

Commonwealth of Massachusetts

**County of Suffolk
The Superior Court**

CRIMINAL DOCKET#: SUCR2008-10899

RE: Commonwealth v Gerhartstreiter, Christian Karl

TO: David A Deakin, Esquire
Suffolk County District Attys Office
1 Bulfinch Place
3rd floor
Boston, MA 02114

NOTICE OF DOCKET ENTRY

You are hereby notified that on 05/07/2009 the following entry was made on the above referenced docket:

Memorandum of Decision and Order on Defendant's Motion for Change of Venue filed by the Court, Gaziano, RAJ denying Defendant's Motion. Gaziano, RAJ (Parties notified with copy).

Dated at Boston, Massachusetts this 7th day of May, 2009.

Maura A. Hennigan,
Clerk of the Court

Assistant Clerk

Telephone: 617-788-8154

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 08-10899

COMMONWEALTH

vs.

CHRISTIAN KARL GERHARTSREITER
a.k.a CLARK ROCKEFELLER

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION FOR CHANGE OF VENUE**

On April 3, 2009, the defendant, Christian Karl Gerhartsreiter a.k.a. Clark Rockefeller ("Gerhartsreiter"), filed a Motion for Change of Venue seeking to transfer this case from Suffolk County to Hampden County. As grounds for the change of venue, Gerhartsreiter contends that "such a change is necessary in order to draw upon a jury venire that has not been tainted by the saturation coverage which the defendant has received from the outset of this case, particularly in Suffolk County and eastern Massachusetts." The defendant relies upon the results of a survey of Suffolk County and Hampden County residents to support his argument that Suffolk County jurors are unfairly tainted by pretrial publicity. The Commonwealth opposes the Motion for Change of Venue and, among other arguments, points out that the defendant, predecessor counsel, and trial counsel are directly responsible for most of the media coverage. After hearing and considering the materials submitted by counsel, I find that the defendant has failed to

demonstrate adequate grounds for a change of venue. The motion is denied without prejudice subject to renewal at a later date.

A trial judge, pursuant to Mass. R. Crim. P. 37(b)(1), may order the transfer of a case to another county if the court "is satisfied that there exists in the community where prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial." The decision to change venue for pretrial publicity is a matter left to the court's sound judicial discretion. *Commonwealth v. Maimoni*, 41 Mass. App. Ct. 321, 332 (1996). A trial judge should exercise his or her discretion to change venue with "great caution" and only after a solid foundation of fact has been first established." *Commonwealth v. Simpson*, 434 Mass. 570, 576 (2001) (citations omitted).

The fact that a juror has been exposed to pretrial publicity does not mean that the juror is no longer impartial. "A defendant's right to a fair and impartial jury does not require that the jury members have no prior knowledge of the crime." *Commonwealth v. James*, 424 Mass. 770, 777 (1997). A claim that the case has generated wide spread pretrial publicity, standing alone, is not enough to meet the defendant's burden of proof. Instead, the defendant is required to demonstrate that pretrial publicity makes it "practically impossible to empanel an impartial jury" in the county where prosecution is pending. *Commonwealth v. Morales*, 440 Mass. 536, 542 (2003) (citations omitted); *Commonwealth v. James*, 424 Mass. at 776.

I find that the defendant has failed to establish adequate grounds for a change of venue. According to the defendant's survey, seventy-seven percent of the 300 Suffolk County residents polled have read, seen, or heard something about the case in the past year. However, a majority of likely Suffolk County residents have not formed the opinion that the defendant is guilty of the

crimes charged: fifty percent of the Suffolk County residents surveyed report that they have not made up their minds, six percent believe that the defendant is innocent, and a small percentage did not answer this question. In contrast, a minority of the individuals responding to this question (42%) report a preconceived notion that the defendant is guilty.¹

One of the factors discussed by the Supreme Judicial Court in *Commonwealth v. Morales*, 440 Mass. at 540, is whether the media coverage is factual as opposed to sensational or inflammatory. Factual publicity includes reports summarizing the alleged criminal conduct, the charges filed by the state, the circumstances of the defendant's arrest, and the defendant's criminal history. *Id.* The defendant properly argues that news reports linking him to an unsolved California missing persons case are prejudicial. The survey results, however, demonstrate that a majority of Suffolk County jurors are not tainted by these media reports. When asked for their initial reaction to the name "Clark Rockefeller," only five percent of Suffolk County jurors mentioned "other crimes." Of the forty-two percent of the individuals who formed the opinion he is guilty, merely three percent stated that they formed this belief because of the California case. Finally, a majority of Suffolk County residents (63%) reported that they are not aware of any other criminal case in another state in which "Clark Rockefeller" is a suspect.

Based on the totality of circumstances presented, I find that the defendant has failed to establish that he is presumptively prejudiced by pretrial publicity.

¹According to the polling data, twenty-nine percent of Hampden County residents believe that the defendant is guilty as opposed to forty-two percent of Suffolk County residents. Once the study's margin of error of +/- 5.66% is accounted for, the difference between the two counties is marginal.

I also note that the defendant, prior counsel, and trial counsel have generated a great deal of pretrial publicity. As set forth in the Commonwealth's response, and collected in tabs A-I, the defendant granted an interview to the news media and both sets of lawyers have made numerous extrajudicial comments about the case. Moreover, in the days following the hearing on defendant's Motion to Change Venue, trial counsel provided interviews to the news media to voice his concerns over his client's inability to receive a fair trial in the face of wide spread media attention.


Although not yet decided by the Massachusetts courts, a line of federal decisions hold that a trial judge may take into account the defendant's efforts to generate media attention in evaluating the merits of a motion to change venue due to the effects of pretrial publicity. See *United States v. Stevens*, 83 F.3d 60, 66 (2nd Cir. 1996); *United States v. Maldonado-Rivera*, 922 F.2d 934, 967-68 (2nd Cir. 1990); *United States v. Sabhani*, 2007 U.S. Dist. Lexis 70226 (EDNY 2007). While not a determinative factor, I find that the defendant and defense counsels' calculated efforts to court media attention diminish the argument that it is necessary to move this trial to avoid pretrial publicity.

Following the Supreme Judicial Court's holding in *Morales*, I intend to proceed with "extreme caution to assure that the jurors selected [are] unswayed by any media publicity and [are] impartial." 440 Mass. at 542-43. As such, I will conduct an individual voir dire of each prospective juror which shall include an inquiry into the potential juror's exposure to pretrial publicity. If a juror has been exposed to pretrial publicity, I will determine whether the potential juror is able to decide the case based solely upon the evidence presented in the court room. Furthermore, the defendant is free to renew his Motion for Change of Venue if it becomes too

difficult to impanel a fair and impartial jury. See *Commonwealth v. Clark*, 432 Mass. 1, 6 (2000) (defendant unable to demonstrate prejudice from pretrial publicity where thirty-five percent of prospective jurors excused for cause due to exposure to publicity); *Commonwealth v. Angiulo*, 415 Mass. 502, 515 (1993) (no rational basis to conclude venire prejudiced where forty-two percent excused for cause).

For the foregoing reasons, it is hereby ordered that the defendant's Motion to Change Venue is denied without prejudice.

Dated: May 7, 2009



Frank M. Gaziano
Justice of the Superior Court