1-3-1955

Memorandum on Motion for New Trial, 1/3/55

Edward J. Blythin

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

IN THE COURT OF COMMON PLEAS

No. 64571

STATE OF OHIO,
Plaintiff,
vs.
SAM H. SHEPPARD,
Defendant.

MEMORANDUM ON MOTION FOR NEW TRIAL

January 3, 1955.

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BLYTHIN, J:

This cause is before the court on the motion filed December 23, and supplement thereto filed December 24, 1954, of defendant for a new trial following a verdict of Guilty of Murder in the Second Degree rendered by a jury and followed by sentence thereon as provided by law.

Still another motion for new trial has been filed on the ground of claimed newly-discovered evidence but this memorandum is not directed in any particular to it. Hearing will be had on it in due course and ruling will be made thereon after such hearing.

The court has deemed this memorandum necessary due to some statements made by counsel for the defense during trial and repeated or enlarged in said motion. Some are not factually true and some others create or tend to create impressions not representative of the true situation.

Forty (40) reasons are advanced in support of the motion and one (1) by the supplement thereto and the court will, as briefly as possible, state the facts or his views as to each.

(1) Error in overruling application for a writ of habeas corpus. This is the first that the court has heard of any such application in this cause and, certainly, none was denied by him.

(2) Error in denying the release of defendant on bail. The guilt or innocence of the defendant was not involved in his application for bail. His guilt or innocence is the only issue in the trial that brought the verdict complained of. This claim is, therefore, clearly without merit.

(3) Denial of change of venue requested by defendant. The request, when made, was based upon the claim that the extraordinary public attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury in this county impossible. It is a matter of common knowledge that the case commanded that same attention throughout Ohio and the United States of America. It commanded very much attention throughout the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.

Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communication the same precise stories were simultaneously published in every city and county in the State and it certainly will not be denied that Cuyahoga County is the most liberal county in the State and, as a result, the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature. It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like, was involved--what actually was involved was a mere mystery--a "whodunit." The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The court reserved ruling on

the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon that being accomplished the court overruled the motion and believes such action was not error. Section 2945.06 Revised Code of Ohio provides that a person charged in a case such as this may waive trial by jury and elect to be tried by a panel of three judges. While not challenging the right of a defendant, in a proper case, to a change of venue it does seem that the lack of confidence in any jury anywhere, coupled with the failure to elect to be tried by a panel of three judges, smacks of objection to any trial at all.

(4) Error in denying application for continuance. The crime charged in the indictment occurred on July 4. Trial started October 18. Defendant's counsel had been engaged and active from a time within hours following the crime and long before defendant's arrest. Seventy-five prospective jurors had been summoned with full knowledge of all counsel long before any application for continuance was filed. The only ground stated for a continuance was "to permit the extraordinary publicity to quiet down." It was not claimed that counsel were not prepared for trial nor was any suggestion made as to who was going to "quiet down" the publicity, nor when nor how.

(5) and (6) Are claims of error in disallowing challenges for cause and refusing to withdraw a juror and continuing the cause.

The court believes the rulings were correct.

(7) Refers to irregularities without detail or specifications of any kind. Too indefinite to justify comment.

(8) Dismissal of Juror Manning and substitution of Alternate Jack Hanson. This, fortunately, took place before viewing of the premises, before opening statements of counsel and before a word of evidence. This is not stated as an admission that it would have constituted error if the problem had developed later in the proceedings. The court believes that the substitution was made in strict conformity with the provisions of law and was not erroneous in any sense or particular.

(9) Error in not permitting defendant to exercise a peremptory challenge upon such substitution. The law makes no provision for challenging an alternate juror except upon his impaneling as such alternate juror. If such a right existed it could, and undoubtedly would in many cases, defeat the entire purpose of having an alternate juror. On its face, this claim is without merit.

(10) Irregularity in the proceedings of the court.

(11) Irregularity in the proceedings of the jury.

(12) Irregularity on the part of the Prosecuting Attorney.

(13) Irregularity on the part of the State's witnesses.

The four items last mentioned are mere conclusions and the facts, if any, on which they are based are not set forth in the motion, nor even referred to. They will, therefore, be disregarded.

(14) Claim that defendant was denied rights to which he is entitled under the Constitution of the United States and the Constitution of the State of Ohio.

Again no details or specifications whatever. Claim is a mere conclusion.

(15) Claim of abuse of discretion. No details or specifications.

(16) Claim of misconduct on the part of the Prosecuting Attorney. Repetition of No. 12 but still no facts.

(17) Claim of misconduct on the part of witnesses for the State of Ohio. Repetition of No. 13 but still no facts nor even information as to which of the witnesses are referred to. All?

(18) Claim that verdict is not sustained by sufficient evidence.

(19) Claim that verdict is contrary to law.

The two claims last above mentioned are, of course, proper claims to make on the entire record but the court cannot agree that either claim has merit in this cause.

(20) Errors of law upon trial. No specifications.

(21) Evidence admitted which should not have been admitted. No specifications.

(22) Evidence excluded which should have been admitted. No specifications.

(23) Errors in the charge of the court.

Counsel for defendant requested two minor changes in the charge before its presentation to the jury. The court considered them and denied them on the ground that he then believed the charge to be correct in the respects then under notice and that it was even expressive of the law as claimed by the defense. That belief is still entertained.

(24) Refusal to give special instructions prior to argument and failure to include them in the general charge. The court believes that the general charge includes in substance and detail every proper principle of law embodied in the requests and applicable to the issues in this cause.

(25) Claimed error in refusing to direct a verdict for defendant at the close of the State's evidence.

(26) Claimed error in refusing to direct verdict for defendant at close of all the evidence.

(27) Is a combination of Nos. 25 and 26.

The court then believed, and still believes, that the record, at both stages referred to in Nos. 25, 26 and 27, presented issues of fact for the consideration of the jury.

(28) Claimed error in not removing from the jury the charge of Murder in the First Degree.

(29) Same as No. 28 excepting in reference to charge of Murder in the Second Degree.

(30) Same as Nos. 28 and 29 excepting in reference to Manslaughter.

Nos. 28, 29 and 30 were overruled because it was the court's judgment that the record contained evidence within which a jury might find all the elements of Murder in the First Degree to be present, and the court still firmly believes that judgment was correct. If correct, it naturally

follows that his ruling was correct on Nos. 29 and 30 for the reason that they are included offenses.

(31) Other errors. None specified.

(32) Is an attack on the Grand Jury and the Indictment. Not involved here at all. It is also claimed that the jury (presumably the trial jury) substituted the presumption of guilt for that of innocence. The court is wholly unable to even imagine what can furnish the basis for such a claim. It is not worthy of serious comment.

(33) This is in the nature of an omnibus complaint, and in view of the statements made and the fact that they were voiced periodically throughout the trial, presumably in the hope that they would impress the jury and inoculate them with the persecution complex of the defense, the court deems it necessary to make clear for the record what the actual situation was.

Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully "cover" the trial, and having requests for space from many of them, the court decided to make proper arrangements before trial and to control the situation so as to minimize and, if possible, eliminate confusion during the trial. The courtroom is small. The court assigned specific seats to individual correspondents in the rear of the courtroom and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the courtroom; that there was to be no passing back and forth through trial area and that all entries to and movings out of the courtroom be via the public doorway in the rear of the courtroom. Members of the defendant's family were accommodated with seats at all times during the trial. The same was accorded members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the courtroom and a scheme of rotation was established so that many

persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.

Rules were prescribed for photographers and representatives of radio and television stations.

They were cautioned that no cameras were to be permitted in the courtroom excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken in the courtroom at any time excepting with his consent or that of his counsel.

The court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to overenthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the court.

A very large number of pictures of defendant, his family, counsel and friends were taken in the courtroom (outside of court session periods) with their permission and without complaint. Counsel for the defense held press conferences in the courtroom with cameras clicking; all to the apparent delight of counsel for the defense and, naturally, without protest.

Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service. Not a single complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State

nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or defendant but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest.

Some space outside of the courtroom which could be spared for the moment without interference with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:

> "The Assignment Room, where cases are assigned for other causes to courtrooms, was assigned by the court to reporters and telegraphers."

Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate courtroom area. They were out of the corridors leading to the courtroom and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity.

Complaint is made of the appearance of a man on or about the courthouse steps, on one occasion, with a banner, and the court's failure to inquire of the jury concerning what effect, if any, the banner or sign had on their thinking. A perfectly harmless and respectable citizen of Mount Pleasant, Pa. did so appear one day with a perfectly meaningless and crude home-made sign. He is, unfortunately, a religious fanatic who has been, at least once, an inmate of an institution for mentally disturbed persons. On knowledge of him and in open court without jury or defendant or his family being present the court ordered him confined in the hospital section of the County jail. His family was reached by telephone and his wife and Pastor came for him and took him back home. The court does not know that any

juror actually saw him or his sign; the entire matter was so wholly meaningless as to make any mention of it at this point border on the ridiculous. Under this item the following is also included:

> "During the trial newspaper pictures were taken inside the home of one juror, showing how the family fared while the juror was at court. This was called to the attention of the court, but no action taken."

The court believes the entire statement true and, while not expressing any opinion as to the legal propriety or impropriety of such action of a newspaper publisher during the progress of the trial, he does, nevertheless seriously wonder what has happened to its sense of the ethics of such a situation and its own responsibility to the public it serves and its respect for the processes involved in the administration of justice.

Whatever the legal or ethical considerations, the incident proved to be a nullity in this case. The juror (Mrs. Mancini) was an alternate juror; her services were not finally needed; she was discharged at the close of the presentation of the court's charge to the jury and took no part whatever in the jury's deliberations or the rendition of the verdict. This is not a suggestion that Mrs. Mancini was influenced in any manner, nor that she even knew of the matter at that time. It certainly cannot be claimed that the other jurors cared anything about it, nor is it even claimed that they even knew of it.

(34) Complaint is made of the procedure in connection with having defendant brought into the courtroom several minutes before opening of the trial session. The court insisted on starting the sessions of the trial on time. It is the custom to bring a defendant to the courtroom before calling the jury down. The rule was followed normally in this case except that on more than one occasion counsel sought delay in calling the jury in order that they might have a brief conference with the defendant before the opening of the formal session. The court cannot say whether "his (defendant's) picture was taken several hundred times" but the court must say

that there was no such picture-taking within the courtroom except upon consent of defendant or his counsel, or both. Only once, toward the closing date of the trial, was the matter of timing mentioned to the court and the court endeavored to have the timing as close as humanly possible in such a situation.

It is difficult to understand how, in any event, this item could have influenced the jury. The jury would not be present at the taking of such pictures.

(35) Complaint re. newspaper articles prior to arrest and prior to trial.

These surely had no connection with the trial and the trial court had nothing to do with them. The court had one function to perform--that of securing to the defendant a fair and impartial trial on an indictment by the grand jury for murder.

(36) Complaint is made of statements, adverse to defendant, supposedly made by various public officials prior to trial. These, again, had no connection with the trial. In this connection it is not to be overlooked that the defendant, members of his family and his counsel were fairly prolific in their statements to the newspapers for publication and public consumption prior to the trial and the defendant's "Own Story" was headlined in unusually bold type on the front page of one Cleveland daily prior to trial. Time and again statements were made by the defendant, or on his behalf declaring him innocent in the clearest and most positive terms. The court intends now no criticism of these actions as he has not deemed them subject to his control when made, or since. He mentions them only to avoid any impression that defendant's instant complaint is a one way thoroughfare.

This conduct, on the part of at least one member of defendant's family, bid fair to continue during the trial period and to become critical, during trial, of the actions of the court itself and those

charged with the prosecution or adjudication of the issues. It is fair to say that this conduct ceased promptly upon the attention of one of counsel for the defense being directed to it, and its impropriety, by the court. The court was then careful to confine the matter entirely between said counsel and himself.

(37) Complaint re. care of jurors during deliberations.

While this court would not for the world minimize the importance of guarding this jury--or the jury in any other case--from annoyance or influence he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.

The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note--and indeed decisive in this court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them it is now pertinent to halt and ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.

It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed. Foreman Bird and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a "separation" is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.

The court had complete confidence in the jury in this case; it was protected at all times from any possible approach, and its every movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it.

(38) Complaint re. part taken by the court in a Fabian television program on the steps of the courthouse. The court, in view of a mere general claim, must beg leave to state the facts. The court, on one morning, walked toward the courthouse steps, as usual, and there saw Robert Fabian (a retired Superintendent of Scotland Yard) with a very small contraption in his hand. Mr. Fabian said "Good Morning, Judge Blythin, nice morning." The court said "Good morning, Mr. Fabian." These are the very words, as near as the court can remember them, that passed. There was no conversation of any kind about the case on trial or any other subject.

If this incident is claimed to be prejudicial error it must be overruled.

(39) Complaint re. court's denying Juror Borke the privilege of asking the defendant a question while the defendant was in the midst of testifying.

This, of course, is a legal matter and will be passed upon on appeal in the event that appeal is prosecuted. Indicative of the regard of chief counsel for the defense for the proprieties of trial and his desire for a fair trial is the remark then made by him to the perfectly honest and sincere juror: "Go ahead and ask it."

(40) Complaint of a general failure to secure to the defense a trial by an impartial jury due to mass hysteria and the state of public opinion created by publicity, etc.

The merits or demerits of this claim must be judged upon the entire record. This court is fully convinced that it is without merit.

Two of the jurors who served in this cause were called to testify upon the motion now being considered but it is not quite clear to the court which, if any, of the 40 complaints was supposed to be supported by their testimony.

They were Louella Williams and Mrs. Louise Feuchter. Each was asked if she had made statements indicating enmity or bitterness toward the defendant before or during the trial. Each emphatically denied the suggestion and not a word of evidence was produced to indicate that either one of them had.

Mrs. ~~Feuchter~~ Williams was also asked if she had received a communication during the trial. She admitted she had and stated she had immediately handed it to the bailiff who, in turn, had handed it to the court. It was promptly produced and was a wholly meaningless drivel, the product of the activities of a known unfortunate citizen of unsound mind. All the prospective jurors, including Mrs. ~~Feuchter~~ Williams, had received communications from the same person following receipt of their summonses for this cause. They were fully questioned about them on voir dire examination as shown by the record. No sensible person could possibly be influenced by such a communication and Mrs. Feuchter testified that she did not even read it and was not influenced in any manner. The envelope and communication were received in evidence on this motion and speak for themselves. The effusions of the unbalanced mind of Amad Nora Heavedoy (real name Ernest Pierce) had long since been cancelled out as harmless by every person having any connection with this cause, including the twelve jurors.

It is to be noted that not a single person or agency connected with the investigation of, or prosecution for, the crime involved escapes the anathema of the defense. These include the police, the coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the grand jury, its foreman, the trial jury, the public, the bailiffs and the court. The sense of search for truth and the declaration

of justice seems to have vanished from a whole community as if by magic and overnight. The news agencies of every kind and character are thrown in for good measure. In spite of all the charges made not a single specific item is cited in support of the claims made. Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did.

SUPPLEMENTAL MOTION

What the court has seen fit to designate as a supplemental motion was filed, adding another ground or reason for the granting of a new trial. That is based upon a complaint that only men bailiffs were placed in charge of the jurors, men and women, during their deliberations. It is asserted that a female bailiff should have been placed in charge of the female jurors. Again we are left with nothing beyond a definite distrust of jurors. No law is cited in support of the contention made nor is there one word of suggestion that any men or women jurors were approached or communicated with by anyone; nor that any of them misconducted themselves in any manner. The jurors, men and women, were properly guarded at all times and in strict accordance with the provisions of law.

The court named Simon Steenstra, permanent criminal jury bailiff and Edgar Francis his own courtroom bailiff as the persons to have charge of the jury in their movements during the period of deliberation. They were named in open court in the presence of all interested parties. Both were well known to all parties, with the possible exception of defendant, and not a word of objection was voiced by anyone. Furthermore, one of counsel for the defense saw the court in chambers prior to the selection of said bailiffs and inquired of the court who he intended to appoint to

take charge of the jury during the deliberation period. Upon being informed that the court would name Bailiffs Steenstra and Francis he expressed his whole-hearted approval.

CONCLUSION

The court is convinced that there is no merit in any of the complaints made by the defendant; that he was accorded a fair trial by an unusually intelligent and impartial jury and that the verdict rendered is supported by the evidence adduced upon the trial.

The motion, as originally filed and as supplemented, is therefore overruled and exceptions noted. It is ordered that this memorandum be made a part of the record in this cause.