

Murder trial delayed

Judge considers change of venue request

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By Rich Bauer, Managing Editor

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The jury trial for a Loogootee teen charged with murdering a neighbor couple was pushed back at the last minute due to a strategy change by his attorneys. And the judge overseeing the trial for Clifford Baker is expected to decide by Friday whether the teen's murder trial will still be held in Fayette County. Baker, 16, is charged with first-degree murder for allegedly murdering Mike Mahon and Deb Tish in their home in the early morning hours of Aug. 4, 2010. He is also charged with home invasion for allegedly entering another nearby home and attacking one of its residents.

Though he was 15 at the time of the offenses, Baker is being tried as an adult. At a court hearing last Thursday morning, Baker's attorneys informed Judge Michael McHaney and Fayette County State's Attorney Stephen Friedel that they would now be presenting a defense that includes evidence of insanity and involuntary intoxication. It was an announcement that both the judge and the prosecutor did not like hearing. McHaney told Baker attorney Mark Wykoff that in a preliminary report, one of the defense team's expert witnesses said she believed that Baker "met the definition for insanity in the first murder, but not the second.

"You were put on notice, weren't you?" McHaney said. "Perhaps," Wykoff said, "but as you stated, that was a preliminary report." In her final report, which the defense team received the day before the hearing, that expert witness offered the belief that Baker has "a mental defect or mental illness."

Wykoff said that when the issue was discussed in court the previous week, when McHaney ruled on a prosecution motion related to an insanity defense, the judge "made a ruling, and I didn't have a chance to respond.

"I strenuously objected to the granting of that motion, so I waived nothing," Wykoff said. He told McHaney that the defense team believed "at that time," prior to receiving the final report, that it would not present an insanity defense. Wykoff said that if the defense team did not consider such a defense, "it may be grounds for (an appellate court ruling on) ineffective assistance of counsel." McHaney said, "If I grant this, will it not necessitate the continuance of the trial?" "Yes," McHaney said, "if the state wishes to get its own expert (to counter the defense evidence and testimony)."

Baker's trial was set to begin this Tuesday morning with the selection of jurors. On the defense request asking to allow an insanity defense, Friedel said, "This is wrong. Dr. (Marcia) Slomowitz has an opportunity to deal with this issue over a month and a half ago.

"She was specifically asked to address this issue," Friedel said. An opinion already offered on the issue, he said, stated that Baker has not had a problem

(mentally), “but for the Cymbalta. “If he’s not taking Cymbalta, he’s not psychotic,” Friedel argued.

Since Baker’s arrest for the murders, “He’s not on Cymbalta, and not showing signs of psychotic behavior,” he said. Presenting evidence on both a mental illness and Baker’s prescribed use of Cymbalta could cause confusion among jurors, Friedel said, citing different parts of Slomowitz’s report.

Wykoff countered, “I think it would be grossly unfair to take snippets of the report and use it as a sword.” Friedel’s response – “I don’t want to get into what’s grossly unfair.” He said the report includes conflicting information.

Wykoff said, “My understanding is that it is, in fact, a mental illness in and of itself,” to which Friedel said, “It is only the drug use, in combination with voluntary intoxication.”

In a videotaped confession that he gave several hours after being taken into custody for the murders, Baker said that he had ingested more than the prescribed amount of Cymbalta, as well as some alcohol and some marijuana. Friedel said that he had an opportunity to have Baker examined and to obtain an expert witness for the insanity issue, “But all along, I am proceeding, I am told, ‘We’re not going to do this (insanity defense).’

“Then, they come in at the 11th hour and say, ‘By the way, we are going to do this,’” Friedel said. “And that’s exactly what you got,” McHaney said. “The state is prejudiced by this in a number of ways,” the judge said. “Should I proceed with one boot on or ask for a continuance that I don’t want?”

While noting that he understood the inconvenience that a delay in the trial would cause, Wykoff said, “We have to focus on” the fact that Baker stands “to lose his liberty for all of his wordly life.” In grant the defense request, McHaney said, “The defendant is not entitled to a perfect trial; he is entitled to a fair trial.

That is the bedrock of our judicial system.” To not grant the defense motion “out of convenience,” McHaney said, would be “blatant abuse” of his authority and would likely result in an appellate court overturning a possible conviction. “I don’t have any choice, in my opinion,” McHaney said.

At the close of Thursday’s hearing, McHaney read a letter from a potential juror in which that person stated that she knew the family of the victims in this case and didn’t think she should be considered as a juror.

“We have at least five of these, and maybe more,” McHaney said, talking about the possibility of having to move the trial to another county. It would be “an unmitigated disaster to go through all of this and then run out of jurors,” the judge said. Discussion on the issue continued at a hearing this Tuesday, when McHaney considered the defense team’s renewed motion for a change of venue. Friedel said concerns about getting enough jurors could be addressed by increasing the pool of juror candidates from 60 to 100. “There is no way we’re not going to get one (a jury) out of 100 people,” the state’s attorney said. “Fayette County is a big county,” Friedel said. “There are pockets throughout.

“There is no reason to believe we can’t impanel not only a jury, but an impartial jury,” he said.

Defense attorney Monroe McWard argued, "I think it would be a terrible mistake not to move this." Defense arguments have contended that there has been extensive, prejudicial press coverage, but Friedel argued, "I don't think there has been inflammatory press, and I don't think people who have information (on the case) have (necessarily) drawn a conclusion."

McHaney said he would make a ruling on the change of venue request by Friday, at which time a new trial date could be set.

Also at Tuesday's hearing, McHaney ruled on several pretrial motions, including one in which the prosecution asked that one of the defense's expert witnesses be limited in his testimony.

McHaney granted a prosecution motion stating that a pharmacologist can testify about drug interaction, but not about Baker's state of mind on Aug. 4 of last year.

During the discussion on Baker's use of Cymbalta, and possibly Xanax, on the evening of the murders,

McWard began to talk about the destruction of a blood sample obtained from the teen. McHaney interrupted, telling McWard that this is not a case where the defense can present arguments about the destruction of evidence, "in no way, shape or form.

"That dog won't hunt," McHaney said. "Sure, it (the blood sample) would be nice to have," he said, but it's not ultimately required.