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12/13/2016 11:42:24 AM
Hennepin County, MN

STATE OF MINNESOTA	DISTRICT COURT
HENNEPIN COUNTY	FOURTH JUDICIAL DISTRICT

State of Minnesota, Plaintiff, v. Allen Lawrence Scarsella, Defendant.	**ORDER AND MEMORANDUM ON DEFENDANT'S MOTION TO CHANGE VENUE** MNCIS No. 27-CR-15-33503 Judge Hilary Lindell Caligiuri

This matter came before the undersigned Judge of District Court upon Defendant's motion to change venue on November 1, 2016.

Defendant, through counsel, Peter Martin and Laura Heinrich, filed a motion, supporting memorandum, and exhibits on November 1, 2016, arguing venue should be changed to a location outside Hennepin and Ramsey Counties. The State, through Judith Hawley and Christopher Freeman, submitted a response and affidavit in opposition on November 21, 2016. The Court took the matter under advisement upon the written submissions.

Based on the file, record and proceedings, as well as the submissions of the parties, the Court makes the following:

CONCLUSIONS OF LAW

1. This case has not generated massive pretrial publicity requiring a change of venue.

2. The Court does not find it reasonably likely that a fair trial cannot be had in Hennepin or Ramsey Counties based on potentially prejudicial pretrial publicity.

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3. If the Court is unable to seat unbiased jurors at trial, Defendant may renew his motion.

ORDER

1. Defendant's motion to change venue is DENIED.

2. The attached Memorandum is incorporated herein by reference.

IT IS SO ORDERED.

BY THE COURT:

Caligiuri, Hilary
2016.12.13
11:39:17 -06'00'

Dated: December 13, 2016

HILARY LINDELL CALIGIURI
Judge of District Court

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MEMORANDUM

The Defendant moves the Court, pursuant to Minn. R. Crim. P. 25.02, for a change of venue outside Hennepin and Ramsey Counties.

Under the State Constitution and by criminal rule, a defendant has the right to be tried in the county where the crime charged occurred. MINN. CONST. art. I, § 6; Minn. R. Crim. P. 24.01. By motion, a defendant may waive this right and request a change of venue. Minn. R. Crim. P. 25.02.

A motion for change of venue may be granted where massive pretrial publicity itself prevents a fair trial. *See Sheppard v. Maxwell*, 384 U.S. 333, 338-42 (1966). The pretrial coverage of the case at bar, although substantial, largely has been limited to reports of pretrial proceedings and Defendant's conduct alleged in the complaint. While certain hearings have been well attended, there have been very few, limited disruptions to the courtroom decorum. This pretrial publicity, alone, does not rise to a level to warrant the granting of Defendant's motion. *See Maxwell*, 384 U.S. at 339-40 (holding failure of trial court to change venue deprived appellant of due process, where a "swarm" of media occupied a coroner's inquest and broadcast proceedings live, and reporting of case was highly editorialized); *Estes v. Texas*, 381 U.S. 532, 552-54 (1963) (describing carnival atmosphere, where media "wandered" around courtroom during proceedings and broadcast them live, in case where court concluded failure to change venue violated due process) (Warren, C.J., concurring).

Additionally, a motion to change venue "must be granted whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3; *see State v. Thompson*, 123 N.W.2d 378, 387 (Minn. 1963) (holding

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that a motion to change venue should be granted "if it appears likely that it is impossible to procure a fair trial before an impartial jury in the county in which the crime was committed") (citation omitted); *see also State v. Fratzke*, 354 N.W.2d 402, 406 (Minn. 1984) (holding the existence of pretrial publicity does not automatically require a change of venue, as the proper question is "whether the publicity is of a type that is prejudicial to the defendant"). In assessing whether pretrial publicity is potentially prejudicial, relevant considerations include whether the publicity was factual and the length of time between the publicity and trial. *State v. Fairbanks*, 842 N.W.2d 297, 302 (Minn. 2014). A showing of actual prejudice is not required. Minn. R. Crim. P. 25.02, subd. 3.

Here, Defendant has presented exhibits depicting numerous headlines, news stories, social media postings, and other material describing and discussing the charges against Defendant and his codefendants. Much of the information presented is factual in nature, describing, for example, the nature of the charges themselves and the pretrial proceedings before this Court. *See, e.g.,* Defendant's Exhibits at 32 (describing alleged shooting), 63-66 ("[Defendant], 23, was charged with five counts of second-degree assault with a dangerous weapon and one count of second-degree riot."), 81-85, 95-96 (reporting bail status), 99 (describing amended charge), 100-01 (describing pretrial hearing), 106-07 (same), 120-21 (describing co-defendant's bail status), 135-37 (describing timeline of case), 156-58 (describing and quoting pretrial filings), 159-62 (describing bail hearing).[1] As these examples of pretrial publicity were factual in nature, they are not potentially prejudicial. *See*

[1] Defendant's submission dated November 1, 2016, contains 162 pages of attached exhibits preceded by two consecutive pages labelled "EXHIBIT A" and "EXHIBIT B." The Court herein refers to the exhibits by the three-digit page number at the bottom of each page of the exhibits.

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Warren, 592 N.W.2d at 448 (affirming denial of motion to change venue where pretrial publicity "consisted largely of 'factual accounts of events surrounding the incident, biographies of the victims, and community response to the incident'"); *State v. Salas*, 306 N.W.2d 832, 835-36 (Minn. 1981) (holding that factual news reports are not prejudicial, and that "[o]pinions or implications of the defendant's guilt are required" to warrant a change of venue).

Defendant's Exhibits include additional pretrial publicity, including some released by the prosecutor's office, referring to Defendant as "sick," a "white supremacist," a racist, a gun enthusiast, a member of a militia, and a sovereign citizen; stating that the attack was racially motivated; and indicating that Defendant has previously been videotaped in front of a Confederate flag. *See* Defendant's Exhibits at 19-32, 34-38, 48-62, 67, 71-72, 74, 80, 90, 93, 97-98, 103-04, 111, 124. Some of these statements, such as that describing Defendant as "sick," can only described as opinion, not fact. Further, even the factual statements listed here, if true, include facts that would not be material to the charges, and thus should not come before a jury determining guilt or innocence in this case.

Even assuming, however, that one of more of these statements are potentially prejudicial, a change of venue would be appropriate only if there is a reasonable likelihood there can be no fair trial in Hennepin County.

Here, the majority of the above-described material was published in November or December 2015, and thus will be more than a year old on Defendant's January 9, 2017 trial date. Coverage from 2016 largely discussed the pretrial proceedings in this case. This weighs against a finding of a reasonable likelihood a fair trial cannot be had in the Twin Cities. *See State v. Brom*, 463 N.W.2d 758, 762 (Minn. 1990) ("We have consistently held that

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a substantial interval of time between the publicity complained of and the trial date decreases the likelihood of juror prejudice owing to that publicity . . . . The trial court was therefore correct in giving substantial weight to the interval of time between the publicity appellant identified as prejudicial and the date of his trial.") (citations omitted); *Fairbanks*, 842 N.W.2d at 303 (affirming denial of motion to change venue where 119 articles about crime, mostly factual, had been published 11 months before trial).

Further, Defendant has not presented any evidence that the proffered publicity discussing Defendant's case has actually reached any potential jurors in Hennepin or Ramsey Counties. Defendant has provided no information as to what coverage, if any, potential jurors in the Twin Cities actually saw, or what if any impact it had on them. This too weighs against granting Defendant's motion. *See Kinsky*, 348 N.W.2d at 323 (affirming denial of motion to change venue in part on basis that appellant submitted no evidence of "qualified public opinion surveys"); *cf. Rideau v. Louisiana*, 373 U.S. 723, 725-27 (1963) (holding change of venue was warranted where appellant's videotaped confession was broadcast to 24,000 to 53,000 viewers in a trial district comprised of approximately 150,000 people).

On this record, the Court is unable to conclude that there is a reasonable likelihood a fair trial cannot be had. Accordingly, Defendant's motion for change of venue is denied. If, at trial, the Court is unable to seat unbiased jurors, Defendant may renew his motion.

HLC