

THE COURT: Mr. Reporter, does the record reflect the appearances of counsel; Prosecuting Attorney John T. Corrigan, and Leo Spellacy for the State of Ohio; F. Lee Bailey and Russell Sherman representing the defendant?

THE REPORTER: And Charles M. Burnim.

THE COURT: Counselor Bailey, you are representing the defendant movant in this matter; will you proceed?

MR. BAILEY: Yes, your Honor. I should like to offer for the Court's consideration and study certain exhibits consisting of two groups; first, five scrap books of newspaper clippings, and I will offer these as one exhibit or as five separate exhibits as your Honor may suggest.

The second group consists of four consecutive issues of a local newspaper which I think are relevant to these proceedings, and, again, these can be offered as one exhibit or separately as your Honor may suggest.

That will be all the evidence that we have to offer.

THE COURT: I wish you would identify them separately, counselor, that is, the volumes that you have and make reference to the separate newspapers that

you have in front of you by date of publication, please.

MR. BAILEY: Very well, your Honor.

THE COURT: There is no need, Counselor, if you would, please, to go through the volumes and give me the dates of the material contained in the volumes, but the separate newspapers that you have I wish you would indicate for the record the date of publication, and the publishing firm.

MR. BAILEY: Very well, your Honor. As to the scrapbooks, which are simply for the record the same scrapbooks which have been referred to in the Federal litigation in this case recently concluded, the first volume is a green scrapbook of clippings marked on the front July, 1954, and there is an identifying tag at the bottom, Defendant's Exhibit 30, which appears on each of these scrapbooks, and I don't know what that has reference to.

There is a second volume--

(Defendant's Exhibit 1 was marked for identification by the reporter.)

MR. BAILEY: I offer as Defendant's Exhibit 2, a green scrapbook of newspaper clippings marked on the front August-September, 1954.

(Defendant's Exhibit 2 was marked for identification by the reporter.)

MR. BAILEY: I offer as Defendant's Exhibit 3 a green scrapbook of newspaper clippings marked October, 1954, on its cover.

(Defendant's Exhibit 3 was marked for identification by the reporter.)

THE COURT: Proceed.

MR. BAILEY: I offer as Defendant's Exhibit 4 a similar volume marked November; and Exhibit 5 a similar volume marked December, all in the year 1954. (Defendant's Exhibits 4 and 5 were marked for identification by the reporter.)

THE COURT: The date of the paper and the publishing firm, Counselor, with respect to the newspapers.

MR. BAILEY: Yes, your Honor. Do you wish to have me indicate for the record the page number we deem relevant to these proceedings?

THE COURT: Please.

MR. BAILEY: Very well. We have four copies of newspapers. Each is a copy of a newspaper published in Cleveland by the Cleveland Press. The first exhibit we offer, Defendant's Exhibit 6, will be the Cleveland Press, Tuesday, January 4th, 1966, Page A-2.

(Defendant's Exhibit 6 was marked for identification

by the reporter.)

MR. BAILEY: The next exhibit we offer, Exhibit 7, the Cleveland Press, January 5, 1966, page A-17.

(Defendant's Exhibit 7 was marked for identification by the reporter.)

MR. BAILEY: For Defendant's Exhibit 8 we offer the Cleveland Press, Thursday, January 6, 1966, page B-12.

(Defendant's Exhibit 8 was marked for identification by the reporter.)

MR. BAILEY: For Defendant's Exhibit 9 we offer the same, Cleveland Press, January 7, 1966, page A-6.

THE COURT: Counselor, in the volumes that have been marked for identification as Movant's Exhibits 1, 2, 3, 4, and 5, do any of those, does any of the material included in those exhibits go beyond the year 1954?

MR. BAILEY: It does not, your Honor.

THE COURT: Thank you, sir.

Please proceed, Counselor.

MR. BAILEY: Those are all our exhibits, your Honor. I will present brief argument on the law, if I may.

THE COURT: Your exhibits are received.

MR. CORRIGAN: For the record, your Honor, may I enter an objection, an objection predicated on the fact that there is no testimony before the Court, as is required by virtue of the section that deals with a motion for a change of venue. There is no affidavit.

There is merely the offering into evidence of isolated material not in any way tied in with the question to be determined that, specifically, can a fair trial be had in this community of the issue before this Court, namely, the charge of second degree murder against the defendant Sam Sheppard.

Until and unless there is some sworn testimony, some evidence before this Court, by way of testimony, and by way of tying into the issue of can a fair trial be had, I wish the record would reflect my objection to the offering of this evidence.

THE COURT: The Court acknowledges, Mr. Corrigan, the validity of your argument. The Court is aware of the rule that supports your argument. The Court believes your argument has substance, but the exhibits are received for the record.

Anything further, gentlemen, with respect to the proffering at this time on behalf of the defendant

movant.

MR. BAILEY: Your Honor, I would like to state, and I think I should in view of my brother lawyer's objection and your Honor's remarks, the basis on which these exhibits are offered, without going into the content in any way.

I recognize that the law of Ohio, by statutory section, provides for a certain procedure involving either affidavits or testimony in support of the motion for change of venue.

I point out to your Honor that I believe this section of the law has been extant for longer than our growing body of jurisprudence on the question of changes of venue and pre-trial publicity, and may to some extent be controlled by the decision of law, especially that of Constitutional magnitude, with which it could clash. And we offer this as evidence simply to show community exposure.

We do not offer affidavits or other evidence as to the number of individuals who may actually have read this material, because we think that according to the decision of law that is something for your Honor to decide, through common experience and inference.

We know of no efficient way to put this kind of proof into the record by affidavit. We know of

no individual who could give an affidavit germane to this proof or who could accomplish the same purpose. That is the reason we have been unable to proceed as the statute suggests; also, having in mind our desire not to republish at this time any of the material which we declare to be relevant to your Honor's consideration and decision as to whether the venue should be changed.

THE COURT: Counselor Corrigan, do you have anything you wish to draw to the Court's attention at this time?

MR. CORRIGAN: Nothing further to add, your Honor.

THE COURT: Anything further on behalf of the defendant movant?

MR. BAILEY: No, your Honor, I have nothing further.

THE COURT: May I see counselors at the bar, please?

(Thereupon counsel and the Court conferred at the Court's bench, as follows:)

MR. BAILEY: May I indicate for the record, your Honor, that I am going to rest the matter in open court, and am requesting an opportunity in order to avoid republication now of the very issues

about which we complain, to pursue the matter further in chambers or at some suitable place.

THE COURT: All right. Let the record show that the matter will now be further considered in chamber, in line with Mr. Bailey's request.

Counselor Corrigan, do you have anything you wish to offer for the record at this time?

MR. CORRIGAN: No, your Honor.

THE COURT: Thank you.

(Thereupon proceedings were resumed in open court, as follows:)

THE COURT: Counselor Bailey?

MR. BAILEY: The movant will rest at this time, your Honor.

THE COURT: Thank you, Counselor. Counselor Corrigan?

MR. CORRIGAN: Nothing further, your Honor.

THE COURT: Let the record show that the Court will rule on the defendant movant's motion for a change of venue, which has been presented to the Court for the Court's consideration this morning, on Friday, October 14th, at 11:00 a.m.; and the Court during now and that time will be available for counselors at any time that counselors wish to address jointly their

attention to this matter.

The Court will not see counselors individually, as is the rule of this court, as counselors know. The Court will see them jointly, and the Court is available to them at any time between now and 11:00 a.m. on the morning of October 14th when the Court will rule on this motion.

Anything further, gentlemen?

MR. BAILEY: Nothing from the
defense, your Honor.

MR. CORRIGAN: Nothing further,
your Honor.

THE COURT: Thank you, gentlemen.

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(Thereupon the following proceedings were had in Court's Chambers:)

THE COURT: Let the record show,
gentlemen, that the exhibits offered by the defendant
movant, Exhibits 1 through 9, are received for record
and are impounded and will be in the custody of this
Court; and for purposes of this record this Court means
this trial judge will have exclusive custody of these
exhibits until they are returned to Mr. Bailey or Mr.
Sherman.

Counselor Bailey?

MR. BAILEY: The defendant movant's Exhibits 1 through 5, being already identified as scrapbooks of clippings from July through December of 1954, were offered as evidence that there was before and during the trial in 1954 of this defendant wide dissemination of much material which we anticipate would be inadmissible in this trial, and which would be highly prejudicial if known to any petit juror charged with deliberation and decision of the issue of guilt or innocence.

I point specifically to evidence widely publicized about the refusal of Doctor Sheppard to submit to a lie detector test by Cuyahoga County authorities;

Number 2, by the admission of Doctor Sheppard that he had philandered a few months prior to the death of his wife with one Susan Hayes in California, and had been carrying on an affair with her for some time;

By publicized and repeated statements by police officials, indicating that they had accused Sam Sheppard of murdering his wife, which he had flatly denied; by editorials prominently displayed, principally in the Cleveland Press, which I think have been the subject of many of the Federal opinions, which, of course, I assume the Court takes judicial notice of, by suggesting

overtly and through innuendo that Sam Sheppard had killed his wife, but because he had hired lawyers, money, and had intelligence, had hidden the evidence and was attempting to frustrate the community's right to see him convicted;

By the widely publicized statement testified to in the last trial that Spencer Houk heard Richard Sheppard saying, "Sam, did you have anything to do with this?" to which Sam replied, "Hell, no."

Those are the highlights of the matters that we feel are represented by these scrapbooks, and which we feel might be recalled after the voir dire but before deliberations by one or more jurors, and have some influence in the result.

The newspapers which were offered as Defendant's Exhibits 6 through 9 contain interviews with the petit jurors who sat on the Sheppard trial in 1954, by one Forrest Allen and one Sam Giamo of the Cleveland Press staff.

These jurors were questioned as to whether or not they had in fact been influenced to any degree by the publicity and reporting and extrinsic matters before and during the Sheppard trial, and in the course of denying any such influence, these jurors each of whom was quoted at length in the several articles offered as

Defendant's Exhibits, re-affirmed in varying terms of sureness, I should say, asserting the guilt of Doctor Sheppard, that is, his factual guilt.

We are fearful that this has led to create the impression which we feel exists to some extent, the extent being unknown to counsel at this point, that Doctor Sheppard being guilty has escaped punishment through some revision in the law or some technicality of the law, but that the real fact of the matter is contained not in any rulings by the Federal District, Circuit or Supreme Court, but by the recollections of the jurors who decided his guilt in the first instance.

We feel that there are two bases for moving the case from Cuyahoga County, because of these articles; first, that there is the danger that the community was inflamed to some extent by the very publication of the articles; and, second, because of our lack of power to order any pre-trial restraint in such matters, to make it plain to the press generally than any conduct of this sort, which could occur any time there is a reversal and retrial, is going to deprive that newspaper of the opportunity to have the case tried in its own back yard; as a matter of deterrent policy which we feel that the Court will some day adopt and hope that it will adopt here, as well as the potential prejudice

to Doctor Sheppard.

These exhibits are offered on that basis. Beyond that we refer the Court to the opinion of the Federal District Court, Sheppard v. Maxwell, and the findings of fact contained therein, 231 Federal Supplement at page 37, and following, to the extent that this Court may be guided by those findings of fact, all of which are relevant to the condition of the community in 1954, it is granted, but which may be the basis for some inference as to the extent and pervasiveness of what was done at that time, and whether or not because of the way that it was handled, it can be safely concluded that the effect is sufficiently dissipated so as to give the defendant reasonable assurance that he can draw from Cuyahoga County a fair and impartial jury.

I think that concludes the presentation of the defendant movant as to arguments applicable to the exhibits offered.

THE COURT: Counselor Bailey, do you have any other evidence except Defendant Movant's Exhibits 1 through 9, which have been received, to offer in support of your motion?

MR. BAILEY: I do not, your Honor.

THE COURT: Counselor Corrigan?

MR. CORRIGAN: In response to the

argument made by defense counsel, or counsel for the movant in this instance, the question before the Court is whether or not the defendant Sheppard can get a fair trial in this community.

The law, as I understand it, is set forth in State vs. Richards, State vs. Tannyhill, and State vs. Sheppard. It is in the discretion of the Court as to whether or not a fair trial can be had predicated on all of the surrounding circumstances.

I refer the Court specifically to the case of Sheppard vs. Maxwell, the United States Supreme Court opinion, wherein they did not say specifically that a change of venue should have been granted. They did say, however, that perhaps a continuance should have been granted until the interest had subsided.

Certainly the interest in 1954 is far different from the interest of 1966. And if a fair trial could have been had in 1954 or 1955 by virtue of a continuance, certainly a fair trial could be had in 1966.

I submit that there is nothing before the Court at this time to indicate that the community is aroused or incensed, or that the community has been contaminated by anything prejudicial to the defendant, and I respectfully request that the Court deny the

motion for change of venue.

MR. BAILEY: No rebuttal.

THE COURT: Counselor Bailey?

MR. BAILEY: No rebuttal, your Honor.

THE COURT: Counselor Bailey, where would you suggest to the Court that this trial be moved in Ohio, moved to in Ohio, what county do you have in mind if you have a county, or where in Ohio do you feel the defendant could get the fair and impartial trial to which he is entitled, inasmuch as your motion asserts that he cannot get a fair and impartial trial in Cuyahoga County, in view of the publicity which you claim has been given this case in 1954, and by your separate exhibits, Exhibits 6, 7, 8, and 9, which are as I understand it, singular news articles appearing in local papers in Cleveland, Ohio, which paper the Cleveland Press and also the Plain Dealer if any were included are distributed throughout most of Ohio?

MR. BAILEY: Well, since you put the question, your Honor, my feeling is that the fairest trial Ohio could provide would be in some sophisticated community not subject to the influence of a Scripps-Howard newspaper. I have not made it part of the record at this time, but I think it relevant to say, and I think it is no secret, that claim has been made by Doctor

Sheppard against the Scripps-Howard newspapers for his damages for the ten years he spent in prison, and we do have, I certainly feel, a pecuniary interest in the outcome of this criminal litigation, because it may well estop him from pursuing his damage claim.

My experience in dealing with the case for five years and being aware of what has been published, and the various developments of which there have been, of course, a great many, is that I have observed no editorial malice, at any rate, in the city of Toledo, and I would be content with a trial there, barring some evidence in the course of voir dire that the jurors were in fact prejudiced.

I think the community in and around Dayton is a little less, let me say, embroiled in hot blood, whether it be anti or pro the defendant; or almost any of the other communities.

I have seen some instances of what I personally regard as partisan reporting in the Scripps-Howard paper in Columbus, and also in Cincinnati, although I am informed that that is abated.

But it isn't a question so much of selecting another community, because I think most of our arguments are principally directed at Cuyahoga County. I don't feel that the other counties in this

state have quite such a stake and historical significance in value of the Sheppard case. They give a more distant and dispassionate view.

But, again, this is simply a matter of personal opinion based on experience in those various cities, whether it be contact with newsmen, or lectures to various professional or non-professional groups, and assessment of community reaction.

I have personally found in Cleveland that people are apt to take a position, and a strong one, on one side or the other, and I am more than willing to admit that those in Cleveland who feel that Doctor Sheppard was treated less than justly feel so with the vehemence which I don't find in any other community.

We have said before and I think it is a matter of record, at least in our Federal proceedings, part of our petition for certiorari, the strong criticism by the Toledo Blade for the manner in which the Cleveland Press was attempting to influence with its editorials and pseudo-editorials, such as "Who will speak for Marilyn?" the prospective jurors.

I think that is about all I can contribute in response to your Honor's question. I have no hesitation in saying for the record that until such time as we commence the voir dire, I suppose the matter must remain

to some degree conjectural.

THE COURT: Counselor Corrigan?

MR. CORRIGAN: I take it that the Court is putting the same question to me?

THE COURT: Yes.

MR. CORRIGAN: My answer is that he can get a fair trial in Cuyahoga County.

THE COURT: Counselor Sherman?

MR. SHERMAN: If it were to be moved, your Honor, my thoughts are any county outside of Cuyahoga or the adjoining counties where the Cleveland Press and Cleveland Plain Dealer are almost on the basis that they are in Cuyahoga County.

I believe once you get away from an adjoining county in northern Ohio you get away from the influence of the two Cleveland newspapers.

THE COURT: Counselor Spellacy?

MR. SPELLACY: I have nothing to add, your Honor.

THE COURT: Do any of you gentlemen have anything further to offer for the record at this time?

MR. CORRIGAN: Not the State, your Honor.

MR. BAILEY: I have nothing for the record.

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