

IN THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

FILED

MAR 13 2013

IN OFFICE
CORINNE T. HURST
CIRCUIT CLERK

STATE OF ALABAMA,

Plaintiff,

vs.

HARVEY ALMORN UPDYKE,

Defendant.

CC-2011-000492.00 - .05

ORDER GRANTING MOTION TO CHANGE VENUE

On June 21st, 2012, Defense Counsel renewed its motion to change the place of trial under Rule 10 of the Alabama Rules of Criminal Procedure. On March 11th, 2013, the Lee County District Attorney's office filed a notice that the State withdraws its opposition to the change of venue request. The Court was prepared to hear oral arguments on defense counsel's motion on March 15th, 2013.

In its notice, the State quotes from a recent decision from the Alabama Court of Criminal Appeals, Luong v. State, ---So.3d---, 2013 WL598119 (Ala. Crim. App. 2013), which contains a substantial discussion of pretrial publicity and the presumed prejudice standard beginning on page 8.¹ The quoted passage describes the media publicity surrounding the Luong capital murder trial, specifically that:

There were articles describing the impact of the crime on the community and the community's efforts to come to terms with the ramifications of Luong's actions. There was extensive publicity concerning the community's involvement in the case and the recovery efforts the community had undertaken At one point over 150 people, mostly volunteers, helped with the recovery efforts, and the newspaper asked all owners of property near the water to walk their properties. A local cemetery donated the plots for the children to be buried and set aside a plot for the children's mother. A local school raised money for the mother. A permanent memorial was erected at Maritime Park in Bayou La Batre to honor the children. The community was invited to the graveside service for the children, the family of the victims hosted an

¹ It would seem that although the Court of Criminal Appeals did an exhaustive analysis of the presumed prejudice standard, the Luong case was reversed and remanded for the trial court's failure to allow individual voir dire of jurors regarding pretrial publicity. This process had been allowed in the State v. Harvey Updyke trial in June of 2012.

appreciation dinner for the volunteers who had searched for the children's bodies, and a moment of silence was observed at a Mardi Gras parade to honor the children. Individuals indicated how consumed the Mobile community had become with the tragedy and the anger an outrage that the community felt toward Luong.

Id. at 18. As the District Attorney notes, the defense attorneys have submitted almost no articles demonstrating prejudicial pretrial publicity.² However, the Court anticipates that these records would have been forthcoming at the hearing on March 15th had the District Attorney not withdrawn his objection. In fact, defense counsel had filed a subpoena request form naming the Custodian of Records at the Opelika-Auburn News. Furthermore, the Court will allow the attorneys to supplement the record with copies of any articles they have collected in support of the presumption of prejudice argument.

This case was previously set for trial during the week of June 18th, 2012. During voir dire on or around June 19th, 2012, a local newspaper³ published a story stating that the defendant confessed to one of its reporters during a break from juror examination. This story was republished by dozens of other media outlets and spread quickly with assistance from the Internet. The potential jurors had previously been instructed to abstain from any media coverage of the trial. On June 21st, 2012, the Court conducted individual voir dire of jurors that had been already qualified prior to issuance of the story. During this process, it became evident that several of the jurors that had been qualified for possible selection had been "tainted" by the news story when other individuals had discussed the case with them. At that time, the defense renewed its motion for a change of venue; the State objected on the grounds that any error was invited by the defendant. The Court determined that a jury could not be seated out of the pool that had been summoned for duty in June of 2012 and granted a continuance; announced that it would schedule a further hearing on the motion to change venue at a later date.^{4 5}

² One article regarding an alleged attack on the defendant was attached to defense counsel's motion to change the place of trial, which was filed on November 14th, 2011. In contrast, the Court of Criminal Appeals in Luong summarizes approximately 59 articles in a newspaper of general circulation in Mobile.

³ The Auburn Plainsman is owned by Auburn University, the alleged victim in this case, and operated by Auburn students.

⁴ Since the continuance in June 2012, the defendant's representation withdrew; new attorneys were appointed; the defendant was arrested for an offense in Hammond, Louisiana; the defendant voluntarily submitted to a mental health examination at Taylor Hardin Secure Medical Facility; the defendant was returned to bond to receive medical treatment for an unrelated condition; hearings were held regarding competency; and the defendant's bond was revoked upon the district attorney's motion, subsequent to a hearing.

⁵ Defense counsel submitted a written motion renewing its change of venue request on August 21st, 2012.

In the notice withdrawing opposition, the District Attorney states in Paragraph 7 that

The prosecution must also consider the very real possibility that after another week of jury selection in April, the trial court could still decide in favor of a change of venue. The defense and state would then have conducted voir dire twice and be no closer to trial than we were before. It is also coincidentally unfortunate that the activities surrounding 'A-Day' could further exacerbate the jury selection process if the case were tried [in Lee County] in April.

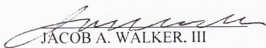
Considering the publicity at the June 2012 trial, as well as the District Attorney's notice indicating a lack of objection, defense counsel's motion is GRANTED.

State law requires that the trial be removed to the nearest county free from prejudice. See Ala. Code § 15-2-24; A.R.Crim.P. 10.1(a). The trial scheduled for April 8th, 2013 will be removed to Elmore County, Alabama. Fortunately, Elmore County has a criminal jury term scheduled for April 8th, 2013; therefore, the trial setting will remain as set forth in this Court's order of January 10th, 2013.

The Lee County Clerk's office is directed to forward the record in this case in accordance with § 15-2-25 of the Code of Alabama. In accordance with Ala. Code § 15-2-27, subpoenas for trial in Elmore County must be issued by the Lee County Clerk's office until the transcript is complete. This Court is most appreciative of the Elmore Circuit Clerk's readiness to assist in this matter.

The hearing scheduled for March 15th, 2013 is cancelled. If either party requests that this date be maintained as status conference, a written motion should be filed listing the nature of the issues therein.

Done this 13th day of March, 2013.


JACOB A. WALKER, III
Circuit Judge

cc: Robbie Treese, Kisha Abercrombie
Margaret Brown, Andrew Stanley
AAA Bonding Co.
Lee County Sheriff's Office
Trisha Campbell
Elmore County Clerk's Office