

STATE OF MARYLAND

v.

EDWARD NERO

Defendant.

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* CASE NO. 115141033

2015 SEP 29 PM 3:39
BALTIMORE CITY
CRIMINAL JUSTICE

* * * * *

DEFENDANT'S MOTION FOR RECONSIDERATION OF THE DENIAL OF MOTION FOR REMOVAL AND REQUEST FOR HEARING

NOW COMES, Defendant, Edward Nero, by and through his attorneys, Marc L. Zayon, Esq. and Roland Walker & Marc L. Zayon, P.A., and respectfully file this Defendant's Motion for Reconsideration of the Denial of Motion for Removal and in Support thereof State as Follows:

Introduction

This Honorable Court reviewed and considered Defendant's Motion for Removal, the State's Response, and Defendant's Reply to the State's Response before hearing arguments on the motion. After a hearing on the motion, this Honorable Court denied the motion, but left open the possibility of reconsideration at a later time. Since the Court's decision on this motion, the Baltimore Sun published an article recounting alleged statements of the Defendants made during the investigation into the death of Freddie Gray. (Article Attached as Defendant's Exhibit 1). The Baltimore Sun acquired these statements (or summaries thereof) from the State when the State¹ permitted the Baltimore Sun to be embedded during the investigation of the death of Freddie Gray.

This article is especially relevant to removal in this case. Publishing a defendant's statements in the news was a heavily weighed factor favoring removal in the cases cited by

¹ The Defendants do not claim that it was the prosecutors involved in this case that permitted the reporter access to the discussion of the Defendants' statements. The Defendants do assert however that since it was the Baltimore City Police Department, which is an entity of the State, that allowed the access to meetings where they discussed only portions of the statements their actions must then be attributable to the State.

Defendant in the original Motion and Memorandum as well as the State's Response. Notably, the State argued throughout its opposition to the original removal motion, that Defendants' statements in the Freddie Gray case had not been publicized. The fact that the Baltimore Sun is now publishing prejudicial information that it gathered when the State permitted reporters to be imbedded in the investigation into the death of Freddie Gray supports removal of this case from Baltimore City.

Argument²

On September 26, 2015, the Baltimore Sun published an article entitled "*Baltimore officer said Freddie Gray asked for help.*" The article then went on to acknowledge that the statements had never been publicly revealed and stated "at least one officer warned that Gray needed medical care but wondered, along with others, whether he was faking injuries or being uncooperative." The article stated that "[s]ome of the statements provide differing accounts of events that day." The article then, in detail, recounted Officer Porter's interaction with Gray, based upon Porter's alleged statement:

Officer William Porter told police investigators that after being summoned to check on Gray on the morning of April 12, he told the van's driver that the city booking facility would not process Gray because he was in medical distress.

"Help me. Help me up," Gray said.

Porter helped Gray up and asked, "Do you need a medic or something? Do you need to go the hospital?"

When Gray responded affirmatively, Porter said he told the van's driver, Officer Caesar Goodson, Jr., that Central Booking wouldn't accept Gray. Porter also told investigators he wasn't sure if Gray was in distress, or trying to convince officers to take him to the hospital instead of jail.

² Defendant hereby incorporates by reference its original motion and memorandum for removal as well as the reply to the State's response to the motion with all arguments and exhibits as if fully state herein.

Though Gray indicated he wanted medical help, Porter told investigators in his statement that he wasn't sure the detainee was in distress. "Everybody plays the 'I need to go to hospital' thing when they get arrested," Porter said in his statement.

The Baltimore Sun then alleged that some of the officers' statements conflicted with other officers statements. The article provided:

According to White's statement, she could not see Gray's face because his head was turned away from the van's door. She asked Gray, "Sir, what's going on?" He didn't say anything, White told investigators, adding that she assumed he was being uncooperative. In her statement, White recalled Porter saying that Gray's medical problem was "jail-itis" -- a reference to not wanting to be confined. She said none of the officers informed her that Gray had asked for a medic. Porter told investigators that White asked Gray if he needed a medic or wanted to go to the hospital. Gray did not respond to that question. He simply said, "Yeah," when she called his name, according to Porter. Porter told investigators that White directed officers to get medical care for Gray, after Porter told her that Gray appeared to be in distress. Porter said White told him to follow the van to the Western District police station, drop off Allen and follow the van with Gray to a hospital.

This new "information" that was published by the Baltimore Sun is prejudicial for a number of reasons. First, Officer Porter's statement will not be admissible against any of the other defendants in this matter, which was one of the grounds for the denial of the State's Motion for Joinder. Second, the information alleges to recount the statements of the officers but the Baltimore Sun states that it does not have the actual statements of the officers. Additionally, the article's claim that the Defendant's statements conflicted with one another directly attacks the credibility of the officers. Whether the statements published by the Baltimore Sun are true or false, the information has been published to the potential jury pool and the paper has represented the information to be accurate. Whether this Honorable Court rules that the statements are inadmissible in none, one, or all six trials, the prejudicial information has already been published to the potential jurors.

A defendant's statement being published prior to trial was a weighty factor considered in cases like *Dinkins v. Grimes*, 201 Md. App. 344 (2011), *Worthern v. State*, 42 Md. App. 20 (1979), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Irvin v. Dowd*, 366 U.S. 717 (1961). Publishing a defendant's statements impacts both the "presumption of prejudice" under Supreme Court precedent as well as the "reasonable grounds" analysis under Maryland's Constitutional standard. Particularly when those statements are not admissible in all of the defendants' trials, and may not be admissible in any of the trials, publishing those statements has a deleterious impact on the right to a fair and impartial trial.

Moreover, the State previously recognized the negative impact the publishing of a defendant's statement could have on a right to a fair trial when it attempted to distinguish the Freddie Gray case from other cases where removal had been found to be proper. *See* State's Response to Removal at 22 ("[m]oreover, any statements that the Defendants may have given have not been made public"): State's Response to Removal at 52 ("[m]oreover, unlike in *Dinkins*, where highly inflammatory and irrelevant statements laughing about handcuffing a child were leaked to the press by the plaintiff, here, no statements by any of the Defendants have been publicized"): State's Response to Removal at 18 ("[t]he televised confession in *Rideau* provides the classic example of ... prejudice"): State's Response to Removal at 42-43 (again discussing the statements being publicized in *Dinkins* making removal appropriate in that case).

The State reaffirmed their attempt to separate the Defendants' case during their oral argument where they reasoned that unlike the facts in *Rideau* and other cases, there had been no publicity about a confession or some form of blatantly prejudicial information released in the Defendants' case that would have been hard for a juror to put out of his or her mind. Following the newly released article providing portions of the Defendant's statements, this distinction no

longer applies as the facts now clearly show that substantially prejudicial information has been released regarding the statements made by the officers. Furthermore, as the article lists the Baltimore City Police Department as the source of the information that only promotes the prejudice to the Defendants due to the position of authority inherent in the police department and any state actor. The statements published recently by the Baltimore Sun were no less inflammatory than those in other cases cited by the defense in the original removal motion as well as the State in its response.

The pattern of improper disclosure of material from the State relating to the investigation into the death of Freddie Gray that has emerged since the origin of this case is severely prejudicing the defense. Although the trials in this court have not yet begun, the defendants are being publicly tried in the press based on information provided by the State. Defendants and their attorneys are left without recourse for the improper disclosures occurring and it is having an impact on the defendants' rights to a fair and impartial trial.

Further, this most recent article evidently confirms that the press will undoubtedly continue, during the trials of the defendants, to publish details of the investigation and *voir dire* will not protect Defendants' right to a fair trial. It is clear that even the most well-meaning juror will be unable to shut out the prejudicial information from their minds thereby making the *voir dire* process completely incapable of eliminating the prejudice that will undeniably effect the Defendant's right to a fair trial. In fact, in yet another article published by the Baltimore Sun, columnist Dan Rodricks discusses specific *voir dire* questions and gives what his responses would likely be.³ Although the article merely expresses the writer's opinion and not the opinion of every

³ In addition to the article being printed in the Baltimore Sun and posted on their website, the author Dan Rodricks tweeted the article on his twitter account to his more than 13,400 followers. (Article and Twitter feed attached as Defendants' exhibit 2 and 3)

Baltimore City potential juror it does however further taint the jury pool with a road map of how to subvert the *voir dire* process.

The disclosure of the new information was wholly improper and severely prejudices Defendant's ability to receive a fair and impartial trial. The accumulation of prejudicial pretrial publicity, the statements of probable cause read on national television, the autopsy being turned over to the press, and the most recent publication of the alleged details of the defendants' statements combined with the public unrest and city source of resentment towards the officers charged all prejudice the right to a fair and impartial jury undoubtedly showing that there exists reasonable grounds to believe that the Defendants will not be able to receive a fair trial in Baltimore City.

Conclusion

The publishing of alleged statements of Officers Porter and White have further prejudiced Defendant's right to a fair and impartial jury. Under both the Supreme Court's test for presumed prejudice and Maryland's constitutional analysis, the published information makes removal appropriate in this case. It is for these reasons that Defendant respectfully moves this Honorable Court to reconsider its decision on removal, grant a hearing in the matter and remove this case to another county within Maryland for trial.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Reconsider Removal was this 29th day of Sept, 2015, mailed first-class, postage pre-paid, United States Mail to the Office of the State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.



Marc L. Zayon, Esq.