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## Constitutional Criminal Procedure - Due Process - Change of Venue - Pretrial Publicity [Note]

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CONSTITUTIONAL CRIMINAL PROCEDURE—DUE PROCESS—CHANGE OF VENUE—PRETRIAL PUBLICITY—The Superior Court of Pennsylvania has held, *sub silentio*, that juror prejudice may be presumed and that a change of venue may be required to overcome the effects of pretrial publicity even when such publicity is not inherently prejudicial.

*Commonwealth v. Casper*, 375 A.2d 737 (Pa. Super. Ct. 1977), *rev'd*, 392 A.2d 287 (Pa. 1978).

William Casper was tried before a jury in 1975 in the Court of Common Pleas of Butler County on charges of macing,<sup>1</sup> extortion, conspiracy, and solicitation. Prior to trial he filed an Application for a Change of Venue<sup>2</sup> claiming that intense local publicity precluded the possibility of a fair trial in Butler County.<sup>3</sup> The publicity consisted of twenty-four newspaper stories in which Casper's name appeared at least thirty-six times.<sup>4</sup> At the time of indictment, he was well-known throughout the community because of his position as chairman of the Democrat Party of Butler County.<sup>5</sup> The requested venue change was denied and Casper was subsequently convicted.<sup>6</sup>

On appeal,<sup>7</sup> the Superior Court of Pennsylvania in a 5-1 decision stated that the breadth of the publicity in this case was such that it was impossible for Casper to receive a fair trial in Butler County and that the trial judge abused his discretion in refusing to grant a change of venue.<sup>8</sup> The court made specific findings that the nature

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1. The charges involved the solicitation of political campaign contributions in violation of the Pennsylvania Anti-Macing Act, which provides in part:

It shall be unlawful for any political committee, . . . to demand from any public officer [or] subordinate, . . . any assessment or percentage of any money or profit, or their equivalent in any thing of value, with the understanding, express or implied, that the same may be used or shall be used for political purposes . . . .

PA. STAT. ANN. tit. 25, § 2374 (Purdon 1963).

2. PA. STAT. ANN. tit. 19, § 551 (Purdon 1964), allows the granting of a change of venue at the discretion of the trial judge whenever it appears that prejudicial pretrial publicity will prevent the defendant from receiving a fair trial.

3. *Commonwealth v. Casper*, 375 A.2d 737, 739 (Pa. Super. Ct. 1977), *rev'd*, 392 A.2d 287 (Pa. 1978).

4. *Id.* For illustrations of the nature of the publicity, see note 48 *infra*.

5. *Id.* at 738. He was also the state treasurer of the Democratic Party. *Butler Eagle*, May 16, 1974, at 1, col. 1.

6. 375 A.2d at 739.

7. *Id.* at 738.

8. *Id.* at 743. In Pennsylvania, the granting of a change of venue is discretionary. See note 2 *supra*. However, the trial judge's decision may be reversed if an abuse of discretion is found. See, e.g., *Commonwealth v. Swanson*, 432 Pa. 293, 296, 248 A.2d 12, 14 (1968).

and extent of the publicity was substantial, that the accused was a well-known local public figure prior to the publicity and that the publicity took place in a small community where its effect would be magnified.<sup>9</sup> The case was remanded to the court below with directions to grant the change of venue and order a new trial.<sup>10</sup>

President Judge Watkins, writing the majority opinion in *Casper*, replied primarily on the United States Supreme Court decision in *Rideau v. Louisiana*<sup>11</sup> and the Pennsylvania Supreme Court decisions in *Commonwealth v. Pierce*<sup>12</sup> and *Commonwealth v. Hoss*.<sup>13</sup> From *Rideau*, he extracted the principle that juror prejudice can be presumed from the extent and nature of the pretrial publicity.<sup>14</sup> *Rideau* was also read as holding that the size of the locale must be considered when analyzing the effects of the publicity.<sup>15</sup> The court cited *Pierce* as authority for the proposition that the source of the publicity is important in determining its effect on prospective jurors.<sup>16</sup> From *Hoss*, which distinguished *Rideau*, the court concluded that publicity has more effect in smaller communities.<sup>17</sup> The major-

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9. 375 A.2d at 743.

10. *Id.* Judge Hoffman concurred in the result and Judge Price dissented, each without opinion. The Commonwealth's request for allocatur was granted, No. 264, March Term, 1977, and the superior court was reversed.

11. 373 U.S. 723 (1963) (change of venue granted because a filmed interview of defendant's confession to murder broadcast over television in community where trial took place was considered prejudicial to defendant).

12. 451 Pa. 190, 303 A.2d 209 (change of venue granted because newspaper accounts of confession and staged reenactment of crime were considered prejudicial to defendant), *cert. denied*, 414 U.S. 878 (1973).

13. 445 Pa. 98, 283 A.2d 58 (1971) (change of venue denied because most of publicity was factual in nature).

14. 375 A.2d at 740. *Rideau*, however, may also be read as being strictly limited to its factual setting of televised confessions. If so, it is not clear that changes of venue are constitutionally required in cases involving other types of pretrial publicity. See Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAW. 925, 940 (1967).

15. 375 A.2d at 740. *Rideau* did make reference to the size of the locale, but only for purposes of illustrating how many persons in the community were exposed to the publicity in comparison to the number of persons residing in the community and not for the reason specified by the *Casper* court. 373 U.S. at 724.

16. 375 A.2d at 740-41. In *Pierce*, the court was troubled with the fact that the source of the prejudicial publicity was the police. The concern seemed to be that potential jurors would pay great heed to and be more apt to be prejudiced as to defendant's guilt when the publicity emanated from such sources. 451 Pa. at 198, 303 A.2d at 214.

17. 375 A.2d at 741. Although *Hoss* is cited for this proposition there is no discussion of it anywhere in the opinion. However, other jurisdictions consider the size of the community relevant in gauging the impact of the publicity. See, e.g., *In re Miller*, 33 Cal. 3d 1005, 109 Cal. Rptr. 648 (1973) (size of community is a factor to be considered in determining whether

ity interpreted these precedents to require courts to consider four factors in deciding whether to grant changes of venue based on adverse pretrial publicity: the nature and extent of the publicity, the source of the publicity, and the nature of the locale affected by the publicity.<sup>18</sup> The majority noted in addition that here the defendant was a well-known public figure prior to the news reports linking him to the macing scheme.<sup>19</sup> Believing that well-known persons are particularly vulnerable to news accounts of alleged wrongdoing,<sup>20</sup> the court declared that a fifth factor had to be added: the extent of the public's familiarity with the defendant's name prior to the news accounts of his alleged illegal activities.<sup>21</sup> In applying these factors to cases involving change of venue petitions, the court stressed that not all of them need be present before a change of venue is mandated, but that any factor or combination of factors may be sufficient to make a change of venue necessary for the defendant to receive a fair trial.<sup>22</sup> The clear implication of this is that the *Casper* court considered no single factor to be indispensable.<sup>23</sup>

Historically, to obtain a change of venue, the defendant had the burden of showing identifiable juror prejudice through voir dire examination.<sup>24</sup> However, in the landmark decision of *Rideau v. Louisiana*, the United States Supreme Court held that juror prejudice need not always be shown, but may be presumed depending on

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change of venue is proper); *Johnson v. State*, 467 S.W.2d 247 (Tex. Crim. App.) (population of community was over one million persons in contrast to other cases where widespread publicity in a sparsely settled county required a change of venue), *cert. denied*, 404 U.S. 951 (1971); *Ferber, Beating Bad Press: Protecting the California Criminal Defendant from Adverse Publicity*, 10 U.S.F.L. REV. 391 (1976) [hereinafter cited as *Ferber*].

18. 375 A.2d at 741.

19. *Id.* See note 5 and accompanying text *supra*.

20. 375 A.2d at 741.

21. *Id.* at 743. No reference to any express authority was made for this new proposition. The court did, however, allude to a prior dissent of Judge Watkins from which the proposition seems to have been developed. See *Commonwealth v. Evans*, 190 Pa. Super. Ct. 179, 280, 154 A.2d 57, 108 (1959) (Watkins, J., dissenting).

California also considers the status of the defendant to be a relevant criterion. See *In re Miller*, 33 Cal. 3d 1005, 109 Cal. Rptr. 648 (1973) (status of the defendant in the community is a factor to be considered in determining whether change of venue is proper); *Maine v. Superior Court*, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968) (where defendants are friendless and victims are prominent, change of venue may be necessary to assure a fair trial); *Ferber, supra* note 17, at 399.

22. 375 A.2d at 743.

23. See notes 38-45 and accompanying text *infra* for a discussion of the significance of this aspect of the decision.

24. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (defendant must rebut the presumption of impartiality).

the nature of the pretrial publicity.<sup>25</sup> The Court did not establish a general standard for when juror prejudice may be presumed, but declared that the televised interview in which Rideau confessed to murder was, in a real sense, his trial and that any subsequent proceedings in the local community would be a hollow formality.<sup>26</sup>

In Pennsylvania, the test for presumed juror prejudice was developed in *Commonwealth v. Pierce*.<sup>27</sup> The Pennsylvania Supreme Court said that identifiable prejudice generally must be shown by voir dire examination of the prospective jurors.<sup>28</sup> However, to come within the *Rideau* guidelines, the court stated that if the publicity were *inherently prejudicial*, the defendant would not be required to show a nexus between it and actual jury prejudice to be entitled to a change of venue.<sup>29</sup> The *Pierce* court concluded that the publicity, which included newspaper accounts of a confession and a staged reenactment of the crime, clearly pointed to Pierce's guilt; hence, it was *inherently prejudicial*.<sup>30</sup> The court mentioned that any prospective juror exposed to this publicity must have formed a definite opinion as to Pierce's guilt or innocence.<sup>31</sup>

In *Commonwealth v. Hoss*,<sup>32</sup> the Pennsylvania Supreme Court upheld a denial of a change of venue because the publicity therein did not approach the dimensions of that in *Rideau*. The court found that the pretrial publicity did not taint the community of 1½ million people so as to make a fair trial impossible.<sup>33</sup> In analyzing *Hoss* in *Casper*, Judge Watkins inferred that the Pennsylvania Supreme Court had found a change of venue was not required by distinguishing *Rideau* on the basis of the relatively small (150,000

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25. 373 U.S. at 727. The publicity in *Rideau* was a filmed interview of the defendant's confession to murder while being interrogated in jail. The interview was broadcast over local television on three occasions.

26. *Id.* at 726. *Rideau* has been interpreted as saying that if the information is prejudicial and the dissemination widespread in the community from which the jury is drawn, the defendant is entitled to relief. See *United States ex rel. Doggett v. Yeager*, 472 F.2d 229, 238 (3d Cir. 1973).

27. 451 Pa. 190, 303 A.2d 209 (1973).

28. *Id.* at 195, 303 A.2d at 212.

29. *Id.* See also *Commonwealth v. Nahodil*, 462 Pa. 301, 306, 341 A.2d 91, 93 (1975) ("It must also appear that the news accounts were so 'inherently prejudicial' that the possibility of a fair trial was questionable.").

30. 451 Pa. at 196, 303 A.2d at 213.

31. *Id.*

32. 445 Pa. at 105, 283 A.2d at 62.

33. 445 Pa. at 106, 283 A.2d at 63.

people) population involved in *Rideau*.<sup>34</sup> This difference in *Hoss* made it less likely that the defendant would be denied a fair trial because the effects of the publicity would tend to be diffused in a highly populated area.<sup>35</sup> Conversely, in *Casper*, the court believed that the publicity would have a substantial effect because Butler County has a population of only 128,000.<sup>36</sup>

The principal issue in *Casper* was whether the trial judge abused his discretion by refusing to grant a change in venue in the face of widespread pretrial publicity allegedly sufficient to raise the presumption of juror prejudice. In resolving this question, the court held that the five factors previously discussed should have been considered by the trial court when it ruled on the change of venue petition.<sup>37</sup> If the opinion had gone no further, it would probably be of limited significance as little more than a restatement of prior case law. The critical importance of *Casper*, however, is that it appears to eliminate the requirement that, in the absence of juror prejudice identified through voir dire, the publicity must be shown to be inherently prejudicial in order to mandate a change of venue. The court impliedly did this when it stated that the presence of any of the five factors alone might be sufficient to require a change of venue.<sup>38</sup>

The *Casper* decision thus viewed is contrary to the settled law in Pennsylvania regarding change of venue. The court in *Pierce* stressed that the inherently prejudicial nature of the publicity was the very basis for its decision that the defendant did not have the burden of showing identifiable juror prejudice.<sup>39</sup> This requirement

34. 375 A.2d at 741. Although the *Hoss* opinion made reference to the size of the community it did not distinguish *Rideau* on that basis. Rather it focused on the nature of the publicity which it described as factual, instead of prejudicial as in *Rideau*. 445 Pa. at 104-06, 283 A.2d at 62-63.

35. 375 A.2d at 741. See note 17 *supra* for further discussion of this matter.

36. 375 A.2d at 741.

37. *Id.* at 743. See notes 18-21 and accompanying text *supra*.

38. If any one factor is sufficient to mandate a change of venue, it is clear that the requirement of inherently prejudicial publicity is no longer viable. In framing its holding, the court said:

It is not necessary that all of the above elements be present before a change of venue is mandated in order to insure a fair trial. Any element set forth above or any combination of the above elements may be sufficient to make a change of venue necessary in order to insure that the defendant receives a fair trial.

375 A.2d at 743.

39. The court stated: "We hold that the nature of the accounts released by the police were so 'inherently prejudicial' that *Pierce* need not have shown a nexus between the publicity and

was reaffirmed in *Commonwealth v. Nahodil*.<sup>40</sup> In addition, where the pretrial publicity has been primarily factual rather than inflammatory or inherently prejudicial, courts in many jurisdictions, including Pennsylvania, have uniformly held that a change of venue is not required.<sup>41</sup> Furthermore, widespread publicity alone does not appear sufficient to compel a change of venue.<sup>42</sup> In *Commonwealth v. Powell*,<sup>43</sup> a change of venue was refused,<sup>44</sup> the court recognizing that extensive pretrial publicity does not necessarily preclude a fair trial.<sup>45</sup>

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actual jury prejudice, and hence, he did not have the burden of showing identifiable prejudice." 451 Pa. at 195, 303 A.2d at 212.

40. 462 Pa. 301, 306, 341 A.2d 91, 93 (1975) (change of venue denied in murder trial because publicity was wholly lacking in inflammatory content). *Accord*, *Commonwealth v. Kichline*, 468 Pa. 265, 275, 361 A.2d 282, 288 (1976) (despite reports from "unidentified" officials that defendant had confessed to murder, change of venue was denied because, although the publicity was prejudicial, it was not inherently prejudicial); *Commonwealth v. Russell*, 459 Pa. 1, 6, 326 A.2d 303, 305 (1974) (change of venue denied because the publicity was limited to factual reporting and, unlike that in *Pierce*, was not inherently prejudicial). *See also* *United States ex rel. Doggett v. Yeager*, 472 F.2d 229, 238 (3d Cir. 1973); *American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Fair Trial and Free Press*, Approved Draft § 3.2 (1968) [hereinafter cited as *ABA Project*].

Because of the concept of presumed juror prejudice, a juror's assurances of impartiality despite exposure to prejudicial publicity are not dispositive of the accused's rights with regard to petitions for change of venue. *Ranney, Remedies for Prejudicial Publicity: A Brief Review*, 21 VILL. L. REV. 819, 821 (1976).

41. *See* *People v. Nye*, 63 Cal. 2d 166, 170, 403 P.2d 736, 738, 45 Cal. Rptr. 328, 332 (1965) (change of venue in murder trial denied because publicity was factual and fair to both sides), *cert. denied*, 384 U.S. 1026 (1966); *People v. Myers*, 35 Ill. 2d 311, 326, 220 N.E.2d 297, 308 (1966) (change of venue in murder trial denied because media coverage was done in an objective manner), *cert. denied*, 385 U.S. 1019 (1967); *Commonwealth v. Swanson*, 432 Pa. 293, 299, 248 A.2d 12, 16 (1968) (change of venue in murder trial denied because the publicity, which included 30 newspaper articles and 45 television newscasts, was factual), *cert. denied*, 394 U.S. 949 (1969). *See also* 1 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 43 (12th ed. 1974).

42. *See, e.g.*, *United States v. Mesarosh*, 223 F.2d 449, 458 (3d Cir. 1955) (change of venue in conspiracy trial denied because, although the publicity was widespread, it was no different than the type accorded others who make the news), *rev'd on other grounds*, 352 U.S. 1 (1956). *See also* *Commonwealth v. Swanson*, 432 Pa. 293, 248 A.2d 12 (1968), *cert. denied*, 394 U.S. 949 (1969).

43. 459 Pa. 253, 328 A.2d 507 (1974) (change of venue denied because reporting was factual, not inflammatory).

44. *Id.* at 259, 328 A.2d at 510.

45. In fact, there is authority for the proposition that jurors who are totally uninformed about the facts in the case they are to hear are not necessarily as desirable as those who have some prior knowledge of the surrounding circumstances. As early as 1874 the Pennsylvania Supreme Court stated:

[W]e must stand abreast with the present age, when every remarkable event of today is known all over the country tomorrow, and exclude those only whose opinions are so

Curiously, the *Casper* court made a specific finding that the nature and extent of the pretrial publicity was great,<sup>46</sup> which may be read as equivalent to saying that the publicity was inherently prejudicial. This is doubtful, however, since the requirements of *Pierce* and its progeny would have been satisfied at that point, and the court would have had no need to establish the new test.<sup>47</sup> Assuming, then, that the publicity in *Casper* did not measure up to the *Pierce* standard, the court may have simply thought a more liberal rule should apply when a public figure is involved. It is reasonable to draw this inference because, although it was extensive, the publicity in *Casper* would probably not be considered inflammatory enough to be classified as inherently prejudicial.<sup>48</sup>

In establishing the requirement that trial judges must consider the familiarity of the accused's name to the local populace when determining whether pretrial publicity necessitates a change of venue, the superior court has made a valuable contribution to this area of the law. The court's hypothesis, that in instances involving criminal charges against public figures the effect of such publicity is magnified,<sup>49</sup> appears reasonable. However, in framing the ultimate holding as it did, the court has confused matters by apparently

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fixed as to be prejudgments, or have been formed upon the [personally] known evidence in the cause. . . . [I]f we lag behind we must commit the trial of the most important causes in life to those, so ignorant, their dark minds have never been smitten by the rays of intelligence.

O'Mara v. Commonwealth, 75 Pa. 424, 428 (1874), quoted in *ABA Project*, supra note 40, at 60.

46. See note 9 and accompanying text supra.

47. See notes 29 & 39 and accompanying text supra.

48. See note 4 and accompanying text supra. The following examples of newspaper accounts in the *Butler Eagle* are representative of those appearing prior to Casper's trial: May 16, 1974, "Casper, 7 Penn DOT Employees Charged With Macing"; December 2, 1974, Quote from Assistant District Attorney Alexander Lindsay, "The charges are merely allegations that must be approved by an indicting grand jury before the cases could go to trial"; February 19, 1975, "Casper on Trial." The following cases contain examples of publicity declared to be prejudicial: *Sheppard v. Maxwell*, 384 U.S. 333, 338, 339 (1966) (headlines stressing defendant's lack of cooperation with the police, and reenactment of the crime before police and newsmen); *Marshall v. United States*, 360 U.S. 310, 311 (1959) (newspaper accounts of defendant's prior criminal activity reached jurors); *Forsythe v. State*, 12 Ohio Misc. 99, 101 (C.P. 1967) (newspapers referred to the defendant as "ex con" and "vice figure"); *Commonwealth v. Brado*, 470 Pa. 306, 307, 368 A.2d 643, 644 (1977) (a newspaper article at time of jury selection was highly critical of the intoxication defense on which defendant intended to rely). *But see Commonwealth v. Swanson*, 432 Pa. 293, 299, 248 A.2d 12, 16 (1968) (change of venue refused despite references to defendant as a "punk, arrogant person" because the bulk of the other publicity was factual in nature), cert. denied, 394 U.S. 949 (1969).

49. 375 A.2d at 741.

abrogating the inherently prejudicial requirement which has been the basis for requiring a venue change in the absence of voir dire.<sup>50</sup> The *Casper* court should have held that where a public figure is involved it takes less prejudicial publicity to raise the presumption of juror prejudice. This would have allowed the court to achieve its apparent objective of establishing a more liberal standard for changes of venue when the defendant is a public figure, while at the same time providing a result consistent with the dictates of *Pierce*. However, in the wake of *Casper*, it is for the Pennsylvania Supreme Court to either retain the inherently prejudicial requirement and thereby reaffirm the vitality of *Pierce*, or to embark on the perilous road of *Casper*.<sup>51</sup>

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50. See note 38 and accompanying text *supra*.

51. *Casper* was reversed by the Pennsylvania Supreme Court. 392 A.2d 287 (Pa. 1978).