

**IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION V**

STATE OF TENNESSEE

VS

ANDREW DELKE

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NO. 2019-A-26

ORDER

2021 JAN 28 PM 12:36
CRIMINAL COURT CLERK

FILED

This cause came to be heard on January 25, 2021 upon the defendant's second request for change of venue pursuant to Tennessee Rules of Criminal Procedure Rule 21. This Court previously issued an order denying the request for change of venue on November 26, 2019. The defendant was granted permission for an interlocutory appeal to the Court of Criminal Appeals of Tennessee on December 17, 2019. The Court of Criminal Appeals of Tennessee denied the appeal on January 14, 2020. The defendant filed a second motion for change of venue on December 2, 2020 requesting for a change of venue for the trial to be conducted outside of Davidson County.

Tennessee Rules of Criminal Procedure Rule 21 provides in pertinent part:

"The court may change venue of a criminal case on the defendant's motion or on its own initiative with the defendant's consent. The court should order a venue change when a fair trial is unlikely because of undue excitement against the defendant in the county where the offense is committed or for any other cause."
T.R.Cr.P. 21

After careful consideration of the defendant's motion to change venue, the response from the State and the evidence presented at the evidentiary hearing, the Court finds the following. A change of venue is necessary when a fair trial is unlikely. In addition to contending that there are number of individuals who recognize the case from media coverage and formulating an opinion about it, the defendant also contends that there have

been multiple massive protests in Nashville which include arson and vandalism at the Historic Metro Nashville Courthouse that have shaped public opinion regarding police officers. Specifically, the defendant points to the protests of May 30, 2020 and the incidents that ensued.

The defendant contends that pretrial publicity in this case has been reignited and exacerbated by the deaths of George Floyd and Breonna Taylor in 2020 which resulted in public demonstrations around the nation. The defendant asserts that this would preclude an impartial jury in Davidson County. However, the overriding issue that still remains is whether a jury in Davidson County can be fair and impartial? *Brady v. State*, 584 S.W.2d 245 (Tenn. Crim. App.1979).

A change of venue may be granted if it appears that “due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had.” Tenn. R.Crim. P. 21(a). The mere fact that jurors have been exposed to pretrial publicity will not warrant a change of venue. *State v. Rogers*, 188 SW 3d 593, 621(Tenn. 2006) citing *State v. Mann*, 959 S.W.2d 503, 531–32 (Tenn.1997). Similarly, prejudice will not be presumed on the mere showing of extensive pretrial publicity. *Id.* at 621 citing *State v. Stapleton*, 638 S.W.2d 850, 856 (Tenn.Crim.App.1982). In fact, jurors may possess knowledge of the facts of the case and may still be qualified to serve on the panel. *Id.* at 621 citing *State v. Bates*, 804 S.W.2d 868, 877 (Tenn.1991). The test is whether the jurors who actually sat on the panel and rendered the verdict and sentence were prejudiced by the pretrial publicity. *State v. Crenshaw*, 64 S.W.3d 374, 386 (Tenn.Crim.App.2001); *State v. Kyger*, 787 S.W.2d 13, 18–19 (Tenn.Crim.App.1989). Jurors who have been exposed to pretrial publicity may sit

on the panel if they can demonstrate to the trial court that they can put aside what they have heard and decide the case on the evidence presented at trial. *Id.* citing *State v. Gray*, 960 S.W.2d 598, 608 (Tenn.Crim.App.1997).

Factors that should be considered for change of venue are outlined in *State v. Hoover*, 594 S.W.2d 743 (Tenn.Crim.App.1979). The *Hoover* court listed the following seventeen factors: the nature, extent, and timing of pretrial publicity; the nature of the publicity as fair or inflammatory; the particular content of the publicity; the degree to which the publicity complained of has permeated the area from which the venire is drawn; the degree to which the publicity circulated outside the area from which the venire is drawn; the time elapsed from the release of the publicity until the trial; the degree of care exercised in the selection of the jury; the ease or difficulty in selecting the jury; the venire person's familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire; the defendant's utilization of his peremptory challenges; the defendant's utilization of challenges for cause; the participation by police or by prosecution in the release of the publicity; the severity of the offense charged; the absence or presence of threats, demonstrations or other hostility against the defendant; the size of the area from which the venire is drawn; affidavits, hearsay or opinion testimony of witnesses; and the nature of the verdict returned by the trial jury. *Rogers* at 622 citing *State v. Hoover*, 594 S.W.2d 743.

Although the case has received extensive pretrial publicity, this Court is of the opinion that jurors can be fair and impartial. Moreover, the voir dire process is available to exclude potential jurors who may have an improper bias. *State v. Fausto*, 463 S.W.3d 469, 482 (Tenn. 1992). Furthermore, as previously held, this Court believes that it can

empanel a jury of citizens who have no knowledge of the case or who can be fair and impartial as it and other courts in Davidson County have done in the past.

The defense is proposing travel to another jurisdiction, select a jury and trying the case in that jurisdiction. Such a move presupposes that the other adjacent jurisdictions in Tennessee are unaware of the publicity surrounding this case. That is highly unlikely, since those jurisdictions have the same news coverage as Davidson County.

Counsel also argues that if the trial is held in Davidson County, protesters will disrupt the proceedings, thus preventing a fair trial. If the trial is moved, there is nothing that would prevent potential protesters from travelling to the site of the trial and disrupt the proceedings at that location. Again, the Court believes that such a circumstance is unlikely to happen.

Nonetheless, if it does appear that circumstances arise that the Court believes the defendant cannot receive a fair trial, this Court is more than willing to do whatever is necessary to effectuate him receiving fair and just trial.

Therefore, the defendant's motion is respectfully DENIED.

IT IS SO ORDERED.

Entered this 28th day of January, 2021.


MONTE D. WATKINS, JUDGE DIVISION V

CC: Roger Moore
David Raybin