

IN THE DISTRICT COURT OF SALINE COUNTY, NEBRASKA

STATE OF NEBRASKA,)	Case No. CR 18-41
)	
Plaintiff,)	
)	
v.)	ORDER
)	
BAILEY M. BOSWELL,)	
)	
Defendant.)	

NOW on this 6th day of September, 2019, the Defendant's Motion to Change Venue comes on for decision. The Court, having fully considered all the evidence and argument, is now ready to rule.

The Defendant stands charged with the first degree murder of Sydney Loofe. She faces the death penalty if convicted. In Nebraska, jurors may be called upon to make findings regarding the aggravation phase of a death penalty sentence.

STATEMENT OF THE LAW

1. In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Neb. Const. Art. I, § 11.

2. All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in section 25-412.03 or sections 29-1301.01 to 29-1301.03, or unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such case the court, upon motion of the defendant, shall transfer the proceeding to any other district or county in the state as determined by the court. Neb. Rev. Stat. Ann. §29-1301.

3. [M]ere jury exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Instead, to warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity. A court must evaluate several factors in determining whether the defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. These factors include (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the

severity of the offenses charged, and (8) the size of the area from which the venire was drawn. *State v. Rodriguez*, 272 Neb 930 at 940 (2007).

ARGUMENT

The Defendant asserts that the pretrial publicity in this case has been extensive and pervasive, partly as a result of expected pretrial publicity in the death of Sydney Loofe under extremely unusual circumstances, and more pointedly as a result of the trial of Aubrey Trail, co-defendant. Such trial was recorded and broadcast under recent Nebraska Supreme Court rules allowing expanded media coverage. Recordings of the trial were made available for viewing on various media outlets, including newspapers, and television and radio stations. Portions were broadcast on regular news programs and disseminated on the media's social media platforms. The evidence indicates that reports were broadcast regionally, nationally, and internationally. While not in evidence, the Court is aware that local radio also covered the trial.

The Defendant argues that the pervasive nature of the publicity has prejudiced her right to a fair trial by impartial jurors in Saline County, Nebraska. Due process and a fair trial are rights guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. Specifically, Defendant points out that not only have potential jurors been able to view the *Trail* trial in detail, the same witnesses may not be called and if called, their testimony may differ, exhibits may differ, and it is unlikely that the co-defendant's testimony will be presented. She argues that the Saline County venire is already armed with too much information to allow them to fairly serve.

The evidence submitted in support of Defendant's allegations of pervasive, prejudicial publicity shows the following:

- (a) Exhibit 5. A woman displayed a sign of support for the victim outside of the Saline County Courthouse during trial. This sign was broadcast on Omaha station Fox 42 KPTM.
- (b) Exhibit 6. KOLN-KGIN TV, Lincoln and Grand Island. A search for "Sydney Loofe" on the web page yielded 144 results.
- (c) Exhibit 7. WOWT, Omaha. A search for "Sydney Loofe" on the web page yielded 125 results.
- (d) Exhibit 8. KMTV, Omaha. A search for "Sydney Loofe" on the web page yielded 269 results.

- (e) Exhibit 9. KLKN TV, Lincoln. 390 results on the web page.
- (f) Exhibit 10. KETV, Omaha. 48 results on the web page.
- (g) Exhibit 11. KPTM, Omaha. 19 results (not a complete listing, according to counsel).
- (h) Exhibit 12. NTV, Central Nebraska. 18 listings on the web page.
- (i) Exhibit 13. NET, Statewide. 7 or 8 listings on the web page, depending on the search term.
- (j) Exhibit 14. Lincoln Journal Star. 105 search results on the web page for Aubrey Trail.
- (k) Exhibit 15. Beatrice Daily Sun. 123 results on the web page for Aubrey Trail.
- (l) Exhibit 16. Seward Independent. 49 results on the web page.
- (m) Exhibit 17. Omaha World Herald. 19 results on the web page for the last 30 days, retroactive from July 18, 2019.
- (n) Exhibit 18. KOLN-KGIN Facebook page, July 29, 2019. Under a story regarding Boswell's request for a change of venue, 12 pages of comments. There are numerous expressions of belief of Boswell's guilt and opinions in favor of a death sentence.
- (o) Exhibit 19. A different iteration of Exhibit 18.
- (p) Exhibit 20. KOLN-KGIN Facebook page, no date noted. Headline: BREAKING: Aubrey Trail has been found guilty. 38 pages of comments. There are numerous expressions of belief of Boswell's guilt and opinions in favor of a death sentence.
- (q) Exhibit 21. Lincoln Journal Star, July 29, 2019. Facebook post on Boswell's Motion to Change Venue. 17 pages of comments. There are numerous expressions of belief of Boswell's guilt and opinions in favor of a death sentence.
- (r) Exhibits 22-24. Comments of a witness regarding the unwanted publicity that she has received due to her testimony and her reluctance to testify again.
- (s) The record reflects that 15 requests were received for expanded media coverage of the *Trail* trial.

The Court will note that it has not attempted to determine the location of the residence of the web-based platform commentators and has entertained the notion that they may not reside in

Saline County or even southeast Nebraska.

ANALYSIS

The right of an accused person to be tried by a jury drawn from the county or district in which the prosecution was initiated is a personal privilege and may be waived where jurisdiction of the subject matter and the accused was first had in the county where the offense was committed. *State v. Furstenau*, 167 Neb. 439 (1958). By her motion, the Defendant waives the personal privilege of being tried in the county where the offense was allegedly committed.

There has been ongoing, pervasive media coverage of this case from the time of the disappearance of Sydney Loofe in November, 2017. Certainly, the expanded media coverage of Aubrey Trail's trial has complicated matters. The videos of the *Trail* trial are available to anyone anywhere in the world with an internet connection.

One of the issues under Nebraska case law is whether the news coverage was "misleading." While certain headlines were indeed sensational, using words such as "dark side," "vampire," and "witch cult," there was testimony regarding "witches" and a "dark side." They were not misleading. All other factors under *Rodriguez* argue for a change of venue.

There are occasions when pretrial publicity can create a presumption that the entire venire is prejudiced. *Irvin v. Dowd*, 366 U.S. 717 (1961).

Here the build-up of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the *cause celebre* of this small community -- so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents....[The Court goes on for another ten or eleven sentences in describing the press coverage.]

Irvin v. Dowd, 366 U.S. 717, 725 (1961).

In 1961, there was no internet where videos of the trial of a co-defendant could be viewed, no media web pages, Facebook or Twitter accounts where anyone could voice an opinion regarding a defendant's guilt and punishment before trial. The record of pretrial publicity and expressed prejudice against the Defendant in this case far exceeds the record developed in *Irvin*. This Court is bound to follow the precedent of the United States Supreme Court.

The Court finds that the pervasive publicity makes it impossible for Boswell to receive a fair trial in Saline County, or even southeast Nebraska, under the *Irvin v. Dowd* standard.

The Honorable James Doyle has advised this Court that he will make his main courtroom in Dawson County available for trial purposes, as he has a secondary courtroom that he can use. The Court thanks him for his courtesy and generosity.

IT IS THEREFORE ORDERED THAT:

Venue for trial purposes only is transferred to Dawson County, Nebraska, where trial shall be conducted in all respects as if the offender had been indicted in Saline County, Nebraska.

On January 15, 2020, the Saline County Clerk of the District shall make a certified transcript of all the proceedings in the case, which, together with the original indictment, shall be transmitted to the Clerk of the District Court for Dawson County, Nebraska.

All costs, fees, charges and expenses accruing from this change of venue, together with all costs, fees, charges and expenses made or incurred in the trial of, or keeping, guarding and maintain the accused shall be paid by Saline County, Nebraska, as the county in which the indictment was found. The sheriff will transfer the prisoner to Dawson County on a date of his choosing.

Upon completion of the trial, the Clerk of the Dawson County District Court shall make a statement of such costs, fees, charges and expenses, and certify and transmit the same to the Saline County Clerk of the District Court, to be entered upon her docket, and collected and paid as if a change of venue had not been had.

The Clerk of Dawson County shall draw 180 names for the jury panel; notices will not be sent out until the case has been transferred.

The Clerk of the Saline County District Court shall issue a warrant transferring the accused to the Sheriff of Dawson County, Nebraska, and ordering the Sheriff of Saline County, to safely convey the prisoner to the jail of Dawson County on a date of the sheriff's choosing, there to be safely kept by the jailer thereof until discharged by due course of law.

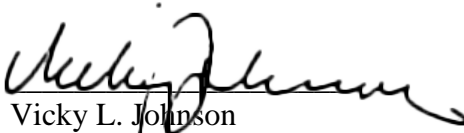
Trial in this matter shall begin March 16, 2020, at 9:00 a.m., in the District Courtroom in Lexington, Dawson County, Nebraska. All previously approved requests for expanded media coverage for the trial will be continued until the trial date. It is not necessary for approved media to reapply.

The Clerk will send a copy of this Order to the Clerk of the Dawson County District Court.

IT IS SO ORDERED.

Dated and signed this 6th day of September, 2019.

BY THE COURT:



Vicky L. Johnson
District Judge