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Criminal Procedure - Motion for Change of Venue - In Search of a Guiding Light - State v. Jerrett

Buxton Sawyer Copeland

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INTRODUCTION

The sixth amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ." Where it would be unfair for a defendant to stand trial in the county where the crime was committed because of a biased jury, North Carolina has provided for the locus of the trial to be moved through the use of its change of venue statute. Thus, the problem of when a motion for change of venue should be granted is burdened with the dual obstacles of the constitutional requirement and the statutory standard; but, as will be seen, the court applies the constitutional test to meet the statutory standard.

In Sheppard v. Maxwell, the United States Supreme Court held that due process requires that the defendant "receive a trial by an impartial jury free from outside influences." The applicable test to use in determining whether an impartial jury could be obtained in the county of venue is whether there is a reasonable like-

1. U.S. Const. amend. VI (emphasis added). In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court applied the right to a jury trial to the states through the due process clause of the fourteenth amendment.
   Motion for change of venue. If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
   (1) Transfer the proceeding to another county in the judicial district or to another county in an adjoining judicial district, or,
   (2) Order a special venire under the terms of G.S. 15A-958.
   The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue. (1973, c. 1286, s. 1).
4. Id. at 362.
lihood that pretrial publicity will prevent a fair trail.\(^5\)

In *State v. Boykin*,\(^6\) the North Carolina Supreme Court adopted the "reasonable likelihood" test of *Sheppard*\(^7\) and held that the "so great a prejudice" standard of the change of venue statute\(^8\) could be met by showing word-of-mouth publicity as well as publicity created by the media.\(^9\) Although the *Boykin* holding broadened the meaning of pretrial publicity, the court in *Boykin* refused to find any prejudicial pretrial publicity of either type.\(^10\)

Recently, the North Carolina Supreme Court again faced the issue of prejudicial pretrial publicity in relation to a motion for change of venue. In *State v. Jerrett*,\(^11\) the court held that under the totality of circumstances, the defendant met his burden of proving that a reasonable likelihood existed that he would not receive a fair trial before a jury composed of Alleghany County residents.\(^12\) The Court expressly based this holding on word-of-mouth publicity and not on any publicity created by the media.\(^13\)

The uniqueness of the *Jerrett* decision in North Carolina case law makes it significant. This is the first case in this state that has reversed the trial court's decision not to grant a motion for change of venue. Likewise, this is the first case where pretrial word-of-mouth publicity has been found to be prejudicial. This note will analyze the unique circumstances of *Jerrett*\(^14\) in light of the purposes for a change of venue motion and consider the precedential value, if any, of this case. In addition, the methodology employed by the court will be examined to determine if it provides a sufficient guide to the practicing attorney.

5. *Id.* at 363.
7. 384 U.S. 333. The North Carolina Supreme Court had formerly used the "identifiable prejudice" test. This required the defendant to specifically show how he was prejudiced by the pretrial publicity. *See, e.g.*, State v. Blackmon, 280 N.C. 42, 185 S.E.2d 123 (1971).
9. 291 N.C. at 269-70, 229 S.E.2d at 918. The use of the word "media" in this note will denote the press and radio and television broadcasts.
10. *Id.* at 271, 229 S.E.2d at 918.
12. *Id.* at 258, 307 S.E.2d at 349.
THE CASE

In the early morning hours of July 25, 1981, the defendant allegedly broke into a family's home on a farm near the Alleghany County town of Sparta. In the process of the break-in, the defendant allegedly killed one member of the family and kidnapped and robbed others. The defendant was charged with first-degree murder, felonious breaking and entering, kidnapping and armed robbery. Prior to the trial, the defendant moved for a change of venue. The judge denied the motion. The defendant renewed his motion both during and after jury selection and these motions were denied by the trial judge.

In support of his motion of change of venue, the defendant offered evidence of publicity in both newspaper and radio broadcasts. In addition, several witnesses testified that it would be hard, if not impossible, for the defendant to receive a fair trial by an impartial jury made up of Alleghany County residents. Due to his strong belief in the right of the citizens of the county to have the trial held in their county, the judge at the motion hearing denied the motion for change of venue.

The jury voir dire revealed that a great number of potential jurors were familiar with the case. Of the jury that actually decided the case, the voir dire revealed that they also were quite familiar with the case prior to the trial. However, each of the actual

15. Id. at 243, 307 S.E.2d at 341. The victims were the Parsons family members.
16. Id. at 243-46, 307 S.E.2d at 241-42.
17. Id. at 243, 307 S.E.2d at 341.
18. Id.
19. Id.
20. The witnesses included a radio station sales manager, a deputy sheriff, a magistrate, and three attorneys.
22. At one point, the judge referred to this right as "unbridled." Id. at 253, 307 S.E.2d at 346.
23. Id. at 257, 307 S.E.2d at 348-49.
24. The North Carolina Supreme Court stated: Of the jury that actually decided the case, . . . ten of the twelve and both alternative jurors had heard about the case. Four of the twelve jurors who decided the question of defendant's guilt knew or were at least familiar with the Parsons family or relatives. The foreman of the jury, Mr. Tom Douglas, stated that he heard a relative of Mrs. Parsons emotionally discussing the case. Six members of the twelve-person jury knew or were at least familiar with State's witnesses.
Jurors stated that he could base his decision in the case solely on the evidence presented at the trial. After the voir dire, the trial judge denied defendant's motion again.

The jury found the defendant guilty of all charges and he was sentenced to death. Pursuant to statute he appealed directly to the North Carolina Supreme Court due to his death sentence. Among other matters, the defendant assigned as error the denial of his pretrial and trial motions for change of venue. The court, relying principally on Sheppard, Boykin and Estes v. Texas, held that under the totality of the circumstances the defendant had met his burden of proving that a reasonable likelihood existed that he could not receive a fair trial before a jury composed of Alleghany County residents. Therefore, the court awarded the defendant a new trial before a jury composed of persons other than from Alleghany County.

**BACKGROUND**

In Irvin v. Dowd, the United States Supreme Court, for the first time, reversed a state criminal conviction because prejudicial pretrial publicity deprived the defendant of his right to an impartial jury. Irvin involved a murder trial in which there was extensive adverse and inflammatory pretrial media publicity against the

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_Id._ at 257, 307 S.E.2d at 349.
26. _Id._ at 247, 307 S.E.2d at 343.
27. _Id._ at 249, 307 S.E.2d at 344.
29. 309 N.C. at 250, 307 S.E.2d at 345. Other assignments of error included insufficient indictment on kidnapping charge, failure to give jury instructions on diminished capacity, refusal to instruct jury on the defense of unconsciousness, and various errors in the sentencing phase of the trial.
30. 384 U.S. 333.
32. 381 U.S. 532 (1965).
defendant.\textsuperscript{36} In addition, two-thirds of the actual jurors were familiar with the circumstances of the case prior to trial and had formed an opinion that the defendant was guilty.\textsuperscript{37} However, each juror stated that he could be fair and impartial to the defendant.\textsuperscript{38} In stating the basis for the right that the defendant claimed, the Supreme Court said that the sixth amendment "right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."\textsuperscript{39} In specifying what impartiality entails, the Court said "[i]t is not required, however, that the jurors be totally ignorant of the facts and issues involved."\textsuperscript{40} As long as the jurors could disabuse their minds of any preconceived opinions and render a verdict based on evidence presented at trial, then the requirement of impartiality is met.\textsuperscript{41} "[T]he test is 'whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality.'"\textsuperscript{42} Applying the above analysis, the Court vacated the defendant's death sentence because of the partiality of the jurors, finding that there was actual prejudice against the defendant.

In 1963, the Supreme Court again addressed the question of an impartial jury, but this time in relation to the trial court's denial of a change of venue motion. In \textit{Rideau v. Louisiana},\textsuperscript{43} another murder trial involving the death penalty, an interview of the defendant was filmed with the cooperation of the law enforcement officers and broadcast three times on a local television station prior to the trial.\textsuperscript{44} Three members of the actual jury said they had seen the televised interview.\textsuperscript{45} Without reviewing the \textit{voir dire} examination, the Court concluded that the trial judge's refusal to grant defendant's change of venue motion was a denial of his due process right under the fourteenth amendment.\textsuperscript{46} The Court in effect pre-

\begin{itemize}
\item \textsuperscript{36} 366 U.S. at 725-26.
\item \textsuperscript{37} \textit{Id.} at 728. Some of the jurors stated that it would take evidence to overcome their opinion. One said he "could not . . . give the defendant the benefit of the doubt that he is innocent." \textit{Id.}
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.} at 722.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.} at 723.
\item \textsuperscript{42} \textit{Id.} (quoting Reynolds v. United States, 98 U.S. 145, 156 (1878)).
\item \textsuperscript{43} 373 U.S. 723 (1963).
\item \textsuperscript{44} \textit{Id.} at 724-25.
\item \textsuperscript{45} \textit{Id.} at 725. Defendant's peremptory challenges to these jurors were exhausted and his challenges for cause were denied by the trial judge. \textit{Id.}
\item \textsuperscript{46} \textit{Id.} at 726-27.
\end{itemize}
sumed the partiality of the jurors due to the televised confession.47

In *Estes v. Texas*,48 the Supreme Court addressed the issue of the effect of media publicity *during* the trial. During the trial, the press were virtually permitted to take over the courtroom. The court allowed them to sit within the bar and the courtroom was overrun with television equipment.49 There was no showing of any identifiable prejudice on the part of the jurors. The Court said that identifiable prejudice to the accused was usually required in cases involving due process deprivations, but "[n]evertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."50 The Court held that this was a situation like *Rideau*, where the circumstances warranted a finding of presumed prejudice to the defendant.51 Although there was extensive pretrial media publicity, the Court primarily based its decision on the "circus atmosphere" of the courtroom *during* the trial52 and the fact that the trial was "but a hollow formality."

A year later, the Supreme Court again faced a case where the periods before the trial and during the trial were infected with extensive media publicity.53 In *Sheppard v. Maxwell*,54 the Court presumed the existence of prejudice without any actual showing by the defendant.55 The extensive pretrial and trial publicity consumed five volumes of reports from three city newspapers some of which urged the arrest of the defendant.56 Much of the space in the courtroom, including the area in front of the bar, was assigned to the media, including photographers.57 Concluding that the inflammatory publicity coupled with the "carnival"58 atmosphere of the courtroom mandated a continuance of the trial or a change of

47. A strong dissent by Mr. Justice Clark argued that the defendant had not met his burden of proving prejudice by the actual jurors who determined his guilt. *Id.* at 733.
49. *Id.* at 536-37.
50. *Id.* at 542-43.
51. *Id.* at 544.
55. *Id.* at 363.
56. *Id.* at 341-42.
57. *Id.* at 355. During the trial, pictures of the jurors appeared forty times in the city newspapers. *Id.* at 345.
58. See 421 U.S. at 799.
venue, the Court set out a new test for change of venue decisions, incorporating some prior case law. Analyzing the case under the “totality of the circumstances,” the Court held that where there is a “reasonable likelihood” that prejudicial pretrial publicity will prevent a fair trial, there should be a change of venue.

Almost a decade later, the Court applied the “reasonable likelihood” test of Sheppard and found neither actual nor presumed prejudice against the defendant. In Murphy v. Florida, the defendant, relying on Irwin, Rideau, Estes, and Sheppard, alleged that prejudice against him should be presumed due to the jurors’ knowledge of his past convictions and of facts surrounding the instant charge. The Court distinguished each of the cases that the defendant relied upon. Since Irwin was based on actual prejudice, it had no application to defendant’s claim of presumed prejudice. In distinguishing Rideau, Estes and Sheppard, the Court pointed out that prejudice was presumed in these cases due to the unusual and inflammatory actions of the press both in and out of the courtroom. Such actions were not present at or before the defendant’s trial. That the jurors had knowledge of the defendant’s prior convictions and of certain facts about the instant case was not enough to raise a presumption of prejudice. Under the totality of circumstances, the Court concluded that the defendant had not met his burden of proving presumptive or actual prejudice.

Due to the constitutional nature of this area of the law, the North Carolina courts are substantially bound by the United

59. 384 U.S. at 363.
60. Id. at 352.
61. Id. at 363. The court also stated that the judge may continue the case, sequester jurors, or grant a new trial if the prejudice threatens the fairness of the trial. Id.
63. Id. at 798.
64. Id. at 798-99.
65. Id. at 798. The Court further distinguished Irwin on the following grounds: in Irwin, 268 of the 430 veniremen were excused for belief in defendant’s guilt; whereas, in Murphy, only 20 of the 78 potential jurors were excused for a prior belief in defendant’s guilt. Therefore, the general hostility of the community against the defendant in Murphy is not as great as the hostility that existed in Irwin. Id. at 803.
66. Id. at 798-99.
67. Id. at 799. The Court noted that the news articles from which the jurors gained their knowledge appeared in print more than seven months prior to the jury selection. Id. at 802.
68. Id. at 803. Mr. Justice Brennan dissented. Id. at 804.
States Supreme Court decisions discussed above. In State v. Boykin, the North Carolina Supreme Court adopted the "reasonable likelihood" standard of proof first used in Sheppard. Furthermore, the court expanded the boundaries for the type of publicity that would require a court to grant a change of venue motion. In addition to media publicity, the court held that a change of venue motion should be granted when word-of-mouth publicity causes prejudice to the defendant. In Boykin, the defendant attempted to prove prejudice by an informal opinion poll conducted by his attorney. The court doubted the reliability of the poll and held that the defendant failed to carry his burden of proof in showing a reasonable likelihood of prejudice.

Thus, in North Carolina, an appellate court will find that the trial judge abused his discretion in denying a motion for change of venue only if there is a reasonable likelihood that a fair trial cannot be conducted in the present county of venue. Actual prejudice need not be shown and the prejudice can result from either media publicity or word-of-mouth publicity. Using the above case law, an analysis of the Jerrett decision will follow.

ANALYSIS

In Jerrett, the North Carolina Supreme Court held that under the totality of the circumstances the defendant had met his burden of proving that there was a reasonable likelihood that prospective jurors would base their decision on pretrial publicity rather than on evidence introduced at trial. The "circumstances" upon which the court based its decision were the testimony of the witnesses at the pretrial hearing and voir dire examination of the jury.

At the outset, it should be noted that this case is unlike any other case previously decided by either the United States Supreme Court or the North Carolina Supreme Court because apparently

70. Id. at 269-70, 229 S.E.2d at 918.
71. Id. at 269-70, 229 S.E.2d at 917-18.
72. Id.
73. Id. at 270, 229 S.E.2d at 918. The poll asked persons if they had heard certain rumors about the case. Defendant's counsel provided the number of persons who had heard the rumors, but failed to introduce the number of persons who said they had not heard the rumors.
74. Id. at 271, 229 S.E.2d at 918.
the decision is based solely on word-of-mouth publicity. This is the first time a North Carolina court has ever found that the trial court has abused its discretion in denying a change of venue motion. As was stated in Boykin, where the court first recognized the word-of-mouth type of prejudicial publicity, "this court is sensitive to the difficulty of proving prejudice generated by 'private talk.' At the same time, this court must be solicitous of the potential for manufacture and manipulation of proof of this type of prejudice." The question remains whether the "difficulty" of proving word-of-mouth prejudice was validly overcome in Jerrett.

Although the majority opinion did not make this clear, there are two ways that a defendant can meet his burden of proving partiality on the part of the jurors. First, a defendant could show actual prejudice as was done in Irvin. This involves circumstances, for example, where actual jurors on voir dire state that they have formed an opinion that the defendant was guilty and go "so far as to say that it would take evidence to overcome their belief" in his guilt. Presumably, this is the type of prejudice that the court referred to when it stated: "Our cases indicate that a defendant, in meeting his burden of showing that pretrial publicity precluded him from receiving a fair trial, must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury." Before the decision in Jerrett, this showing was apparently the only way a defendant could meet his burden of proof on a motion for change of venue. As in prior cases, the defendant in Jerrett was unable to meet his burden of proving actual

76. However, it is unclear exactly what the court bases its decision on; but it is clear that media publicity is not the basis for the prejudice found. 309 N.C. at 251, 307 S.E.2d at 345.

77. 291 N.C. at 270, 229 S.E.2d at 918. This is not to suggest that the evidence was manufactured in Jerrett.

78. 421 U.S. at 798.

79. 366 U.S. at 717.

80. Id. at 728. See Murphy, 421 U.S. at 798.


The second way that a defendant can meet his burden of proof is by showing presumptive prejudice under the totality of the circumstances test of *Sheppard*. This is the rationale adopted by the court in *Jerrett*. The cases in which the United States Supreme Court has applied the presumptive prejudice doctrine have been unusual, extreme ones where the media have infected the criminal justice system in some way. In *Rideau*, prejudice was presumed where the defendant's confession prior to trial was broadcast several times by the local television station. In *Estes*, the Court relied on the carnival atmosphere of the courtroom during the trial in presuming that the defendant received an unfair trial. Finally, in *Sheppard*, the Court presumed prejudice due to the inflammatory media publicity and the virtual takeover of the courtroom by the press.

The facts in *Jerrett* are simply not analogous to any of these Supreme Court cases where prejudice was presumed. Yet the North Carolina Supreme Court goes so far as to say that, under the totality of the circumstances, the evidence at the pretrial hearing was sufficient to grant the defendant's change of venue motions. There were no special circumstances before or during the trial involving the media or any other type of publicity that warranted such a finding. In fact, the court expressly rejected the notion that any pretrial publicity by the media had any prejudicial effect upon the defendant. Nevertheless, the court seemingly relied on both *Sheppard* and *Estes*. The testimony at the pretrial hearing consisted of six witnesses who stated that in their opinion the defen-

83. 309 N.C. at 256, 307 S.E.2d at 348. Although this proposition is not expressly stated, the court would have resorted to the actual prejudice test if defendant was able to prove it.
84. 421 U.S. at 798-99.
86. Although *Estes* and *Rideau* were decided before the *Sheppard* totality of the circumstances test evolved, they were the forerunners of *Sheppard* and are considered to be examples of the application of the presumptive prejudice doctrine. 421 U.S. 798-99.
87. 373 U.S. at 724, 726.
88. 381 U.S. at 536-37; see also 421 U.S. 794, 799 (1975).
89. 384 U.S. at 363.
90. 309 N.C. at 256, 307 S.E.2d at 348.
91. *Id.* at 251, 307 S.E.2d at 345.
92. *Id.* at 256, 307 S.E.2d at 348; accord *id.* at 274, 307 S.E.2d at 358 (Mitchell, J., dissenting in part and concurring in part).
dant could not receive a fair trial from an impartial jury made up of the county residents. To hold that this testimony, in itself, is enough to find that the trial court abused its discretion, is to delve into imaginative analogies to the prior case law. In light of Sheppard, Estes, and Boykin, that testimony does not rise to the level necessary to overcome the presumption of the impartiality of the jurors.

Even when you consider evidence of the jury voir dire examination, an analogization of Jerrett to the other presumptive prejudice cases does not follow. In Jerrett the majority noted the jury’s familiarity with the case and some of the state’s witnesses. This may well be a minor point to consider in examining the totality of the circumstances, but it certainly does not deserve much weight. As Mr. Justice Mitchell pointed out in his dissenting opinion:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective jurors' impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

The fact that none of the jurors had formed an opinion as to the defendant’s guilt prior to the trial should remove any thoughts of partiality on their part. As noted by Mr. Justice Mitchell, where many of the veniremen will admit to prejudicial opinions about the defendant’s guilt, the reliability of the other veniremen who do not admit to such prejudice may be doubted. However, such a situation is not presented here. Of the veniremen questioned at the trial in Jerrett, the court excused only sixteen because of their preconceived opinions as to defendant’s guilt, and by the time the twelve jurors were selected, the defendant had not exhausted his peremptory challenges. Of the actual jurors

93. Id. at 251-54, 307 S.E.2d at 346-47.
94. See supra note 24.
95. Dissenting in part and concurring in part.
96. 309 N.C. at 278, 307 S.E.2d at 360 (quoting Irvin, 366 U.S. at 723).
97. Id. at 276, 307 S.E.2d at 359 (a point that the majority omits).
98. Id.; see 421 U.S. at 803.
99. 309 N.C. at 276, 307 S.E.2d at 359. This is in contrast to Irvin where ninety percent of the veniremen and eight of the actual jurors had preconceived opinions as to the defendant’s guilt. See supra note 65.
100. Id. at 278, 307 S.E.2d at 360; see C. Torcia, Wharton’s Criminal Pro-
who decided the defendant's guilt, each said that he could base his
decision on the evidence presented at trial.\footnote{101} In the past, the
North Carolina courts have placed much emphasis on the fact that
jurors stated they could free their minds of any preconceived opin-
ions and base their decision on the evidence presented at the trial.
In a 1983 case just prior to \textit{Jerrett}, the deciding factor in the
court's decision to deny a defendant's motion for change of venue
was the fact that the jurors said they could base their decision
solely on the evidence presented at the trial.\footnote{102} This was precisely
the situation presented in \textit{Jerrett}. In sum, the court's reliance on
the pretrial testimony and on the juror's knowledge of the case in
finding abuse of discretion seems misplaced in light of prior North
Carolina case law.

The majority's use of the totality of the circumstances test,
though the propriety of its use is supported by \textit{Sheppard}, creates a
fog over the decision and provides little guidance for the legal
practitioner. Although the legal basis for the court's decision would
have still been doubtful, the court could have reached the same
conclusion in a better reasoned manner that would have provided
more direction for the practicing attorney. In \textit{Commonwealth v.
Casper},\footnote{103} the Pennsylvania Superior Court addressed the change
of venue problem in a well reasoned manner. The Pennsylvania
court enumerated five specific factors to examine when ruling on a
change of venue motion:

\begin{quote}
\end{quote}
\footnote{101. \textit{Id.} at 276-77, 307 S.E.2d at 359.}
\footnote{102. The North Carolina Supreme Court said:
Perhaps the most persuasive evidence that the pretrial publicity was not
that prejudicial or inflammatory are the potential jurors' responses to
questions asked at the \textit{voir dire} hearing conducted to select the jury. . .
More important however, each juror selected to hear defendant's case
unequivocally answered in the affirmative when asked if they could set
aside what they had previously heard about defendant's case and deter-
dine defendant's guilt or innocence based solely on the evidence intro-
duced at trial. In sum, therefore we hold that the trial court did not
abuse its discretion in denying defendant's motion for a change of venue.

By not giving much weight to this factor in \textit{Jerrett}, the court may have rec-
ognized that it is impractical to ask a juror to do such mental gymnastics. Once a
juror has heard something about a case, it is difficult, if not impossible, for him to
disabuse his mind of this matter when rendering a verdict.
\end{quote}
\footnote{103. 249 Pa. Super. Ct. 21, 375 A.2d 737 (1977), \textit{rev'd as to interpretation of
stated factors}, 481 Pa. 143, 392 A.2d 287 (1978).}
1. the extent of pre-trial publicity;
2. the nature of the pre-trial publicity;
3. the nature of the community which was subject to the pre-trial publicity and where the trial was scheduled to take place;
4. the source or sources of the pre-trial publicity, including the possibility of prosecutorial misconduct, in creating an atmosphere of hostility toward the accused; and
5. the familiarity of the accused's name with the local populace prior to the time when the charges were brought against him for which he is being tried.  

If the court in Jerrett had formulated some express factors to be considered under the totality of the circumstances test, the decision would have been better reasoned and the criminal defense lawyer would be in a better position to know what he needs to show in moving for a change of venue.

Although the decision in Jerrett is not based on any strong legal precedent, the apparent underlying reason for the court's ultimate conclusion is a sound principle of our criminal law: "our system of law has always endeavored to prevent even the probability of unfairness." The supreme court expresses its apprehension as to the actual fairness of the trial the defendant received by noting the small population of the county and the remarks made by the trial court at the pretrial hearing with respect to the unrestrained right of the county residents to have the case tried in their county. In granting a new trial under the totality of the circumstances test, the court in effect, found that the "probability of unfairness" existed at the defendant's trial.

104. 249 Pa. Super. Ct. at 32-33, 375 A.2d at 743; see also Note, Criminal Procedure—Pretrial Publicity—When Change of Venue Should Be Granted Despite Results of Voir Dire, 82 DICK L. Rev. 616, 617 n.2 (1978).

105. For instance, the pretrial testimony could have been analyzed under factor (1) of Casper and the fact that it was word-of-mouth publicity could have been analyzed under factor (2).

106. 309 N.C. at 256, 307 S.E.2d at 348 (originally quoting In re Murchison, 349 U.S. 133, 136 (1955)).

107. In death cases, the court is inclined to review the assignment of errors with more caution. See, e.g., State v. Oliver, 362 N.C. 28, 274 S.E.2d 183 (1981).

108. Alleghany County—population 9,587. 309 N.C. at 252 n.1, 307 S.E.2d at 346 n.1. The court said that it is "extremely significant to note that here, the crime occurred in a small, rural and closely-knit county where the entire county was, in effect a neighborhood." Id. at 256, 307 S.E.2d at 348.

109. See supra note 22 and accompanying text.

110. Supra note 106 and accompanying text.
Since the result reached by the court seems to be based primarily on the relatively small size of the county, an analysis under the Casper factors would have been quite simple. Point three of the Casper factors concerns the "nature of the community." By basing its decision on a factor such as this and enumerating other factors, the court in Jerrett could have given some form to the "totality of the circumstances." As it is now, an attorney is left to guesswork in deciding what factors a court will consider in ruling on a change of venue motion.

CONCLUSION

In State v. Jerrett the North Carolina Supreme Court held under the totality of the circumstances the defendant met his burden of proving that a reasonable likelihood existed that he could not receive a fair and impartial trial before before a jury composed of Alleghany County residents. Thus, the court found that both the pretrial and trial judges abused their discretion in denying the defendant's motion for change of venue.

The court based its decision on the prior case law of Sheppard, Estes and Boykin. The court has extended what constitutes abuse of discretion on the part of the trial court in ruling on a change of venue motion far beyond any limits previously set. Although the above cases were cited as the apparent basis for the court's ruling, it is unclear how this decision will effect future decisions in the change of venue area. If the court had identified specific criteria that it would examine in future change of venue rulings, as was done in Casper, trial judges and attorneys would be more certain as to the correctness of their rulings and arguments in the future. By not clarifying this area at this time, the state supreme court risks the problem of creating needless delay in the future by the granting of new trials.

However, due to the vagueness of the court's opinion and the significance that this opinion places on the particular facts of this case, it is likely that the legal value of this decision is limited to those particular facts. Probably the only precedential value that

111. See supra note 104 and accompanying text.
113. 384 U.S. 333.
114. 381 U.S. 532.
115. 291 N.C. 264, 229 S.E.2d 914.
this possesses is in its application to the very small, rural counties of North Carolina.

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