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Criminal Law: Change of Venue in Misdemeanor Cases

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Criminal Law: Change of Venue In Misdemeanor Cases—In *State v. Groppi*[1] the defendant was arrested in the City and County of Milwaukee, Wisconsin, for violations of a proclamation by the Mayor of Milwaukee restricting the movement of Citizens in the City. Defendant, long a leader of civil rights movements in Milwaukee, was charged with resisting arrest under Wis. Stat. 946.41(1).[2]

Prior to the commencement of the trial, the defendant moved for a change of venue on the grounds of community prejudice. The motion was denied on the grounds that the Wisconsin Statute[3] does not provide for a change of venue in a misdemeanor case. The statute provides that a defendant must be charged with a felony before a defendant has a right to a change of venue.

After a trial by jury, the defendant was found guilty of resisting arrest. He was fined $500 and sentenced to six months in the house of correction. Sentence, however, was stayed, and the defendant was placed on two years' probation.

The Wisconsin Supreme Court, on appeal, held that Wis. Stat. Sec. 956.03(3) prohibits a change of venue in misdemeanor cases and that such legislative prohibition is not, either on its face or as applied in this case, a violation of the due process clause of the Wisconsin Constitution or the "equal protection" clause of the Federal Constitution.[4]

The majority reasoned that there is a sufficient difference between a felony and a misdemeanor which warrants a distinction. They believe that it would be unusual for a community, as a whole, to prejudice the rights of any person charged with a misdemeanor since a misdemeanor does not involve a type of crime which would arouse community passions against a defendant.[5]

The majority decision further pointed out that the prosecution of misdemeanors has been simplified as much as possible because society demands a balance between absolute fairness and the efficient administration of justice.[6]

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[1] 41 Wis. 2d 312, 164 N.W.2d 266 (1969).

[2] §946.41 RESISTING OR OBSTRUCTING OFFICER: (1) Whoever knowingly resists or obstructs an officer while such officer is doing any act in his official capacity and with lawful authority may be fined not more than $500 or imprisoned not more than one year in county jail or both.

[3] WIS. STAT. § 956.03 (1967).
§ 956.03 CHANGE OF VENUE OR JUDGE.
(3) COMMUNITY PREJUDICE. If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection.

[4] State v. Groppi, 41 Wis. 2d at 318-321, 164 N.W.2d at 268-270.

[5] *Id.* at 317, 164 N.W.2d at 268; State ex rel Gaynon v. Krueger, 31 Wis. 2d 609, 143 N.W.2d 437 (1966).

[6] *Id.*

The Right To A Change of Venue As One Method For Insuring A Fair And Impartial Trial

Generally, all states provide by constitution or statute for a change of venue in certain cases to safeguard against local prejudices, feelings and opinions.[7] In Wisconsin the right to have the venue changed to obtain a fair and impartial trial in felony cases exists independent of any statute.[8] The Wisconsin Constitution,[9] like the Federal Constitution,[10] guarantees to every accused the right to a fair and impartial trial.

The members of the Wisconsin Supreme Court, however, are not in agreement as to the validity of a statute which limits or excludes a change of venue in misdemeanor cases where the misdemeanant does not have an opportunity to present evidence of community prejudice in support of his motion for change of venue.[11]

Under the majority view, if a motion for change of venue is denied in a misdemeanor case, as it necessarily had to be under the statute, then counsel would have to make a motion for a continuance. If there exists a "reasonable likelihood" that prejudicial news prior to trial would prevent a fair trial, then the trial judge should continue the case until the threat abates.[12] Also, if a juror has formed an opinion on material issues which prejudicially affect his judgment, counsel for the defendant, during the *voir dire* examination would have to move to exclude the juror for cause. If there is no cause to challenge a juror, he can still be excluded by peremptory challenges if he is suspected of prejudice.[13]

However, the defendant is not limited to pretrial motions. If prior to the verdict, counsel determines that one or more of the jurors is prejudiced by pretrial or trial publicity, then a motion can be made to withdraw the juror, which if successful, would lead to a mistrial.[14] If the defendant can prove his rights have been prejudiced by pretrial

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[7] *See:* 1 AM. JUR. TRIALS, Controlling Trial Publicity § 32 (1964); Annot., 10 L. Ed.2d 1272 (1963). For illustrative statutes *see:* MICH. COMP. LAWS ANNOT. § 762.7 (1968); ME. REV. STATS. ANNOT. Tit. 14 § 508 (1964); ILL. REV. STAT. ANNOT. Ch. 146 § 18 (1964).

[8] State v. Nutley, 24 Wis. 2d 527, 129 N.W.2d 155 (1964).

[9] WIS. CONST. art. I § 7: "In all criminal prosecutions, the accused shall enjoy the right . . . to a speedy public trial by an impartial jury . . . ."

[10] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

[11] Chief Justice Hallows concurred in the result but agreed with Justice Heffernan and Justice Wilkie, who dissented from the majority. The position of the Chief Justice was that the right to a change of venue on the grounds of community prejudice was a constitutional right. He viewed the statute as regulatory only and not exclusive. He concurred on the grounds that in this particular case, the error of not granting a change of venue was harmless since the defendant had no difficulty in selecting and obtaining a satisfactory jury and one which on the record was not claimed as biased or unfair.

[12] State v. Alfonsi, 33 Wis. 2d 469, 147 N.W.2d 550 (1967).

[13] WIS. STAT. § 957.03 (1967). *See* State v. Nutley, 24 Wis. 2d 527, 129 N.W.2d 155 (1964); Irvin v. Dowd, 366 U.S. 717 (1961).

[14] Oseman v. State, 32 Wis. 2d 523, 145 N.W.2d 766 (1966).

or trial publicity after a verdict has been rendered, then a motion for a new trial must be granted.[15] Whether the accused has met his burden of proving prejudice is a matter to be determined by the trial judge in the exercise of his discretion.[16]

Justice Heffernan, in his dissent, maintained that the method consistent with fairness and efficient administration of justice in misdemeanor cases is one that would allow a defendant to present evidence of community prejudice before the *voir dire* examination. This method would allow judicial discretion as to whether or not the accused can receive a fair and impartial trial in the county where the prosecution is pending. Moreover, under *Sheppard v. Maxwell,*[17] the test of community prejudice is not whether an impartial jury can or cannot be impanelled, but whether there is a "reasonable likelihood" that community prejudice exists.

The Wisconsin court in *State v. Nutley*[18] has in fact accepted the conclusion that a *voir dire* does not necessarily assure a trial free from the contamination of community prejudice. Moreover, the United States Supreme Court has held that even if a defendant has examined prospective jurors at length during a *voir dire,* and even if the jurors state they will evaluate the issues only on the evidence presented during trial, a defendant may still be denied a fair trial if prejudicial pretrial publicity is of such quantitive and qualitative magnitude that it is probable that jurors predetermined the issue despite their protestations to the contrary.[19]

In some jurisdictions statutes permit a jury in criminal cases to be summoned from a county or district other than that in which the prosecution is pending. Consequently, several cases have held, or have suggested, that under certain circumstances, the trying of a criminal prosecution by a jury summoned pursuant to law from a different county or judicial district from that in which the trial was heard, secured a fair and impartial trial for the defendant.[20] Such an alternative procedure would appear to be consistent with the Court's concern for absolute fairness in all criminal cases and would not seem to render inefficient the disposition of misdemeanor cases.

Of course, this type of procedure should be undertaken only after sufficient evidence reveals community prejudice against the defendant. However, the apparent refusal on the part of judges to hear evidence

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[15] WIS. STAT. § 958.06 (1967).
[16] State v. Laabs, 40 Wis. 2d 162, 161 N.W.2d 249 (1968); State v. Stevens, 26 Wis. 2d 451, 132 N.W.2d 502 (1965). *See also,* Marshall v. U.S., 360 U.S. (1959).
[17] 384 U.S. 333 (1966).
[18] 24 Wis. 2d 527, 565-67, 129 N.W.2d 155, 172 (1964).
[19] Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963).
[20] KY. REV. STATS. ANNOT. § 29.262 (1969); N.J. STATS. ANNOT. § 24:76-1 (1952); *see also Annot.,* 102 A.L.R. 1038 (1936).

on community prejudice solely because they conclude the statute gives them no jurisdiction to order a change of venue in misdemeanor cases, apparently would preclude such action.[21]

Pamplin v. Mason—A Different Conclusion

The constitutionality of denying a change of venue in a misdemeanor case on the basis that the statutes provide for a change of venue only in felony cases has been successfully challenged.

In *Mason v. State*[22] the defendant moved for a change of venue and alleged that he could not have a fair and impartial trial because of community prejudice. The trial court denied the motion on the grounds that the Texas statutes did not provide for a change of venue in misdemeanor actions.[23] The Texas Court of Criminal Appeals affirmed, holding that statutes which do not provide for a change of venue are not unconstitutional.

The defendant petitioned for a writ of habeas corpus in the United States District Court.[24] The petition alleged that the petitioner was being held in violation of his rights under the due process clause of the Fourteenth Amendment in that he was denied a hearing in the trial court on his motion for change of venue. The district court granted the petition and reversed the Texas Court of Criminal Appeals.

The district court held that where the totality of the surrounding facts necessitates a change of venue it becomes the duty of the judiciary to provide for a change of venue in any criminal prosecution, even if such an order is contrary to a statute. To do otherwise would be a violation of the due process clause of the Constitution of the United States.[25] To avoid violating the Constitution of the United States, the court argued, a court must hear any proper and competent evidence which may be offered in support of, or in opposition to, a motion for a change of venue in a misdemeanor action as well as in a felony prosecution.[26]

The Fifth Circuit Court of Appeals in affirming the district court decision held that the same Constitutional safeguard of an impartial jury is available to a man denied his liberty for a misdemeanor as for

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[21] *Dissenting Opinion,* State v. Groppi, 41 Wis. 2d at 325-26, 164 N.W.2d at 273.
[22] 375 S.W.2d 916, 918 (Tex. Crim. App. 1964).
[23] Texas had uniformly denied the right of a defendant to a change of venue based on community prejudice in misdemeanor actions. *See* Annot., 38 ALR2d. 738, 740 (1954).
24. Mason v. Pamplin, 232 F. Supp. 539 (W.D. Texas 1964).
[25] *Id.* at 542; *see* Irvin v. Dowd, 366 U.S. 717 (1961); *accord.,* State ex rel Ricco v. Biggs, 198 Ore. 413, 255 P.2d 1055 (1953). In *Biggs* the Oregon Supreme Court decided that a failure to provide for a change of venue in misdemeanor cases violated the Oregon Constitution and the Fourteenth Amendment of the United States Constitution.
[26] Mason v. Pamplin, 232 F. Supp. 539 (W.D. Texas 1964).

prejudice is to be applied by judges hearing evidence on motions for change of venue.[28] The test is no longer whether prejudice found its way into the jury box at the trial, but is now the following:

> "Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial."[29]

The position of the Texas state courts in *Mason* and the Wisconsin Supreme Court in *Groppi,* represent the minority view.[30] However, they are not alone. Other courts have held that a denial of a change of venue in misdemeanor cases does not violate state constitutional provisions.[31] Similarly, a number of cases have denied change of venue on the ground that state statutes failed to provide for such a change on the facts presented.[32]

Conclusion

What is significant about other jurisdictions, which was not commented upon by the majority in *Groppi,* is that the legislatures in at least two other jurisdictions which had denied the right of a change of venue in misdemeanor cases, had recently amended their respective statutes to permit a change of venue based on community prejudice in *all* criminal actions.[33] Currently, only a few jurisdictions—Minnesota, Iowa and Massachusetts—which have statutes similar to Wisconsin Statute §956.03(3) (1967), have not amended their criminal venue statutes to allow a change of venue based on community prejudice in all criminal actions.[34] This leads one to the conclusion that many legislators are of the opinion that the administration of a criminal court system would not necessarily break down by permitting motions for change of venue to be heard in misdemeanor and felony prosecutions. However, the Wisconsin Supreme Court emphasized the belief that allowing

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[27] Pamplin v. Mason, 364 F.2d 1 (5 Cir. 1966). *See also,* Harvey v. Mississippi, 340 F.2d 263 (5 Cir. 1965) (90 day sentence); McDonald v. Moore, 353 F.2d 106 (5 Cir. 1965) (6 month sentence).

a felony.[27] The court of appeals also ruled on what test of community

[28] Pamplin v. Mason, 364 F.2d 1 (5 Cir. 1966); for United States Supreme Court decisions concerning change in test of community prejudice *see,* Irvin v. Dowd, 366 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966).

[29] Pamplin v. Mason, 364 F.2d 1 (5 Cir. 1966).

[30] *Annot.,* 38 ALR2d 738 (1954).

[31] State ex rel Clark v. Cowen, 29 Idaho 783, 162 Pac. 674 (1916); Commonwealth v. Sacarakis, 196 Pa. Super. 455, 175 A.2d 127 (1961).

[32] Washington v. State, 101 P. 863 (1909); State ex rel Carpenter v. Backus, 165 Wis. 179, 161 N.W. 759 (1917).

[33] For example, see TEX. CODE CRIM. PROC. ARTS. 31.01-31.03 (1965); PA. STAT. Tit. 19 § 551 (1965); VT. STAT. Tit. 13 § 4631-38 Am. (1969). CODE ARTS. 75, 844 (1969); PA. STAT. Tit. 19 § 551 (1965); VT. STAT. Tit. 13 § 4631-38 Am. (1969).

[34] MINN. STAT. § 627.01 (1967); IOWA STAT. § 778.01 (1962); MASS. GEN. LAWS Ch. 277 § § 51-53 (1956).

a change of venue based on community prejudice in misdemeanor cases would be too great a burden on the administration of a criminal court system.

Nevertheless, in November of 1969 the Wisconsin legislature adopted the new Wisconsin Code of Criminal Procedure and changed the venue statute.[35] The new code provides that a defendant in a criminal action may move for a change of place of trial if community prejudice would prevent a fair and impartial trial.[36] This statute does not state that a defendant charged with a felony may so move, or that only a defendant charged with a felony may so move, rather it states that any defendant may so move. While the Reporter's notes do not point out the following, in effect the new statute changes the rule enunciated in *Groppi.* As of July 1, 1970, a defendant in a misdemeanor action does have a right to be heard on a motion for a change of venue in Wisconsin.

Ultimately the right to a change of venue in all criminal cases may be mandatory whether or not a statute provides such right for *any* defendant. The United States Supreme Court has granted a stay of execution and certiorari to Father Groppi. The Supreme Court will probably consider the policy issue of whether permitting all criminal defendants to be heard on a motion for a change of venue will impair the administration of justice.

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[35] WISCONSIN LAWS OF 1969, ch. 255. This chapter was introduced in the 1969 Assembly as Assembly Bill 603. It was published on December 20, 1969.

[36] WIS. STAT. § 971.22 CHANGE OF PLACE OF TRIAL.

(1) *The defendant may move* for a change of the place of trial on the ground that an impartial trial cannot be had in the county. The motion shall be made at arraignment, but it may be made thereafter for cause.

(2) The motion shall be in writing and supported by affidavit which shall state evidentiary facts showing the nature of the prejudice alleged. The district attorney may file counter affidavits.

(3) If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall order that the trial be held in any county where an impartial trial can be had. Only one change may be granted under this subsection. The judge who orders the change in the place of trial shall preside at the trial. Preliminary matters prior to trial may be conducted in either county at the descretion of the court. The judge shall determine where the defendant, if he is custody, shall be held and where the record shall be kept.