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plication, it results in a very strict and narrow rule allowing searches and seizures after arrest for traffic violations only in exceptional cases.

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DISCOVERY OF PREJUDICIAL PRE-TRIAL PUBLICITY ON VOIR DIRE

A major problem facing courts today is attainment of a fair trial with an impartial jury when pre-trial publicity has been sufficient so as to constitute "trial by newspaper."¹ This problem has become more widespread since the development of rapid communication.² It is most acute when there is circulation of prejudicial pre-trial publicity in the area from which the jurors are to be drawn. The courts must determine whether pre-trial publicity has caused widespread prejudice within the jury panel.

In the recent case of *State v. Van Duyn*,³ the Supreme Court of New Jersey rejected an allegation of prejudicial publicity and affirmed a first degree murder conviction. The "prejudicial" story first appeared in the community newspaper on the evening selection of the jury began. The following morning, a similar story was published, and numerous copies were found in the jurors' assembly room. Since one juror had already been sworn before this alleged prejudicial publicity could be brought to the attention of the court, defense counsel moved for a mistrial. Before denying this motion, the trial judge had permitted the *voir dire* examination of the juror to be re-opened in order to determine whether the juror already sworn had read the allegedly prejudicial stories and was prejudiced.⁴ The trial judge also permitted the *voir dire* interrogation to be expanded to determine if

¹Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964). On granting a writ of habeas corpus in the famous Dr. Sam Sheppard murder case, the court said that the publicity both before and during the trial had been an example of trial by newspaper.

²The problem, however, existed before rapid communications developed. Pre-trial newspaper coverage of a former trial confronted the Supreme Court of the United States in 1878. A juror had read local newspaper reports, but was found not to be in fact biased. *United States v. Reynolds*, 98 U.S. 145 (1878).

³43 N.J. 369, 204 A.2d 841 (1964).

⁴During the three week period of jury selection, four additional mistrial motions were overruled. The trial judge thought that at every stage of the jury selection proceeding the defendant could be accorded a fair trial with that panel, at that time, and location.

there was any prejudice within the panel of prospective jurors.⁵ Each juror was ordered to be sequestered when accepted.

The New Jersey Supreme Court completely reviewed the liberal *voir dire* examination of prospective jurors permitted by the trial judge. Relying on the principle that a ruling on a motion for a mistrial is within the discretion of the trial judge⁶ and is reversible on appeal only if there is an abuse of discretion,⁷ the court held that the pre-trial publicity was not sufficiently prejudicial to warrant a new trial.

In order to determine the prejudice among the jurors resulting from pre-trial publicity, the judge will usually resort to the *voir dire* examination. This oral interrogation seems to be the only practical way of ascertaining the predetermined prejudices of the jurors. This prejudice must be discovered before the remedial motions—change of venue and continuance—can be effectively ruled upon.⁸ The answers of the individual jurors to the propounded questions will show any existing prejudice and, at the same time, indicate the attitude of the entire panel.⁹ The record of the trial will include this interrogation so that the appellate court can also make an independent evaluation of the impartiality of the jurors.¹⁰

The *voir dire* examination in *Juelich v. United States*¹¹ revealed prejudice among the entire panel of prospective jurors. In that case, of the eighty-one jurors on the panel, ten were excused; fifty-one

⁵The purpose of this oral interrogation of prospective jurors by either judge or counsel, or both, is to determine the conscious, and even subconscious, biases a juror may have. Although this procedure may be clumsy, imperfect, and time consuming, it is the only practical way to disclose any existing prejudices. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

⁶When ruling on a remedial motion, this discretion of the trial judge is similar to the defendant's burden of proving that the jurors were in fact biased. Because of the judge's first-hand observation, his ruling has great weight on appeal. *Gicino v. United States*, 212 F.2d 8 (8th Cir. 1954); see *United States v. Parr*, 17 F.R.D. 512 (S.D. Tex. 1955).

⁷*Stroud v. United States*, 251 U.S. 15 (1919); *Holt v. United States*, 218 U.S. 245 (1910).

⁸The advantages and reasons for holding the motions in abeyance until after the *voir dire* is completed, revealing any possible prejudice, can be seen in *United States v. Suchman*, 206 F. Supp. 688 (D. Md. 1962); *United States v. Dioguardi*, 147 F. Supp. 421 (S.D.N.Y. 1956); and *Ohio v. Sheppard*, 165 Ohio St. 293, 135 N.E.2d 340 (1956).

⁹See *Rakes v. United States*, 169 F.2d 739 (4th Cir. 1948). Remedial motions were denied here because of the satisfaction of the trial judge, based on the *voir dire* examination, that the jury in Richmond, Virginia, was impartial. The offense was committed in Fredericksburg, Virginia, 50 miles away. The same jury also acquitted appellant's co-defendant on all counts.

¹⁰*United States v. Bando*, 244 F.2d 833 (2d Cir. 1957).

¹¹214 F.2d 950 (5th Cir. 1954).

thought both defendants were engaged in the killing; twelve thought either or both of the defendants were guilty; two thought defendant Juelich was the guilty party; and six had no opinion. In reversing a conviction, the court said: "We have not yet found any decision, and we have been cited to none, wherein a defendant has been held to have had a fair trial after conviction by a jury of twelve men, every member of which had sworn on *voir dire* that he had no opinion the defendant was guilty."¹² Similar prejudice was shown by the *voir dire* examination of prospective jurors in *Irvin v. Dowd*,¹³ where 90 per cent of the panel of 430 had some opinion of guilt, ranging from mere suspicion to absolute certainty. Two-thirds of the jurors selected had an opinion that the accused was guilty and were familiar with all the material facts and circumstances involved.

Publicity alleged to be prejudicial may be directed toward groups rather than individuals. When considering this type of publicity, the courts often require a direct attack on the accused in addition to the attack on the group itself. Attacks on organizations, such as the Communist Party, have been held insufficient where reference was not personally directed toward the defendants.¹⁴ This additional requirement was applied, with the same result, to publicity directed against a savings and loan association where the defendant was himself an officer, but not personally attacked.¹⁵

A guideline to aid the trial judge in exercising his discretion in determining from the *voir dire* the effect of the alleged prejudicial pre-trial publicity¹⁶ was established by the Supreme Court of the United

¹²Id. at 955.

¹³366 U.S. 717 (1961).

¹⁴United States v. Stein, 140 F. Supp. 761 (S.D.N.Y. 1956); United States v. Foster, 81 F. Supp. 281 (S.D.N.Y. 1948).

¹⁵United States v. Sorce, 308 F.2d 299 (4th Cir. 1962).

¹⁶At common law, a standard was not necessary to aid the trial judge in this type of determination. This is evidenced by the fact that a juror who entered the box with an opinion was ipso facto disqualified from serving. E.g., *People v. Miller*, 125 Cal. 44, 57 Pac. 770 (1899); *People v. Wells*, 100 Cal. 227, 34 Pac. 718 (1893); and *People v. Allen*, 43 N.Y. 28 (1870). This rule has been somewhat modified by statutes. E.g., Cal. Pen. Code § 1076; N.Y. Code Crim. Proc. § 376.

This position has also been modified by court decisions, and approaches the standard announced by the United States Supreme Court in the *Dowd* case. In *United States v. Titus*, 210 F.2d 210 (2d Cir. 1954), the juror said he had a casual opinion of the case from newspaper reports, but that he could lay this aside and decide the case by the evidence presented in court. The trial judge then denied the challenge. "The remarks of the juror justified the court's ruling." Id. at 214.

A different standard was announced in *Geagan v. Gavin*, 292 F.2d 244 (1st Cir. 1961), when the court said: "The best the courts can do, however, is to take a prospective juror's word for his impartiality or for his capacity to overcome a tentative opinion on the merits, valued in the case of the trial judge, by an estimate of

States in *Irvin v. Dowd*,¹⁷ involving a pattern of deep and bitter prejudice throughout the community. In reversing a death sentence, the Court said that a prospective juror did not have to be completely ignorant, for to require that would be to establish an impossible standard. A more realistic standard was adopted when the Court said: "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."¹⁸

The *Dowd* standard is adequate when the jurors' claim of impartiality is factually sound.¹⁹ It is inadequate, though, when it can be established that the jurors were not impartial, notwithstanding their contrary assertions on *voir dire*.²⁰

the prospective juror's character and intelligence formed by observation of the general appearance of the individual concerned and his demeanor under examination." *Id.* at 249.

¹⁷366 U.S. 717 (1961).

¹⁸*Id.* at 723.

¹⁹In *Geagan v. Gavin*, 292 F.2d 244 (1st Cir. 1961), the court relied on the fact that 306 of the 1104 (almost 28%) prospective jurors called had no opinion at all as to the guilt or innocence of the accused. This was compared with *Irvin v. Dowd*, *supra* note 17, where 8 of the 12 jurors had an opinion, whereby in the *Geagan* case only 2 of the actual jurors had an opinion. Also, in the *Geagan* case, there had been no passion aroused by the Brinks robbery. The court, in affirming the fair trial said, "These voir dire examinations speak eloquently for themselves. The most that they show is that the jurors had formed some impression or opinion as to the merits of the case as might well be expected of intelligent and alert citizens of the community." *Id.* at 249. The same situation appeared in *Beck v. Washington*, 369 U.S. 541 (1962); and *Spies v. Illinois*, 123 U.S. 131 (1887).

²⁰In *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963), a murder conviction was reversed. Of the 16 jurors finally seated, after numerous ones were excused because of pre-trial publicity, only one had not read of the case, 8 had no opinion; and 8 thought he was guilty but said they could change it and render an impartial verdict. On appeal, the voir dire was extensively examined because of the claim of impartiality, but the court concluded that this impartiality was not possible. The predeterminations placed an additional burden on the defendant that he was not required to bear. "The record is convincing that such an impartial jury could not be obtained in Suffolk County at the time this jury was drawn for the trial of this case." *Id.* at 373.

This review procedure is illustrated in *Sheppard v. Maxwell*, *supra* note 1, where habeas corpus was granted to the defendant on the basis of a biased jury trial twelve years before. The trial court in *Ohio v. Sheppard*, 165 Ohio St. 293, 135 N.E.2d 340 (1956), found that the jury was impartial. On appeal, the court said that "regardless of what might have been said on the voir dire examination, the community was so prejudiced against petitioner that a fair trial could not be had." 231 F. Supp. at 59. "This court now holds that the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge." 231 F. Supp. at 60.

For other cases where the appellate court has reached similar results see: *Juelich v. United States*, *supra* note 11; and *Irvin v. Dowd*, *supra* note 13.

Aside from the questions propounded to the jury on the *voir dire*²¹ by the court and counsel to discover prejudice resulting from pre-trial publicity, the trial judge must also consider all the factors surrounding the trial in determining the existence of any prejudice. These factors include the source of the publicity, whether it has emanated from government or independent sources; the extent and inflammatory nature of the publicity; the inconvenience to the government and administration of justice in granting either a continuance or change of venue; the possibility of securing a substantially better panel at another time or location; whether the alleged prejudicial material reached the veniremen; and the time lapse between the publicity and the trial.²² If the *voir dire* reveals purely objective reporting of the court record,²³ or if the defendant has failed to show that the jury was actually biased,²⁴ remedial motions should be denied. When prejudice does appear, however, change of venue and continuance are the two major remedial motions available to aid the trial judge in securing a fair trial with an impartial jury.²⁵

The motion for a change of venue is most useful when the publicity is intense²⁶ and well circulated in the area,²⁷ and when it is convenient for the parties to have the trial in another location.²⁸ When

²¹The appellate court must consider these questions and decide if they in any way prejudice the defendant. If these questions turn out to be actually prejudicial, the conviction must be set aside on this bias as well. *Marson v. United States*, 203 F.2d 904 (6th Cir. 1953).

²²*Northern Cal. Pharmaceutical Ass'n v. United States*, 306 F.2d 379 (9th Cir. 1962); *United States v. Bonanno*, 177 F. Supp. 106 (S.D.N.Y. 1959). In *Bonanno*, these remedies were outlined by the court in denying motions for continuance and change of venue. The trial was ordered to begin and if any prejudice resulted, time would still remain to guarantee the defendant a fair trial through a renewal of the proper remedial motions.

²³*United States v. Synodinos*, 218 F. Supp. 479 (D. Utah 1963).

²⁴*Buchalter v. New York*, 319 U.S. 427 (1943). "We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established." *Id.* at 430.

²⁵When prejudicial pre-trial publicity is involved, various other remedial devices are available to defense counsel. They include: peremptory challenges, challenge of the array, challenge for cause, motions to quash the indictment, motion for dismissal, motion to declare a mistrial, and motion for a new trial. See generally Annot., 10 L. Ed. 2d 1243 (1964); Annot., 3 L. Ed. 2d 2004 (1959); and Annot., 31 A.L.R.2d 417 (1953).

²⁶*United States v. Parr*, 17 F.R.D. 512 (S.D. Tex. 1955).

²⁷*Rideau v. Louisiana*, 373 U.S. 723 (1963).

²⁸*United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952). The publicity that appeared the day before the jury selection began, was intense, critically timed, and prejudicial. In granting the motion for a change of venue, the court relied heavily on the fact that there "was relatively minor inconvenience and little additional expense in trying the case in another district." *Id.* at 299.

nationwide publicity would prevent the drawing of an impartial jury in another location, the change of venue motion should be overruled.²⁹

The motion for a continuance³⁰ will be granted when a change of venue would be unsatisfactory.³¹ When granted, the continuance provides an opportunity for hostile sentiments to subside.³² When the proceeding is resumed, it is hoped impartial jurors can then be empaneled. If, at the time of the *voir dire*,³³ there is any doubt about obtaining a fair trial because of prejudicial pre-trial publicity, that doubt will be resolved in favor of the defendant to protect his constitutional rights guaranteeing a fair trial with an impartial jury.³⁴

In *Delaney v. United States*,³⁵ there was national publicity due to Federal Government hearings concerning the defendant's activities as a Collector of Internal Revenue. The trial judge did everything possible to minimize the effect of this publicity on the jurors, including cautionary instructions and questions to the prospective jurors at selection. Only the first of three continuance motions was granted. On appeal, the conviction was reversed on the basis that the other

²⁹*United States v. Bando*, supra note 10. Since the publicity here was nationwide and read by millions, equal prejudice would appear in any community served by national press associations.

³⁰*United States v. Hoffa*, 156 F. Supp. 495 (S.D.N.Y. 1957). Here the court discusses the practical approach of postponing the trial and says that "the court is charged with the responsibility of making the best practical decision under the circumstances; that is, to try the case and ascertain upon the *voir dire* whether, in fact and in law, a fair and impartial trial can be selected." *Id.* at 500.

³¹In *United States v. Dioguardi*, 147 F. Supp. 421 (S.D.N.Y. 1956), the continuance was granted to let the local community, from where jurors were to be drawn, free itself of emotional tension. The *voir dire* would be held at that time to determine any need for a change of venue. Nationwide publicity may make a change of venue useless and the continuance would be the only way of securing a fair trial. This was the situation in *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952).

³²Often, however, this is not necessary and continuance motions are properly denied. Such was the case in the *United States v. Moran*, 194 F.2d 623 (2d Cir. 1952). Here the reason for denying the motion was that only 27 talesmen were questioned in obtaining a jury satisfactory to both sides and only two of the 12 finally selected had read anything about the case in the newspaper. In *United States v. Suchman*, 206 F. Supp. 688 (D. Md. 1962), the court said in denying the motion that "the publicity here was not so prejudicial that the Court can conclude as a matter of law that defendant cannot obtain a fair trial..." 206 F. Supp at 691. Also, the motion should be denied when the publicity was not widespread. *Green v. Maine*, 113 F. Supp. 253 (D. Me. 1953). The judge's discretion is a factor to be considered and when he feels the circumstances do not demand a continuance, such a motion should be denied. *Centoni v. United States*, 69 F.2d 624 (9th Cir. 1934).

³³As to a continuance motion, complete reliance on the *voir dire* examination of prospective jurors can be seen in *Rizzo v. United States*, 304 F.2d 810 (8th Cir. 1962); and *United States v. Malinsky*, 20 F.R.D. 300 (S.D.N.Y. 1957).

³⁴*United States v. Hoffa*, supra note 30 at 499.

³⁵199 F.2d 107 (1st Cir. 1952).

continuance motions should have been granted to permit the effect of the publicity to subside. By releasing and causing this publicity while the defendant's indictment was pending, the United States Government placed an unfair burden on the defendant. The court said that the accused should not be forced to stand trial "while the damaging effect of all the hostile publicity may reasonably be thought not to have been erased from the public mind."³⁶

The motion for a continuance places on the trial judge the burden of weighing the defendant's right to a speedy trial against his right to a fair trial with an impartial jury. A fair trial with an impartial jury usually controls if it appears that a fair trial can be obtained at a later date.³⁷

Often the motions for change of venue and continuance are made together and in the alternative. In such a case, the *voir dire* examination of prospective jurors provides the trial judge with a basis for choosing between these motions. On appeal, the exercise of the trial court's discretion will be reviewed in light of the *voir dire* examination.³⁸

When these remedial motions alleging prejudicial pre-trial publicity are not made, the defendant may be deemed to have waived any right to claim error on this ground.³⁹ In *United States v. Rosenberg*,⁴⁰ the court said raising the issue of prejudicial pre-trial publicity for the first time on appeal was an "after thought," and just an attempt to find a basis for reversal.⁴¹

³⁶Id. at 114.

³⁷*United States v. Dioguardi*, 147 F. Supp. 421 (S.D.N.Y. 1956).

³⁸The conviction in *Shepherd v. Florida*, 341 U.S. 50 (1951), was reversed when the Supreme Court of the United States found that the defendant had not received a fair trial. The review of the entire case, including the record of the *voir dire*, revealed "that these defendants were prejudiced as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated." Id. at 51. The prejudicial material consisted of a press release by an officer of the court charged with the defendant's custody, stating that the defendant had confessed. "[T]his trial took place under conditions and was accompanied by events which would deny defendants a fair trial before any kind of jury." Id. at 55.

Often the review by the appellate court results in affirming the conviction when the record fails to disclose any prejudiced jurors. This is the case when the record of the trial and the *voir dire* show that a fair trial had been received by the defendant, and not one tainted by prejudicial pre-trial publicity. Convictions were affirmed in: *United States v. Bletterman*, 279 F.2d 320 (2d Cir. 1960); *Bianchi v. United States*, 219 F.2d 182 (8th Cir. 1955); and *Callanan v. United States*, 223 F.2d 171 (8th Cir. 1955).

³⁹*United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956); *Stroble v. California*, 343 U.S. 181 (1952); *Finnegan v. United States*, 204 F. 2d 105 (8th Cir. 1953).

⁴⁰200 F.2d 666 (2d Cir. 1952).

⁴¹Defendant's acceptance of the entire panel without using all of his peremptory