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Criminal Law - 22-Year Delay Between Indictment and Trial Not Error in Absence of Demand for Trial

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crime. Continuing, the dissent maintained that to hold the defendant for contempt on the second occasion was to state a rule that would fit this particular case only. There is much merit to this contention because under the rule in this case there is nothing to restrain a prosecutor from recalling the witness to the stand any number of times and proceeding to ask the same questions in which instance the witness would be in continuing contempt of court. Where the witness is in continuing contempt, he could be sentenced for each such appearance on the stand where he refused to answer questions. That the questions were identical each time the witness was called to the stand would be of no consequence since, in the instant case, the questions were quite identical because they were so closely related.

Thus, the Supreme Court of the United States, as have various state courts, maintained that a defendant refusing to answer questions after numerous interrogatories should be in no worse position than a witness who refuses to testify at all, and who could be sentenced for only one contempt. This principle is based on the idea that purposes and policies of the law are to encourage testimony and not to discourage it by a more severe penalty where the witness takes the stand and cooperates as to all queries except one.

CRIMINAL LAW–22-YEAR DELAY BETWEEN INDICTMENT AND TRIAL NOT ERROR IN ABSENCE OF DEMAND FOR TRIAL

Defendant, in 1934, was indicted for and pleaded guilty to a charge of murder. Thereupon, he was released on bail. The case remained dormant for twenty-two years, until the acting prosecutor, in January of 1957, discovered the open indictment. On February 7, 1957 the defendant was brought to trial. During the twenty-two year interim the defendant made no demand for a trial. The defendant made a pre-trial motion to dismiss on the ground that the long delay had harassed and prejudiced him. The motion was denied. He was found guilty of second degree murder and on appeal to the New Jersey Supreme Court, the conviction was affirmed. The court, after expressing disapproval for the delay, held that the defendant should not go free merely because his trial was long delayed, where there was no evidence that he was thereby prejudiced and he had made no demand for a trial. *State v. O'Leary*, 25 N.J. 104, 135 A. 2d 321 (1957).

The United States Constitution provides that, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ."[1] Although this constitutional provision does not apply to the states, New

[1] U.S. Const. Amend. 6.

Jersey, the jurisdiction of the instant case, guarantees a speedy trial by statute and constitution.[2]

Whether the accused must make demand for a trial in order to invoke the protection afforded by the statutory and constitutional provisions, is the question which faced the court in the instant case. Although most states have statutes or constitutional safeguards similar to those of New Jersey,[3] there is a conflict of authority as to whether a demand to have a trial date set is necessary before the indictment may be discharged for want of timely trial.

The courts requiring a demand reason that the right to be discharged for lack of a speedy trial is conditional and only becomes absolute when the accused has fulfilled his duty of demanding trial.[4] The expression of the Minnesota Supreme Court in *State v. McTague*[5] is illustrative of this reasoning:

> There is really no reason for the courts to free an accused simply because a dilatory prosecutor has "gone to sleep at the switch". . . while the defendant and his counsel rest in silence. . . . The spirit of the law [statute entitling accused to a prompt trial] is that the accused must go on record in the attitude of demanding a trial or resisting delay. If he does not do this, he must be held in law, to have waived the privilege.[6]

The rationale of the opposing view is that when the accused is not brought to a speedy trial, his right to discharge is absolute and not con-

[2] N.J. Const. Art. I, § 8 (1844); N.J. Code (Tule, 1954) § 2:12-4(b), (c).

[3] E.g., Ariz. Rev. Code (1928) § 5204; Ind. (Burns Ann., 1942) § 9-1403; Iowa Code Ann. (1913) § 1042; N.Y. Code of Crim. Proc. (McKinney, 1948) § 668; Ohio Const. Art. I, § 10; Va. Code (1942) § 19-164; W. Va. Code Ann. (1913) c. 159, § 25.

[4] United States v. Chase, 135 F. Supp. 230 (N.D. Ill., 1955). The defendant was found guilty of one murder and sentenced to imprisonment. Another indictment for a murder allegedly committed at the same time remained open. Twenty years later the defendant, still serving his sentence, brought a motion to dismiss the open indictment on the ground that his right to a speedy trial was denied. During the twenty year period defendant made no effort to have his case tried. The district court noted that in previous federal decisions the courts, in general terms, stated that unless a demand is made, the right to a speedy trial is waived. However, this court pointed out that in these previous cases there was involved an action in avoidance that was more positive than mere silence or inaction. The Chase case, however, does not seem to be an absolute divergence from the previous federal cases; in qualifying their holding that the defendant may remain silent, the court pointed out the following: By the mere lapse of the twenty years a fair and impartial trial was impossible; the gravity of the charge (murder); the practical difficulties of demanding trial while the defendant was imprisoned. State v. Williams, 73 So. 2d 295 (Fla., 1954), (two year delay); State v. Lyndon, 40 Wash. 2d 88, 241 P. 2d 202 (1952), (five month delay); State v. Boynton, 143 Me. 313, 62 A. 2d 182 (1948), (one month delay); People v. Foster, 216 Mich. 247, 246 N.W. 60 (1933), (sixteen month delay); State v. McTague, 173 Minn. 153, 216 N.W. 787 (1927), (six month delay); State v. Bohn, 62 Utah 362, 248 Pac. 119 (1926), (twenty-three month delay); State v. Dinger, 51 N.D. 98, 199 N.W. 196 (1924), (six month delay); Raine v. State, 143 Tenn. 168, 266 S.W. 189 (1920), (five year delay); Weeks v. State, 160 Okla. Cr. 443, 183 Pac. 932 (1919), (two year delay); State v. Lamphere, 20 S.D. 98, 104 N.W. 1058 (1905), (one year delay); Noll v. State, 35 Ala. App. 79, 43 So. 2d 841 (1950), (eight year delay).

[5] 173 Minn. 153, 216 N.W. 787 (1927).

[6] Ibid., at 155, 788.

ditioned on any prior demand for trial, as it is the state that has breached its duty to provide a speedy trial.[7] In *Ex Parte Trull*[8] the court stated:

> The rule is that the defendant need not take any affirmative action. The duty and responsibility of providing the accused with a speedy trial is on the officers of the state.[9]

And in *Zehrlaut v. State*[10] it was said:

> [The] statute . . . casts no burden on the defendant, but casts an imperative duty on the state and its officers, trial courts and prosecuting attorneys, to see that a defendant . . . is brought to trial agreeably [with this section of the constitution and its implementary statute][11]

Although the decisions which hold no demand is necessary speak of constitutional safeguards in relation to a speedy trial, it appears that many of the cases were actually decided on the basis of a statute of limitations.[12]

The court, in the instant case, followed the rule that a demand must be made. The decision contains no discussion of the opposing view. The court did, however, express a strong opinion as to the length of the delay by saying:

> These proceedings present a remarkable chronology which we hope will never be duplicated in the annals of New Jersey criminal jurisprudence. No explanation was given, but, in lieu thereof, an apology is submitted for the unprecedented delay of nearly a quarter of a century between arraignment and prosecution. This dismaying procrastination stands as an inerasable blot on our record of the expeditious administration of criminal justice as we proudly thought it had existed.[13]

[7] People v. Prosser, 309 N.Y. 353, 130 N.E. 2d 891 (1955); Zehrlaut v. State, 230 Ind. 175, 102 N.E. 2d 203 (1951); Davidson v. Garfield, 221 Iowa 424, 265 N.W. 645 (1936) (Overruled by Pines v. District Court, 233 Iowa 1284, 10 N.W. 2d 574 (1943)); State v. Carrillo, 41 Ariz. 170, 16 P. 2d 965 (1932); Ex Parte Trull, 135 Kan. 165, 298 Pac. 775 (1931); Ex Parte Chalfant, 81 W. Va. 93, 93 S.E. 1032 (1917); State v. Rosenberg, 71 Ore. 389, 142 Pac. 624 (1914). In Shafer v. State, 430 Ohio App. 493, 183 N.E. 774 (1932) the court stated the rule that no demand for a trial must be made. However, the court held that under the circumstances the eighteen month delay was not a denial of the right to a speedy trial.

[8] 135 Kan. 165, 298 Pac. 775 (1931).

[9] Ibid., at 167, 776.

[10] 230 Ind. 175, 102 N.E. 2d 203 (1951).

[11] Ibid., at 177, 204.

[12] But cf. Shafer v. State, 430 Ohio App. 493, 183 N.E. 774 (1932).

[13] 25 N.J. 104, 110, 135 A. 2d 321, 325 (1957).

CRIMINAL LAW—WIRETAP EVIDENCE PROCURED SOLELY BY STATE OFFICIALS INADMISSIBLE IN FEDERAL COURT

The New York Police, suspecting that Benanti was dealing illegally in narcotics, obtained a warrant (in accordance with state law)[1] authorizing

[1] N.Y. Const. Art. I, § 12; N.Y. Code of Criminal Procedure (McKinney, 1948), § 813-a.