IN THE CIRCUIT COURT FOR DICKSON COUNTY, TENNESSEE
AT CHARLOTTE

STATE OF TENNESSEE	)	
	)	
v.	)	**Case No. CR7990**
	)	
MITCHELL WAYNE BOWERS	)	

MOTION FOR CHANGE OF VENUE

Mr. Mitchell Bowers asserts that he cannot receive a fair and impartial trial in Dickson County because of the sheer number of citizens in this community who have indicated a prejudice and bias against him and who have presumably expressed their prejudices and biases to other Dickson County residents who will serve on the jury. Thus, Mr. Bowers requests that this Court transfer this case to another venue. As required by Rule 21(b), Tenn. R. Crim. P., and as recognized in *State v. Davidson*, 121 S.W.3d 600, 611 (Tenn. 2003), this motion is accompanied by affidavits demonstrating the prejudice.

A.

Mr. Bowers is a truck driver. On July 8, 2005 he departed from the lane of traffic and struck and killed a trooper who was standing out of the right-of-way, some short distance over the fog line, while the trooper was writing a ticket to a motorist. After stopping his truck and telling an assisting officer that he was the driver involved, Mr. Bowers was arrested at the scene.

Mr. Bowers was charged with a non-alcohol related vehicular homicide in violation of Tenn. Code Ann. § 29-13-213, a Class C Felony. Mr. Bowers was later charged with a violation of Tenn. Code Ann. § 55-8-132 – the so-called move-over law – which is a Class C Misdemeanor punishable by the terms of Tenn. Code Ann. § 55-8-132 with a $50.00 fine.

On July 11, 2005 the general sessions judge fixed a bond at one million dollars. The matter was bound over to the grand jury on July 15th, and the grand jury indicted Mr. Bowers in September. On September 12, 2005 Mr. Bowers was arraigned in this Court, and his bond was reduced to a quarter of a million dollars following an evidentiary hearing. Mr. Bowers was released four days later through a professional bonding company.

The victim, Trooper Todd Larkins, was a young, popular law enforcement officer whose tragic death inflamed the community. In preparation for the trial the defense became aware of pervasive publicity surrounding the case, which has continued unabated in this county of approximately 45,000 souls.

The accident occurred on the interstate and, as is becoming more common, a huge seven-foot cross was erected at the scene within days of the tragedy. More recently, the government erected a large "move-over" sign, which was intentionally located within a mile of the location of the officer's death (and the seven-foot cross). Source: Department of Safety Website noting that the sign was erected on "I-40 east, Dickson Co., mile marker 173, near Trooper Larkin accident site." See page 36 of the attachment to the Raybin Affidavit. These publicly visible signs are intended to catch the attention of all drivers as they pass by. However, they are particularly meaningful to members of the Dickson County community

and can have nothing but an adverse effect on Mr. Bowers' chances for a fair trial in Dickson County.

The defense commissioned a public opinion survey to gauge community sentiment. Of those 124 persons who responded to the survey, only two individuals had not heard of the case. The investigators inquired whether Mr. Bowers could have a fair trial in Dickson County. From the 124 individuals who responded to the survey, the following statistics emerge: 58.9% believed that it would be fairer for the trial to be moved out of Dickson County, 20.1% either did not know or had no opinion as to whether a fair trial could be conducted in Dickson County, and only 21.0% believed that a fair trial could be conducted in Dickson County. The survey is unassailable given that ALL of the those surveyed had been members of the Dickson County jury pools between March and July of this year.

The survey was completed just prior to the October 8, 2005 rally staged by the trooper's friends in Dickson to raise money and publicize the move-over law. The rally – attended by hundreds of people – included tee-shirts and bumper stickers containing the trooper's name and badge number. Naturally this event was subject to wide media attention in the local press and on televised broadcasts to the community.

Rule 22 of the Tennessee Rules of Criminal Procedure requires that a motion for change of venue "be made at the earliest date after which the cause for the change of venue is said to have arisen." The October 8 rally for Trooper Larkins was the proverbial "last straw," and thus this motion is promptly tendered to promote the fair administration of justice.

B.

Under the United States Constitution, a defendant must receive a fair trial consistent with constitutional due process. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966). "The constitutional standard of fairness requires that a defendant have a 'panel of impartial, indifferent jurors.'" *Murphy v. Florida*, 421 U.S. 784, 799, 95 S.Ct. 2031 (1975), quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639 (1961). If a defendant cannot obtain such a jury in the county where the charges are brought, the defendant is entitled to a change of venue, see e.g., *Groppi v. Wisconsin*, 400 U.S. 505, 510-11, 91 S.Ct. 490 (1971). Indeed, Justice Black has stated that "our system of justice has always endeavored to prevent even the probability of unfairness." *In re Murchinson*, 349 U.S. 133, 136, 75 S.Ct. 623 (1955).

The Tennessee constitution also affords a defendant a fair trial consistent with Due Process. Article I, § 9 of the Tennessee Constitution states that "in all criminal prosecutions, the accused hath the right to…a speedy public trial, by an impartial jury of the County in which the crime shall have been committed…." See also, Tenn. R. Crim. P. 18(a). Where an impartial jury cannot be had in such a county, Rule 21 of the Tennessee Rules of Criminal Procedure sets forth the standard, stating, in relevant part: "In all criminal prosecutions the venue may be changed upon motion of the defendant, or upon the court's own motion with the consent of the defendant, if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had."

The decision whether to change venue falls within the discretion of the trial court. *State v. Smith*, 857 S.W.2d 1, 6 (Tenn. 1993); *State v. Melson*, 638 S.W.2d 342, 360 (Tenn. 1982); *Rippy v. State*, 550 S.W.2d 636, 638 (Tenn. 1977). In the context of a pretrial motion, the view of the trial court is necessarily prospective:

> The rule is preventative. It is anticipatory. It is not solely curative as is a post-conviction constitutional attack. Thus, the rule evokes foresight, always a more precious gift than hindsight, and for this reason the same certainty which warrants the reversal of a conviction will not always accompany the change of venue. Succinctly, then, it is well-grounded fear that a defendant will not receive a fair and impartial trial which warrants the application of the rule.

United States v. Marcello, 280 F. Supp. 510, 513 (E.D. La. 1968), aff'd, 423 F.2d 993 (5th Cir. 1970).

Notably, the right to a trial by an impartial jury and in the same county wherein the crime has been committed is the defendant's right. *State ex rel. Lea v. Brown*, 64 S.W.2d 841, 849 (Tenn. 1933). Specifically, the Tennessee Constitution, as well as Rule 21 of the Tennessee Rules of Civil Procedure, confer this right only to the defendant. The purpose of the venue rule is to protect the defendant from being tried in some distant location and with the attendant difficulties in obtaining witnesses.

To establish that a change of venue is merited, it has been said that the defendant must prove that the pre-trial publicity is so excessive and inflammatory that a fair trial probably cannot be had. It is clear that the law does not require the defendant to establish proof of actual prejudice; the applicable test is whether a "fair trial *probably* could not be had." Tenn. R. Crim. P. 21(a) (emphasis added).

C.

The United States Supreme Court has stated that the decision to grant or deny a motion for a change of venue is a fact-oriented determination that depends upon the "totality of the circumstances." *Murphy*, 421 U.S. at 799. This fact-oriented determination requires the trial court to examine the content and tone of the publicity, as well as the extent to which it has been disseminated to the public where the cause for transfer of venue is undue excitement. See e.g., *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980).

Tennessee courts have identified numerous factors which should be considered in determining whether a change of venue should be granted. Those factors relevant to the pretrial assessment include:

1. The nature, extent, and timing of pretrial publicity.
2. The nature of publicity as fair or inflammatory.
3. The particular content of the publicity.
4. The degree to which the publicity complained of has permeated the area from which the venire is drawn.
5. The degree to which the publicity circulated outside the area from which the venire is drawn.
6. The time elapsed from the release of the publicity until the trial.
7. The participation by police or by prosecution in the release of publicity.
8. The severity of the offense charged.
9. The absence or presence of threats, demonstrations, or other hostility against the defendant.
10. Size of the area from which the venire is drawn.
11. Affidavits, hearsay or opinion testimony of witnesses.

State v. Hoover, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979), citing 33 A.L.R.3d 1. Several of the factors identified in *Hoover* are relevant here.

The severity of the offense and the public reaction are best demonstrated by the unreasonable bond originally set by the general sessions court. Mr. Bowers presented no risk of flight, yet his bond was fixed at a million dollars, which this Court remarked during the bond reduction hearing, was no bond at all. The original bond amount was published in the media, clearly reinforcing the animosity and uproar of the community regarding the allegations against Mr. Bowers.

The fact that Trooper Larkins lived in and served the Dickson County community enhanced public interest as to the circumstances surrounding his death. Admittedly, when a law enforcement officer loses his life in the line of duty, the tragedy immediately grabs the attention of the public. Moreover, when another person causes a law enforcement officer's death, the public is even more attentive. However, mere attentiveness is not the situation in this case. This case represents an entire community of people outraged or shocked at the death of a beloved public servant, seeking to vindicate their loss.

There has been extensive media coverage of the "facts" and progression of this case since July 8, 2005. From the moment the accident occurred, the media has covered the circumstances of Trooper Larkins' death and Mr. Bower's alleged role in the accident. The press disseminated to the public at large has been unduly inflammatory to Mr. Bowers given the charitable view given to the trooper and the hostile tone to the accused:

Trooper's family urges attention to move-over law

Hearing testimony indicates suspect veered toward trooper, DA says

By PATRICIA LYNCH KIMBRO
The Dickson Herald

Published: Wednesday, 07/13/05

As they prepared to bury their loved one yesterday, Tennessee Highway Patrol Trooper Todd Larkins' family urged more public awareness of the new “move-over” law and said that, had it been obeyed by a trucker Friday, it could have prevented the trooper's death.

The 31-year-old trooper was struck and killed Friday afternoon after he pulled over a motorist in the eastbound lane on Interstate 40 in Dickson County.

A Robertson County man, Mitchell Wayne Bowers, 46, is charged with vehicular homicide in Larkins' death.

Yesterday, as plans were under way for a second day of visitation with the trooper's family, they took time out to speak to the media.

Larkins' sister, Dianna Murphy, along with his widow, Alicia Larkins, his parents and other loved ones, stood in a flower-filled room in Spann Funeral Home, where they spoke of his love and dedication for his work.

“We thank each one of you for your sympathy during this tragic and senseless loss of our loved one,” Murphy said.

“This was senseless. My daughter won't have her father there for her sweet-16th birthday. He won't be there for her college graduation,” Alicia Larkins said.

“This is something we should not be going through.

“We're going to miss him, but we at the same time are going to do all we can to push for more public awareness of the move-over law.”

> Sgt. Jim Hutcherson, Todd Larkins' supervisor, explained that the new law, which went into effect July 1, 2004, requires motorists whenever possible to move away from the emergency lane into the left lane when they see emergency lights of any kind.
>
> Apparently, that didn't happen in this case, officials said.
>
> In fact, District Attorney General Dan Alsobrooks said it came out at a bail hearing for Bowers on Monday that the trooper "was at least two feet on the right side of the fog line and that the truck driver came down the road and appeared to veer off on the right side of the road, striking the trooper."
>
> Although Trooper Larkins lived his life "with faith instead of fear," his family said that was one of his biggest concerns.
>
> "My husband did not fear being shot," Alicia Larkins said.
>
> "His biggest fear was being hit rather than being shot. Sometimes they (motorists) would drive by close enough to see if they could knock his hat off."
>
> Murphy added: "Todd lived with faith, not fear. He loved what he did.
>
> "His heart's desire was to serve with the Tennessee Highway Patrol."
>
> The family, who said they have received condolences from Gov. Phil Bredesen, said they will work for more funding or whatever it takes to ensure that the move-over law receives more attention.
>
> "This is what he would have wanted," Alicia Larkins said.
>
> Published: Wednesday, 07/13/05

Numerous grassroots efforts, as well as statements by Trooper Larkins's family and friends, have fostered the message that drivers of tractor-trailers should be more careful by yielding to officers who are involved in traffic stops by changing lanes. Trooper Larkins' widow, Alicia Larkins, has been actively promoting the "move-over" law as a pivotal law

for the protection of law enforcement officials. This has all been publicized in the media as demonstrated in the numerous articles attached to the Raybin affidavit.

The press has continued unabated. Most recently, a "Biker's Rally" in honor of Trooper Larkins was conducted in Dickson County, and coverage broadcast on News Channel 5 at 10:00 p.m. on October 8, 2005. See page 47 of the attachment to the Raybin Affidavit. The event was used to raise awareness of the "Move-Over" law and to educate drivers in an effort to prevent future deaths. Alicia Larkins spoke in the news segment as well. As noted in the affidavit of Ron Lax, tee-shirts and bumper stickers were sold at the rally. The tee-shirts were black with Trooper Larkins' badge on the front and back. This demonstration has permeated the entire county regarding Trooper Larkins' death given that event was also printed in the Dickson County newspaper:

> Wednesday, 10/12/05
>
> **Bikers ride in memory of Larkins**
>
> By Tim Adkins
> *Editor*
>
> Family and friends of the late Tennessee Highway Patrol Trooper Todd Larkins came out in full force Saturday to remember the fallen officer and spread the word of the state's "move over" law.
>
> They did so by jumping on their motorcycles for a poker run.
>
> "He was a real good friend," said Doug Pendergrass, a childhood friend of the fallen trooper and who organized the event at Thunder Alley in Dickson.

> Larkins, a five-year veteran of the THP, was struck and killed in July by a tractor-tractor on Interstate 40 in Dickson County during a routine traffic stop. Family and friends of Larkins want to prevent this from happening to others by bringing attention to the "move over" law.
>
> The law, which went into effect in July 2004, requires all motorists when possible to move over when they see the flashing lights of law enforcement or other emergency vehicles.
>
> "If we can save just one life, then all this work will be worth it," said Alicia Larkins, the late trooper's wife.
>
> Organizers estimate the poker run raised about $5,500 and more is expected. The money will go toward buying bumper stickers and billboard advertisements to promote the law.
>
> Pendergrass, who manages the bar at Thunder Alley, was pleased with the huge turnout, which attracted about 200 people.
>
> "A lot of people knew Todd," he said. "And we want to help push the 'move over' law."
>
> As a part of the poker run, the bikers stopped at five locations in Middle Tennessee and picked up a card at each one. At the end of the day, they determined who had the best poker hand.
>
> A trial date for Mitchell Wayne Bowers, the trucker charged in Larkins' death, is set for February.

In addition, there is a large cross marking the place on I-40 where Trooper Larkins lost his life. Such a marker serves as a constant reminder to all who pass by, and especially all Dickson County residents operating a car on the interstate, that Trooper Larkins died there. The cross is approximately seven and a half feet tall and five feet wide. See pages 1 and 2 of the attachment to the Raybin Affidavit (photograph of the cross). As has been noted,

there is a "Move Over" sign intentionally posted at approximately mile marker 173 on I-40 East, near the Trooper Larkins' accident site. See pages 36 and 37 of the attachment to the Raybin Affidavit.

While Mr. Bowers and his counsel certainly agree that the "move-over" law is worthwhile legislation, there has been no evidence establishing that Mr. Bowers could have avoided the accident by taking the action required in the "move-over" law. Therefore, the statements associating Alicia Larkins with the prevention of future officer deaths in this manner are unnecessarily suggestive. Such statements have reinforced the belief that Mr. Bowers' acted recklessly in causing the death of Trooper Larkins. See also pages 37-40 of the attachment to the Raybin affidavit showing the Governor's Website with Move-Over press release and photographs.

Here there is clearly adverse publicity. The defense can also demonstrate the impact of that publicity on the community and, specifically, how that adverse publicity affects potential jurors. *See, State v. Davidson*, 121 S.W.3d 600 (Tenn.,2003) ("While the defendant did produce evidence of publicity, he presented no affidavits or other evidence that this publicity affected or infected the community."). To that end, the defense commissioned the aforementioned public opinion survey. The result of the survey, described more fully in the affidavit of Ron Lax which accompanies this Motion, is perhaps the most conclusive proof that Mr. Bowers cannot be fairly and impartially tried in Dickson County.

Research has demonstrated that general public opinion surveys of people in the community are subject to the valid criticism that those interviewed may not have qualified as potential jurors and thus their opinions are irrelevant. *See, State v. Thacker*, 164 S.W.3d 208 (Tenn.2005)("On cross-examination, Ms. Hudgings admitted that she did not attempt to determine whether or not those persons polled were actually qualified to sit on a jury panel."), and *State v. Davidson*, 121 S.W.3d 600(Tenn.,2003)(the state presented the testimony of a criminal investigator and a court clerk who had conducted "informal" surveys in Dickson and Cheatham Counties).

In our case the investigators wanted to avoid some random survey of fifty folks walking out of Kroger or Wal-Mart. Thus, they compared "apples to apples." The investigators went to the courthouse and acquired the names of 237 persons who had most recently qualified to be in the pool of those called for jury service in Dickson County between March and July of this year. The investigators attempted to contact all 237 names by telephone and interview them. The investigators managed to reach 144 persons of whom 16 refused to participate and 4 would not complete the survey. Of the remaining 124 persons surveyed , 58.9% believed it would be fairer for the trial to be conducted away from Dickson County, while 20.1% either did not know or had no opinion as to whether a fair trial could be conducted in Dickson County. The survey revealed that a minority of 21% believed the case could be tried in Dickson County. An overwhelming 98.4% of those surveyed had heard of the Trooper Larkins' case.

Lastly, while judicial convenience is not a factor in a change of venue determination, it is a practical consideration. In this case preliminary discovery has disclosed that none of the eye-witnesses to the accident reside in Dickson County. Several live or work in Davidson or Williamson counties. One of the government's experts lives in Nashville. The motorist whom Trooper Larkins was ticketing now lives in Knoxville. Naturally, none of the proposed defense witnesses reside in Dickson county. A change of venue is not an intolerable burden.

To try Mr. Bowers in Dickson County – where the community feeling is so strongly set against him – will violate Mr. Bower's right to a fair trial by an impartial jury. Moreover, a change of venue will not place an undue burden on witnesses. Therefore, Mr. Bowers respectfully requests that this Court grant this Motion for Change of Venue.

Respectfully submitted,

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ATTORNEYS FOR MR. BOWERS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via U.S. Mail to Dan Alsobrooks, District Attorney General, Dickson County, P.O. Box 580, Charlotte, TN 37036, this the ____ day of October, 2005.

_____

David L. Raybin