

MAINE SUPERIOR COURT
LOCATION: ROCKLAND
Docket No. KNOCD-CR-21-185

MOTION TO CHANGE VENUE

MALCOLM STEWART,
Defendant

NOW COMES Mr. Stewart by and through counsel, and hereby moves
court to change venue in this matter pursuant to M.R.Crim.P. 21(b) stating as
as follows:

PROCEDURAL POSTURE

Mr. Stewart was indicted by a Grand Jury on March 25, 2021 of two counts of theft by deception (Class B), 17-A M.R.S. S 354. Mr. Stewart was arraigned by video on May 20, 2021. Mr. Stewart pleaded ‘not guilty’ and the court set a

\$50,000 unsecured bond. A Dispositional Conference was scheduled for July 22, 2021 and later continued until September 30, 2021 as Mr. Stewart tried to obtain representation.

On February 8, 2022, undersigned counsel entered an appearance on behalf of Mr. Stewart. A Judicial Settlement Conference was held on April 21, 2022. Prior to the judicial settlement conference, undersigned counsel had submitted a conference memorandum under seal. The Government had also submitted a conference memorandum, with a summary that appeared in the local press. <https://knox.villagesoup.com/2022/05/04/state-seeks-five-year-in-prison-for-man-accused-of-bilking-homeowners/> . This Court conducted a conference on June 6, 2022 where the venue issue was raised.

INDICTMENT

The Indictment charges Mr. Stewart with two counts of Theft By Deception under 17-A M.R.S. §354(1)(B)(1).

BACKGROUND

Castle Builders, Inc. opened in 2017 employing office staff and laborers. Malcolm Stewart, the founder, had a background in sales but not as much in construction. He was the salesman for Castle Builders, Inc. and his wife, Elizabeth managed the finances. Castle Builders, Inc. offered residential construction and renovation services. At the start, Castle was highly successful and generated repeat business.

As with many construction businesses, there were errors made in accounting and related to the work force, to name two areas. Work crews saw consistent turnover. But at no point did Castle ever fail to pay a worker, even though some work checks initially had insufficient funds. As time progressed, Castle saw its income dwindling and its bills expanding as evidenced by the monthly summary. Castle hoped to secure cash infusion by bringing in a financial partner(s), but were unable to close any deal. Finally, without money to pay the employees, Mr. Stewart closed his business on September 8, 2019, leaving behind all of his business and main personal assets. Both he and his wife filed for bankruptcy. Subsequently, Mr. Stewart was employed as a car salesman, sometimes working 60 hours per week. His wife has worked stocking shelves at a store and is currently a public high school custodian. Currently, Mr. Stewart is

unable to work for any significant periods due to health problems. He receives dialysis three times per week.

SUMMARY OF APPLICABLE LAW

A person is guilty of theft by deception if the person obtains or exercises control over property of another as a result of deception and with intent to deprive the other person of the property. 17-A M.R.S.A. § 354; *State v. Bouchard*, 881 A.2d 1130, 2005 ME 106 (Me. 2005). “The Criminal Code instructs that an '[i]ntent to deprive' includes, among other things, an intent '[t]o use or dispose of the property under circumstances that make it unlikely that the owner will recover it.' 17-A M.R.S.A. § 352(3)(C) (1983).” *Bouchard*, 881 A.2d 1130. “A person acts intentionally with respect to a result of the person's conduct when it is the person's conscious object to cause such a result.” 17–A M.R.S. § 35(1)(A) (2012); *State v. Woodard*, 2013 ME 36, 68 A.3d 1250 (Me. 2013).

MEMORANDUM OF LAW

M.R.Crim.P. 21(b) provides “[t]he court upon motion of the defendant shall transfer the proceeding as to the defendant to another county if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial in that county. The motion may be made only before the jury is impaneled or, where trial is by the court, before any evidence is received.”

It is unarguable that this matter contained much pretrial publicity within the County the alleged acts occurred.

https://www.google.com/search?q=malcolm+stewart+knox+maine&rlz=1C1GCEA_enUS985US985&oq=malcolm+stewart+knox+maine&aqs=chrome..69i57j33i160.5701j0j15&sourceid=chrome&ie=UTF-8

The pretrial publicity is only one concern. The State has named 57 persons in the indictment. It would be difficult for a jury pool within Knox County to consist of persons who had no knowledge of any of the persons who are alleged to be victims in this matter.

Decisions on a motion to change venue are a matter for the sound discretion of the Court. *State v. Beckus*, 229 A.2d 316 (1967). The power to change venue should be exercised with caution. *Id.* In terms of this case, the respondent must show such widespread prejudice throughout Knox County as would interfere with the obtaining of an impartial jury or with the calm orderly conduct of the trial. *State v. Hale*, 172 A.2d 631 (Me. 1961).

The United States Supreme Court addressed this issue in the case that inspired “The Fugitive,” *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 1522 (1966). In that matter, the Court noted the incredible power of the press stating “there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.” *Id.*

While it can be argued that the initial pretrial publicity had abated, the recent article is from April of 2022¹ and relates not only to the charges against Mr. Stewart but also the sanction the Government is seeking.² This creates a probability of prejudice. *Beckus*, 229 A2d. 316, 318 (one factor for the Court is whether the pretrial publicity included requests or demands for action by the authorities against the respondent). See also *Estes v. State of Texas*, 381 U.S. 532, 542-43, 85 S. Ct. 1628, 1632 (1965) (“Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.”)

WHEREFORE, Mr. Stewart seeks that this honorable Court change venue of this proceeding together with any and all other relief that is fit and just.

Dated this 22nd day of September 2022 at Portland, Maine.

¹ Recent articles also appeared related to the Government’s civil case against the Defendant. See https://www.google.com/search?q=malcolm+stewart+civil+judgment&ei=_1orY7H2A6GqptQPwsaNgAc&ved=0ahUKEwjx8fnpxKb6AhUhlYkEHUjA3AQ4dUDCA4&uact=5&oq=malcolm+stewart+civil+judgment&gs_lcp=Cgdnnd3Mtd2l6EAMyBQghEKABMgUIIRCgAToKCAAQRxDWBBCwA0oECEYYAEoECEYYAFD4AVj4AWDDBGgBcAF4AIABa4gBa5IBAzAuMZgBAKABAcgBAsABAQ&scient=gws-wiz

² Inexplicably, the Government did not file the Memorandum under seal.

Respectfully submitted,

/s/David J. Bobrow

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CERTIFICATE OF SERVICE

I hereby certify that on this date that a copy of this Motion was provided, via email and mail, to the Office of the Attorney General through the Assistant Attorney Generals in this matter.

Date: 09/22/2022

/s/David J. Bobrow