Criminal Law – Presumptive Prejudice and Denying Change of Venue

Commonwealth v. Toolan, 460 Mass. 452 (2011)

Introduction

> One of the rightful boasts of Western civilization is that the state has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.[1]

Justice Frankfurter's language reminds us that publicity, inflammatory media coverage and pretrial prejudice can so saturate and infect a jury pool as to rob an accused of the most fundamental right — the right to an impartial jury. In *Commonwealth v. Toolan*, the Massachusetts Supreme Judicial Court (SJC) wrestled with this very issue. There, the SJC reversed a conviction of first degree murder where the defendant was denied his right to a fair trial because the trial judge failed to conduct an examination of prospective jurors "in a way that would have allowed him to make a sound determination as to whether each juror was impartial despite the exposure" to extensive and emotional publicity and "issues extraneous to the case."[2] The holding in *Toolan* is straightforward and unremarkable: potential exposure to a mountain of potentially prejudicial publicity and media coverage in the "small, socially interconnected community of Nantucket" required the trial court to carefully assess whether each juror could be impartial.[3] The trial court's *voir dire* was insufficient to meet this obligation, which deprived the defendant, under the totality of circumstances, of the guarantee of a fair trial.[4]

At the same time, the *Toolan* case is remarkable in that the SJC, in affirming the trial judge's refusal to order a change of venue for the trial, noted that "the defendant points to no case in which this court has overturned a criminal conviction on the basis of presumptive bias in the jury pool, and we are aware of no such case."[5] Despite the longstanding common law recognition of "the right of a defendant to have the case removed to another community for the purpose of achieving an impartial trial,"[6] and the right to a fair and impartial trial guaranteed by the fourteenth amendment to the United States Constitution, "which right includes the right 'to show that a change of venue is required' in a particular case,"[7] the SJC has never found a trial judge to have abused his or her discretion in refusing to change venue on the basis of a presumptively prejudiced jury. In view of the limited size of the prospective jury pool, the tiny population of Nantucket, the publicity and media coverage preceding and continuing throughout the trial, and the myriad connections between the prospective jurors and the witnesses and subject matter of the case, it is arguably "hard to imagine a more compelling case for a change of venue" than in *Toolan*.[8] Yet the SJC held otherwise. The SJC's decision, in this regard, not only reinforces the wide discretion held by trial judges in addressing motions to change venue; it suggests that in Massachusetts a trial judge would virtually never be held to abuse his or her discretion by refusing to change venue on grounds of presumptive prejudice.

The Facts

In the fall of 2004, the 44 year old victim lived on Nantucket as did her parents and brother.[9] She became romantically involved with the defendant, who lived in New York City, and the victim ended the relationship in late October of 2004 because of the defendant's heavy drinking.[10] "Leaving the defendant behind in New York, the victim returned to Nantucket on Saturday, Oct. 23, 2004."[11] The next day, a security officer at LaGuardia International Airport stopped the defendant as he attempted to carry a knife through passenger security.[12] The knife was seized and the defendant received a criminal summons for carrying a knife of more than four inches in length.[13] The next morning, the defendant flew to Nantucket; arrived around 10:45 a.m., rented a car, bought two knives, drove to the location where the victim rented a cottage and asked the victim's neighbor and landlady, who lived next to the cottage, "if anyone was at home there."[14] "Some time after noon, the neighbor grew concerned when she noticed that one window shade had been lowered and the victim had not yet left the house for a 1 p.m. appointment," and contacted the victim's brother, who contacted the police.[15] In response to a 1:15 p.m. dispatch, the police went to the cottage and found the victim lying dead on the living room floor from multiple

1. Irvin v. Dowd, 366 U.S. 717, 729-730, 281 S. Ct. 1639, 1646, 6 L. Ed. 2d 751, 760 (1961) (Frankfurter, J. concurring).
2. Commonwealth v. Toolan, 460 Mass. 452, 468-69, (2011), citing Mass. Gen. Laws ch. 234, § 28.
3. *Toolan*, 460 Mass. at 467-469.
4. *Id.*
5. *Id.* at 463, n. 17 (2011).
6. Reporter's Notes to Mass. R, Crim. P. 37 (b).
7. *Id.* (*quoting* Groppi v. Wisconsin, 91 S.Ct. 490, 400 U.S. 505, 27 L.Ed.2d 571 (1971)).
8. Brief of Defendant-Appellant at 37.
9. *Toolan*, 460 Mass. at 453.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

stab wounds to the chest and back.[16] The defendant, meanwhile, "took a 1 p.m. flight to Hyannis, where he rented a second car."[17] The defendant was ultimately stopped at a roadblock in Hopkinton, Rhode Island on that same afternoon.[18] "Police found blood on the rental care left at Nantucket airport. They matched blood from paper towels found at the airport and from the defendant's clothing to the victim's [DNA]."[19]

At trial, the defense claimed that the defendant was not criminally responsible due to brain damage and mental illness caused by alcohol addiction, "exacerbated by alcohol and prescription drugs ingested on the day of the victim's murder."[20] The jury found the defendant guilty of first degree murder and assault and battery by means of a dangerous weapon.[21]

The Community and the Media

Prior to trial, the defendant moved for a change of venue based on the extraordinary pretrial publicity surrounding the case, "along with an array of exhibits detailing the unique nature of this case."[22] The facts and arguments tending to support a change of venue included the following:

- Nantucket is a small island community with 10,783 residents according to the 2006 town census.[23] The jury pool consisted entirely of Nantucket residents.[24]
- The victim spent many summers on Nantucket since childhood, and moved there in the spring of 2004.[25]
- The victim's brother lived on Nantucket with his wife, an artist who showed her work locally, and their children; the victim's parents lived on the island; the victim's father owned an art gallery on the island; and the family was well-known in the community.[26]
- The defendant lived in New York City and was an outsider.[27]
- The victim's murder was the first murder on Nantucket in more than 20 years.[28]
- National media outlets extensively publicized the murder. The defense counsel noted that national news outlets including *Vanity Fair*, ABC and CBS intended to cover the case.[29] This included the Nov. 15, 2004 *People* magazine cover story called "Looking for Love, Finding Tragedy," wherein "a former girlfriend described the defendant as 'a Jekyll and Hyde.'"[30]
- The *People* magazine article also "described how, when the victim tried to end her relationship with the defendant a few days before the murder, he 'became violent and kept her from leaving his apartment. She apparently managed to slip out at 4 a.m. the next day, [October] 23, when he was asleep, and fled back to Nantucket.' The alleged false imprisonment, which was never introduced at trial, appeared in one of Nantucket's local newspapers, *The Inquirer and Mirror*, on Nov. 6, 2004."[31]
- The *People* magazine article also gave a glowing portrayal of the victim, along with pictures of her and her family, one of which contained the caption/quote from a friend, "There was a smile in her voice … She always made you happy."[32]
- In 2006, a "true crime" book entitled, *Safe Harbor: A Murder in Nantucket*, was sold in Nantucket bookstores. The first page of the introduction stated, in part, "Underneath a self-admitted alcohol problem lurked a lethal hatred of women. For much of his adult life, it seemed, [the defendant] was a homicide waiting to happen." The book also described the incident in which the defendant allegedly held the victim captive in his apartment, "including details that had not appeared in earlier magazine stories."[33]
- Local media articles from such outlets as *The Inquirer and Mirror*, *Nantucket Independent* and the *Cape Cod Times*, detailed and highlighted potentially prejudicial issues such as the filings of and hearing on the defendant's motions to suppress evidence; the judge's denial of suppression motions because he found the defendant's statements to police while in custody in Rhode Island to be voluntary; and the defendant's "insanity" defense and the "low success rate" of this "difficult" or "uncommon" defense.[34]
- Local media outlets continued their dramatic detail-laden coverage of the murder and the above-mentioned issues on the eve of jury empanelment and throughout the trial. This included an article from the *Cape Cod Times* with a "photograph of the friend who introduced the victim ad the defendant to one another, wearing an anguished expression at the defendant's arraignment … ."[35] The *Cape Cod Times* article again repeated the allegation that the defendant had held the victim captive.[36]
- During jury empanelment, 43 members of the jury venire (25 percent) disclosed that they knew the victim or her family either directly or indirectly. Another 67 jurors (38 percent) knew witnesses scheduled to testify. "These relationships ranged from intimate — several jurors were related to witnesses by blood or marriage — to casual. Some members of

16. *Id.* at 454.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 455.
21. *Id.*
22. *Id.*; Brief of Defendant-Appellant at 7-8.
23. *Toolan*, 460 Mass. at 455
24. *Id.* at 455, n. 2.
25. *Id.* at 455.
26. *Id.*
27. *Id.* at 452; Brief of Defendant-Appellant at 36. Interestingly, a defendant has a constitutional right to have his or her trial held where the indictment is pending. See Article 13 of the Massachusetts Declaration of Rights ("In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen."). As in *Toolan*, tension may exist between (a) this critical right and (b) the common law right to remove a case to another community and the constitutional right under the Fourteenth Amendment to the United States Constitution to a change of venue in unique circumstances after a "solid foundation of fact has been first established." Crocker v. Justices of the Superior Court, 208 Mass. 162, 180 (1911).
28. *Id.* at 455.
29. Brief of Defendant-Appellant at11.
30. *Id.* at 455-56. See also Brief of Defendant-Appellant at 8-9 (stating that the *People* magazine story was titled "Murder in Nantucket: Every Woman's Nightmare," with the subtitle, "Beth Lochtefeld thought Tom Toolan was Mr. Right. But when their romance soured, cops say the charming ex-stockbroker turned into a killer.").
31. *Id.* at 456.
32. Brief of Defendant-Appellant at 9.
33. *Id.* at 456.
34. *Id.* at 456-57.
35. *Id.* at 457.

> the venire knew the medical examiner as their personal physician. Many knew police witnesses. Others knew the victim's landlady as a close family friend or through her work on the board of a local organization. Still others knew witnesses as neighbors, employers, coworkers, customers and friends." Although the trial judge "did not systematically question the venire covering media exposure or knowledge of the case," 50 prospective jurors (29 percent) informed the court that they had discussed the case prior to trial. Seventy-four venire members (42 percent) mentioned that they had seen media coverage of the case.[37]

At the conclusion of jury empanelment, the trial judge denied the motion for a change of venue.[38]

The Law

In *Toolan*, the SJC reaffirmed the longstanding rules regarding change of venue due to presumptive prejudice. "A judge upon his own motion or the motion of a defendant or the commonwealth made prior to trial may order the transfer of a case to another division or county for trial if the court is satisfied that there exists in the community where the prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial."[39] A change of venue should be ordered only "with great caution and only after a solid foundation of fact has been first established."[40] "Prejudice against the defendant sufficient to preclude a fair and impartial trial may exist because the entire jury pool is tainted by exposure to pretrial publicity ... . In such circumstances, the venire is considered presumptively prejudiced, regardless of the details of the *voir dire* process ... and even if individual members of the jury expressly assert their belief that they can be 'fair and impartial.' However, presumptive prejudice exists only in truly extraordinary circumstances."[41] Moreover, the mere existence of pretrial publicity, even pervasive, adverse publicity, does not inevitably lead to an unfair trial.[42] Rather:

> In assessing whether such publicity and resulting local prejudice precludes a fair trial, the United States Supreme Court in *Skilling* looked to the influence, if any, of the media on the trial; the size of the community, the content of the news stories; the length of time between the peak media coverage and the trial; and any evidence from the verdict itself, such as the jury's decision to acquit the defendant of any of the charges.[43]

Similarly, the SJC has identified the nature of the publicity as a highly significant factor, and has held that "[m]edia coverage that is inflammatory or sensational as opposed to factual better supports a claim for change of venue."[44] Ultimately, "[a] trial judge has substantial discretion in deciding whether to allow a motion for a change of venue."[45]

The Analysis

The defendant argued that presumptive prejudice existed because:

> When you're considering a change in venue, you have to understand ... that it's a small island. The connection of the family to the island is irrefutable. The hysterical coverage of this case, your honor, is readily apparent from the evidence that's before the court. How would any juror be able to be objective in this case? You go to breakfast down the street. You go and have a cup of coffee in one of the coffee shops. You go to a restaurant the following week. And I acquitted Tom Toolan? I found Tom Toolan guilty of a lesser offense?[46]

At a minimum, the defendant's status as an outsider viewed in conjunction with the tiny size of the community, the saturated local media coverage and the influx of national media coverage, created a unique situation which pushed the boundaries of the "presumptive prejudice" analysis. As the SJC noted, "[t]he question is a close one."[47] A consideration of the relevant "*Skilling*"[48] factors demonstrates just "how close" the question is.

First, as the SJC held, the "small size of the Nantucket community weighs in favor of finding local prejudice."[49] Community size and the potential impact of media coverage on small communities has been a critical factor in "presumptive prejudice" analysis. In *Rideau v. Louisiana*, for example, the U.S. Supreme Court held that it was a denial of due process to allow a motion to change venue where "a filmed custodial 'interview' in which the jailed defendant confessed to murder was rebroadcast on local television three nights in a row less than two months prior to the trial."[50] The Court reasoned that the exposure of tens of thousands of people in Calcasieu Parish (with a population of approximately 150,000 people), to the televised interviews created a presumptively prejudiced jury, regardless of the *voir dire* process.[51] "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."[52] In comparison to *Rideau*, Nantucket, with a much smaller population of only 10,000 permanent residents, presents an even more compelling case.

Second, the connections among the victim, her family and the island, corroborated the concerns underlying the "small community" factor. The victim had deep and prevalent family roots in the community. Twenty-five percent of the prospective jurors disclosed that they knew the victim or her family; 38 percent knew prospective witnesses, some from blood or marriage, and others as "neighbors, employers, co-workers, customers and friends"; 29 percent informed the court that they had discussed the case prior to trial; and 42

36. Brief of Defendant-Appellant at 10.
37. *Toolan*, 460 Mass. at 457-58.
38. *Id.* at 455.
39. Mass. R. Crim. P. 37 (b)(1).
40. *Toolan*, 460 Mass. at 462-63 (quoting Commonwealth v. Clark, 432 Mass. 1, 6 (2000)).
41. *Id.*, internal citations omitted.
42. *Id.* (*citing* Skilling v. United States, 130 S. Ct. 2896, 2916 (2010)).
43. *Skilling*, 130 S. Ct. 2913-2916.
44. *Toolan*, 460 Mass. at 464 (*citing* Commonwealth v. Morales, 440 Mass. 536, 540 (2003)).
45. *Toolan*, 460 Mass. at 463.
46. Brief of Defendant-Appellant at 11 (citing Trial Transcript at 1/15-16).
47 *Toolan*, 460 Mass. at 464.
48. *Skilling*, 130 S. Ct. 2913-2916.
49. *Toolan*, 460 Mass. at 464.
50. Rideau v. Louisiana, 373 U.S. 723, 724, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963).
51. *Id.* at 724-26.

percent mentioned that they had seen media coverage of the case.[53] Put simply, the venire was saturated with jurors who revealed a form of serious potential bias or prejudice. "The extensive links among the victim's family, members of the over-all jury venire and trial witnesses demonstrate the network of social relations connecting this community, of which the victim was a valued member, and to which the defendant was an outsider."[54]

Third, "the media coverage of the case was extensive, at times emotional, and prejudicial to the defendant's anticipated theory of defense."[55] This was the first murder on Nantucket in decades, and the media attention was massive, sustained and prominent before and throughout trial, and consisted of substantial local and national coverage.[56] Articles portrayed the victim in "the most glowing terms, and described the pain suffered by her family, their anger towards [the defendant] and their hope that he would never be released. These articles were patently intended to, and no doubt did, evoke a visceral emotional response in the reader."[57] By contrast, "[p]ortrayals of the defendant emphasized his troubled history with women, his difficulties in holding a job, his erratic criminality and his alcohol problems, while simultaneously suggesting he was unlikely to succeed on his theory that he was not guilty by reason of insanity."[58] The consistent message was that the defendant was a bad person; that he had a history of mistreating women; that he murdered a local, "charismatic" woman which brought grief to her family and friends (and thus to the island itself); and that he had a defense that would not (or should not) work.[59]

And yet, the SJC found that this was not enough. The SJC noted the absence of evidence of a "raucous or carnival atmosphere at trial," as well as a lapse of three years between the murder and the trial which "was likely to have blunted the impact of initial media coverage."[60] Furthermore, the content of the media coverage in *Toolan*, per the SJC, was not as prejudicial to the defendant as the publicity in cases like *Rideau*, where the televised confession directly contradicted the defendant's not guilty plea and "in a very real sense *was* Rideau's trial."[61] In addition, the "pretrial publicity left open questions of the relationship between or among [the defendant's] mental problems, alcohol and the victim's death."[62] In the SJC's final analysis, the pretrial publicity did not rise to the "'smoking gun variety' certain to invite prejudgment of culpability."[63]

The Lesson

As contended by defense counsel, "[t]he facts here seem more like an implausible law school hypothetical than a real case."[64] Yet, the trial judge was clearly in a better position than the SJC to evaluate the jurors' ability to be impartial. Likewise, the trial judge was clearly more familiar with local feelings and the impact of the media coverage on the relevant populace. Accordingly, a finding of abuse of discretion does not seem warranted. At the same time, one cannot easily reconcile the trial judge's seemingly boundless discretion in this case with Justice Frankfurter's admonition in *Irvin v. Dowd*.[65] The SJC has never overturned a criminal conviction on the basis of presumptive bias in the jury pool, and it is difficult to conjure a more compelling claim of presumptive prejudice than the facts in *Toolan* presented. The takeaway, in the end, is that under Massachusetts law a finding of an abuse of discretion for failing to change venue on the basis of presumptive prejudice, while available in concept, is highly improbable, if not virtually unattainable, in practice.

52. *Id.* at 726.
53. *Toolan*, 460 Mass. at 457-58.
54. *Id.* at 464.
55. *Id.* at 465.
56. *Id.* at 455-57. *See also* Brief of Defendant-Appellant at 8-11 (delineating, describing, and citing record appendix regarding extent of pre-trial publicity and media coverage).
57. Brief of Defendant-Appellant at 37 (*citing Irvin*, 366 U.S. at 728 (defendant entitled to trial in "atmosphere undisturbed by so huge a wave of public passion")).
58. *Toolan*, 460 Mass. at 465.
59. *Id.* at 456-65.
60. *Toolan*, 460 Mass. at 465. *But see id.* at 456-57 (delineating some of the extensive media coverage in the months preceding trial and continuing throughout jury empanelment and trial).
61. *Id.* at 465-66 (quoting *Rideau*, 373 U.S. at 726 (emphasis in original)).
62. *Toolan*, 460 Mass. at 465.
63. *Id.* at 466 (citing *Skilling*, 130 S. Ct. at 2916).
64. Brief of Defendant-Appellant at 36.
65. *Irvin*, 366 U.S. at 729-730, 281 S. Ct. at 1646, 6 L. Ed. 2d at 760 (1961)