No. 24-5382

In the Supreme Court of the United States

MICHAEL DALE IERVOLINO,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED (REPHRASED)

Whether Iervolino's Sixth Amendment right to an impartial jury was violated when the St. Clair County Circuit Court declined to transfer his trial to another judicial district because the evidence indicated that most of the prospective jurors had not seen any media coverage of the crime and the newspaper articles presented in support were factual in nature and written several years before trial when the crime occurred.

STATEMENT OF THE CASE

Shortly before 11:00 p.m. on November 5, 2019, Michael Dale Iervolino shot Nicholas Sloan Harmon in the head while the men were driving their respective vehicles. Although Harmon did not immediately die from the gunshot wound, it only took a few minutes for him to succumb to its effects.

The night of the crime, Iervolino was like a powder keg waiting to explode with criminal frenzy. Several hours before murdering Harmon, Iervolino was driving in a car with his girlfriend, when they started arguing and he tried to hit her before throwing her out of the car. R. 553, 893, 952.[1] Immediately thereafter, Iervolino drove with a friend to a nearby hotel parking lot. R. 894, 914. There, he started stealing items from the bed of a construction pickup truck that was parked overnight. R. 894, 929. He also stole a spare key to the truck. R. 895, 929.

Iervolino took these stolen goods and drove to a friend's house, where he traded some of the items for drugs and a Hi-Point 9mm pistol. R. 895-97, 931. He then drove

[1] "C." refers to the clerk's record, "R." to the reporter's transcript, and "S." to the supplemental record.

back to the hotel parking lot and used the stolen key to drive off in the construction pickup truck. R. 557. While driving the truck to his girlfriend's house, Iervolino encountered Harmon who was driving home, and shot him, apparently because Iervolino thought Harmon was driving too slowly. R. 587, 1166-67. After being shot, Harmon drove into a utility pole. R. 754.

Iervolino showed up at his girlfriend's house and told the people there that he "might have fucked up" and that they needed to go. R. 905. He walked outside with a friend and showed him two guns: the Hi-Point he had acquired that night and a Glock 9mm pistol that he found inside the stolen truck. R. 906-07. He admitted to a friend that he had fired the Hi-Point while driving the truck. R. 1026.

Around midnight, Iervolino and his girlfriend were riding around in the stolen truck. Unbeknownst to Iervolino, the truck was outfitted with a GPS tracker, and a manager for the construction company had begun receiving alerts that one of his trucks was speeding down the interstate. R. 574. After the manager contacted the police, they began a high-speed pursuit. R. 606-11, 964. Iervolino was able to avoid the police's attempt to pull him over and eventually eluded them. R. 611. The police continued to monitor the truck's GPS and found the truck abandoned in a ditch on a remote road. R. 626-27.

As the police officers approached the truck, Iervolino shot multiple times. R. 630. The police initiated a manhunt in the nearby woods, then found Iervolino the next morning around 7:00 a.m. hiding underneath a trailer, and took him into

custody. R. 666. After looking underneath the trailer, police found the Glock 9mm pistol that Iervolino had been firing with one bullet remaining. R. 680-82.

The stolen truck was later processed, and four bullet casings were found inside. R. 813-17. Forensic analysis confirmed that the casings were part of the bullets fired from Iervolino's Hi-Point 9mm pistol. R. 1108-09.

A St. Clair County grand jury indicted Iervolino for two counts of capital murder: (1) for shooting and killing Harmon while Harmon was in a vehicle, in violation of section 13A-5-40(a)(17) of the Code of Alabama, and (2) for shooting and killing Harmon while Iervolino was in a vehicle, in violation of section 13A-5-40(a)(18) of the Code of Alabama. C. 12.

Iervolino's case received media attention in St. Clair County, partly because Harmon was the twenty-year-old son of the St. Clair County District Attorney. The St. Clair County District Attorney's Office and all the judges in the county recused from the case. C. 23, S. 72-73. The Talladega County District Attorney was appointed to prosecute the case, S. 72-73, and a circuit judge from the same neighboring county was assigned to preside over the trial, C. 23.

Iervolino filed a motion for change of venue, arguing that he could not obtain a fair trial in either St. Clair County or a county in proximity due to the victim being the son of the district attorney and because of the media coverage. C. 93-94. At a pretrial hearing on this motion, defense counsel presented to the trial court seventeen news articles involving the case. C. 221-267. The prosecutor responded that the articles were factual accounts of the murder and the subsequent investigation and that

eleven of them were remote in time, as they had been published before Iervolino was charged with capital murder. S. 168-75. The court denied the motion but stated that it intended to conduct a "thorough voir dire examination of the prospective jurors" regarding any information they had heard about the case. C. 134.

Out of the seventy prospective jurors in the venire, only eighteen indicated that they had heard of the case through either news or social media. R. 354-404. The court allowed individual voir dire of the eighteen venire members who had knowledge of the case and removed six after defense counsel challenged them for cause. R. 413-15. The record indicates that the twelve remaining prospective jurors in this group did not have any preconceived view of the case based on their exposure to any type of media coverage.

A jury was ultimately impaneled, and six days later, returned a guilty verdict on both counts. C. 156. The penalty phase immediately began, and the jury returned a 10-2 death recommendation on both counts. C. 157, 162, 164. The court conducted a sentencing hearing and sentenced Iervolino to death. C. 157.

On direct appeal, Iervolino challenged, among numerous issues, the trial court's denial of his motion for change of venue. In evaluating the issue, the Alabama Court of Criminal Appeals (ACCA) stated, "[T]here are two situations which mandate a change of venue: (1) when the accused has demonstrated 'actual prejudice' against him on the part of the jurors; (2) when there is 'presumed prejudice' resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected." Iervolino v. State, CR-21-0283, 2023 WL 5316682, at *6-7 (Ala. Crim.

App. Aug. 16, 2023) (citation omitted).[2] The ACCA noted that the trial court had allowed individual voir dire for the eighteen prospective jurors who had knowledge of the case and granted challenges for cause against six of them. Id. at *7-8. "There is no indication in the record that the remaining twelve prospective jurors who had heard about the case had any preconceived view of the case based on their exposure to any type of media coverage." Id. at *9. Regarding "presumed prejudice," the ACCA quoted this Court's decision in Skilling v. United States, 561 U.S. 358 (2010), stating that it would look to the "totality of the circumstances," which included "the size and characteristics of the community where the offense occurred; the content of the media coverage; the timing of the media coverage in relation to the trial; the extent of the media coverage; and the media interference with the trial or its influence on the verdict." Id. at *8. The ACCA held that "the majority of the articles that defense counsel presented were written before an arrest had been made" and were "factual accounts of the murder and the subsequent investigation of that murder." Id. at *9.

Reasons for Denying the Writ

Iervolino argues that the trial court's denial of his motion for change of venue violated his Sixth Amendment right to an impartial jury. The ACCA correctly found that no Sixth Amendment violation occurred in this case. Iervolino, 2023 WL 5316682, at *6-9. That case-specific holding does not conflict with any decision of this Court, and further review is unwarranted.

[2] The ACCA's opinion is an exhibit to the petition, but the pages to that appendix are not numbered. Thus, the State will cite to the Westlaw citation.

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." That right "guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961) (punctuation omitted). However, juror impartiality … does not require ignorance. Skilling, 561 U.S. at 381 (2010). Thus, "[j]urors … need not enter the box with empty heads in order to determine the facts impartially." Id. at 398. Even in cases involving extensive pretrial publicity, a fair trial is possible if "jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court." Id. at 398-399 (brackets and citation omitted).

As the ACCA correctly determined after careful analysis of the record, Iervolino "failed to meet his burden of establishing that he could not receive a fair and impartial trial in St. Clair County." Iervolino, 2023 WL 5316682, at *9. The court noted that "out of 70 prospective jurors, only 18 had heard about the case, and only 6 of those were removed for cause because of their knowledge of the case." Id. The ACCA further noted that the remaining twelve prospective jurors indicated they had no "preconceived view of the case based on their exposure to any type of media coverage." Id.

Iervolino's contention that the ACCA's opinion conflicts with Rideau v. State of Louisiana, 373 U.S. 723 (1963), should be easily rejected. There, the police took the extraordinary steps of surreptitiously recording a defendant's uncounseled confession and allowing that recording to be broadcast three times in a parish of approximately

150,000 people. Id. at 724. The combined television viewing of these confessions was at least half of the population of the parish. Id. In addition, Rideau's trial was held two months later "after the people of the parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged." Id. at 726.

In contrast, the facts here show no presumption of prejudice. The news articles presented were factual and did not characterize the crime or the defendant in inflammatory terms. The articles were primarily from two time periods, when the victim was murdered in November 2019 and when Iervolino was arrested several months later. C. 221-267. Indeed, most of the articles that were presented were published prior to March 2020, approximately nineteen months before the trial started in November 2021. The presumed prejudice standard is a high bar to prove and states that the pretrial publicity must be sufficiently prejudicial and inflammatory, and this publicity must saturate the community where the trial was held. United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990). The ACCA did not abuse its discretion in ruling that Iervolino had not met this standard.

Iervolino contends that the ACCA's analysis was deficient because it did not consider the "totality of the circumstances." Pet. 11. However, the ACCA stated that it did consider the "totality of the circumstances," Iervolino, 2023 WL 5316682, at *8-9, but that the evidence presented at trial consisted exclusively of news articles. In Skilling, 561 U.S. at 381-85, this Court identified four factors pertinent to whether the defendant has demonstrated a presumption of prejudice that supports a change

of venue: (1) the size and characteristics of the community where the offense occurred and from which the jury is drawn; (2) the quantity and nature of the media coverage about the accused and whether it included "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; (3) the passage of time between the offense and the trial and whether prejudicial media coverage decreased during that time, and—when evaluating the motion following a verdict—(4) whether the jury's conduct ultimately undermined any potential pretrial presumption of prejudice.

A. Size and characteristics of the community.

Iervolino's petition baldly concludes that this case "resembles" Rideau because St. Clair County has 50,000 fewer residents than the Louisiana parish referenced in that case. Pet. 11. To the extent this argument was made below, the ACCA compared this case to Luong v. State, 199 So. 3d 139 (Ala. 2014), cert. denied, Luong v. Alabama, 577 U.S. 1241 (2016) (mem.), a high-profile case in which the defendant killed his four children by throwing them off a bridge. In Luong, the trial was conducted in Mobile County which has a population of 400,000, and the Alabama Supreme Court described the media coverage of the crime as "extensive." Id. at 147. However, that court reviewed the articles from the local paper of record "and conclude[d] that, although they [did] not paint a flattering picture of Luong, the media coverage mainly focused on the facts surrounding the offenses and the proceedings of the case." Luong, 199 So. 3d at 147. Moreover, as the Alabama Supreme Court explained, "the record establishes that the majority of the media coverage occurred during the first month

following the offenses. The fact that the majority of the publicity occurred more than a year before the trial supports a conclusion that a fair and impartial jury could be selected from the community." Id. at 148.

Turning then to Iervolino's case, the ACCA stated that the media coverage was not nearly as extensive as that in Luong. Iervolino, 2023 WL 5316682, at *8-9. Most of the articles supporting Iervolino's change of venue motion were written before an arrest had been made, and all the articles were factual accounts of the crime and the subsequent investigation. Id. Considering the relatively small number of articles written over the period of several years from the time of the crime to the time of trial, the ACCA's ruling that the community was not saturated with media coverage is not an abuse of discretion.

Further, as previously stated, this case is nothing like Rideau. In that case, the defendant's uncounseled confession was repeatedly broadcast to most of the parish several months before trial, Rideau, 373 U.S. at 724, a factual situation quite different from Iervolino's.

B. Content of media coverage.

The ACCA also rightly explained that the media coverage was primarily factual, as it contained "factual accounts of the murder and the subsequent investigation of that murder by law enforcement." Iervolino, 2023 WL 5316682, at *9. Iervolino's petition does not contest this conclusion but rather argues that some of the media coverage portrayed Iervolino in a bad light. His petition cites several references for statements such as Iervolino "was well known to law enforcement" and he had

"numerous arrests," Pet. 12-13, but most of these articles do not even mention his name. See C. 223, 235, 241, 246, 253. The articles that contain Iervolino's photo, Pet. 12, were all published over a year before the trial. This sort of factual media coverage is inevitable in a capital murder case.

Iervolino's petition also cites Skilling, in which this Court ruled that pretrial publicity did not establish that venue should have been moved despite hundreds of articles written in the Houston market that characterized the defendant in a negative light. 561 U.S. at 382-84. This Court stated that despite this intemperate commentary, the media coverage overall had been objective and unemotional. Id. The Court further noted that voir dire would reveal if the pretrial publicity had prejudicially tainted the venire. Id. at 386-87. Here, Iervolino failed to establish that the media coverage in this case so inflamed or saturated the community as to create a presumptively prejudicial situation. As noted above, only 18 of the 70 veniremembers had heard anything about his case, and of those eighteen, only six warranted removal for cause.

C. Time of coverage in relation to the trial.

The ACCA also noted that in Iervolino's case, the "majority of the articles that defense counsel presented were written before an arrest had been made in the case." Iervolino, 2023 WL 5316682, at *9. Conversely, Rideau involved a trial that "swiftly followed a widely reported crime." Skilling, 561 U.S. at 383; cf. Irvin v. Dowd, 366 U.S. 717, 725 (1961) (finding actual prejudice after "barrage" of publicity "unleashed against [the defendant] during the six or seven months preceding his trial").

Iervolino's petition does not even discuss this Skilling factor other than to note, Pet. 11, that the two-year period between Iervolino's crime and trial was shorter than the four years in Skilling, where this Court concluded that due process did not require a change of venue.

D. Media influence on trial or verdict.

Lastly, there is no indication that the media coverage influenced the trial or verdict. Again, 52 out of 70 prospective jurors—nearly three-quarters of the venire—had not heard about the case through media coverage. Iervolino, 2023 WL 5316682, at *9. And of the 12 prospective jurors who remained after cause challenges, none of them had any "preconceived view of the case based on their exposure to any type of media coverage." Id. Iervolino does not meaningfully press any claim of error in the finding that his jury was impartial, nor would such a fact-bound claim warrant this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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