Duquesne Law Review

Volume 30
Number 3 *The Pennsylvania Issue*

Article 12

1992

Constitutional Law - Right to Impartial Jury - Pretrial Publicity - Change of Venue

John Jacob Hare

CONSTITUTIONAL LAW—RIGHT TO IMPARTIAL JURY—PRETRIAL PUBLICITY—CHANGE OF VENUE—The Pennsylvania Supreme Court has held that a change of venue request based on pretrial publicity can only be granted where the publicity is prejudicial, pervasive, and in the minds of the jurors at the time of trial.

Commonwealth v Gorby, 527 Pa 98, 588 A2d 902 (1991).

On December 20, 1985, Jeffrey Gorby (hereinafter "appellant") and Drayton Sphar were patrons at the Old Trails Inn.[1] Sphar, while buying drinks for the appellant and others, repeatedly displayed a large roll of bills which was readily visible to the appellant.[2] The victim, Sphar, was wearing a leather jacket, a chain belt with a buckle containing his name, and was carrying a wallet with a Harley Davidson emblem embossed on it.[3] Sometime between midnight and 12:30 a.m. on December 21, the appellant and Sphar left the Old Trails Inn in the victim's car and headed for the Somerset Inn.[4] Upon leaving, Sphar assured another patron that he would return quickly.[5] At approximately 1:00 a.m. the appellant arrived alone at the Somerset Inn and, displaying a large roll of bills, bought drinks for everyone present.[6] The appellant then showed to several patrons a belt matching the description of the one worn by the victim earlier in the evening, and he also gave to the bartender a Harley Davidson wallet.[7] The bartender noticed

---

1. *Commonwealth v Gorby*, 527 Pa 98, 588 A2d 902, 905 (1991). Although nothing else in the record indicates that the appellant and the victim were acquainted prior to their coincidental meeting at the Old Trails Inn on December 20, 1985, the court did have before it a newspaper article which suggested that the two were in fact acquainted prior to December 20th. The Washington Observer-Reporter, Dec 24, 1985 at 1, col 2. See note 39 for the full text of the article.

2. *Gorby*, 588 A2d at 904. The appellant was seated next to Sphar. Id at 905.

3. Id.

4. Id. The appellant and Sphar left the Old Trails Inn after the appellant asked Sphar for a ride so that the appellant could retrieve his car which was supposedly parked at the Somerset Inn. Sphar's vehicle was later found in the parking lot of the Somerset Inn. Id. His body was discovered inside. Id.

5. Id. The patron, James Yeager, was Sphar's roommate and had originally requested Sphar's presence at the Old Trails Inn so that Sphar could drive Yeager home. Id at 904, 905.

6. Id. At trial, the appellant's girlfriend, Susan Loveland, testified that the appellant had called her on December 20, 1985, requesting money, and that she had given him twenty dollars. Id.

7. Id.

blood stains on a knife in the appellant's possession,[8] and also noticed the victim's car in the parking lot as he left the Somerset Inn to drive the appellant to the Old Trails Inn.[9] The appellant entered the Old Trails Inn between 2:30 and 3:00 a.m. and again purchased drinks for all present.[10] The appellant was wearing a chain belt wrapped around his hand[11] and a patron noticed blood stains on his pants.[12] The appellant was seen leaving the Old Trails Inn about 4:00 a.m. on December 21, 1985.[13] On December 22, police questioned the appellant, and on December 23 they attempted to serve him with an arrest warrant but were unable to locate him.[14] The appellant was finally located in April of 1986 in Houston, Texas,[15] living under an assumed name.[16]

At trial, the appellant's girlfriend, Susan Loveland, testified[17] that the appellant had confessed to her that he had killed Sphar by stabbing him and slitting his throat,[18] and also that he had robbed Sphar.[19] Loveland further testified that the appellant's con-

---

8. Id. The bartender, Harold Cain, testified that he noticed the blood stains as the appellant shaved Cain's arm in an attempt to show him how sharp the knife was. Id.

9. Id. The appellant requested that Cain drive him to the Old Trails Inn. Id.

10. Id.

11. Id. The belt was later identified as belonging to the victim. Id.

12. Id. The patron, Nanette Leeper, testified that Gorby explained the blood stains by saying that he had been gutting deer earlier in the day. Id.

13. Id.

14. Id. When the police arrived to serve the appellant, his mother, with whom he had been living, informed the officers that she had not seen the appellant since shortly after the police had questioned him on December 22. Id at 906.

15. Id. The Commonwealth, in closing argument, referred to this flight by saying, "I think [the flight], to a large degree, speaks to itself as to the defendant's participation [in the crime]." The appellant appealed the trial court's admission of this reference and the court, citing *Commonwealth v Smith*, 518 Pa 15, 540 A2d 246 (1988), as the standard for a new trial based on a prosecutor's comments to the jury, rejected the appeal. *Gorby*, 588 A2d at 909.

16. *Gorby*, 588 A2d at 909. The appellant waived extradition and was returned to Pennsylvania on April 24, 1986. Id at 906.

17. Id at 907. This testimony served as the basis of the appellant's appeal that the testimony should have been precluded by the marital incompetency rule because Loveland was in fact his common law wife. 42 Pa Cons Stat Ann §5913 provides in part that, "in a criminal proceeding husband and wife shall not be competent or permitted to testify against each other . . . ." 42 Pa Con Stat Ann § 5913 (1978). Common law marriages have been held to fall within the meaning of Section 5913. *Commonwealth v Smith*, 511 Pa 343, 513 A2d 1371 (1986). However, the court found that the appellant was legally married to another woman during the alleged common law marriage and that therefore no marriage to Loveland existed. *Gorby*, 588 A2d at 907. On this basis, the court rejected the appeal and allowed Loveland's testimony. Id.

18. *Gorby*, 588 A2d at 905. The victim had in fact been stabbed thirteen times and his throat was slit. Id at 908.

19. Id.

fession had taken place at the Howard Johnson Motor Lodge, that the appellant had a leather jacket and belt with him, both of which matched the description of those belonging to Sphar, and that the appellant had disposed of these items in a trash can on the premises.[20]

Within a week of Sphar's murder, an article was published regarding the murder.[21] One month before the appellant was apprehended, an article profiling the area's ten "most wanted" men (among them the appellant) was published.[22] Two more articles were published when the appellant was apprehended in Houston and an article appeared shortly before the appellant's trial commenced.[23]

The appellant was convicted of first degree murder[24] and robbery.[25] At the penalty hearing[26] the jury fixed the sentence at death.[27] The trial court then heard the appellant's post trial motions and imposed the sentence as decided by the jury.[28] In addition, the trial court sentenced the appellant to a consecutive term of eight to sixteen years of imprisonment on the robbery conviction.[29] On automatic direct appeal,[30] the superior court consoli-

---

20. Id. On December 23, the jacket and the belt and buckle containing the name of the victim were found in a trash can at the Howard Johnson Motor Lodge. Id. The jacket had slash marks corresponding to the stab wounds on the body of the victim. Id at 905, 908.

21. Id.

22. Id.

23. Id. These articles served as the basis of the appellant's motion for a change of venue. Id. The trial judge denied the motion and another appeal was taken, appellant again alleging that the articles were prejudicial. Id at 906. These articles were discussed and four were reprinted in full. See notes 39, 42, 44 and accompanying text.

24. *Gorby*, 588 A2d at 906. First degree murder is the intentional and unlawful killing of a human being. 18 Pa Cons Stat Ann § 2502 (1978).

25. *Gorby*, 588 A2d at 906. Robbery is the felonious and forcible taking of goods or money of any value from the person of another by violence or putting in fear. 18 Pa Cons Stat Ann § 3701 (1976).

26. *Gorby*, 588 A2d 904 (1991). The penalty hearing denotes the post-conviction stage at which the jury determines the defendant's punishment. Id.

27. Id at 906. At the post-conviction penalty hearing the jury found two aggravating circumstances and no mitigating circumstances, the robbery of Sphar and the appellant's prior felony record being the former. Id at 910. Pennsylvania law requires the imposition of the death penalty where a jury finds, subsequent to a first degree murder conviction, at least one aggravating circumstance and no mitigating circumstances. 42 Pa Cons Stat Ann § 9711(c)(1)(iv) (1980).

28. *Gorby*, 588 A2d at 904.

29. Id.

30. Id. Pennsylvania law requires that the state supreme court review all cases in which the death penalty has been imposed to determine the sufficiency of the evidence upon which the defendant has been convicted. 42 Pa Cons Stat Ann § 722(4) (1988); 42 Pa Cons Stat Ann § 9711(h)(1) (1988); PaRAP Rule 702(b). In reviewing such evidence, the court

dated and transferred[31] the appellant's appeal of the trial judge's denial of his request for a change of venue based on pretrial publicity.[32]

The issue before the Pennsylvania Supreme Court was whether the trial judge's denial of the appellant's request for a change of venue was proper.[33] In his motion for a change of venue, the appellant argued that the newspaper articles concerning his case were so emotional and inflammatory, and that the publicity surrounding the case was so extensive, that his right to a fair trial without a change of venue was effectively precluded.[34] The court began its analysis by finding that only when a trial judge has abused his dis-

---

must determine whether the evidence, and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict-winner, is sufficient to establish all the elements of the offense(s) beyond a reasonable doubt. *Commonwealth v Rhodes*, 510 Pa 537, 510 A2d 1217 (1986); *Gorby*, 588 A2d at 904. Further, the court must determine whether the sentence imposed is excessive or disproportionate to the penalty imposed in similar cases. 42 Pa Cons Stat Ann § 9711(h)(3)(iii) (1988). Pursuant to this statutory duty, the court reviewed the appellant's trial and affirmed the judgment and sentence. *Gorby*, 588 A2d at 911.

31. *Gorby*, 588 A2d at 911. Gorby's appeal of the denial of the change of venue motion was consolidated and transferred by the superior court to the supreme court because the case was already required to go to the supreme court on direct appeal. See note 30; FRAP 3(6).

32. *Gorby*, 588 A2d at 911. The automatic direct appeal also contained a consolidation of various other appeals which the state supreme court addressed. Id. Besides the points of appeal discussed in notes 15 and 17, the appellant appealed the fact that the evidence used to convict him was purely circumstantial. Id. Citing *Commonwealth v Halcomb*, 508 Pa 425, 498 A2d 833 (1985), the court concluded that, "The law is well settled that circumstantial evidence can be sufficient to convict one of a crime." *Gorby*, 588 A2d at 908. The appellant also appealed the trial court's refusal to sequester the jury because of the case's allegedly extensive publicity. Id. The court, rejecting this appeal, held that *Commonwealth v Jackson*, 481 Pa 426, 392 A2d 1366 (1978), requires a showing of actual prejudice rather than a mere assertion that such prejudice will occur. *Gorby*, 588 A2d at 908. Appellant next assigned as error the admission of photographs depicting the crime scene. Id. The court, in rejecting this appeal, found that the photographs "provided essential evidence tending to show that the defendant intended to inflict more than serious bodily injury" and were therefore necessary to a first degree murder prosecution. Id. Finally, the appellant appealed the jury's finding that his prior criminal record was an aggravating circumstance, see note 27, on the ground that he had intended to plead guilty to misdemeanors, and not to the felonies which the jury found to constitute an aggravating circumstance. *Gorby*, 588 A2d at 908. The court, finding that the appellant in fact intended the felony plea, also held that the jury's finding of another aggravating circumstance, namely, the robbery of Sphar, was alone sufficient to support the death penalty sentence even in the absence of the prior criminal record. Id at 911.

33. *Gorby*, 588 A2d at 911. PaRCrP § 312(a) provides in part that "venue . . . may be changed . . . when it is determined after hearing that a fair and impartial trial cannot otherwise be had in the county where the case is currently pending." 42 Pa Cons Stat Ann § 312(a) (1981).

34. *Gorby*, 588 A2d at 906.

cretion in denying a change of venue request will his decision be overturned on appeal.[35] Further, the court held that pre-trial publicity will be deemed inherently prejudicial where the publicity is inflammatory, sensational and biased against the accused rather than objective; reveals any prior record of the accused; refers to confessions or admissions by the accused; or is derived solely from those asserting the defendant's guilt, namely, police or prosecutors.[36] However, the court continued, even the existence of one of these elements will not require a change of venue if sufficient time has lapsed between the publication and trial for the prejudice to dissipate.[37]

The court next reviewed the articles which the appellant contended contained emotional and inflammatory accounts of the crime.[38] The first of these,[39] the court found, was published within a week of the crime, contained only factual accounts, and omitted any reference to the appellant's criminal record or confessions.[40] Another article, which was published prior to the appellant's apprehension, profiled the area's ten "most wanted" men, but only mentioned the appellant's name and appearance, and briefly discussed the facts.[41] The court further found that two more articles[42]

---

35. Id. The court cited *Commonwealth v Buehl*, 510 Pa 363, 508 A2d 1167 (1986), as the appropriate standard for an appellate court to employ in reviewing a trial court's decision regarding a change of venue request. *Gorby*, 588 A2d at 906.

36. *Gorby*, 588 A2d at 906. The court cited *Commonwealth v Pursell*, 508 Pa 212, 495 A2d 183 (1985), as setting forth the aforementioned standards beyond which publicity will be deemed prejudicial. *Gorby*, 588 A2d at 906.

37. *Gorby*, 588 A2d at 906. The court cited *Commonwealth v Casper*, 481 Pa 143, 392 A2d 287 (1978), as establishing this proposition. *Gorby*, 588 A2d at 906.

38. *Gorby*, 588 A2d at 907.

39. Id. The article read as follows:

> State police have issued a warrant for the arrest of Thomas Gorby of Eighty Four, Washington County, in the fatal stabbing of Drayton Sphar, 39, of Washington, Pa.
>
> Gorby is wanted on charges of criminal homicide and robbery.
>
> Sphar's body was found in his car in a parking lot at the Somerset Inn in Somerset Township Saturday night.
>
> Coroner Farrell Jackson said Sphar, owner of an auto repair shop in Washington, had been stabbed several times in the chest and throat. Troopers said their ivestigation (sic) showed Gorby and the victim were acquainted and the suspect was the last person to see the victim alive.
>
> Police said Sphar was known to carry as much as $500. When his body was discovered, he had $1.40.
>
> Gorby was described as 6-foot-1, 160 pounds with shoulder length brown hair, a dark beard and mustache.

The Washington Observer-Reporter, Dec 24, 1985 at 1, col 2.

40. *Gorby*, 588 A2d at 907.

41. Id.

42. Id. The articles read as follows:

published when the appellant was apprehended, which only mentioned minimal facts regarding the murder of Sphar, presented no threat to a fair trial.[43] Finally, the court discussed an article[44] published shortly before the appellant's trial was commenced, and found that it only mentioned the fact that the appellant was arrested in Houston, Texas and was awaiting trial for the murder of Sphar.[45]

The court then reviewed the voir dire proceeding[46] to determine whether any of the jurors were in fact prejudiced by pretrial publicity,[47] and held that none of the jurors in the appellant's trial

---

1) A Washington County man wanted in a fatal stabbing at a tavern near Eighty-Four has been arrested in Houston, Texas.

Thomas J. Gorby, 27, of Eighty-Four was taken in custody without incident. He is accused of killing Drayton Sphar, 39, of Washington in the parking lot of the Somerset Inn Dec. 21.

Gorby was returned to Washington and jailed without bond on a charge of criminal homicide.

The Pittsburgh Press, Apr 26, 1986 at C2, col 4.

2) A Washington County coroner's jury Thursday recommended Thomas Gorby, 27, of Eighty-Four, be held for further court action in the stabbing death of Drayton Sphar, 39.

Sphar's body was found in his car in the parking lot of the Somerset Inn on Dec. 21.

Assistant Director Attorney Dan Johnson said key points in the case were testimony by a bartender who said he saw Sphar and Gorby together on Dec. 21 and a motorcycle jacket in Gorby's possession that had slash marks similar to those on Sphar's body.

Gorby, who had been a fugitive for four months and was extradited to Pennsylvania from Houston, Texas, last week, was charged with criminal homicide.

The Washington Observer-Reporter, May 1, 1986 at 1, col 2.

43. *Gorby*, 588 A2d at 907.

44. Id. The article read as follows:

A Washington County man has been held for trial on criminal homicide and robbery charges in the fatal stabbing of Drayton Sphar, 39, of Washington, Pa.

Thomas J. Gorby, 27, of Eighty-Four, was held following a preliminary hearing before District Justice Paul Pozonsky of McDonald.

Sphar was found stabbed to death Dec. 21 inside his parked car outside the Somerset Inn near Eighty-Four.

Gorby fled after the stabbing but was arrested in Houston, Texas. He was held without bond pending trial.

The Washington Observer-Reporter, May 16, 1986 at 2, col 2.

45. *Gorby*, 588 A2d at 907.

46. Id. Voir dire "denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualifications and suitability to serve as jurors." *Black's Law Dictionary* 1575 (West, 6th ed 1990).

47. *Gorby*, 588 A2d at 907. The court cited *Commonwealth v Bachert*, 499 Pa 398, 453 A2d 931 (1982), as mandating that the court focus on whether any juror formed a fixed opinion of the defendant's guilt or innocence as a result of the pre-trial publicity. *Gorby*, 588 A2d at 906.

were so prejudiced.[48]

In light of the foregoing determinations, namely that the articles were neither prejudicial nor the cause of any juror bias, the court concluded that there was no abuse of discretion at the trial court level[49] in the denial of the appellant's request for a change of venue.[50]

Establishing the proper balance between the right to a free press and an accused's right to an impartial trial "has long been a complex and troublesome problem."[51] This balance becomes even more difficult to achieve because both of the rights involved are indeed "fundamental."[52] Freedom of the press[53] has long been recognized as the "handmaiden"[54] of justice because it subjects the judicial process to the full light of public scrutiny.[55] The importance of this truism can hardly be overstated and, in the pursuit to expose the judicial system, the press has generally been afforded "the broadest scope that could be countenanced in an orderly society."[56]

However, the courts have generally held that the press, in fulfilling its critical duty, cannot be permitted to interfere with the right to a fair trial.[57] These holdings have been firmly grounded in

---

48. *Gorby*, 588 A2d at 907. The court found that of the seventy potential jurors, thirty-four said they knew something about the case, twenty-six said they had no knowledge of the incident, and ten were not asked because they were excused for personal reasons. Id. Only four of the thirty-four who had some knowledge of the case said they may have been influenced by the publicity, but none of those four were ultimately chosen as members of the jury. Id.

49. Id. The court stated:

> Our review yields no evidence of either actual prejudice or any pre-trial publicity that was so sensational or inflammatory as to justify a presumption of prejudice. Accordingly, we find no abuse of discretion in the trial court's refusal to grant a change of venue.

Id.

50. Id. The court affirmed the conviction and sentence of the appellant on April 3, 1991. Id at 902.

51. *Commonwealth v Pierce*, 451 Pa 190, 303 A2d 209 (1973).

52. James T. Ranney, *Remedies for Prejudicial Publicity: A Brief Review*, 211 Vill L Rev 819, 820 (1976), citing *Commonwealth v Bruno*, 466 Pa 245, 352 A2d 40 (1976).

53. See US Const, Amend I.

54. *Pierce*, 303 A2d at 211.

55. In *Sheppard v Maxwell*, 384 US 333 (1966), the United States Supreme Court, per Justice Clark, recognized the vital role of the press in fostering justice by stating, "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *In re Oliver*, 333 US 257, 268 (1948), quoting *Sheppard*, 384 US at 349-50.

56. *Bridges v California*, 314 US 252, 265 (1941).

57. Interference with this right has been consistently held to constitute a violation of due process. In *Irwin v Dowd*, 366 US 717 (1961), Justice Clark stated, "The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent

the belief that, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[58]

Clearly, the place in which pretrial publicity has had its most damaging impact is in the minds of jurors.[59] This is so because jurors, like all people, are "extremely likely to be impregnated by the environing atmosphere"[60] and can therefore be biased against the accused simply by what they read or hear prior to trial. This bias is impermissible because "a juror who has formed an opinion cannot be impartial"[61] and impartiality is required by law.[62]

It follows, then, that courts have historically focused on the standards with which to gauge pretrial publicity in a given case to determine if it jeopardizes the accused's right to a fair trial. A review of the relevant Pennsylvania case law reveals that, even though "each case [turns] on its [own] special facts,"[63] a relatively consistent standard has emerged.

The modern Pennsylvania law regarding pretrial publicity began to emerge in *Commonwealth v Pierce*.[64] In *Pierce*, the court found that the publicity surrounding the murders of a seminarian and a lawyer was "emotionally charged and inflammatory,"[65] referred to re-enactments and admissions of the crime, mentioned the accused's prior criminal record, and was taken predominantly from the statements of police and prosecutors.[66] In holding that the

---

jurors. The failure to afford an accused a fair hearing violates even the minimal standards of due process." *Irwin*, 366 US at 721. Similarly, the Supreme Court has concluded that, "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 US 133, 136 (1955). Further, the Sixth Amendment right to a fair trial and due process of law are applicable to the states under the Fourteenth Amendment. US Const, Amend VI and XIV; Pa Const, Art I, § 9.

58. Justice Holmes, speaking for the Court, in *Patterson v Colorado*, 205 US 454, 462 (1907).

59. Obviously, a vast number of convictions have been reversed because pretrial publicity was deemed, on review, to have precluded the defendant's right to a fair trial. *Commonwealth v Pierce*, 451 Pa 190, 303 A2d 209 (1973); *Commonwealth v Frazier*, 471 Pa 121, 369 A2d 1224 (1977); *Commonwealth v Cohen*, 489 Pa 167, 413 A2d 1066 (1980).

60. *Frank v Magnum*, 237 US 309, 345, 349 (1915).

61. 1 *Burr's Trial* 416 (1807).

62. See note 57.

63. *Marshall v United States*, 360 US 310, 312 (1959).

64. 451 Pa 190, 303 A2d 209 (1972).

65. *Pierce*, 303 A2d at 211.

66. Id. The court also found gross abuses of discretion by the police and prosecutors. Id. For example, it was the authorities who referred to the defendant as the confessed "triggerman" with a prior criminal record. Id. Also, it was the police who staged a highly public re-enactment. Id. Further, the court found that the district attorney's office released state-

publicity was therefore "inherently prejudicial" in pointing to the defendant's guilt,[67] the court adopted the view of the United States Supreme Court that such a finding relieves the accused of the usual duty to show actual prejudice.[68] In so finding, the court reversed the defendant's conviction on the grounds that a change of venue request was improperly denied.[69]

Commonwealth v Frazier,[70] citing *Pierce* with approval, clearly sets forth the appropriate standard of review for high publicity cases.[71] Here, an eleven-year-old girl was murdered in a small rural community in which only one other murder had occurred that year.[72] The community's reaction was intense and the local newspaper gave the story extensive headline coverage.[73] The coverage detailed the defendant's prior criminal record, quoted a family member referring to the defendant as "mentally ill," recited admissions made by the accused,[74] and relied heavily on information from the police.[75]

However, the court's analysis did not stop with these findings. It proceeded, citing *Pierce*, to look at the pervasiveness of the publicity.[76] This second step is required, the court ruled, because some

---

ments, one promising "a swift and very special treatment" to the perpetrator, which undoubtedly aroused the emotions of the community. Id. In response to such abuses the court ruled, referring to the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, §§ 1.1 and 2.1 (Approved Draft 1968), that police and prosecutors shall not release to the news media any statement or confession given by the accused, prior criminal records of the accused, inflammatory statements referring to the case or the accused, the possibility of a guilty plea, or photographs of the accused connecting him with the crime scene. *Pierce*, 303 A2d at 211. The court concluded that "anything short of compliance with these standards can operate to deprive an accused of due process of law." Id at 214.

67. *Pierce*, 303 A2d at 212.

68. Id. The court cited *Sheppard v Maxwell*, 384 US 333 (1966); *Turner v Louisiana*, 379 US 466 (1965); and *Rideau v Louisiana*, 373 US 723 (1963), as authority for the proposition that some publicity is so "inherently lacking in due process" that the accused need not show actual prejudice. *Pierce*, 303 A2d at 212.

69. *Pierce*, 303 A2d at 211.

70. 471 Pa 121, 369 A2d 1224 (1977).

71. *Frazier*, 369 A2d at 1227.

72. Id.

73. Id. For example, the newspaper announced the defendant's arrest in red print headlines measuring over one-half inch in height and included a large picture of the defendant. Id at 1226.

74. Id.

75. Id. One such story, which occupied one-third of the front page, quoted a state police sergeant as saying that the defendant went Christmas shopping after murdering the girl. Id.

76. Id at 1227. It is unclear how much emphasis the court in *Pierce* placed on the pervasiveness of the news coverage, but it does appear, in light of passing references to

pretrial publicity can be "so sustained, so pervasive, so inflammatory and so inculpatory as to demand a change of venue. . . ."[77] Finding that the coverage was in fact so pervasive,[78] the court then sought to determine whether "a sufficiently long period of time [had] passed" between the time of the publicity and the application for a change of venue for the prejudicial effect of the publicity to have dissipated.[79] The court pursued this third prong[80] by examining the voir dire record,[81] and reversed the defendant's conviction,[82] concluding that the four-month period between the publicity and the trial was not sufficiently long.[83]

Yet another high publicity murder trial was reviewed by the court in *Commonwealth v Rolison*,[84] where the defendant was convicted of the first degree murder of the husband of one of his co-conspirators. In support of his motion for a change of venue, the defendant presented evidence that his co-conspirator's trial was the first murder trial in twenty years in the county of 30,000, that a widespread belief existed in the county that he was in fact guilty, and that numerous articles regarding the crime had been published in newspapers with a combined circulation of 24,000.[85] The fact that the defendant had also been named as the actual killer in his

---

"widespread publicity," *Pierce*, 303 A2d at 211, and an extended quote from a case relying heavily on the pervasiveness of publicity, *Rideau v Louisiana*, 373 US 723 (1963), that pervasiveness was factored into the court's analysis.

77. *Frazier*, 369 A2d at 1227.

78. Id. The court found that the newspaper carrying the relevant articles was delivered daily to approximately 30,000 of the 31,074 households in the county. Id.

79. Id at 1228.

80. As previously discussed, see notes 70-77 and accompanying text, the first prong is the determination of whether the publicity was in fact prejudicial, and the second is whether the prejudicial publicity was so pervasive as to "create a likelihood that a significant percentage of potential jurors had been exposed to it." Id at 1230.

81. Id. The court found that of thirty-two potential jurors asked, twenty-eight recalled reading or hearing of the murder, and eleven of the fourteen seated jurors also recalled reading or hearing of the murder. Id. Two jurors stated that they did not recall if they knew of the murder prior to voir dire, and one said that he did not know of the murder prior to voir dire. Id. Also at voir dire, the defendant had eleven challenges for cause because jurors had formed fixed opinions. Id at 1229.

82. Id. Justice Nix dissented, contending that the United States Supreme Court requires a showing of actual prejudice unless the publicity can be deemed inherently prejudicial, and since the publicity in this case could not be so deemed, the change of venue request was properly denied. Justice Nix viewed the majority's approach as a "sub silentio" departure from precedent. Id at 1230.

83. Id. Nine months had passed between publication and trial in *Pierce*. *Pierce*, 303 A2d at 210. However, in *Commonwealth v Kirchline*, 468 Pa 265, 361 A2d 282 (1976), six months was held to be sufficient. *Frazier*, 369 A2d at 1227.

84. 473 Pa 261, 374 A2d 509 (1977).

85. *Rolinson*, 374 A2d at 511.

co-conspirator's trial had also been published.[86] The court, reviewing the types of articles that had been found prejudicial in *Frazier*,[87] concluded that no such article was published regarding Rolison.[88] The court continued,[89] holding that once a defendant has proceeded to voir dire, a showing of actual prejudice is required to support a change of venue request.[90] The court then reviewed the records of voir dire to determine if any prejudice in fact existed and found none.[91] Accordingly, it affirmed the denial of the defendant's request for a change of venue.[92]

In a dissenting opinion, Justice Manderino, with whom Justice Roberts joined, argued that the majority's view of that which can be prejudicial is too narrow, and that elements other than those present in *Frazier* (namely, references to confessions, a prior criminal record, and reports which go beyond objective reporting)[93] can constitute prejudicial publicity.[94] The publicity here, Justice Manderino concluded, while different from that in *Frazier*, still jeopardized the defendant's right to a fair trial and the voir dire results confirmed the prejudice.[95]

The *Frazier* standard has not been limited to publicity arising from murder trials. For instance, in *Commonwealth v Casper*,[96] the chairman of the county Democratic Committee was charged with numerous counts of "macing."[97] The record before the court contained fifty articles, ten of which mentioned the defendant's name and six of which referenced his name in the first three

---

86. Id.

87. Id at 512. The court in *Frazier* was confronted with articles which referred to the defendant's prior criminal record and confessions, and went beyond objective reporting. Id.

88. Id. The court concluded that the articles were limited to "factual accounts . . . and contained no inflammatory material." Id.

89. Under the standards set forth in *Pierce* and *Frazier*, the court's analysis in *Rolison* could have terminated with the failure to find prejudicial pretrial publicity.

90. Id.

91. Id. The court found that all fourteen jurors empaneled stated on voir dire that they had no opinion whatsoever on the appellant's guilt. Id at 513.

92. Id at 515.

93. See note 75 and accompanying text.

94. *Rolison*, 374 A2d at 516 (Manderino dissenting).

95. *Frazier*, 369 A2d at 1224. Justice Manderino's review demonstrates that 101 of 111 potential jurors asked replied that they had read or heard of the case, and sixty-one challenges for cause were granted relating to juror bias. *Rolison*, 374 A2d at 517.

96. 481 Pa 243, 392 A2d 287 (1978).

97. *Casper*, 392 A2d at 290. "Macing" occurs when a demand for political contributions is made on public employees with the understanding that such contributions will ensure the stability of the employees' jobs. Id.

paragraphs.[98] The defendant's photograph appeared twice, none of the articles mentioned testimony before the grand jury which indicted the defendant, and a summary of the grand jury's presentments appeared on page fifteen of the newspaper.[99] No accounts of admissions, a prior criminal record, or statements from police or prosecutors were published.[100] The court, reciting the three-part *Frazier* standard, found that the publicity was not prejudicial and therefore did not proceed to (other than by mention) the second step.[101] The court did, however, review voir dire to amplify the lack of prejudicial pretrial publicity.[102] In so finding, the court reversed the superior court's finding of "inherent prejudice"[103] and held that the trial court's denial of the change of venue request was proper.[104]

Two years later, in another murder trial, the state high court again reviewed a high publicity murder case. In *Commonwealth v Cohen*,[105] the defendant was convicted of murder and conspiracy.[106] In support of his motion for a change of venue, the defendant presented extensive evidence regarding prejudicial pretrial publicity.[107] The defendant offered into the record various publications,[108] many of which referred to the trial as one involving a "contract killing,"[109] others of which alluded to the defendant's use of drugs and alcohol.[110] The defendant also introduced a public opinion poll,[111] conducted by an expert, on the impact of criminal

98. Id at 294.

99. Id.

100. Id at 295.

101. Id.

102. Id. The court found that only fourteen of the thirty-two prospective jurors questioned had any knowledge of the case, and none of the thirteen who were ultimately seated had any fixed opinion as to the defendant's guilt. Id at 296.

103. Id. The court also struck down the superior court's finding that, because the defendant was a "public figure," his right to a fair trial was jeopardized. Id. The court found first that the defendant was not in fact well known and, secondly, that even if he was well known a court cannot assume prejudice against him. Id. The court characterized the lower court's findings as an "unwarranted," id at 290, change in Commonwealth law. Id at 297.

104. Id at 290.

105. 489 Pa 167, 413 A2d 1066 (1980).

106. *Cohen*, 413 A2d at 1071.

107. Id at 1069.

108. Id. These publications consisted of forty-two articles, sixteen front page stories, numerous large photographs, and transcripts of thirty-eight radio broadcasts. Id at 1073.

109. Id.

110. Id.

111. Id at 1069. Public opinion polls are expressly recommended as a means to determine the pervasiveness and prejudicial impact of pretrial publicity. ABA Standards Relating to a Fair Trial and Free Press, Standard 8-3.3(b) (Approved Draft, 2d ed 1978). *Cohen*, 413

proceedings on public opinion[112] that concluded that a fair trial in the county was very unlikely.[113] Further, six lay witnesses testified that the defendant could not get a fair trial in the county.[114] The court, again using the standard set forth in *Frazier*,[115] found that the publicity was prejudicial, clearly widespread, and in the minds of the jury at the time of trial.[116] The court accordingly ordered a change of venue.[117]

Yet another application of the *Frazier* standard occurred in *Commonwealth v Romeri*,[118] where the defendant was convicted of first degree murder. Only one article was published regarding the crime, but it referred to confessions, the defendant's prior contact with law enforcement agencies and, the court found, implicit in the story was the trial court's view that the defendant was guilty.[119] On this basis, the court found the article "inherently prejudicial."[120] The court then proceeded, citing the *Frazier* three-part test, to judge the pervasiveness of the publicity by examining the voir dire results.[121] The court concluded that the publicity had not so satu-

---

A2d at 1069 n 5.

112. Id at 1070. Dr. Jay Schulman, a professor at Columbia University, has consulted in over fifty criminal and civil proceedings, including the "Harrisburg 7" case, *United States v Ellsberg*, 455 F2d 1270 (1st Cir 1972), *United States v Mitchell and Stans*, 485 F2d 1290 (2d Cir 1973), the "Wounded Knee" cases, the "Attica" cases, and the Joan Little case. Id at 1069-70 n 5.

113. *Cohen*, 413 A2d at 1070. The poll found that 65% of all residents of the county knew of the case and 30% of the population admitted to adjudging the defendant guilty. Id at 1076. The poll was conducted during the two months prior to Cohen's first hearing. Id.

114. Id at 1070.

115. Id at 1077.

116. Id. The court looked to voir dire to establish the actual impact of the prejudicial publicity. Id at 1076. It found that 105 of the 169 prospective jurors asked held an opinion as to the defendant's guilt, and that eighty-nine of those 105 admitted a fixed opinion of the defendant's guilt. Id. Those eight-nine (or 53% of the original 169) were dismissed for cause. Id. Also, twelve of the fourteen seated jurors knew of the case and one admitted a fixed opinion as to the guilt of Cohen. Id at 1076 n 36. The court called this evidence of juror bias "unprecedented." Id at 1077.

117. Id. Justice Nix dissented, contending that the five years since the murder at least required the court to determine the present climate in the county before ordering a change of venue. Id. With the remaining findings of the majority, Justice Nix was in "substantial agreement." Id.

118. 504 Pa 124, 470 A2d 498 (1983).

119. *Romeri*, 470 A2d at 503.

120. Id. The court defined "inherently prejudicial" as "publicity which is harmful to the accused and which may or may not require a change of venue depending on what effect it has had in the community from which prospective jurors are drawn." Id at 501 n 1.

121. Id at 503. The court found that only seven of the eighty-eight prospective jurors (or 8%) had a fixed opinion as to the defendant's guilt, and none of the fourteen seated jurors had read the article. Id.

rated the community as to require a change of venue.[122] Accordingly, the court affirmed the trial court's denial of the change of venue request.[123]

Justice Zappala dissented,[124] arguing that once publicity has been deemed inherently prejudicial, a change of venue is required because the majority's definition of "inherently prejudicial"[125] includes pervasiveness,[126] the very element which the majority found absent.[127]

The supreme court again reviewed a change of venue request in *Commonwealth v Haag*,[128] where the defendant was convicted of first degree murder.[129] An article was published which summarized the charges against the defendant, described the voir dire proceedings, indicated that the crime was related to money and drugs, and stated that a co-conspirator was convicted for the same crime.[130] Another article added that the defendant had allegedly paid to have the victim killed.[131] The court held that the articles were not inherently prejudicial and, after reviewing voir dire,[132] concluded that the publicity was not pervasive[133] and therefore that the change of venue request was properly denied.[134]

Another recent application of the *Frazier* standard occurred in *Commonwealth v Breakiron*,[135] where the defendant was convicted of first degree murder. The publicity upon which the defendant based his request for a change of venue described the crime as "grisly," contained emotional statements by the prosecutor,[136] showed the defendant handcuffed and in police custody, detailed

---

122. Id at 503-04.

123. Id at 504.

124. Id at 506 (Zappala dissenting).

125. Id. See note 76 and accompanying text.

126. *Romeri*, 470 A2d at 506.

127. Id. Justice Nix, believing the article to be inherently prejudicial, again contended that a finding of inherent prejudice mandates a change of venue. Id. See also Justice Nix dissent in *Frazier*, 369 A2d at 1230.

128. 522 Pa 388, 562 A2d 289 (1989).

129. *Haag*, 562 A2d at 291.

130. Id at 294.

131. Id.

132. Id at 295. The court found that eight of the fourteen jurors knew nothing of the case prior to trial, and the remaining six had some knowledge of the facts but had formed no opinion. Id.

133. Id.

134. Id.

135. 524 Pa 282, 571 A2d 1035 (1990).

136. *Breakiron*, 571 A2d at 1036-37. The district attorney described the crime as "the most brutal I've ever seen." Id.

his criminal record, contained disparaging quotes from his family and others,[137] and contained a story headlined, "Few Willing to Talk about Troubled Hopwood Man."[138] The court, citing the *Romeri* court's characterization of the *Frazier* standard,[139] found the publicity "unquestionably" prejudicial.[140] However, the court held that since nearly a year had elapsed between the time of the publicity and the time of jury selection, and in light of the voir dire review,[141] the publicity did not jeopardize the defendant's trial.[142] Accordingly,[143] the court affirmed the denial of the defendant's request for a change of venue.[144]

In sum, the historical development of Pennsylvania law regarding prejudicial pretrial publicity has achieved a relatively fixed and consistently applied standard. The publicity in *Gorby* probably does not rise to the level of that found inherently prejudicial in the foregoing case review. In *Pierce*, which involved the murders of two prominent citizens, the publicity mentioned the defendant's prior criminal record and referred to admissions and re-enactments of the crime.[145] In *Frazier*, where only one other murder had occurred in the county that year, the publicity detailed the defendant's criminal record, referred to admissions made by the defendant and cited a disparaging quote from a family member.[146] None of these factors (in either case), which contributed to the prejudicial nature of the publicity, were present in the publicity referring to the de-

---

137. Id. The victim's father described him as a "cuckoo." Id at 1037. An uncle was quoted as saying, "Please tell them he's not my son." Id.

138. Id.

139. Id. The appropriate standard is set forth as follows:

> 1. Whether pretrial publicity was inherently prejudicial;
>
> 2. Whether pretrial publicity saturated the community;
>
> 3. Whether there was a sufficient proximity in time between the publicity and the selection of a jury such that the community . . . [could] "cool down" from the effects of the publicity . . . If all of these questions are answered in the affirmative, a new trial is required.

Id.

140. Id.

141. Id at 1038. The court found that none of the jurors had more than "a vague recollection" of the publicity, at least two of them were "totally unaware" of the publicity, and none had formed a fixed opinion as to the defendant's guilt. Id.

142. Id.

143. The court expressly declined to address part two of the standard cited in note 76 because, "even if saturation of the community were established, the cooling-off period was sufficient to allow an impartial jury to be empaneled." Id at 1038 n 2.

144. Id at 1038. Justices Nix and Zappala dissented on unrelated grounds. Id at 1044.

145. See notes 64-69 and accompanying text.

146. See notes 70-83 and accompanying text.

fendant in *Gorby*.[147]

Even though the publicity in all three cases refers to information provided by the authorities, the publicity concerning Gorby[148] is not nearly as reliant on such sources as that found in *Pierce* and *Frazier*.

Moreover, in *Cohen*, where publicity was also found to be prejudicial, the court reviewed forty-one articles and thirty-eight radio broadcasts, many of which referred to the defendant as a "contract killer" and alluded to his abuse of drugs and alcohol.[149] Also, expert and lay witnesses testified regarding the defendant's inability to receive a fair trial in the venue county.[150] No such extensive evidence of prejudice was in the record, or even alleged, regarding the defendant Gorby.

Likewise, even if the publicity in *Gorby* was found to be inherently prejudicial, it was not nearly as pervasive as that found in *Frazier* and *Cohen*.[151] In the former, the newspaper carrying the prejudicial articles was delivered to approximately 30,000 of the 31,074 households in the county.[152] Also, eleven of the fourteen seated jurors had heard or read of the murder prior to trial.[153] In *Cohen*, a public opinion poll showed that 65% of the residents of the venue county had heard of the case and 30% had adjudged the defendant guilty prior to trial.[154] Further, eighty-nine of the original 169 potential jurors (or 53%) were dismissed for cause, twelve of the fourteen seated jurors knew of the case prior to trial, and one admitted a fixed opinion as to the guilt of Cohen.[155] By contrast, none of Gorby's jurors admitted that they had been persuaded by pretrial publicity[156] and the paper in which the articles were published had a circulation of 39,000 in a county of 217,000

147. See notes 39, 42, 44 and accompanying text.

148. The articles quoted in notes 39 and 42 contain the only information provided by the authorities that was in the *Gorby* record. Those quotations probably do not constitute "inflammatory statements referring to the accused or the case," which were expressly prohibited by the Pennsylvania Supreme Court in *Pierce*, 303 A2d at 214. See note 66.

149. See notes 108-10 and accompanying text.

150. See notes 111-14 and accompanying text.

151. 413 A2d 1066. Although it is unclear, it is probable that the court in *Pierce*, found the publicity to be sufficiently pervasive to mandate a change of venue. See note 76 and accompanying text.

152. See note 78 and accompanying text.

153. See note 81 and accompanying text.

154. See note 113 and accompanying text.

155. See note 116 and accompanying text.

156. See note 48 and accompanying text.

residents,[157] a far cry from the nearly total exposure of county residents to the prejudicial publicity in *Frazier*. In this light, the publicity regarding Gorby cannot be said to have been so pervasive that it prejudiced Gorby's right to a fair trial.

Finally, assuming the publicity was inherently prejudicial and pervasive, the analysis would focus on the voir dire results to establish whether sufficient time had elapsed between the publication of the prejudicial articles and trial for the prejudicial effect of the publicity to dissipate.[158] While the two months which passed between the publicity and trial in *Gorby* might seem insufficient to have allowed the prejudicial effect to subside, the fact that none of Gorby's jurors were found to be prejudiced indicates otherwise.[159]

In sum, the publicity referring to Gorby was not prejudicial, pervasive, or in the minds of the jurors at trial, and did not therefore threaten the defendant's right to a fair trial. These conclusions, as determined by the state supreme court and the foregoing review, are completely consistent with and mandated by the case law of Pennsylvania.

John Jacob Hare

---

157. See Audit Bureau of Circulations (Mar 1992) and The Pennsylvania Manual, vol 109 at 561 (Dept. of General Services, Dec 1989).

158. A review of the cases emphasizes the fact that there is no specific time period after which the court will find the publicity has dissipated. For instance, four- and nine-month periods were held not to be sufficiently long for the prejudicial effect of publicity to subside in *Frazier* and *Pierce*, respectively. Yet, in *Kirchline*, six months was held to be sufficiently long, and in *Breakiron* the court found that highly prejudicial and pervasive publicity dissipated after one year.

159. Of course, the fact that none of the jurors were prejudiced also reflects the lack of pervasiveness, but the assumption upon which the analysis of the third step rests is that the publicity was both prejudicial and pervasive. Without such an assumption the analysis would never proceed to the third step. Similarly, the analysis of whether the publicity was pervasive (the second step) would not occur without the assumption that the publicity was in fact prejudicial.