North Dakota Law Review

Volume 46 | Number 1 Article 4

1969

Criminal Law - Change of Venue - Right of Misdemeanant to Change of Venue

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Recommended Citation
Anderson, Terry M. (1969) "Criminal Law - Change of Venue - Right of Misdemeanant to Change of Venue," *North Dakota Law Review*: Vol. 46: No. 1, Article 4.
Available at: https://commons.und.edu/ndlr/vol46/iss1/4

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RECENT CASES

CRIMINAL LAW—CHANGE OF VENUE—RIGHT OF MISDEMEANANT TO CHANGE OF VENUE—Defendant was arrested in connection with a civil rights march in Milwaukee, and while in the custody of the police was charged with resisting arrest, a misdemeanor punishable by a maximum of one year in prison and/or a five hundred dollar fine. Prior to trial he made a motion for a change of venue, alleging community prejudice. The trial judge denied the motion interpreting the applicable Wisconsin statute:

> 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. . . . [1]

This was interpreted as denying misdemeanants the right to a change of venue. Defendant appealed his conviction on the grounds that the statute as interpreted, limiting change of venue to felonies was a denial of due process and violative of the equal protection of the law. *Held*: The statute was constitutional, both on its face and as applied in this case, because the felony-misdemeanor classification was not arbitrary nor unreasonable, and because other methods besides change of venue were available to insure that the defendant received a fair and impartial trial. *State v. Groppi*,—Wis. 2d—, 164 N.W.2d 266 (1969).

Section one of the fourteenth amendment to the United States Constitution reads:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . [2]

The Constitution also guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .[3]

The due process clause of the fourteenth amendment has been construed to require that in all criminal proceedings, trials shall not be

1. WISC. STAT. ANN. 956.03(3) (Supp. 1969).
2. U.S. CONST. amend. XIV, § 1.
3. U.S. CONST. amend. VI.

> conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice,' and in a way that 'necessarily prevents a fair trial.'[4]

The question then becomes, whether a categorical denial of a change of venue to all misdemeanants is a denial of that fundamental fairness.

In a recent Texas case the Fifth Circuit Court of Appeals held, under facts almost identical to those in the instant case, that a statute limiting change of venue to felonies was a denial of due process because it created the possibility that a trial by a fair and impartial jury may not be had.[5] In other words, the test for a change of venue as stated by that court is:

> 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 change of venue, to assure a fair and impartial trial.[6]

The Court of Appeals further said:

> The *Irvin v. Dowd* line of cases involves capital crimes. We are of the view, however, that the same constitutional safeguard of an impartial jury is available to a man denied his liberty—here two years—for a misdemeanor as for a felony.[7]

For the Fifth Circuit Court of Appeals, then, it is immaterial whether the crime is serious or petty, felony or misdemeanor; if the defendant is to have a trial by jury, the jury must be as free from prejudice as possible. To achieve this end all available procedural safeguards, not just one or two, must be extended to every defendant.

Although the United States Supreme Court has never decided the particular question raised in the instant case, the Court has had occasion to consider the necessity of change of venue in cases involving felonies. In *Irvin v. Dowd*,[8] the Court was faced with the question of whether or not an Indiana statute[9] limiting a defendant to one change of venue denied the defendant due process of the law. In holding that the denial of defendants' request for a second change of venue was a denial of due process, the Court said:

4. Lyons v. Oklahoma, 322 U.S. 596, 605 (1944).
5. Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966).
6. *Id.* at 5.
7. *Id.* at 7.
8. Irvin v. Dowd, 366 U.S. 717 (1961).
9. IND. ANN. STAT. § 9-1305 (Burns 1956).

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord to an accused a fair hearing violates even the minimal standards of due process.[10]

The Court further said in *Irvin* that even though the prospective jurors may say they can disregard pre-trial publicity, if it appears that the publicity so pervaded the courtroom as to make an impartial jury impossible, the court should grant a change of venue regardless of any procedural statute to the contrary. In other words, regardless of extensive *voir dire* proceedings, if it appears unlikely that an impartial jury can be had, some other option must be exercised by the court, one of these being change of venue. Obviously, if an option is to be exercised by the court, it must remain open to do so.[11]

The thrust of *Irvin* and its progeny[12] seems to be that due process requires as a bare minimum that a jury be impartial and free from prejudice. In order to insure this impartiality it is necessary only to show the probability that prejudice has entered the jury box. As the Court said in *Sheppard v. Maxwell*,[13] it is not necessary to show identifiable prejudice; the increase in probability is sufficient.

If it is true that due process is concerned only with the probability of prejudice entering the jury box, it would seem to follow that any practice, procedure, or policy adhered to by a court or state which increased the probability of prejudice would immediately be suspect as a denial of due process. In view of the fact that Wisconsin confers on every defendant in a criminal prosecution the right to a trial by jury,[14] it would seem a fair inference that in the present case denying the defendant the right to a hearing on change of venue works as a denial of due process. The probability of prejudice destroying the impartiality of the jury goes up as the procedural safeguards against prejudice go down.

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10. Irvin v. Dowd, 366 U.S. 717, 722 (1961).
11. State v. Groppi, ——Wis.2d——, 164 N.W.2d 266 (1969). As the dissent in the instant case points out, even if it is shown at *voir dire* proceedings that prejudice is rampant in the community, it does not help a misdemeanant, since the statute under the majoritys' interpretation, excludes him from a change of venue regardless of the circumstances. All that would be available to him would be a continuance, or allow the trial to continue and later request a new trial. If the first alternative is chosen the defendant in effect loses his right to a speedy public trial; if he chooses the second the whole concept of a fair and impartial trial is meaningless. This situation would certainly meet the test that the probability of unfairness has increased.

The dissent also argues that the venue statute is procedural in nature and simply states the duty of the judge if prejudide is apparent and the defendant is charged with a felony. Thus, the dissent says, the statute does not exclude misdemeanants from change of venue; it merely is silent as to the judges' duty if the misdemeanant requests a change of venue.
12. *See* Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963).
13. Sheppard v. Maxwell, 384 U.S. 333 (1966).
14. WIS. CONST. art. 1, § 7 (1848).

Although all of the *Irvin* line of cases involved felonies, that fact does not seem to be controlling. The question in each case was what does the United States Constitution, via the fourteenth amendment, guarantee a criminal defendant who is being *tried by a jury*. In each case the answer was the same: a fair and impartial jury, with all necessary procedures toward that end. Since, as stated earlier, all criminal defendants in Wisconsin may have a jury trial if they wish, the *Irvin* cases are directly in point. Once a defendant has requested a jury, he has satisfied all the requirments necessary to bring himself within the purview of *Irvin*.[15]

Despite the Wisconsin courts' argument that change of venue is only one method of insuring a fair trial,[16] if the other methods fail as they did in *Irvin*, it seems hardly logical to say that any further procedures possible may not be used because the others should not have failed. It should not be necessary to argue that a defendant may appeal on the basis that he did not receive a fair trial. The Constitutions of both the United States and Wisconsin guarantee a fair and impartial jury, not a fair and impartial appellate court.

Section one of the fourteenth amendment to the United States Constitution guarantees that no state shall

> deny to any person within its jurisdiction the equal protection of the laws.[17]

Unless some rational basis exists to justify it, the distinction made by the Wisconsin legislature (if indeed the legislature made the distinction) between felons and misdemeanants for the purpose of obtaining a change of venue in criminal cases would seem to violate the equal protections clause.[18]

The basis for the Wisconsin courts' justification of the distinction drawn between felons and misdemeanants seems to be twofold: (1) Misdemeanors are not the kind of crimes which engender community prejudice, and therefore change of venue is not a necessary

15. In other words, the difference between the scope of the *Irvin* cases and that of the cases exemplified by *Gideon v. Wainwright*, 372 U.S. 335 (1962) is simply that those cases incorporate into their holdings the felony-misdemeanor distinction because they must designate who is entitled to, for example, effective counsel. The *Irvin* cases on the other hand need not make such a distinction. The question is, *given* a jury trial, what standards must be followed to insure it be a fair and impartial jury. Accordingly, the Wsconsin court (or legislature, as the case may be,) by making the felony-misdemeanor distinction is really saying all criminal defendants are entitled to a trial by jury, but only felons are entitled to all the guarantees necessary to insure that it be a fair and impartial jury. This is not in the spirit of the *Irvin* cases, and to deny their applicability is to read into their holdings a caveat not to be found in the cases themselves.

16. State v. Groppi, ——Wis.2d——, 164 N.W.2d 266, 270 (1969).

17. U.S. CONST. amend. XIV, § 1.

18. WIS. STAT. ANN. 956.03(3) (Supp. 1969). The Wisconsin court does not seem to have interpreted the statute at all in the opinion; they apparently *assume* the legislature intended to restrict the statutes appliotaion to felons.

remedy; (2) Efficiency in the administration of justice justifies the distinction drawn, since allowing misdemeanants a change of venue would bog down the judicial system.[19]

The difficulty with the first of these justifications is that the major premise, that misdemeanors do not engender community prejudice, simply is not true. Not only do a large number of crimes normally classified as misdemeanors attract a great deal of publicity, and thus generate community prejudice,[20] but also the person who commits the offense quite often draws attention to himself and hence to the crime. A perfect example of this situation is the present case. Here the defendant was a well-known, and well-publicized, civil rights leader. His activities made good news. Accordingly, when he was arrested, his arrest received a great deal of attention. It does not seem too difficult to imagine that the community, *the community from which the jury would be drawn,* would rely on the publicity given the present arrest, along with the knowledge of the defendant's previous activities, and become prejudiced against him to a degree that an impartial jury could not be extracted from the community.

The second justification, that the efficient administration of justice requires the distinction be drawn, at first glance seems to have some merit. It undoubtedly would be expensive and time consuming to grant a change of venue to every person charged with a misdemeanor. However, this line of reasoning is subject to at least three criticisms: (a) Not every misdemeanant will apply for a change of venue, and thus neither time nor money will be expended on those cases; (b) Whatever costs are saved by denying the right to pre-trial hearing will probably nonetheless be incurred in post-trial proceedings. As the court in the instant case said, the defendant may request a hearing to determine if he was denied a fair and impartial trial;[21] (c) Those people who can show they did not receive a fair trial because of the inability to find an impartial jury would probably be given a new trial. The costs of the first trial would have been avoided in those cases if the defendant had been allowed a change of venue.

Neither of the reasons given to justify the distinction drawn

19. State v. Groppi, ——Wis.——, 164 N.W.2d 266, 268 (1969).

20. A good example of a misdemeanor which attracts and creates community prejudice is WIS. STAT. ANN. 940.29 (1955). This section makes it a crime punishable by a $500 fine and/or one year in the county jail, (a misdemeanor under Wisconsin law), for any person in charge of or employed by any one of a specified number of institutions to abuse, neglect, or mistreat any inmate of the institution. Anyone charged with, for example, mistreating minors in a state reform school would most certainly arouse the wrath of the community. A change of venue, under present Wisconsin law, would not be available to this person regardless of the nature and extent of the prejudice his alleged crime engendered in the community.

21. State v. Groppi, ——Wis.2d——, 164 N.W.2d 266, 270 (1969).

between felons and misdemeanants seems sufficient to relieve the charge that the distinction does in fact violate the equal protections clause.

It seems clear that the Wisconsin statute does in fact serve to deny to misdemeanants due process, and that the distinction should be dropped. This is all the more apparent in light of other states' provisions which generally do not make any distinction between defendants for the purpose of change of venue.[22] Furthermore, the trend seems to be toward dropping the felony-misdemeanor classification for purposes of determining which defendants are entitled to such things as jury trial or adequate counsel.[23] Both the statute and the decision in this case are against the weight of authority and the principles of justice, and both should be changed.

TERRY M. ANDERSON

WORKMEN'S COMPENSATION — REMOTE PROXIMATE CAUSE — ALCOHOLISM CAUSED BY ORIGINAL COMPENSABLE INJURY—Plaintiff incurred a back injury arising out of and in the course of his employment at the defendant's plant for which he received the allowable compensation. Shortly after surgery, plaintiff returned to favored employment[1] at a greater wage than he had received previously. More than seven years after his return to work the plaintiff was discharged for being under the influence of intoxicants while at his place of employment. A claim for workmen's compensation was submitted contending that there was a causal relationship between plaintiff's drinking problem and his compensable back injury.[2] The trial court found for the plaintiff and on appeal the Michigan Court of Appeals affirmed. *Scroggins v. Corning Glass Company,* 10 Mich. App. 174, 159 N.W.2d 171 (1968).

The Court of Appeals relied upon the plaintiff's self-diagnosis that his consumption of alcoholic beverages was to relieve the pain caused by his back injury. The plaintiff testified that he hadn't

22. ALA. CODE *tit.* 15, § 267 (1959); CAL. PENAL CODE, § 1033 (West 1956); GA. CODE ANN. § 27-1201 (1953); IDAHO CODE ANN. § 19-1801 (1947); ILL. REV. STAT. ch. 38, § 114-6 (1963); LA. REV. STAT. § 15:290 (1950); MICH. COMP. LAWS § 762.7 (1946) MISS. CODE ANN. § 2508 (1957); N.D. CENT. CODE § 29-15-01 (1960); N.Y. CODE OF CR. PROC. § 344 (Mc-Kinney 1958); WASH. REV. CODE ANN. § 10.25.070 (1961); State *ex. rel.* Ricco v. Biggs, 198 Ore. 413, 255 P.2d 1055 (1955).

23. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (jury); State v. Borst, 278 Minn. 278 Minn. 388, 154 N.W.2d 888 (1967) (counsel); Stevenson v. Halzman, ——Ore.——, 458 P.2d 414 (1969) (counsel).

1. A return to a position commensurate with employee's former work both in salary and status. Scoggins returned as a plant guard.

2. No claim was submitted contending that the type of work contributed to the drinking problem.