

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES,
Plaintiff,

vs.

EDWARD VALENCIANO,
Defendant.

No. CR06-4082-MWB

**ORDER REGARDING
DEFENDANT'S MOTION FOR
TRANSFER OF TRIAL SITE**

I. INTRODUCTION AND BACKGROUND

On September 8, 2006, an indictment was returned against defendant Edward Valenciano, charging defendant with conspiring to distribute and possess with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. Defendant Valenciano has filed a Motion For Transfer Of Trial Site (#12). In his motion, defendant Valenciano argues that pretrial publicity, relating to the trial of Ryan Mathison and Mathison's subsequent flight in the middle of his trial, have so infected community sentiment that he cannot receive a fair trial in this district. He argues that, under the circumstances, it is within the court's sound discretion to transfer venue of this case to another district not so infected. Specifically, defendant Valenciano requests that the court transfer this case to the United States District Court for the District of New Mexico. Defendant Valenciano alternatively requests that the court transfer this case to the United States District Court for the District of New Mexico for the convenience of the parties and witnesses and in the interest of justice. The government has filed a timely

resistance to defendant Valenciano's motion. The government contends in its response that publicity surrounding this case has not been so extensive or corrupting as to justify moving the trial out of this district. The government further argues Ryan Mathison is neither a charged nor uncharged co-conspirator in this case. Although Shad Derby, a co-conspirator and co-defendant of Mathison, will be a witness in this case, the government asserts that because the Mathison-Derby conspiracy was separate and distinct from the conspiracy charged here between defendant Valenciano and Derby, Ryan Mathison's name will rarely, if ever, be mentioned during the government's case in chief.

II. LEGAL ANALYSIS

A. Change Of Venue For Prejudice

Defendant Valenciano initially seeks to transfer the trial in this case on the grounds of prejudice pursuant to Federal Rule of Criminal Procedure 21(a). Rule 21 of the Federal Rules of Criminal Procedure provides for a transfer of venue for trial, as follows:

(a) For Prejudice. Upon the defendant's motion, the court *must* transfer the proceeding against that defendant to another district *if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.*

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.

FED. R. CRIM. P. 21(a) & (b) (emphasis added). Where the motion for change of venue is pursuant to Rule 21(a) and is based on pretrial publicity, the Eighth Circuit Court of Appeals has explained the applicable standards as follows:

When a change of venue is requested due to pretrial publicity, we engage in a two-tiered analysis. First, we must

determine whether the pretrial publicity was “so extensive and corrupting” that we must presume “unfairness of constitutional magnitude” existed. [*United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001)] (quoted sources and internal marks omitted)[, *cert. denied*, 534 U.S. 880 (2001)]. . . .Second, if we were to determine that the pretrial publicity was not so corrupting as to warrant a presumption of unfairness, then we must look at the voir dire testimony of those who became trial jurors to determine if they “demonstrated such actual prejudice that it was an abuse of discretion to deny a timely change-of-venue motion.” [*Id.*]

United States v. Nelson, 347 F.3d 701, 707-08 (8th Cir. 2003), *cert. denied*, 543 U.S. 978 (2004); *accord United States v. Gamboa*, 439 F.3d 796, 815 (8th Cir.) (stating the same two-tiered analysis), *cert. denied*, 127 S. Ct. 605 (2006); *United States v. Allee*, 299 F.3d 996, 1000 (8th Cir. 2002) (same); *United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001) (same), *cert. denied*, 534 U.S. 880 (2001). The court has repeatedly explained that a district court’s *denial* of a motion for change of venue is reviewed for abuse of discretion. *See, e.g., Gamboa*, 439 F.3d at 815; *Nelson*, 347 F.3d at 707; *Allee*, 299 F.3d at 999; *Blom*, 242 F.3d at 803 (same).

Of course, at this point in the proceedings, only the first tier of the analysis is applicable, because defendant Valenciano relies solely on pretrial publicity and no voir dire has taken place. At this first tier of the analysis, the court must determine whether the pretrial publicity was “so extensive and corrupting” that the court must presume “unfairness of constitutional magnitude.” *Nelson*, 347 F.3d at 707. The court must be mindful “that ‘the presumption of inherent prejudice is reserved for rare and extreme cases,’ [citation omitted,] and that a defendant ‘must satisfy a high threshold of proof in order to prove inherent prejudice.’” *Id.* at 707-08 (first quoting *Blom*, 242 F.3d at 803, then quoting *Pruett*, 153 F.3d at 585).

The Eighth Circuit Court of Appeals has considered the extent and nature of pretrial media coverage. In *Allee*, the court noted that “[t]he mere existence of press coverage, however, is not sufficient to create a presumption of inherent prejudice”; rather, “[t]o create a presumption, the coverage must be inflammatory and accusatory.” *Allee*, 299 F.3d at 1000; *accord Blom*, 242 F.3d at 804 (also considering whether the coverage was extensive and whether that coverage was “inflammatory or accusatory”); *Pruett*, 153 F.3d at 585 (merely documenting the quantum of media coverage is not enough). Even so, “[i]solated incidents of intemperate commentary about the crimes and perpetrators . . . do not rise to the level of inflammatory or accusatory [reports] where for the most part, the reporting appears to have been objective and unemotional.” *Id.*

The court must also consider “the time frames in which the bulk of the coverage occurred,” including such incidents as the crimes themselves, any arrests, periods encompassing a guilty plea, or periods encompassing an unusual event, such as a jailbreak, and the time of those events relative to the time of trial, *id.*; the extent to which the defendant had himself or herself invited the pretrial publicity, *see Pruet*, 153 F.3d at 585 (the defendant had made several statements to the media in which he implicated himself in the crimes and described himself as a “mad-dog killer”); and whether a “circus atmosphere” prevailed around the trial owing to the amount and nature of the media attention. *Id.* at 586 (finding that the media attention was “largely unexceptional, perhaps even less pervasive and inflammatory than publicity generated in similar cases,” so that there was no such “circus atmosphere”); *Snell v. Lockhart*, 14 F.3d 1289, 1293 (8th Cir.) (“Prejudice may be ‘presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held.’”) (quoting *Coleman v. Kemna*, 778 F.2d 1487, 1490 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986)), *cert. denied sub nom. Snell v. Norris*,

513 U.S. 960 (1994).

Here, at this point, in the first tier of the applicable analysis, defendant Valenciano has not met the “high threshold of proof” to show that this is one of the “rare and extreme cases” in which the court can presume “inherent prejudice” based on pretrial publicity, such that a transfer pursuant to Rule 21(a) is appropriate. *Nelson*, 347 F.3d at 707-8. While there can be little doubt that there was pretrial publicity related to the trial of Ryan Mathison, along with Mathison’s flight and subsequent arrest, the court cannot find at this juncture that the pretrial publicity has been sufficiently “corrupting” that the court must presume “unfairness of constitutional magnitude.” *Id.* at 707. As the Eighth Circuit Court of Appeals explained, “[t]he mere existence of press coverage . . . is not sufficient to create a presumption of inherent prejudice,” and defendant Valenciano has not identified *any* individual press reports or series of press reports that could be characterized as “inflammatory and accusatory.” *Allee*, 299 F.3d at 1000; *Blom*, 242 F.3d at 804; *cf. Pruett*, 153 F.3d at 585 (merely documenting the quantum of media coverage is not enough).

Even if the court could pick out “[i]solated incidents of intemperate commentary” from the media material provided by defendant Valenciano, which defendant Valenciano himself has not attempted to do, the court finds that the majority of the reporting “appears to have been objective and unemotional,” consisting almost exclusively of factual reporting—albeit with varying degrees of accuracy—of the circumstances of the case, the evidence presented in Mathison’s case, and the court’s various rulings. *Allee*, 299 F.3d at 1000 (isolated intemperate commentary is not enough, “where for the most part, the reporting appears to have been objective and unemotional”). Moreover, the court notes that mention of defendant Valenciano in the course of the media coverage of the Mathison case has been extremely sparse. Nevertheless, the court is mindful that pretrial publicity

in defendant Valenciano's case is on-going; indeed, it is likely that such publicity will intensify as the date for trial approaches. Similarly, the court is mindful that post-trial publicity in Mathison's case may arise between now and the time for defendant Valenciano's trial, as the court has post-trial motions pending in that case and cannot predict precisely when a ruling on those motions may issue or some other incident may bring that case back into the public eye. Thus, the court is cognizant of the fact that it must monitor the mass media's publicity of this case to ensure that defendant Valenciano can receive a fair trial in this district. The court recognizes that, here, certain events have kept coverage of Mathison's case in the news, over such a period of time that they make it *more* likely that jurors will be aware of some facets of the two cases. Even so, the court finds that there is no evidence in the record about what opinions jurors may actually hold, based on any exposure to pretrial publicity, or their ability or inability to set aside their preconceptions based on such publicity; there is, at this time, only speculation about what potential jurors might know or might think. Thus, on the present record defendant Valenciano has not convinced the court that it can presume "inherent prejudice" based on pretrial publicity, such that a transfer pursuant to Rule 21(a) is appropriate. *Nelson*, 347 F.3d at 707-8. Therefore, this portion of defendant Valenciano's motion is denied.

B. Change Of Venue For Convenience

Defendant Valenciano also seeks to transfer the trial in this case on the grounds of convenience of the parties and witnesses pursuant to Federal Rule of Criminal Procedure 21(b). In support of his motion, defendant Valenciano points to the fact that he is a resident of the District of New Mexico and that the marijuana he allegedly delivered in furtherance of the charged conspiracy occurred in Las Cruces, New Mexico. He also argues that certain unnamed witnesses and certain undisclosed records are all located in

that district.

The government's choice of forum is generally to be respected. *United States v. McManus*, 535 F.2d 460, 463 (8th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977). However, as the Eighth Circuit Court of Appeals has recognized, “Rule 21(b) interjects into criminal law an analogue to the civil doctrine of forum non conveniens.” *Id.* “The decision whether the convenience of the parties and witnesses and the interest of justice require a transfer to another district belongs to the sound discretion of the district court.” *United States v. Green*, 983 F.2d 100, 103 (8th Cir. 1992) (citing *United States v. Phillips*, 433 F.2d 1364, 1368 (8th Cir. 1970), *cert. denied*, 401 U.S. 917 (1971)); *see United States v. Perry*, 152 F.3d 900, 904 (8th Cir. 1998), *cert. denied*, 525 U.S. 1168 (1999); *see also In re United States*, 273 F.3d 380, 387 (3rd Cedar Rapids, Iowa. 2001). The United States Court of Appeals for the Eighth Circuit has enumerated the following factors, which were considered in *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 243-244 (1964), as pertinent in the determination of whether a case should be transferred:

“(1) location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer.”

United States v. McGregor, 503 F.2d 1167, 1170 (8th Cir. 1974) (quoting *Platt*, 376 U.S. at 243-44). “No one of these considerations is dispositive, and '[i]t remains for the court to try to strike a balance and determine which factors are of greatest importance.’” *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990); *see United States v. The Spy Factory*, 951 F. Supp. 450, 455 (S.D.N.Y. 1997) (finding that “[a] Court should not

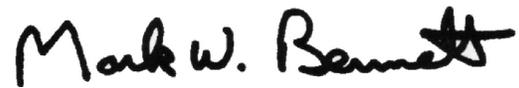
give any one factor preeminent weight nor should it assume that the quantity of factors favoring one party outweighs the quality of factors in opposition.”). In determining the propriety of transfer, a court must decide which of these factors support transfer and which do not and then determine whether transferring of the case is warranted. *See In re United States*, 273 F.3d at 387 (“A balance should be struck among the most important factors in the particular case to determine whether transfer is appropriate.”). While the burden of proof is on defendant Valenciano, “the defendant is not required to show “truly compelling circumstances for . . . change . . . [of venue, but rather that] all relevant things considered, the case would be better off transferred to another district.” *In re United States*, 273 F.3d at 387 (quoting *In re Balsimo*, 68 F.3d 185, 187 (7th Cir. 1995)).

Here, the factors that courts have identified as pertinent to a “convenience” transfer pursuant to Rule 21(b) simply do not weigh sufficiently strongly in favor of transfer out of this district to grant defendant Valenciano’s alternative motion. The crimes charged occurred in this district; it appears that the majority of witnesses reside in this district, and even supposing that travel for those witnesses to the District of New Mexico, is just as easy or easier, it is not sufficiently easier to weigh heavily in favor of a transfer; the government’s documents and records pertinent to the trial are in this district; the business of the participants in the trial will be just as disrupted, if not more disrupted, by a transfer to the District of New Mexico than it would be otherwise; the expenses to the parties and the court may actually be increased significantly by a transfer since all of the counsel involved are in this district; and it would be inappropriate to burden another district with the expense and inconvenience of this trial, in the absence of a showing of prejudice to the defendant. No balance of these factors that the court can reasonably draw from the record warrants a transfer of this case for trial out of district pursuant to Rule 21(b). Therefore, that part of defendant Valenciano’s motion seeking a change of venue pursuant to Rule

21(b) is also denied.

IT IS SO ORDERED.

DATED this 27th day of December, 2006.

Handwritten signature of Mark W. Bennett in black ink.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA