SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

CR 72787

VS.

Supreme_Court

No. CRIM

24557

KEVIN COOPER,

Defendant-Appellant.

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

HONORABLE RICHARD C. GARNER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

1/d. 22

APPEARANCES:

For Plaintiff-Respondent:

HON. JOHN K. VAN DE KAMP
State Attorney General
Department of Justice

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For Defendant-Appellant:

IN PROPRIA PERSONA

VOLUME volumes.
Pages 1022 to 1038, incl.

JILL D. MC KIMMEY, C.S.R., C-2314 and BRIAN V. RATEKIN, C.S.R., C-3715 Official Reporters

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
                   FOR THE COUNTY OF SAN BERNARDINO
 2
    THE PEOPLE OF THE STATE
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    OF CALIFORNIA,
               Plaintiff,
5
                                         NO. OCR-9319
        vs.
                                         VOLUME 13
    KEVIN COOPER,
                                         Pgs. 1022-1038, incl.
 7
               Defendant.
8
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                     REPORTER'S DAILY TRANSCRIPT
11
              BEFORE HONORABLE RICHARD C. GARNER, JUDGE
12
                  DEPARTMENT 3 - ONTARIO, CALIFORNIA
13
                        Wednesday, April 18, 1984
14
    APPEARANCES:
15
                                  DENNIS KOTTMEIER
    For the People:
16
                                  District Attorney
17
                                  DENNIS KOTTMEIER
                                  District Attorney
18
                                  BY: JOHN P. KOCHIS
                                        Deputy District Attorney
19
                                  DAVID MC KENNA
    For the Defendant:
20
                                  Public Defender
                                  BY: DAVID NEGUS
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                                        Deputy Public Defender
22
23
24
                                  BRIAN RATEKIN
    Reported By:
25
                                  Official Reporter
                                  C.S.R. No. 3715
26
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Wednesday, April 18, 1984 SUBJECT INDEX

Chambers discussion

SATE TENNER

When the proceedings will recommence Pretrial issues remaining

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ONTARIO, CALIFORNIA; WEDNESDAY, APRIL 18, 1984; 9:51 A.M.
                                   HON. RICHARD C. GARNER, JUDGE
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    DEPARTMENT NO. 3
3
    APPEARANCES:
            The Defendant with his Counsel, DAVID
            NEGUS, Deputy Public Defender of San
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            Bernardino County; DENNIS KOTTMEIER,
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            District Attorney of San Bernardino
7
            County and JOHN P. KOCHIS, Deputy
8
            District Attorney of San Bernardino
9
            County, representing the People of the
10
            State of California.
11
            (Jill D. McKimmey, C.S.R., Official Reporter, C-2314
12
             Brian Ratekin, C.S.R., Official Reporter, C-3715.)
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             (Whereupon the following proceedings were
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            held in chambers.)
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            THE COURT: All right. Good morning. Mr. Negus,
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    Mr. Kochis, Mr. Kottmeier, Mr. Cooper are all present.
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            I've got a -- a number of questions to ask you
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    two people. But perhaps the -- the biggest one first, is
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    there any change of position?
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            MR. NEGUS: Your Honor, I would request until Monday
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    to make up my mind if there's any change in position or not.
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            THE COURT: That's all right, then. That's okay.
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            MR. KOCHIS: I was going to --
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            THE COURT: I would like to maybe clarify some other
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things in the meantime. But I sure don't want to push you to any precipitous decision.

Yes, sir?

MR. KOCHIS: Your Honor, I believe in previous appearances in court, specifically in the transcript which is contained on March the 2nd and March the 5th of 1984 -- I was going to give the Court pages and lines of that transcript.

It's March -- the transcript is March 2nd and 5th, starting on Page 191, Line 11 through Line 26, all of --

THE COURT: Lines 11 through 26, that's the March 10th transcript?

MR. KOCHIS: March the 2nd and March the 5th -- the transcript has two dates on it; it's a very short transcript - all of Page 192; Page 193, Lines 1 through 6. Page 196, Lines 15 through 17. And then March the 14th of 1984, Pages 496 and 497.

And it's our contention that on those dates there was an agreement by the parties in this case. And on the 14th transcript, there was an agreement and a waiver by Mr. Cooper, a waiver that jury selection would not start until July the 2nd, a waiver that, unless I interposed an objection, jeopardy would start on April the 16th, with pre-trial motions. And it's our position that this Court has the power to hold us to that agreement.

THE COURT: Well, I think it's premature. I -
MR. KOCHIS: I gave the Court those pages because
that is our position today, and that will be our position on

Monday, and it's our position tomorrow.

THE COURT: All right. Suppose -- suppose you're right. Suppose I read it and say that that's a firm jury trial date which maybe, off hand, you know, there's reason to dispute it.

MR. NEGUS: There's no doubt that we have waived time until July 2nd.

THE COURT: That's not the question --

MR. NEGUS: Not disputed.

THE COURT: -- if I understand the question right now, though. And you may be begging the question then.

MR. KOCHIS: The second question is we also stipulated as to what would take place on the 16th. And it was not contingent anywhere in the transcript on what would happen on the location of the venue. So I'm saying there's two prongs.

THE COURT: What are you --

MR. NEGUS: I agree that -- that the anticipation was that motions would begin on the 16th. I am not necessarily interposing any objection -- if I take -- we could take two positions. If I -- if I agree to go ahead with what we originally discussed, which would be to stipulate that all motions be done in this county, which that stipulation has not yet been made, then there would be -- I would -- well, let me try --

MR. KOCHIS: I think the stipulation has been made,

but I agree with Mr. Negus. If he turns around and in five or ten minutes or some later date re-agrees to the stipulation, then we start right here and there is no problem.

MR. NEGUS: Fine. Without trying to push the District Attorney into any boxes, if I stick with the position that I articulated yesterday that I'm not agreeing to anything, of course, you can still overrule me and find that he's correct and go ahead and do it here or go ahead and do it in San Diego without picking a jury first. Whichever way it comes out, you can do that.

My position is going to be that before -- well, before I decide what my position is on whether I agree to do it here or not, I would like to read the transcript of our in-chambers conversations which were not transcribed, because that --

THE COURT: Which -- which in-chambers conversation?

MR. NEGUS: The ones when Mr. Cooper was not present where we discussed the list and procedures of it.

MR. KOCHIS: When the names started to come down from the Judicial Council, the tentative names.

THE COURT: You have a date on that?

MR. NEGUS: I believe -- have we -- I thought you ordered those to be prepared yesterday, and --

THE COURT: How far along are you?

MR. NEGUS: -- Mrs. McKimmey told me that she could

do it if we weren't in session these two days.

MR. KOCHIS: She would have them, hopefully, by Friday.

THE COURT: Well, Counsel, I'll send her to your office with her tape and let her read it to you, let you take notes on it. And let's don't delay the two days, if that's what you need.

MR. NEGUS: Well, the other thing --

THE COURT: Then she can go back and continue working on it whenever she can.

MR. NEGUS: That's not going to do me any good,

Judge. I've got to be able to see it and analyze it. I can't

-- I can't -- I mean, I'm not going to sit there for an

hour and a half while she dictates it to me, either.

THE COURT: It wasn't that long.

MR. NEGUS: Yes, it was.

REPORTER MC KIMMEY: Can I say something. I have probably three-quarters of it dictated right now. The typist is typing it now. It probably could be ready late this afternoon, I would guess.

MR. NEGUS: The whole thing, all three days?
REPORTER MC KIMMEY: I think so.

MR. NEGUS: Fine. Then that -- I still would like to have until Monday because of administrative problems.

Or, not problems, but just administrative things in my office.

I've been requested by Mr. McKenna to -- to ask that the

matter go over until Monday.

THE COURT: Any -- you have two witnesses, I appreciate, standing by. As far as the Court is concerned, I most likely could perhaps even try a small jury trial, another matter in the meantime. There is a problem with your witnesses, problem with utilizing the court and a problem with the media and legitimate people that want to know, and we're unable to tell them for certain. But you have a particular problem that cannot be surmounted?

MR. KOCHIS: I'll be very candid with the Court.

My primary concern is how the passage of time, even a day or two, may affect the mental state of this Court in deciding what to do. If the Court can assure me that the decision that was made yesterday will remain the Court's decision, I'm inclined to go over until Monday.

THE COURT: Well, it never occurred to me that I would change my mind as far as the venue order is concerned. Not at all. Do you feel that you have some concern about that?

MR. KOCHIS: Yes.

THE COURT: Well, I don't. I have -- I have absolutely no concern about that at all. I'm not one to be pressured or intimidated, I don't think, in the slightest. And I can't conceive of any other reason why I might do that.

MR. KOCHIS: Then I can handle my witnesses.

THE COURT: And I can otherwise utilize myself --

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I'd like to still get some questions answered so I understand if you --

MR. NEGUS: I have one more thing, just -- I don't want to mislead you as to what --

THE COURT: No, that's all right.

MR. NEGUS: -- I'm doing. I also, whenever I resolve the issue of what my position is as to where we -- as to where we hear motions, I will be asking for a -- a slightly more additional time. I have by statute only 15 days from Monday to prepare a Writ of Prohibition. And the evidence that we're about to start on, if we do start on it, is highly technical in nature. I don't think I can do both at once. So I would need, I believe, at least until the middle of -- I would be asked -- I will tell you that some length of time; I'll be asking for an additional -- until at least the middle of the week of the 25th, if not the 26th, in order to prepare that writ.

THE COURT: Let me pass the subject for a second.

Let me make you aware of some of the -- my questions.

You know, I have received reassignment orders from my presiding Judge to serve in San Bernardino. Another Judge has -- Judge Fenton Jones is coming over to take my place, all to occur on April 30th, today being the 18th. There's that uncertainty and concern. Can you tell me what pretrial subjects remain issues. Forgetting when, where --

MR. KOCHIS: There's --

THE COURT: -- for the moment, what remains?

MR. KOCHIS: There is a Kelly-Frye issue on the reliability and validity of enzyme typing. I anticipate four to five days of testimony on that at a minimum. There is a motion to suppress certain evidence and possibly dismiss the information based on the case of People vs. Hitch, which Mr. Negus anticipates will take three and a half to four weeks.

MR. NEGUS: Or more.

MR. KOCHIS: Or more. There is then the motion on --

THE COURT: On?

MR. NEGUS: Of testimony.

MR. KOCHIS: Of testimony.

THE COURT: On?

MR. KOCHIS: On what the officers seized, what they didn't seize, and what they did with the stuff they did seize. He's probably going to be calling 15 to 20 deputy sheriffs to the stand --

MR. NEGUS: If not more.

MR. KOCHIS: -- in addition to three or four criminalists.

MR. NEGUS: If not more.

THE COURT: It seems like this will probably be -that will be about the third time we've gone into this issue.

It's never been ruled on specifically by ae, but you -- you
examined on it at great extent in the Preliminary Hearing.

MR. NEGUS: It's a credibility issue.

THE COURT: You have cited the issue to me but not had testimony in Superior Court on it.

MR. NEGUS: It's a credibility issue just like a 1538.5. I don't think we can possibly do it on the transcript. Mr. Kochis, I believe, agrees.

THE COURT: One and two. Is there a third?

MR. NEGUS: There will be numerable -- innumerable --

MR. KOCHIS: The next motion, I would anticipate, is a motion as to prior acts, the 1101 Motion that I filed a response to. Mr. Negus will want to litigate that and have a determination from the Court as to what we can admit, what we cannot admit.

MR. NEGUS: There will -- yes. There -- I'm not sure that that's the actual order that I will be requesting the Court to consider them. There will be also motions in limine with respect to the testimony or lack of testimony of Joshua Ryen. There will be motions in limine with respect to the testimony of James Taylor. There will be motions in limine with respect to various other evidentiary matters like photographs; a whole bunch of -- a whole bunch of shorter motions.

MR. KOCHIS: The typical motion you get, Judge, in a case where there's a murder case and there are color photographs is to which photographs will be admitted and how many I intend to file.

THE COURT: Yes. Those are all routine in limine-type motions.

MR. NEGUS: Right. Those are the ones we're talking about, except I think that -- that the -- with respect to Joshua Ryen and James Taylor will involve taking of testimony in some complexity, some length. The motions with respect to the prior acts may involve some complexity and some length. Prior -- while we're doing --

MR. NEGUS: I'm not sure. I -- prior to that, I'm going to be filing a request as soon as I have a chance to do it, and I've, you know, been writing as fast as my -- as I can. But now I feel that the most -- the most important thing to do is the writ within 15 days. I'm going to have that for awhile. I have motions to -- to discover certain things which are necessary before we get to some of these other motions. We also may have motions with respect to the testimony of a person by the name of Phillip Walz in limine.

THE COURT: Who is he?

MR. NEGUS: He is the Robin Hood Murderer in -- in San Bernardino who -- I have been provided discovery, Mr. Cooper has alleged to have made some statements from him -- to him. And the Prosecution is unwilling to warrant that they won't call him. So I'm going to be making some motions with respect to him.

Before we get to that, if that -- we'll have motions

with respect to discovery of innumerable matters about him.

There will be motions --

THE COURT: Mr. Negus, I hold up my hands in protest.

MR. NEGUS: Okay.

THE COURT: There's so much, it's hard --

MR. NEGUS: There's a lot.

THE COURT: -- for each and every one of us three respective positions here to anticipate down the road where we're going. But I can anticipate for your position, for gosh sakes, if you maintain the position you initially had yesterday and we have to go to San Diego to start hearing these motions, you're going to incur the wrath of the Board, the -- the Judge that approves your expenses, the trial Judge, just about everybody, the media people. People are going to say, "How the heck can they do that?"

MR. NEGUS: Well, I understand, Judge. But the -- and I'm sure that Mr. Kottmeier has -- has already --

THE COURT: It's a PR -- it's a PR problem I would think that you would have --

MR. NEGUS: Mr. Kottmeier has already advised my supervisors in no uncertain terms, I understand, of that PR problem.

THE COURT: I know nothing of that.

MR. NEGUS: And I am well aware of the PR problems involved. On the other hand, it's my belief that the Court committed error yesterday, and it's my belief that Mr. Cooper cannot get a fair trial in San Diego. And it is my -- I am

concerned about the legal ramifications of any agreements 2 on my part with respect to the workings of the change of venue statutes because I intend to make a motion for change 3 of venue out of San Diego County once we get in there. And I have not worked out in my mind all the legal ramifica-5 tions of that. I know Mr. Kochis is an able advocate. 6 And I don't want to put myself in any legal traps with 7 respect to putting myself at any disadvantage towards making R change of venue motions. 9

My purpose is not to incur greater expense, because, as I indicated before, I think we have done -- gone out of our way, unlike the Prosecution in this case, to not incur expense. We were willing to transfer the case to downtown Los Angeles at -- which would have saved us lots of money. Mr. Kottmeier was the one that rejected that for, I think, reasons having to do with racial composition of the jury there. And --

MR. KOCHIS: Your Honor, we're re-litigating now the motion as opposed to what we're doing next.

MR. NEGUS: No. I think --

MR. KOCHIS: And I would object to that.

MR. KOTTMEIER: I also object to the reference that Mr. Negus made and don't want to get involved in answering, but, on the other hand, I don't like the insinuation that he's making with no foundation of proof.

THE COURT: Well, I'm not a party to it. It was -- it

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was done before I ever came involved -- became involved in the case, if it was done at all. And it's not borne upon any decisions that I have made and that's a justification that you can hang your hat on or they can protest, whatever. It's just not going to affect anything that I do as far as I can see.

Okay. I just want to --THE COURT: I know from my own point of view that to me Los Angeles was absolutely the worst place of the four choices that I had based upon the evidence that I received, its proximity to the scene and all the other factors. that's why I simply believe that I was not about to put it there, unless there was a -- a very, very clear stipulation on the record, waiver of the defendant and all of that.

MR. NEGUS: We were --

MR. NEGUS: Fine.

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THE COURT: So that's --

MR. NEGUS: We were perfectly willing to do that, Your Honor, and so indicated.

THE COURT: But it takes two to tango in all of this. MR. NEGUS: Mr. Cooper was perfectly willing to -to agree to downtown Los Angeles as well.

THE COURT: I don't mean you two. I mean you and the Prosecution.

MR. NEGUS: I don't see what -- I don't see, you know, how they could be prejudiced by going to downtown Los Angeles except that they don't want to have a lot of

blacks on the jury.

THE COURT: The other factor that I -- I -- I'm really not urging downtown Los Angeles in any way, and I would be reluctant even -- well, it's -- I don't know what I would do if the Prosecution likewise agrees to it.

MR. NEGUS: Well, they're not going to.

THE COURT: But we're taking the only courtroom that they've got down there, from what I understand. I have had no contact with Judge George over there at all or with any of the judges from any of the four counties. I have had no personal contact.

I feel compelled now, however, on another point, to make a phone call to the presiding Judge of San Diego and tell him at least to -- I'll let him know more later on about the uncertainties that we're having, because they're down there wondering when they're going to have a procession or something.

MR. KOTTMEIER: He's on vacation until Monday, Your Honor.

THE COURT: I beg your pardon?

MR. KOTTMEIER: Judge Low of San Diego is on vacation until Monday.

THE COURT: Okay. Well, a lot of these things have to do with when do you want to appear in San Diego, how long the appeal process is going to take, are you going to seek stay orders, how long expert in limine motion -- I prepared

the necessary orders in case you go the other way, an Order of Transfer of Action to San Diego County. And this is somewhat technical, and I can give you each copies of orders that may or may not later become in that final form. They're just --

MR. NEGUS: Well, I -- I think I need to have you do the order so I can appeal from it. I mean, whether we do motions in San Bernardino or we do motions in San Diego, if I'm going to appeal, I need to have the order done. I don't -- I don't see -- the Court of Appeal doesn't like to take appeals from non-orders.

THE COURT: We can talk about it Monday.

I hand you copies of the Proposed Order of Transfer of Custodial Defendant, Transfer of Action, under the applicable rules.

They look somewhat similar.

One other thing, gentlemen. I gave you my vacation list, and I don't recall offhand or have it before me.

MR. NEGUS: The 7th through the 11th --

THE COURT: I think -- I think --

MR. NEGUS: -- approximately.

THE COURT: -- I don't have July.

MR. KOCHIS: May, Your Honor, you're going to be gone, from the 7th to the 11th.

THE COURT: But my -- my --

MR. NEGUS: July 16th, the week of July 16th.

THE COURT: My -- my time has changed somewhat.

I haven't told my clerk or anybody about that.

It would be the week of the 4th now.

MR. NEGUS: July 4th?

THE COURT: Yes. So I would be gone 2, 3, 4, 5 and 6 as opposed to, I believe, 9, 10, 11, 12 and 13. I don't have my schedule, and I'm out of chambers. But --

MR. KOCHIS: Your Honor, the problem that unfortunately creates is we have the stipulation that Mr. Cooper's only waived time up until July the 2nd.

MR. NEGUS: We're not going to give any problem about that.

THE COURT: This is not bound in concrete. I will give up vacation to accommodate this case if it creates any problem at any time. There's nothing exotic about my vacation.

Okay. I don't know of anything else to do now, then, except call off your witnesses. I'm going to try to, of course -- I don't want to lie fallow. I'll try and move on with other cases. And we had -- I had in fact two cases stand by. And I don't know the status of those. But I've got one custody defendant and one non-custody backed up, presumably, and a jury set for 1:30 this afternoon. So it will be Monday or as soon thereafter as I can free up from the other case.

MR. NEGUS: I would suggest that we have a conference

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Monday morning, and at that point --

THE COURT: You can have a conference at any time.

MR. NEGUS: Right. And I'd like to have Mr. Cooper brought over Monday morning for the conference.

THE COURT: All right.

MR. NEGUS: And at that point in time, I will tell you what my position is going to be with respect to agreeing or -- or remaining silent or objecting to doing motions here.

THE COURT: Okay. All right. We'll leave it set, then, for Monday, I suggest, 9:30.

MR. KOCHIS: And then I will have one local expert on call for that morning. He can be here within 45 minutes. And if we start, I'll be prepared to start on Monday.

THE COURT: Okay. Okay. If he's on call. All right. Thank you.

(Whereupon the proceedings concluded at 10:13 a.m.)