

FILED
04-04-2023
Clerk of Circuit Court
Calumet County
2022CM000213

STATE OF WISCONSIN	CIRCUIT COURT	CALUMET COUNTY
STATE OF WISCONSIN Plaintiff,	STATE'S BRIEF IN OPPOSITION TO THE DEFENDANT'S MOTION FOR CHANGE OF VENUE	
vs.		
JOHN C. ANDREWS Defendant.	Case No. 2022CM000213	

THE STATE OF WISCONSIN, by Nathan F. Haberman, District Attorney for Calumet County, hereby moves the Court for an Order denying the request to change the place for trial as a fair trial can occur in Calumet County.

Wis. Stat. § 971.22(1) permits a defendant to move for a change of the place of trial on the grounds that an impartial trial cannot be had in the county. To evaluate the pretrial publicity and whether an impartial trial can be had, the follow factors are considered:

(1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

State v. Albrecht, 184 Wis.2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994)j. The test is whether there was a reasonable likelihood of community prejudiced prior to and at the time of trial. *Id.* Gaps between publicity articles and gaps between publicity and the trial can permit the memories and passions of reasons time to fade. *State v. Messelt*, 178 Wis. 2d 320, 330, 504 N.W.2d 362 (Ct. App. 1993).

Here, there has been publicity since the disappearance of Starkie Swenson in 1983, and in the early 1990s as the homicide trial for the defendant was held. But time passed, until media attention was revisited in 2021. The media coverage, however, focused on locating the remains of Mr. Swenson years, and the opportunities afforded to college students to learn about anthropology. Then, in 2021 when the body was found and in 2022 upon the arrest of

the defendant. Since the felony charges were dismissed in July 2022, the media coverage has undisputedly declined.

The majority of the defendant's brief focuses on the distinction between the *Alford* plea and the representation that the defendant "pleaded guilty." This distinction, however, is not to an "inflammatory" nature. When a defendant enters an *Alford* plea, he is conceding a court will "find him guilty" based on evidence that shows a "strong proof of guilt." *State v. Garcia*, 192 Wis.2d 845, 857-60, 532 N.W.2d 111 (1995). From this, it is not inflammatory for a media to conclude that he was guilty, despite his *Alford* plea because he was found guilty based on strong evidence of guilt.

Furthermore, it is immaterial that the distinction between a no contest plea, guilty plea and an *Alford* plea is not spelled out in media coverage. In the end, the defendant would benefit from a jury that has not been exposed to any media coverage at all. This, however, is not the standard. What still must be assessed is whether the jury can be fair and impartial regardless of what may have been heard or read in the media. A court can question every prospective juror regarding what each read or heard about the case. *Messelt*, 178 Wis. 2d at 331. The Court can strike jurors for cause if they cannot set aside what they have read or heard, or if they cannot be fair and impartial. *Id.* A larger panel and jury questionnaires can still be utilized to ensure the jury panel is fair and impartial.

Aside from the unique legal distinction about an *Alford* plea, the publicity has been factually accurate, deriving evidence from the previous trial and pleadings. There has not been graphic detail designed to inflame or arouse the community against the defendant.

Unlike prior charges, this is a misdemeanor offense, with a maximum penalty of 9 months in jail and a \$10,000 fine. Unlike other cases, the severity of the case does not equate to first degree sexual assaults or homicide offenses. *See id.* at 328-29.

For all these reasons, considering the *Albrecht* factors, this Court should conditionally deny the defendant's motion for a change of venue, allowing the defense to renew the motion if

the voir dire examination of the jury panel demonstrate any actual concerns for an impartial trial.

See Miller v. State 35 Wis. 2d 777, 785-86, 151 N.W.2d 688 (1967).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Nathan F. Haberman', with a long horizontal flourish extending to the right.

Nathan F. Haberman
District Attorney

Date Signed: 04/04/23

Electronically Signed By:

Nathan F. Haberman

District Attorney

State Bar #: 1073960