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Criminal Law--Change of Venue--Transfer--Right to Fair Trial (People v. Sandgren, 75 N.Y.S.2d 753 (Sup. Ct. 1948))

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Though this strict interpretation often results in parties to an otherwise valid agreement not being able to seek the aid of the courts, it is to be desired as the lesser of two evils.

V. P.

CRIMINAL LAW—CHANGE OF VENUE—TRANSFER—RIGHT TO FAIR TRIAL.—The defendant in this action seeks a transfer under the N. Y. Code of Criminal Procedure, § 344, from the County Court to the Supreme Court of Bronx County, and also a change of venue from Bronx County to another county on the grounds that he can not obtain a fair and impartial trial before an unbiased court and unprejudiced jury in that community. The defendant, who was charged with manslaughter in the second degree because his dogs, which killed an eleven year old boy, were allowed by him to run at large despite his knowledge of their dangerous propensities, maintained that widespread newspaper comment and publication of belief of his guilt would prevent him from obtaining an unbiased trial. *Held,* application denied. The defendant must present clear and unequivocal proof that the trial would be held in a community so prejudiced as to cause him to be denied the full benefit of presumption of innocence until proof of guilt beyond reasonable doubt. The mere existence of widespread newspaper comment does not evidence such overwhelming bias. *People v. Sandgren,* — Misc. —, 75 N. Y. S. 2d 753 (Sup. Ct. 1948).

The right to remove the place of trial from one county to another when a fair trial can not be had where the indictment is pending is a right which existed under common law [1] and was subsequently incorporated into the laws of the State of New York.[2] This right is a substantial one and necessary in order to fairly protect the rights of the defendant. Safeguard against local prejudice is a fundamental principle of criminal jurisprudence.[3]

The defendant in the instant case applied for both remedies under the applicable section,[4] that is, transfer from the County Court to the Supreme Court, as well as change of venue to another county. The application for a change of venue of the County Court indictment must be made to the Supreme Court, Special Term,[5] but it is not necessary to first transfer the indictment to the Supreme Court of the county where it was found.[6] The right to transfer from the

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[1] People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017 (1896).
[2] N. Y. CODE CRIM. PROC. § 344.
[3] People v. Becker, 135 Misc. 471, 239 N. Y. Supp. 61 (Sup. Ct. 1930); People v. Nathan, 139 Misc. 345, 249 N. Y. Supp. 395 (Sup. Ct. 1931).
[4] N. Y. CODE CRIM. PROC. § 344.
[5] N. Y. CODE CRIM. PROC. § 346.
[6] People v. Green, 201 N. Y. 172, 90 N. E. 658 (1911).

County Court to the Supreme Court of the same county depends on whether there is a charge that the judges serving in the County Court are prejudiced [7] or whether there is a question of fact or law of great importance to the general public.[8] Neither situation exists in the principal case, and the court therefore disregarded the application for the transfer and limited its consideration to the application for change of venue.

The only ground to be considered in determining whether there is a serious question as to whether the defendant will obtain a fair trial is the prejudice and bias of the community.[9] The granting of the application rests solely in the discretion of the court, and each case is decided on its own facts and individual merits.[10] Unless an order is granted by the Supreme Court on such application, the fact issues must be tried before a jury in the county in which the indictment is found, in accordance with Section 355 of the Criminal Code. This is mandatory and not a mere regulatory method of removal. Although there have been cases in which such removal has been effected on the People's application,[11] recent decisions hold, as the common law did, that the defendant only may make a motion to remove.[12] The order of the Supreme Court upon the application by the defendant is not appealable, since there is no constitutional or general right of appeal in a criminal case, but purely a statutory right.[13] The policy, as set down by the statute, forbids appeals from an intermediate order.[14]

Existence of prejudice in a community need not be unequivocally proven. It is sufficient if the court can find that in all human probability such a condition exists.[15] There may exist a prejudice, insidious in its nature, which pervades the entire community to such an extent that prospective jurors are unconsciously affected by its influence. In such case, no test exists which will reveal its presence and it must be discovered from the circumstances and conditions which surround it.[16] These circumstances may be shown by affidavits of persons who have made investigations, and numerous news-

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[7] People v. Faricchia, 44 N. Y. S. 2d 269 (Sup. Ct. 1943); People v. Dormann, 180 Misc. 160, 44 N. Y. S. 2d 266 (Sup. Ct. 1943).

[8] People v. Clark, 15 N. Y. Supp. 79 (Sup. Ct. 1891).

[9] People v. Diamond, 36 Misc. 71, 72 N. Y. Supp. 179 (Sup. Ct. 1901); People v. Georger, 109 App. Div. 111, 95 N. Y. Supp. 790 (4th Dep't 1905).

[10] People v. Hyde, 149 App. Div. 131, 133 N. Y. Supp. 780 (1st Dep't 1912); People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017 (1896).

[11] People v. Farini, 239 N. Y. 411, 146 N. E. 645 (1925).

[12] Matter of Murphy v. Supreme Court, 294 N. Y. 440, 63 N. E. 2d 49 (1945).

[13] N. Y. CODE CRIM. PROC. § 517.

[14] Matter of Montgomery, 126 App. Div. 72, 110 N. Y. Supp. 793 (1st Dep't 1908).

[15] People v. Hyde, 149 App. Div. 131, 133 N. Y. Supp. 780 (1st Dep't 1912); People v. Frankel, 149 Misc. 195, 266 N. Y. Supp. 360 (Sup. Ct. 1933).

[16] People v. Diamond, 36 Misc. 71, 72 N. Y. Supp. 179 (Sup. Ct. 1901).

paper clippings, plus affidavits by those admittedly affected by the newspaper stories, but the court will not consider statements by members of the bar that they believe the defendant will not have a fair trial.[17]

The defendant in the instant case charges that articles in a particular newspaper, "The Bronx Home News," were of such a sensational nature as to excite local passion and incite warped judgment. The defendant made these articles part of his moving papers and it was found that they referred to the dogs as bred for pit fighting and as being savage, vicious, killer dogs, that they described the horrible death of the infant, the mauling of a policeman, the shock of the parents, and the possibility that another person had been killed by these dogs.

The court held that if the facts published by the press are merely those of the basis of the charge in the indictment, although stated in colorful, journalistic style, together with other surrounding circumstances and similar happenings, accompanied by opinion and comment, such circumstances would not authorize holding of serious doubt as to the defendant obtaining a fair trial so as to make a change of venue necessary.

Further, assuming the defendant's fears are justified, he could not be tried in any county in New York State, since the metropolitan press circulates throughout the State. The defendant does not take into account the ephemeral nature of newspaper articles. Each event is crowded out by each succeeding event in a very short time. One spectacular criminal case is soon replaced by another.[18] Moreover, in a large community, it is difficult to believe that newspaper denunciation, no matter how strenuous, can have an over-all effect, considering the wide choice of jurors. The community would have to be virtually a unit in extreme feeling of aversion against the particular defendant. This occasionally happens, as in the case where the defendant was deemed to be the cause of the failure of the local bank,[19] or where racial[20] or religious[21] hostility is rampant, but no such unified prejudice can be held to have existed in the principal case.

It is apparent that the court was justified in holding that newspaper articles alone are not grounds for removal of the place of trial from the county of indictment to another county, in view of the fact that they are transitory in nature and in effect, and are of minimum influence in a large community where there is a varied selection of

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[17] People v. Hyde, 149 App. Div. 131, 133 N. Y. Supp. 780 (1st Dep't 1912).
[18] People v. Brindell, 194 App. Div. 776, 185 N. Y. Supp. 533 (1st Dep't 1921).
[19] People v. Georger, 109 App. Div. 111, 95 N. Y. Supp. 790 (4th Dep't 1905).
[20] People v. Lucas, 131 Misc. 664, 228 N. Y. Supp. 31 (Sup. Ct. 1928).
[21] People v. Ryan, 123 Misc. 450, 205 N. Y. Supp. 664 (Sup. Ct. 1924).

jurors, and in view of the further fact that whatever influence they exert adverse to the interests of the defendant is counteracted by the oath of each juror to decide the issues solely on the basis of the evidence adduced and to render an impartial verdict.

H. P.

CRIMINAL LAW—DOUBLE JEOPARDY.—Defendant was charged, pleaded guilty to and convicted of three separate offenses in separate indictments, for reckless driving, driving without a license, and for violating Section 43 of the Penal Law [1] by blowing the horn of his car in a manner to annoy and disturb people, racing his car through the street at a high and dangerous rate of speed, using profane and indecent language, causing a crowd to collect and failing to stop his car when ordered to do so. He contended on appeal that he was twice placed in jeopardy [2] because the acts comprising the violation of Section 43 were the same as those constituting the reckless driving. *Held,* conviction affirmed. The acts constituting the offense in the third indictment were separate and distinct. There was no double jeopardy in violation of Section 1938 of the Penal Law.[3] *People v. Morrisohn,* — Misc. —, 74 N. Y. S. 2d 775 (Co. Ct. 1947).

Defendant's position is that the acts separately charged are part of the same transaction. Since reckless driving must be determined from all of the surrounding circumstances where a statute does not designate particular acts,[4] he contends that the racing of the car through the street, the failure to stop the car, the blowing of the horn, the use of profane language and the causing of a crowd to collect were all part and parcel of the same transaction, comprising those circumstances from which the court already deduced that he drove recklessly and for which he has been punished. To again punish him for the same offense would be double jeopardy.

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[1] N. Y. PENAL LAW § 43. "A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this chapter is guilty of a misdemeanor; . . ."

[2] U. S. CONST. AMEND. V: a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; N. Y. CONST. § 6: "no person shall be subject to be twice put in jeopardy for the same offense."

[3] N. Y. PENAL LAW § 1938. "An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

[4] People v. Devoe, 246 N. Y. 636, 159 N. E. 682 (1927); see Note, 86 A. L. R. 1274 (1933).