STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1225

State of Minnesota,
Respondent,

vs.

J. Alexander Kueng,
Appellant.

Filed January 11, 2021
Affirmed
Cochran, Judge

Hennepin County District Court
File No. 27-CR-20-12953

Christopher W. Bowman, Madigan, Dahl & Harlan, Minneapolis, Minnesota (for respondent)

Deborah Ellis, Thomas C. Plunkett, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Jesson, Judge; and Slieter Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

This is an appeal from an ex parte order granting in part and denying in part appellant's application for expert services under Minn. Stat. § 611.21 (2018). Appellant requested $6,300 to retain an expert to perform a preliminary analysis of the extent and character of publicity concerning his pending criminal case for the purpose of evaluating

whether to bring a change of venue motion. Appellant argues that the district court abused its discretion by denying his request. Relatedly, he also argues that the district court violated his constitutional rights to due process, fundamental fairness, and an impartial jury by denying him the means to show that a change of venue is necessary. Because we conclude that the district court did not abuse its discretion by denying the requested funding, we affirm.

FACTS

The State of Minnesota charged appellant J. Alexander Kueng in Hennepin County District Court with aiding and abetting second-degree murder and aiding and abetting second-degree manslaughter for the death of George Floyd. Kueng's case is presently joined for trial with his codefendants, and trial is scheduled. In August 2020, Kueng filed an ex parte application under Minn. Stat. § 611.21 (2018), requesting $6,300 for the services of an expert to conduct phase I of a venue research study. In support of the request, Kueng appended his sworn affidavit, stating that his liabilities exceed his assets, and a copy of his expert witness's "venue research proposal." The proposal has two phases. Phase I involves a "preliminary analysis of the extent and character of the newspaper publicity and other possible sources of community bias" to determine what "prophylactic measures" are necessary to ensure that Kueng receives a fair trial. If it is deemed necessary following completion of phase I, phase II would involve a public opinion survey in Hennepin County and a likely comparison survey in another county "to measure the impact that pretrial publicity . . . and other relevant factors . . . may have had on the jury pool." Depending on the results of the public-opinion survey and phase I analysis, the expert may recommend

protective measures, including "an extensive jury questionnaire and individual sequestered voir dire," or a change of venue.[1] The total estimated cost of phase II is $41,875.

The district court determined that Kueng met financial eligibility requirements to apply for expert services, although he is represented by private counsel, but denied his application for $6,300 for phase I of the venue research study, reasoning that "expending more than $48,000 in public funds to fund a two-phase venue research study to lay the foundation for a motion for change of venue in the manner proposed by Kueng is not necessary to the preparation of an adequate defense." Nevertheless, the district court authorized "up to $1,200 for expert witness services to Kueng's jury consultant to consult with and advise Kueng and his defense counsel regarding proposed questions to be included on a jury questionnaire and with respect to questioning of the jury panel during voir dire." The district court reasoned that these expert services are necessary because of the "magnitude of media publicity and community protests," and because the court intends to rely on "extensive jury questionnaires" and "extensive voir dire to ferret out prospective jurors who may have been unduly influenced by prejudicial publicity."

[1] On August 27, 2020, before the district court ruled on his ex parte application for expert services to support a potential motion for change of venue, Kueng filed a motion seeking to change venue "outside the seven-county metro area." Kueng based his motion, in part, on "the fact that 'potentially' prejudicial material has been disseminated publicly by the prosecution, creating a reasonable likelihood that a fair trial in the metro area cannot be had." The motion identifies "1700 local articles focusing on this prosecution," some of which include comments from "State actors." On November 4, 2020, the district court issued a preliminary order denying Kueng's change-of-venue motion and denying similar motions filed by Kueng's codefendants. Also on that date, the district court ordered that the jury would be anonymous, jurors would be examined "outside the presence of other chosen and prospective jurors," and the jury would be partially sequestered during trial and fully sequestered during deliberation.

Kueng filed an appeal from the order denying his application for expert services and requested expedited consideration. *See* Minn. Stat. § 611.21(c) (providing defendant may appeal immediately and request an expedited hearing). We granted expedited consideration and assigned responsive briefing to counsel not involved in the prosecution.

DECISION

Kueng argues that the district court abused its discretion by denying his request for $6,300 for an expert to conduct a preliminary analysis of the character and extent of pretrial publicity surrounding his case. Kueng further contends that the district court's decision to grant funding for an expert to assist in preparing a jury questionnaire and to assist with voir dire is inconsistent with this determination. And he argues that, without the assistance of an expert to conduct an independent venue study, he will not be able to meet his burden to prove that a change of venue is necessary, depriving him of his constitutional rights to an impartial jury, due process, and fundamental fairness.

This court reviews an order denying funds for expert services under Minn. Stat. § 611.21 for an abuse of discretion. *In re Application of Wilson*, 509 N.W.2d 568, 570 (Minn. App. 1993). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

The Due Process Clause ensures that "every criminal defendant has the right to be treated with fundamental fairness and '[is] afforded a meaningful opportunity to present a complete defense.'" *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1994)); *see generally*

U.S. Const. amend. XIV, § 1 (ensuring criminal defendant's right to due process and fair trial); Minn. Const. art. I, § 7 (same). Consistent with this constitutional requirement, the Supreme Court "has long recognized that" states must ensure that indigent criminal defendants have the ability to "participate meaningfully" in judicial proceedings where their liberty is at stake. *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S. Ct. 1087, 1092 (1985). But access to the courthouse is not enough; the state must also provide indigent defendants with "access to the raw materials integral to the building of an effective defense." *Id.* at 77, 105 S. Ct. at 1093.

To further these constitutional requirements, Minn. Stat. § 611.21 allows indigent defendants to request funding from the district court for expert or investigative services necessary for their defense. *State v. Volker*, 477 N.W.2d 909, 910 (Minn. App. 1991). The statute provides: "Counsel appointed by the court for an indigent defendant, or representing a defendant who, at the outset of the prosecution, has an annual income not greater than 125 percent of the poverty line . . . may file an ex parte application requesting investigative, expert, or other services necessary to an adequate defense in the case." Minn. Stat. § 611.21(a).[2] Upon a finding "that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant." *Id.* The compensation may not exceed $1,000, unless the

[2] Although Kueng is represented by private counsel and the affidavit filed in district court did not include any information about his income or resources "at the outset of the prosecution," as required by Minn. Stat. § 611.21(a), respondent does not contest the district court's determination that Kueng is financially eligible.

payment in excess is certified as necessary, and the chief judge approves.[3] *Id.* (b). But, in order to obtain funds for expert services, the defendant must present some specific evidence showing that the expert's services are necessary to the defense. *Volker*, 477 N.W.2d at 911 (holding appellant's statement that an expert was necessary without any specific reasons did not meet the *Ake* threshold showing of need for expert assistance); *see also Richards*, 495 N.W.2d at 198 (citing *Volker* with approval). For example, the submissions should answer the following questions: "Why is the expert necessary? How would the expert's testimony aid in appellant's defense?" *Volker*, 477 N.W.2d at 911. The district court also has discretion to limit the fees that may be expended for expert services. *In re Application of Jobe*, 477 N.W.2d 723, 727 (Minn. 1991) (stating district court is in best position to determine what is reasonable compensation).

Kueng contends that without the requested expert services he will not be able to meet his burden to show that a change of venue is necessary, thus depriving him of his Sixth Amendment right to an impartial jury. For this reason, we consider the standard for granting a change of venue before addressing whether the district court abused its discretion. Criminal trials must be held in the county where the offense was committed, "unless the[ ] rules direct otherwise." Minn. R. Crim. P. 24.01. A trial may be continued or venue may be changed because of prejudicial pretrial publicity. Minn. R. Crim. P. 25.02. A district court "must" grant a motion for continuance or to change venue "whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be

[3] The chief judge authorized the expenditure of up to $1,200 in this case.

had." *Id.*, subd. 3. "Actual prejudice need not be shown." *Id.* A party may support a motion for change of venue due to pretrial publicity by testimony, affidavits, written statements from individuals in the community, a qualified public opinion survey,[4] or other probative material. *Id.*, subd. 2. The district court has broad discretion over the decision of whether to grant a change of venue due to pretrial publicity, and this court will not reverse the decision unless a clear abuse of discretion is shown. *State v. Salas*, 306 N.W.2d 832, 835 (Minn. 1981). But the fact that there is widespread publicity does not require a change of venue; the question is "whether the publicity is of a type that is prejudicial to the defendant" and "affects the minds of the specific jurors involved in the case." *State v. Fratzke*, 354 N.W.2d 402, 406 (Minn. 1984). The type of publicity that is prejudicial may include quotes of public officials' opinions concerning the defendant's guilt. *See Salas*, 306 N.W.2d at 835.

It is undisputed that the death of George Floyd has generated substantial publicity. Kueng's ex parte application for expert services indicates that "[a] cursory review of media coverage has established that there are over 1,700 articles" regarding George Floyd's restraint and death.[5] The district court's order acknowledges the extensive publicity surrounding this case. Nevertheless, the district court was not persuaded that Kueng met

[4] Phase II of the venue research study would have included a public opinion survey, if, after conducting phase I, the expert deemed it necessary. Although rule 25.02, subdivision 2, permits qualified public opinion surveys, the Eighth Circuit has "expressed doubts about the relevance of such polls when reviewing rejected change-of-venue motions." *United States v. Rodriguez*, 581 F.3d 775, 785-86 (8th Cir. 2009).

[5] Kueng's initial brief, reply brief, and addendum also include links to some of the news articles about the case.

his burden of demonstrating that a two-phase venue research study "to lay the foundation for a motion to change venue" was necessary to an adequate defense, in light of the protective measures that the district court identified to reduce the risk of unfair prejudice and ensure that Kueng receives a fair trial by an impartial jury. The district court's order describes the following protective measures: (1) sending a comprehensive jury questionnaire to 150 prospective jurors, which is larger than the usual pool of 30 prospective jurors; (2) asking questions regarding exposure to pretrial publicity and its effect on potential jurors; (3) permitting Kueng to renew a motion to change venue after questionnaires are completed and returned; (4) permitting extensive voir dire and conducting voir dire one prospective juror at a time rather than by the panel as a group; and (5) remaining open to changing venue if jury questionnaires and voir dire demonstrate that it is not possible to impanel a fair and impartial jury in Hennepin County. The district court also observed that Kueng is represented by an experienced "leading member of the private criminal defense bar" who "can be expected to vindicate Kueng's right to a trial before a fair and impartial jury through his participation in the design of the jury questionnaire and in voir dire."

We are not persuaded that the district court abused its discretion by concluding that Kueng did not meet his burden to show that authorizing public funds for expert services to conduct phase I of a venue-research study is necessary for an adequate defense. Kueng's ex parte application did not explain why it is necessary to have an expert complete a preliminary analysis of pretrial publicity, or how an expert's preliminary analysis would specifically support a motion for a change of venue, particularly when Kueng's own

submissions established his awareness of the extent and character of pretrial publicity. *See Volker*, 477 N.W.2d at 911 (discussing threshold showing of "need" for expert assistance).

The district court "remains willing to order a change of venue if the jury questionnaires and voir dire process demonstrate that it is not possible to impanel a fair and impartial jury in Hennepin County." The Sixth Amendment right to an impartial jury "includes the ability to conduct 'an adequate voir dire to identify unqualified jurors.'" *State v. Greer*, 635 N.W.2d 82, 87 (Minn. 2001) (quoting *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222, 2230 (1992)). The district court's plan to rely on an extensive jury questionnaire and individual voir dire to "ferret out prospective jurors who may have been unduly influenced by prejudicial publicity" appears designed to ensure that unqualified jurors are identified. Given the protective measures that the district court adopted and its willingness to reconsider the motion to change venue, we cannot say that the district court abused its discretion by concluding that $6,300 for expert services to conduct a preliminary analysis of publicity is not necessary for an adequate defense. *Cf. Rodriguez*, 581 F.3d at 785, 789 (assuming without deciding that denial of funding for venue study could violate *Ake*, appellant did not show how additional funding would have aided his defense when district court's 21-day voir dire process, which included assembling a larger-than-usual jury pool, a comprehensive jury questionnaire, and extra peremptory strikes, "screened out prejudiced jurors").[6]

[6] Although not precedential, the analysis in *State v. Hull* is also persuasive. No. A08-1280, 2008 WL 4301902 (Minn. App. Sept. 23, 2008). There, we affirmed the district court's order denying Hull's request for expert services for a public-opinion survey to support a motion to change venue because he failed to show that those services were necessary, and

We also do not agree that the district court's decision to grant Kueng up to $1,200 for expert assistance regarding proposed questions for a jury questionnaire and with respect to voir dire contradicts its decision that a preliminary analysis of publicity is not necessary. Phase II of Kueng's venue-research proposal includes "an extensive juror questionnaire and individual sequestered voir dire" as possible recommendations the expert might make to protect Kueng's right to a fair trial. Because the district court had already concluded that a jury questionnaire and extensive, individual voir dire are appropriate and necessary, it was within the court's discretion to grant Kueng $1,200 for expert services to assist with preparing jury questions and voir dire. *See* Minn. Stat. § 611.21(a) (stating district court determines reasonable compensation). We are, therefore, not persuaded that the district court's decision to grant expert services that were not requested in phase I of the venue research study is contradictory.

Nor are we persuaded that the district court's order deprives Kueng of his constitutional rights to due process and fundamental fairness or his right to an impartial jury. Kueng's brief treats this as a separate issue. But section 611.21 is intended to guarantee indigent defendants the rights to services necessary for their defense at government expense, so whether Kueng's due process rights are violated is an integral part of appellate review and our consideration of whether the district court abused its discretion by denying a request for expert services. *See Wilson*, 509 N.W.2d at 570 (discussing *Ake*

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because the district court concluded that jury voir dire would be sufficient to ensure an impartial jury, and if enough impartial jurors could not be found, "a change of venue would be mandatory." *Id.* at *1-2.

constitutional requirement that government must provide indigent defendants with "raw materials" necessary for an effective defense). The district court has already instituted protective measures to screen out prejudiced jurors, which includes some of the very same protective measures his expert might recommend in phase II of the venue research proposal. Moreover, the district court will permit Kueng to renew his motion to change venue if it becomes apparent that an impartial jury cannot be convened. Accordingly, we are not persuaded at this point in the proceedings that the district court's order violates Kueng's right to an impartial jury or his rights to due process and fundamental fairness.

Finally, Kueng appears to argue that this court should, in the interests of justice, direct the district court to order a change of venue because "massive pretrial publicity" has created a presumption of prejudice. Although pretrial publicity can create a presumption of prejudice, *Irvin v. Dowd*, 366 U.S. 717, 725-27, 81 S. Ct. 1639, 1644-45 (1961), Kueng does not identify any authority that would permit this court to direct a change of venue. This appeal involves the funding of expert services; this is not an interlocutory appeal from an order denying a change of venue. The court of appeals is an error-correcting court and does not exercise supervisory powers reserved to the supreme court. *State v. Ramey*, 721 N.W.2d 294, 302 n.6 (Minn. 2006). Respondent also correctly observes that *State v. Thompson*, the case Kueng relies on, is inapposite because the criminal defendant in that case challenged the district court's order denying his motion to change venue by filing a petition for a writ of mandamus. 123 N.W.2d 378, 381-82 (Minn. 1963). By contrast, there is no petition for mandamus before this court.

In sum, because the district court did not abuse its discretion by denying Kueng's application for $6,300 for expert services under section 611.21 to conduct phase I of a venue-research study, we affirm.

Affirmed.