MSC Opinion: Venue for prosecution of criminal case is proper in a county whether any one of the acts was committed

2. August 2010 By Madelaine Lane

On Saturday, July 31, 2010, the Michigan Supreme Court issued its opinion in *People v. Houthoofd*, Case Nos. 138959 & 138969. Justice Hathaway wrote for the five-member majority reversing the Court of Appeals in part and restating the defendant's conviction for solicitation to commit murder. The Court held that while venue was not proper in Saginaw County for defendant's trial on the charges of solicitation to commit murder and witness intimidation, such error was harmless and did not warrant vacation of the defendant's conviction. The Court remanded the matter back to the Court of Appeals for consideration of whether the trial court failed to articulate substantial and compelling reasons for upwardly departing from the sentencing guidelines when imposing defendant's sentences on both offenses.

This case concerned three separate criminal offenses: 1) obtaining a tractor, tiller, and trailer by false pretenses; 2) intimidating a witness; and, 3) soliciting defendant's cellmate to murder Edward Wurtzel, Jr. Defendant's criminal spree began in April 1998 when he appeared at Wurtzel's store in Saginaw County to rent a tractor, tiller and trailer. At that time, Mr. Houthoofd identified himself as Colin Francis and presented the store with the driver's license of Mr. Francis. In reality, Mr. Francis was a co-worker of the defendant. The defendant never returned the equipment.

In November 2001, the defendant was arrested for trespassing on his employer's property. A search of defendant's car and home revealed the missing farm equipment, Mr. Francis's missing driver's license, and two pipe bombs. Mr. Wurtzel picked him out of a line-up at the police station. The defendant was subsequently arrested and incarcerated at Arenac County Jail. While incarcerated at Arenac County Jail, the defendant offered his cellmate, Dotson, money to kill Wurtzel at his rental equipment store in Saginaw County. Dotson later revealed the plan to police and cooperated with them in their investigation.

A few days before the scheduled trial on the false pretenses charge, the investigating detective received a page from an unknown number. He returned the phone call and heard the defendant on the other end. The detective believed that the defendant was threatening to kill him or his family. The denfendant was subsequently charged with witness intimidation and solicitation to commit Wurtzel's murder. The jury convicted the defendant on all three charges. He was sentenced to five to ten years imprisonment on the false pretenses conviction, ten to 15 years for the witness intimidation conviction, and 40 to 60 years on the solicitation to commit murder conviction. The Defendant appealed his conviction. Initially the Court of Appeals ordered the case remanded to the trial court

for consideration of the defendant's motion for a new trial. On remand, the trial court denied defendant's motion.

Once again, the defendant appealed the trial court's decision alleging that venue was improper, the trial court committed evidentiary errors, and prosecutorial misconduct. In an unpublished opinion, the Court of Appeals held that although the defendant and the detective witness whom he attempted to intimidate were not in Saginaw County when Houthoofd called the detective, the effect of the intimidation was directed toward the case against the defendant pending in Saginaw County Circuit Court. Accordingly, the Court of Appeals held that venue in Saginaw County was proper on the witness intimidation charge. But because the requisite acts of Houthoofd's solicitation to commit murder occurred outside Saginaw County, the Court of Appeals held that venue was not proper in Saginaw County for that charge. The Court of Appeals upheld Houthoofd's conviction for witness intimidation but reversed his conviction for solicitation to commit murder.

The Supreme Court disagreed and concluded that venue was not proper in Saginaw County for either the witness intimidation or solicitation charges. Although Court of Appeals decided this case under MCL 762.8, the statute dictating venue where a felony consists of two or more acts, the Supreme Court held that neither offense at issue in this case required two or more acts. Nonetheless, the Court examined the Court of Appeals' ruling under this statute and concluded that the MCL 762.8 case law applied equally in this case.

In reaching its conclusion, the Court overruled *People v. Flaherty*, 165 Mich. App. 113; 418 N.W.2d 695 (1987) and *People v. Fisher*, 220 Mich. App. 133; 559 N.W.2d 318 (1996). Under this line of cases, the Court of Appeals had interpreted MCL 762.8 broadly, ruling that when an act done in preparation of a felony has effects elsewhere that are essential to the offense, venue is proper in the place where the act has its effects. Instead, the Court agreed with the Court of Appeals' analysis in *People v. Webbs*, 263 Mich. App. 531; 689 N.W.2d 163 (2004), and concluded that the plain language of MCL 762.8 requires an act to be done in the perpetration of the felony without regard to where the effects of the crime are felt.

In this case, the Court concluded that no act was committed in Saginaw County. Therefore, venue was not proper in Saginaw County for the charge of witness intimidation of solicitation to commit murder. However, the Court further concluded this is a statutory error, and not a constitutional error, and it is therefore subject to harmless error analysis under MCL 769.26. Further, the Court noted that under MCL 600.1645, no verdict or judgment can be set aside, reversed, or a new trial granted for any procedural error unless the error results in a miscarriage of justice. In this case, the Court concluded that the defendant provided no argument that the outcome of his trial would have been different if he had been prosecuted in a different county. Therefore, the Court concluded there was no miscarriage of justice and the defendant's conviction could not be overturned pursuant to MCL 600.1645.

Without discussion the Court remanded the matter back to the Court of appeals for consideration of whether the trial court failed to articulate substantial and compelling reasons to depart upward from the sentencing guidelines when imposing the defendant's sentence on these two convictions.

Justice Corrigan concurred with the majority but wrote separately to state that she believes MCL 600.1645 requires any venue challenges in criminal cases to be resolved through interlocutory appeal. Justice Kelley dissented for the reason that she believed the majority erred in applying MCL 600.1645 to criminal cases and because she concluded that *People v. Hall*, 375 Mich. 187; 134 N.W.2d 173 (1965) required the prosecution to prove venue beyond a reasonable doubt and therefore the venue error was not subject to harmless error analysis. Justice Cavanagh authored a separate dissent and noted that he disagreed with the majority's application of MCL 600.1645 and their decision to extend the harmless error analysis to claims of improper venue.