

FILED

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2008 AUG 25 PM 3: 08

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE STEVEN F. CONN  
DIVISION 3  
DATE: AUG. 25, 2008

VIRLYNN TINNELL  
SUPERIOR COURT CLERK SC\*  
VIRLYNN TINNELL, CLERK

COURT NOTICE/ORDER/RULING

STATE OF ARIZONA,  
  
Plaintiff,  
  
vs.  
  
WARREN STEED JEFFS ,  
  
Defendant.

No. CR-2007-0743 & CR-2007-0953

The Court has reviewed the files in each of these cases, including in each case the Defendant's Motion for Remand, the State's Response and the Defendant's Reply. The Court has read or reread the cases cited therein, at least to the extent that it felt it needed to decide the issues presented. The Court has read the grand jury transcripts for each case and is aware that these cases were presented to different grand juries by the same prosecutor. The Court is aware of some other circumstances which may not be part of the record in these cases which it will refer to where appropriate. The Court has considered the arguments of counsel presented at the hearing on August 22, 2008.

The first ground for remand asserted by the Defendant in each of these cases is that the prosecutor made an inadequate inquiry as to whether any publicity which had been generated at that time would prevent the grand jurors from being fair and impartial. To put this issue in some sort of chronological perspective, these cases were presented to grand juries in May and June, 2007. The Defendant by that time had already been indicted in 3

different cases by an earlier grand jury and warrants had been issued for his arrest. The Defendant had been arrested in Nevada on those warrants in the summer of 2006, prior to the presentation of these cases to the grand juries. There was, at least in the state of Arizona, a fair amount of publicity surrounding his arrest. The Defendant subsequently, but after these cases were presented to the grand juries, went to trial on similar charges in Utah and was found guilty and eventually sentenced. The Defendant was returned to Mohave County on these charges in February, 2008. It is the Court's recollection that sometime in the spring of 2008 authorities in Texas, who had apparently never heard of Short Creek, raided a facility in their state and removed from their families various children believed to be affiliated with the Defendant's church.

All of the above incidents, especially the legal proceedings in Utah and Texas, have generated a fair amount of publicity. The Court has read coverage of the Defendant's legal matters or those of his church in TIME magazine and there has presumably been other coverage on a national level. The Court has read everything that it saw regarding these cases but did so primarily because it knew it was assigned these cases. The Court has no way of knowing whether the average citizen has anywhere near the same interest in these cases as does the media. Before the cases out of Colorado City were pending, the Court paid little attention to publicized prosecutions of other polygamists in Utah, considering them of little relevance. In the summer of 2007, within a few months of these cases being presented to the grand juries, this Court had 2 jury trials involving different members of the Defendant's church charged with sexual offenses involving underage minors. The Court's recollection is that it was relatively easy to select a jury in each of those cases and that individual questioning of potential jurors reflected an ability to separate issues of polygamy

from issues of child abuse which the Court might not have anticipated. Some of the reasons for the above recitation, most of which is not presently part of the record in either of these cases, will be addressed below

In the first of these two presentations to the grand jury on May 10, 2007, in what would eventually become CR-2007-0743, an unknown number of grand jurors apparently indicated that they had read something about the Defendant. Unlike the second case, the prosecutor made no effort to count how many did so. Of that unknown number, two grand jurors indicated that they would be unable to be fair and impartial and were excused. The remaining grand jurors voted 10 to 2 in favor of indicting the Defendant.

In the second of these two presentations to the grand jury on June 21, 2007, in what would eventually become CR-2007-0953, 11 grand jurors apparently indicated that they had read something about the Defendant and one indicated that he had not. The Court notes that there were 13 grand jurors present and that eleven plus one equals 12, but perhaps the prosecutor miscounted or maybe one grand juror did not understand the question. None of the grand jurors indicated that they would be unable to be fair and impartial and none were excused. The grand jury voted 13 to zero in favor of indicting the Defendant.

The following admonitions were made in each of the presentations. The grand jurors were told that people biased or prejudiced in favor of the State were subject to disqualification. One of the transcripts actually reflects that the grand jury was told that the above would be a basis for qualification, rather than disqualification, but the Court assumes that may be a mistake and that the true meaning or intent of this admonition was made clear from the circumstances. The grand jurors were told that they could request the presentation of additional evidence, they could end the inquiry or they could indict the Defendant. They

were told that they could amend the draft indictment if they chose. The grand jurors were told not to discuss anything they may have heard about the Defendant and to put aside anything they may have heard and make a decision based solely on the evidence presented to them. They were told to advise the prosecutor if at any time during the proceedings they determined that they were no longer able to be fair and impartial, although this last admonition appears to have been given only in the first of the two presentations. As noted before, two of the grand jurors in the first case voted not to indict the Defendant.

The Defendant argues that the above process for determining possible bias or prejudice on the part of the grand jurors were inadequate and that he was therefore denied a substantial procedural right. He supports his position by citing numerous appellate decisions addressing jury selection in high profile criminal cases. At least insofar as the defense has cited Arizona cases in support of their argument, each of those cases is readily distinguishable. The cases primarily relied upon by the defense involve cases where a change of venue was sought because of pretrial publicity and the issue discussed was the eventual trial on the matter of guilt or innocence and whether that was a fair trial. None of these cases discussed pretrial publicity in the context of a grand jury presentation and the Court is independently unaware of any Arizona reported decision which has addressed the extent to which grand jurors must be questioned regarding publicity or prior knowledge regarding a case being presented to them.

The Defendant argues that the same procedures which would be followed at a trial should be followed at a grand jury presentation, without citing any authority for that proposition as it relates to publicity. It goes without saying that in many critical ways the grand jury is not like a trial jury and lacks numerous features that would safeguard the rights

of a defendant. Neither the defendant nor his attorney is present at the grand jury, at least under most circumstances. The defendant has no opportunity to question witnesses. Hearsay evidence is admissible and leading questions are typically asked. There is probably no obligation to instruct on lesser-included offenses. The grand jury has to find probable cause rather than guilt beyond a reasonable doubt. Their decision need not be unanimous and can be as close as 9 to 7. The Court is aware of the numerous decisions upholding the proposition that the above circumstances do not give a prosecutor a license to ride roughshod over the rights of a defendant in the manner in which a case is presented to the grand jury. None of those cases, however, has involved publicity at the grand jury level. The Court determines that the law relating to pretrial publicity at a trial level does not apply to a case being presented to a grand jury.

Assuming for the sake of argument that the above determination is found to be incorrect, then it is instructive to look at some of the guidelines set forth in the cases cited by the defense. Those cases hold that only in unusual circumstances will it be presumed that pretrial publicity renders a fair trial impossible. Those circumstances include where the publicity is "outrageous" or where the publicity pervades the court proceedings to the extent that they take on a "carnival atmosphere". In all other cases, a defendant has the burden of proving that pretrial publicity will likely deprive him of a fair trial. He can do so by showing that jurors have formed preconceived notions concerning his guilty which cannot be set aside. Prior knowledge of a case, by itself, is insufficient to disqualify a juror.

Assuming that the above standards do apply to the grand jury presentations in these cases, the Defendant can prevail one of two ways. First, the Court can find independently that the publicity was outrageous or that the grand jury proceedings took on a carnival

atmosphere. Second, the Defendant can carry his burden of proving that the publicity in these cases deprived him of a fair determination by the grand jury. The Court reiterates what it has at least alluded to above. The record in this case is silent as to what the publicity regarding the Defendant prior to the spring of 2007 actually consisted of. The Court has received no copies of newspaper or magazine articles or tapes or transcripts of radio or television coverage. Although the defense has made certain conclusory statements regarding the extent of publicity regarding the Defendant, statements with which the Court does not necessarily disagree, there is almost nothing in the record to clarify how the actual content of that publicity would have deprived the Defendant of a fair and impartial determination by the grand jury. The Court has set forth its admittedly subjective impression regarding the possible impact of publicity on this case but has done so mostly to dispel the suggestion of outrageous publicity or a carnival atmosphere. Beyond that, it is not the obligation of the Court or the State to show that the publicity did not deprive the Defendant of a fair grand jury determination. It is the obligation of the Defendant to show that it did. The Court determines that the Defendant has failed to meet that burden.

The questioning of the grand jurors in these cases was not as extensive as it could have been but it clearly addressed the possibility of prior knowledge of the Defendant. Admonitions were given to make sure that a decision was based on the evidence presented. At least one and probably more of the grand jurors had never heard of the Defendant. Two grand jurors were excused because they could not be fair and impartial. Two grand jurors who heard the evidence were obviously able to be fair and impartial enough that they voted not to indict the Defendant. The cases relied on by the Defendant regarding publicity do not apply to grand jury proceedings. If they do, the Defendant has not shown that the publicity

deprived him of a fair determination by the grand jury. The Court determines that the Defendant was not denied a substantial procedural right at the grand jury proceedings in either case because of prior publicity.

The second ground for remand asserted by the Defendant in each of these cases is that the prosecutor never read to the grand jury the legal definition of "accomplice". This is at least objectively an easier issue to analyze, primarily because it is clear that he did not. The issue is what impact that oversight had on the determination of probable cause by each grand jury. The indictment in each of these cases and as to each of the counts alleges that the Defendant committed the crime "as an accomplice" and cites A.R.S. 13-303. The Court's position would be that the reference to liability as an accomplice does not preclude prosecution of these charges under any other theory of criminal liability based on the conduct of another that is set forth in A.R.S. 13-303. That statute enumerates 3 different ways a person can be criminally accountable for the conduct of another, one of which is if the person is an accomplice of the other in the commission of an offense. That statute also enumerates 2 different ways in which a person can be guilty of an offense if causing a result is an element of an offense and if the person does one of 2 things with the culpability required for that result. Those 2 things represent 2 of the 3 things a person can do to qualify him as an accomplice under A.R.S. 13-301. That latter definition, however, clarifies that an accomplice has to do one of those 3 things with the intent to promote or facilitate the commission of an offense.

In each of these cases the prosecutor read to the grand jury in its entirety A.R.S. 13-303. In each of these cases the prosecutor did not read to the grand jury the definition of "accomplice" under A.R.S. 13-301. Whether that was a deliberate decision to eliminate the

most obvious theory of criminal liability available under A.R.S. 13-303 or was just a mistake does not matter. In each of the cases the prosecutor read to the grand jury the culpable mental states for the crimes charged and also read to the grand jury the definitions of those mental states. The general principle of accomplice liability is set forth in A.R.S. 13-303(A)(3). Although a finding of criminal liability under A.R.S. 13-303(A)(1) can probably be discounted in these cases, the Court cannot rule out the possibility that a finding of probable cause was premised on liability based on either A.R.S. 13-303(A)(2) or A.R.S. 13-303(B). The grand jury was fully instructed on the law necessary to make such a determination. Without addressing the sufficiency of evidence presented, the Court determines that evidence was presented which, if believed by the grand juries, would have been sufficient for them to find criminal liability based on either A.R.S. 13-303(A)(2) or A.R.S. 13-303(B). The prosecutor probably did himself a disservice by not instructing the grand juries on the most easily understandable principle of criminal liability for the conduct of another, but the Court does not believe that it can assume either grand jury indicted the Defendant on a legal theory that was not defined for them.

With one exception, the Arizona cases cited by the defense regarding the necessity of instructing the grand jury on the applicable law can probably be distinguished. Crimmins, Korzep and Herrell all involved cases where the grand jury was not advised of statutes that would have justified or excused the defendant's behavior. In each of those cases the prosecutor knew when presenting evidence to the grand jury that the defendant was asserting circumstances surrounding his conduct which if believed would be an absolute bar to criminal liability on his part. The deliberate choice to not make those circumstances known to the grand jury was held to be a denial of a substantial procedural right in each of those

cases. Although those decisions include policy and philosophical discussions that are relevant to any grand jury case, the specific facts are not relevant to this case. This is not a case where the Defendant is asserting, at least in the context of these motions, that his conduct was justified. He is asserting that the grand juries were not defined a certain necessary term.

The Baumann case is certainly more on point. In that case the trial judge remanded a case to the grand jury where an indictment charging a conspiracy had been obtained without the need for or the definition of an "overt act" ever being explained to the grand jury. The Court notes that the propriety of that decision was not in any manner addressed by the Arizona Supreme Court in that decision, which primarily addressed the propriety of joining the conspiracy charge with the remaining counts of the indictment after the prosecutor again presented the case to the grand jury and apparently properly defined what an overt act consisted of. The Court is willing to entertain the assertion that Baumann does in fact stand for the proposition that "overt act" must be defined for a grand jury considering a conspiracy charge in which that is an element. An overt act is not defined in the criminal code but has instead been defined in a series of appellate decisions. The Court would submit that the legal definition of an overt act is not one that would be immediately apparent to the average juror, including as it does acts which are not necessarily criminal in nature and acts which need not even be committed by the defendant. Although the legal definition of an accomplice has features that may require some thought, it is not a concept completely incapable of being grasped accurately by a grand juror for whom the word is undefined as would be the case where an overt act was a necessary element.

The grand juries in these cases were not read the definition of "accomplice", which seems inexplicable under the circumstances, but they were read the entirety of A.R.S. 13-303, which included the culpable mental states required for criminal liability based on the conduct of another. Even if the Court were convinced that the grand jury's finding of probable cause could only have been based on accomplice liability under A.R.S. 13-303(A)(3), which it specifically is not holding, the Court believes that the legal definition of "accomplice" is not so contrary to a common understanding of that word that the Defendant could have been indicted based upon a misunderstanding of the meaning of an accomplice. The Court finds this especially to be so based on the evidence presented to the grand jury regarding the Defendant's culpable mental state and specific intent and any reasonable influences or deductions that could be drawn from that evidence. The Court determines that the Defendant was not denied a substantial procedural right at the grand jury proceeding in either case because of the failure to define an accomplice.

The third ground for remand asserted by the Defendant in each of these cases is that the prosecutor presented false or misleading evidence and failed to present clearly exculpatory evidence. With one exception, these assertions are unique to each individual case. The one exception is the assertion that in each case the grand jury was told that the parties in question were first cousins who could not marry as opposed to being first cousins of the half blood. The Court has already ruled earlier in these cases that there is no legal prohibition against persons in the latter relationship marrying or engaging in sexual relations. The charges which this testimony would have been relevant on have already been dismissed by the Court. The Court cannot imagine under the circumstances that the mistaken belief that the parties were full first cousins rather than first cousins of the half blood so prejudiced

the grand juries that they voted to indict the Defendant on the charges not based on the familial relationship on something other than a finding of probable cause. The Defendant was not denied a substantial procedural right when the grand juries were told that the parties were full rather than half blood first cousins. The other allegedly false or misleading evidence presented as to CR-2007-0743 only was that the Defendant could not legally perform marriages and that an underage person cannot marry. Although no evidence has been presented on this issue, the Court suspects that the Defendant probably would as head of his church have the authority to perform civil marriage ceremonies. That is not apparently what was done in this case. An underage person can in fact get married in Arizona and the grand jury was told the circumstances under which that can happen. They were also told that none of those circumstances existed in this case. More to the point, the grand jury was told that the ceremony took place in Nevada. The Defendant has directed the Court's attention to no Nevada statutes suggesting that a marriage with an underage person would have been legal under the circumstances of this case. The issue was not whether the Defendant had the authority to perform civil marriage ceremonies or whether the bride could legally be married despite her age. The testimony made it clear that this did not purport in any way to be a state-sanctioned civil marriage but was instead a sealing ceremony which had meaning only within the Defendant's church. The ultimate issue remains whether the Defendant was criminally accountable for an adult man having sex with a minor girl. Any misleading testimony about the Defendant's capacity to perform marriages or the circumstances under which underage girls can marry were not really relevant to the charges in this case and cannot have contributed improperly to the finding of probable cause. This testimony did not deny the Defendant a substantial procedural right

The other alleged failure to present exculpatory evidence in CR-2007-0953 was that the grand jury was not told of statements made by the alleged victim casting doubt on her veracity. In the defense motion the Court's attention is directed to certain pages of the State's disclosure but copies of that disclosure were not included with the motion or made part of the record. The Court, of course, does not have access to the State's disclosure. The State at oral argument disputed the factual assertions made by the defense. The Court has no way to know, based on the record, whether the victim made statements that would have significantly impeached her credibility and that were known to the State when the case was presented to the grand jury. The Court cannot find any basis for the assertion that there was exculpatory evidence that should have been presented to the grand jury regarding the credibility of the victim and that the failure to do so denied the Defendant a substantial procedural right.

The fourth ground for remand asserted by the Defendant in each of these cases is that the prosecutor improperly influenced the grand jury and usurped their function, primarily by eliciting prejudicial references to the religious practices and beliefs of the Defendant's church to suggest his guilt. There is no doubt that testimony of the teachings of the Defendant's church permeated the grand jury presentations in both of these cases. It is hard to imagine how these cases could have been presented without doing so. The persons whose relationships are the basis for the charges in these cases did not come together at the behest of their teacher, mailman or VCR repairman. They were allegedly brought together by the head of the church to which they all belonged. To understand how this happened, it was necessary to present to the grand jury some of the tenets of that religion, some of which may be unfamiliar to non-members of that church although arguably no more bizarre than rituals

and beliefs of other major religions. The grand juries were told in these cases that the basis for the proposed charges was sex with underage girls, not polygamy or an unfamiliar religion or culture. The presentation of evidence regarding the religious beliefs and practices of the Defendant's church did not deprive him of a substantial procedural right.

The Defendant in addition asserts as to CR-2007-0743 only that the prosecutor improperly controlled and directed the grand jury's investigation. The grand jury in this case had numerous questions for the prosecutor and the witness. It is interesting to note that the prosecutor's questioning of the witness takes up 34 pages of the grand jury transcript and the questioning of the grand jurors themselves takes up 24 pages. The questions asked by the grand jurors seem to indicate that they wanted to understand the applicable law and that they were unwilling to act as the proverbial rubber stamp for the prosecution. This was a grand jury that was near the end of their term and might have been expected to have become blasé about their obligation in screening cases presented to them. It is the Court's experience that grand juries that ask no questions are viewed as not doing their job and when grand jurors do ask questions defendants generally attack how those questions are handled.

Aside from the above general observations, the Court can find no response by the State that undermined the fairness of this presentation. They were reread the applicable statutes. The prosecutor was careful not to answer factual questions and the witness deferred to the prosecutor on legal questions. The prosecutor actually discouraged some areas of inquiry that would have been inappropriate, such as a question about brainwashing. It was emphasized that the grand jury could indict only for crimes committed within the jurisdiction of the state of Arizona. The prosecutor read various statutory defenses applicable to sexual offenses. The grand jury actually was told that they could add another name of a

defendant to the indictment or even indict him and not the Defendant. The Court believes that the prosecutor handled the grand jurors questions appropriately and that the manner of his doing so did not deprive the Defendant of a substantial procedural right.

For all the above reasons, the Court determines that the Defendant was not denied a substantial procedural right in the presentation of either of these cases to the grand jury.

IT IS ORDERED denying the Defendant's Motion for Remand as to each of these cases.

cc:

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