shooter was watching a newscast about the killing when he told another person details about the killing, including how Osborn fell onto his bike and down to the ground.

Ron Osborn, a brother, said news of the arrest and reason behind the killing did little to help family members understand the shooting.

"Yes, it's a relief to hear they got one and are on the trail of the other one," Ron Osborn said. "But it's disgusting, it's unbelievable that people would think so little of a person's life."

Robert Osborn held life in a higher regard, family members said. He sought adventure and climbed mountains in Colorado and traveled to Egypt to see the pyramids. His intellectual side spurred curiosity and he earned his pilot's license to understand flight. He also joined the Civil Air Patrol, they said.

Those traits showed up at the Hy-Vee where Osborn worked for the past 18 months. Paul Hoppman, store director, said he didn't think Osborn had missed a day of work.

"He was a hard-working individual, honestly liked by everybody," he said.

Hoppman added that Osborn was smart and intensely curious. Each time Osborn encountered a new item in the store, Hoppman said, he would go onto the computer on his break to research its ingredients, uses and history.

"He was always learning something about something," Hoppman said. The store is providing the family with meals for Thanksgiving, the funeral and a floral spray for the casket.

"That helped with our own healing process, to be able to do that for the family," Hoppman said.

A check of Willis' background showed that he has worked for Kansas City's Water Services Department since last December. Jackson County Circuit Court records showed that Willis had protection orders filed against him in December and January by the mother of a girl he had dated. He allegedly harassed the 17-year-old girl by phone and in person, according to the allegations made in court records. The woman who filed the protection orders declined to comment Wednesday.

Willis had lived on his own for some time, and previously lived with his mother and stepfather in Kansas City near 51st Street and Noland Road. Three police officers lived on the same block, including Maj. Anthony Ell, commander of the Violent Crimes Unit. Willis' mother called Ell on Wednesday to ask about her son's arrest. Ell said she was "shocked and devastated."

Ell said he, too, was surprised, because he always knew Willis to be respectful and well-mannered.

"He seemed like a kid on the right track when I knew him," Ell

said. "I never knew him to be in trouble."
Russ Pulley, Tony Rizzo, Lynn Horsley contributed to this report.
To reach Kevin Hoffmann, call (816) 234-7801 or send e-mail to
khoffmann@kcstar.com.
Raphael L. Willis has been charged in the death of Robert W.
Osborn.
Police are searching for Fabian Brown as a person of interest in
the case.
Photos (color)
Willis; Brown
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Record Number: 1763974

EXHIBIT "A"

