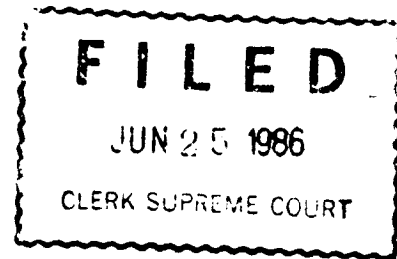


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

CURTIS L. DeMICHELIS,)

Defendant-Appellant.)

Filed June 25, 1986 174

6-100
84-1811

Appeal from the Iowa District Court for Lucas County (No. 1408) - Joel D. Novak, Judge.

Defendant appeals from the judgment and sentence entered following his conviction of arson in the second degree in violation of Iowa Code sections 712.1 and 712.3 (1983) after a trial to the court. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Paul M. Goldsmith, Lucas County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

Defendant, Curtis L. DeMichelis, appeals from the judgment and sentence entered following his conviction of arson in the second degree in violation of Iowa Code sections 712.1 and 712.3 (1983) after a trial to the court. The sole issue raised in this appeal concerns the trial court's failure to grant defendant's motion for a change of venue.

Defendant was charged with arson in the second degree on June 4, 1984. On July 22, 1984, defendant filed a motion for change of venue on the grounds that he could not receive a fair trial in Lucas County due to his own bad reputation locally and due to various newspaper, television, and radio stories concerning defendant's arrest and pretrial procedures. After an evidentiary hearing, the trial court overruled the motion. On August 27, 1984, the day the trial was scheduled to commence, defendant asked the court if he could first voir dire the jurors, then renew his motion for change of venue, and still waive a jury trial if the court denied the motion. The court indicated that it might permit this procedure, but the county attorney stated that if voir dire occurred he would not consent to the waiver. The defendant, with the consent of the county attorney, waived his right to a jury trial. Defendant was then tried at a bench trial before Judge Novak and convicted of arson in the second degree as charged on September 18, 1984.

On appeal, defendant argues that the trial court abused its discretion in denying defendant's motion for change of venue. He argues that the publicity surrounding his prior criminal activities, the publicity surrounding the fire, and the pretrial publicity was so great that he could not obtain a fair trial in Lucas County. He also argues that the community was so hostile to him personally that he could not obtain a fair trial in Lucas County. After refuting each of the examples the defendant makes to show the degree of prejudice which

existed in the county, the State points out that defendant could not credibly claim prejudice because of the circumstances of the trial. Defendant was tried before Judge Novak without a jury. Judge Novak was normally assigned to Polk County and did not have contact with Lucas County proceedings. Judge Novak would not have been likely to have had any knowledge of the crime or of the defendant other than through the proceedings in this case. The trial court would have had the legal expertise to separate evidence heard at the venue hearing from the evidence submitted at defendant's trial and to disregard the venue hearing evidence in determining defendant's guilt or innocence on the arson charge.

This case presents the issue of whether defendant by asserting his right to a fair trial by seeking a change of venue was unfairly denied his right to a jury trial or whether he unreasonably sought, so to speak, to have the best of both worlds. We find the latter assessment to more accurately portray this situation. Our review is de novo based on the totality of the circumstances.

A recent Iowa case, State v. Spargo, 364 N.W.2d 203 (Iowa 1985), involved a 34-year-old man who was convicted of having sexual relations with a 14-year-old boy. The defendant sought a change of venue from Scott County where the act occurred. Because the Spargo case cogently summarizes the law in this area, we quote at length where the court stated:

[Defendant] contends he was entitled to a change of venue to satisfy his due process right to a fair trial under the fourteenth amendment to the United States Constitution and the language of Iowa R. Crim. P. 10(10)(b).¹ Our review on this issue is de novo, with reversal indicated

¹Iowa R. Crim. P. 10(10)(b) provides:

Change of venue ordered. If the court is satisfied from a motion for a change of venue and the evidence introduced in support of the motion that such degree

only if the trial court abused its discretion in denying the motion. State v. Hickman, 337 N.W.2d 512, 514 (Iowa 1983).

As we noted recently in State v. Gavin, 360 N.W.2d 817 (Iowa 1985), a defendant who seeks reversal of a conviction on the basis of denial of his motion for change of venue must show either actual prejudice on the part of the jury or must show that the publicity attending the case was so pervasive and inflammatory that prejudice must be presumed. Defendant makes no argument regarding actual jury prejudice. Instead, he contends that the pretrial publicity in this case was such as to create a presumption of prejudice. We do not agree.

* * *

Six articles apparently constitute[d] the total of newspaper stories that mentioned defendant. In addition, local television and radio news shows broadcast reports on January 9, 10, and 31 concerning defendant's case and his prior Illinois conviction.

We generally agree with the State that these articles and broadcasts cannot fairly be characterized as inflammatory. Although the January 10 Quad-City Times headline and paragraph quoted above is not a model of journalistic restraint, it is relevant that neither it nor any of the other articles or broadcasts indicated that defendant was guilty of the charges against him. See State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). The media accounts are factual and informative in tone and as such do not support defendant's claim that they must be presumed to have created prejudice against him. See State v. Love, 302 N.W.2d 115, 122 (Iowa 1981); State v. Cuevas, 288 N.W.2d 525, 527-28 (Iowa 1980).

Although it was reported several times that defendant had previously been convicted of exhibiting child pornography, it is well established that community knowledge of a defendant's prior criminal record does not create

of prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county, the court either shall order that the action be transferred to another county in which the offensive condition does not exist, as provided in paragraph "c", or shall order that the trial jury be impaneled in and transferred from a county in which the offensive condition does not exist, as provided in paragraph "d."

a presumption of prejudice. See State v. Hickman, 337 N.W.2d at 515; State v. Johnson, 318 N.W.2d 417, 423-24 (Iowa), cert. denied, 459 U.S. 848, 103 S. Ct. 106, 74 L. Ed. 2d 95 (1982).

Finally, we note that the last articles and broadcasts mentioning defendant appeared between two and three months before the start of his trial. We have previously stated that a time lapse of similar length was sufficient to dissipate any prejudicial effect that may have been created initially by adverse publicity. See State v. Johnson, 318 N.W.2d at 423 (approximately three months); State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980) (two months); State v. Pelelo, 247 N.W.2d 221, 223 (Iowa 1976) (three months); State v. Loney, 163 N.W.2d 378, 382 (Iowa 1968) (eleven weeks).

* * *

We conclude that the total of all the pretrial publicity of record falls short of exhibiting the extensiveness and hostility to defendant that is required to give rise to a presumption of prejudice. There was no "substantial likelihood a fair and impartial trial" could not be had in Scott County for the purposes of Iowa R. Crim. P. 10(10)(b) and there was no fourteenth amendment due process deprivation. The trial court did not abuse its discretion in overruling defendant's motion for change of venue.

Id. at 207-08.

Similarly, because there was a bench trial, defendant only claims the publicity attending the case was so pervasive and inflammatory that prejudice must be presumed. While Iowa cases involving denied motions for a change of venue have reached different results, State v. Johnson, 318 N.W.2d 417, 420-24 (Iowa 1982) (defendant, who waived the right to a jury trial and was tried by the court and convicted, should not have had the motion granted even though the crime involved beating and killing a baby where considerable media attention focused on defendant); Lloyd v. District Court of Woodbury County, 201 N.W.2d 720, 721-22 (Iowa 1972) (in certiorari appeal before trial had commenced, the motion should have been granted for a defendant accused of murdering a police officer due to great matter of public interest); State v. Parkey, 200 N.W.2d

518, 520-21 (Iowa 1972) (in certiorari appeal before trial had commenced, the motion should have been sustained for a defendant who was a public employee charged with embezzling municipal funds which was discovered during a state audit where pretrial publicity focused on investigation itself and embezzlement charge because it was a matter of large public concern), we note that Lloyd and Parkey involved defendants who were accused of crimes against the local governments which made the crime a larger matter of public concern.

The pretrial media coverage in this incident involved newspaper articles carried by the Chariton Herald-Patriot on May 31, 1984, which contained pictures of the burned buildings, and a June 28, 1984, article indicating a woman was also charged; the Chariton Leader ran a story on June 12, 1984, about the charges, and radio coverage by local station KYRS on May 30, June 13, 25, and 26, 1984, regarding the incident contained similar information. No television reporting of this incident occurred.

All of the media reports were objective and factual and did not provide any editorial comments about defendant or his guilt of such charges. The reporting ceased almost two months before trial. The crime defendant was charged with does not tend to stir widespread resentment. These facts do not indicate sufficient pervasive or inflammatory reporting to support a presumption of prejudice.

Defendant also tried to establish prejudice resulted from his prior bad acts which were claimed to be well-known in the county. Defendant provided an article from the Chariton Leader dated November 1, 1983, and testimony regarding the telecast by a local cablevision station, channel 10, involving a prior altercation in downtown Chariton. Additionally, defendant's evidence included testimony from his brother, who was a former policeman, that defendant

was on a "police blacklist" of persons to watch to establish the defendant was generally regarded in the community as a troublemaker. Further, the county sheriff received between three to five calls regarding defendant over the last three years.

Even if defendant had a less-than-ideal reputation in the community, we cannot find pervasive evidence that prejudice would have resulted from his claimed inability to find fair jurors in Lucas County. The reporting of defendant's prior criminal activity does not indicate prejudice. See State v. Hickman, 337 N.W.2d 512, 515 (Iowa 1983). Nor does the police "blacklist" show sufficient prejudice in the community because the list was not disseminated to the public and was only used by the police department. Nor were the calls to the sheriff known by the public. Thus, we cannot conclude these items show the likelihood of widespread prejudice in Lucas County against the defendant.

Other testimony by defendant's family members regarding their past contact with members of the community who disliked defendant similarly does not rise to the level of widespread community prejudice. Even if such incidents were not isolated events, we believe defendant's showing of the prejudice which existed in the entire county is better characterized as conjecture or speculative. The evidence provided does not necessitate a finding of a presumption of prejudice.

The final matter we address is defendant's attempt to use a strategic ploy before trial. He wanted to use voir dire to find the level of community prejudice and, if such prejudice did not exist, he would have a jury trial. If sufficient prejudice existed, defendant wanted to renew his motion for a change of venue and, if such motion were denied, he wanted to then be able to waive his right to a jury. Defendant seeks to cast the county attorney's reluctance to allow defendant these choices as coercing him into making a choice between Scylla and Charybdis by not being able to waive jury trial after voir dire (i.e.,

defendant's choices were to voir dire and forfeit the right to waive a jury trial, or before voir dire waive the right to a jury trial and have a bench trial). The choices defendant was ultimately confronted with were if voir dire occurred he could not have a bench trial but could have venue changed if prejudiced existed in Lucas County; however, if he did not voir dire, he could have a bench trial with no chance to have a jury trial. We are aware of no authority, and defendant does not direct us to any, which requires a defendant to be accorded the options this defendant desired.

Albeit this case presents a degree of tension between the defendant's right to a fair trial with a jury and the choice he eventually made, which was to waive the jury trial before voir dire, however, we cannot find this case merits reversal on this ground because the defendant was not coerced into making an undesirable choice. The trial judge was from Polk County so, in effect, defendant received a bench trial which would have been the same as granting the change of venue and having a bench trial in Polk County. While this may not be the same as having a jury trial in Polk County, we do not believe requiring defendant to make the choice that he did was repugnant to constitutional principles.

We affirm the trial court's decision to deny the motion for a change of venue because we cannot find there was a substantial likelihood that a fair and impartial trial could not occur in Lucas County for this defendant.

AFFIRMED.