CRIMINAL PROCEDURE: THE RIGHT TO A SPEEDY TRIAL

THE ANCIENT and fundamental right to a speedy trial in criminal cases[1] is guaranteed by the federal[2] and most state constitutions.[3] Denial of this right generally entitles the defendant to a dismissal of the indictment.[4] However, under the majority rule, the defendant must demand trial or he is deemed to have waived his right to a speedy trial.[5] A recent Georgia case, *Josey v. State*,[6] illustrates the potential harshness of this rule.

In 1943, Josey was indicted but was neither arrested nor informed of the charges; no effort was made to prosecute him. In 1960, he moved for a dismissal instead of demanding a trial under the statutory procedure.[7] The motion was denied, and on appeal Josey contended that he had been deprived of his right to a speedy trial under state and federal law. The Georgia Court of Appeals affirmed the decision of the trial court, holding that Josey had neither followed the statutory requirements[8] for obtaining a speedy trial nor shown any injury from the pend-

[1] The right to a speedy trial was probably first codified in the Magna Charta, cl. 40: "To no one will we sell, to no one will we refuse or delay, right or justice." See MCKECHNIE, MAGNA CHARTA 395 (2d ed. 1914).

[2] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI.

[3] Only six states, Idaho, Massachusetts, Nevada, New Hampshire, New York, and North Carolina, do not have express constitutional guarantees to speedy trial. See Annot., 129 A.L.R. 572 (1940); Annot., 57 A.L.R.2d 302 (1958). *But see*, Comment, 5 STAN. L. REV. 95 (1952).

[4] *E.g.*, Petition of Provoo, 17 F.R.D. 183 (D. Md.), *aff'd per curiam*, 350 U.S. 857 (1955); State v. Carrillo, 41 Ariz. 170, 16 P.2d 965 (1932); *Ex parte* Mill, 66 Colo. 261, 180 Pac. 749 (1919); Zehrlaut v. State, 230 Ind. 175, 102 N.E.2d 203 (1951); State v. Chadwick, 150 Ore. 645, 47 P.2d 232 (1935); State v. Keefe, 17 Wyo. 227, 98 Pac. 122 (1908).

[5] See, *e.g.*, Shepard v. United States, 163 F.2d 974 (8th Cir. 1947); Meadowcroft v. People, 163 Ill. 56, 45 N.E. 991 (1896); State v. Beckwith, 222 Ind. 618, 57 N.E.2d 193 (1944); People v. Foster, 261 Mich. 247, 246 N.W. 60 (1933); State v. McTague, 173 Minn. 153, 216 N.W. 787 (1927); State v. Sawyer, 263 Wis. 218, 56 N.W.2d 811 (1953); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 380 (1947).

[6] 102 Ga. 707, 117 S.E.2d 641 (1960).

[7] Ga. Code § 27-1901 (1933).

[8] "Any person against whom a true bill of indictment is found for an offense not affecting his life may demand at either the term when the indictment is found, or at the next succeeding regular term thereafter, a trial; or, by special permission of the court, he may at any subsequent term thereafter demand a trial. In either case the

ing indictment. As the finding of an indictment tolled the statute of limitations,[9] Josey could be tried at any time thereafter because of his failure to demand a speedy trial. The practical result of the *Josey* decision is that the defendant must either allow the indictment to remain pending or demand the very thing he wishes to avoid—the hazard of a trial instituted on a stale indictment.

From the terms of the statute,[10] it would appear that the Georgia legislature did not intend such a result, but rather enacted the law to insure speedy trials of defendants who are arrested and confined or released on bail. Such a statute should not be taken to limit a defendant's constitutional rights, but merely to delineate the proper procedure in certain instances.[11] Moreover, the pending indictment significantly injures the defendant because of attendant anxiety, public suspicion, and police surveillance.

The minority rule does not require that the defendant demand a

---

demand for trial shall be placed upon the minutes of the court. If such person shall not be tried when the demand is made, or at the next succeeding regular term thereafter, provided at both terms there were juries impaneled and qualified to try him, he shall be absolutely discharged and acquitted of the offense charged in the indictment." GA. CODE § 27-1901 (1933).

This statute now also includes defendants charged with crimes punishable by death. GA. CODE § 27-1901.1 (1933).

Whether a defendant may demand a trial after two terms of court lies within the discretion of the trial court. The Court of Appeals suggested in the principal case that abuse of this discretion may constitute a denial of the right to a speedy trial. 117 S.E.2d at 643.

[9] GA. CODE § 27-601 (1933). Most states have similar statutes of limitations for criminal proceedings. Under these statutes, the period of limitation pertains to the finding of an indictment rather than the time of trial. See *e.g.*, CAL. PEN. CODE §§ 800, 801; N.Y. CODE CRIM. PROC. §§ 142, 144; WIS. STAT. § 939.74 (1957).

[10] ". . . If such person shall not be tried when the demand is made, or at the next succeeding regular term thereafter, provided at both terms there were juries impaneled and qualified to try him, he shall be absolutely *discharged and acquitted* of the offense charged in the indictment." GA. CODE § 27-1901 (1933) (emphasis added).

[11] In Alabama, a "demand" jurisdiction which has some statutory material dealing with the right to a speedy trial, the supreme court stated in a case where an indictment had been pending for twelve years: "Although there may be such legislation, the party indicted is entitled to a speedy trial and the failure to accord it will give occasion for just complaint on his part." *Ex parte* State *ex rel.* Att'y. Gen., 255 Ala. 443, 446, 52 So. 2d 158, 160 (1951).

Cf. People v. Wilson, 8 N.Y.2d 391, 171 N.E.2d 310 (1960). There a New York statute providing for reindictment after dismissal was held subservient to the right to a speedy trial—a right which is not an express constitutional guarantee in that state. The court said: "[T]his group of statutes must not be so read as to defeat the fundamental right of an accused citizen to be brought to trial. . . ." 8 N.Y.2d at 394, 171 N.E.2d at 312.

trial. If the state unreasonably delays in bringing the defendant to trial, the court will grant his motion to dismiss.[12] This rule prevents the harsh results possible under "demand" statutes and still requires the defendant to show an invasion of his right to a speedy trial.[13]

In both majority and minority rule jurisdictions the prosecution may voluntarily dismiss the action before the period in which the defendant must be tried or discharged has elapsed.[14] The defendant then may not complain of the lack of a speedy trial, because he is no longer charged with any crime. However, the grand jury may revive the period within which trial must be granted by finding a new indictment.[15] Thus, prosecutors may harass "potential defendants" by forcing repeated preparation for defense.[16] It is possible to maintain this procedure until the statute of limitations has run.[17]

A variant of this dilemma occurs when the defendant is tried under a new indictment after a dismissal due to denial of a speedy trial. By

[12] In five states the right to a speedy trial is not waived by failure to demand a trial. State v. Carrillo, 41 Ariz. 170, 16 P.2d 965 (1932); Zehrlaut v. State, 230 Ind. 175, 102 N.E.2d 203 (1951); People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955); Flanary v. Commonwealth, 184 Va. 204, 35 S.E.2d 135 (1945); *Ex parte* Chalfant, 81 W.Va. 93, 93 S.E. 1032 (1917).

Oklahoma requires a demand by the defendant for trial if he is at large or on bail or bond. Hutson v. State, 72 Okla. Crim. 61, 112 P.2d 1109 (1941). However, the burden of bringing speedy trial is on the state if the defendant is in jail. Brummit v. Higgins, 80 Okla. Crim. 183, 157 P.2d 922 (1945).

[13] In addition to the constitutional provisions for the right to a speedy trial, forty-two states have implementing statutes. In order to show a denial of his rights, a defendant merely needs to prove that he was not tried within the statutory period. See, *e.g.*, State v. Carrillo, 41 Ariz. 170, 16 P.2d 965 (1932); Flanary v. Commonwealth, 184 Va. 204, 35 S.E.2d 135 (1945).

[14] The voluntary dismissal, or *nolle prosequi*, is allowed by statute in most states. See, *e.g.*, IND. ANN. STAT. § 9-910 (1956); KAN. GEN. STAT. ANN. § 62-1437 (1949); ME. REV. STAT. ANN. ch. 89, §117 (1954); N.C. GEN. STAT. § 15-175 (1951); WIS. STAT. § 955.17(2) (1957). Some states, however, have expressly abolished this procedure. See, *e.g.*, ALASKA COMP. LAWS ANN. § 66-18-17 (1949); CAL. PEN. CODE § 1386.

[15] *E.g.*, People v. Godlewski, 22 Cal. 2d 677, 140 P.2d 381 (1943); State v. Rowland, 172 Kan. 224, 239 P.2d 949 (1952); State v. McGowan, 113 Mont. 591, 131 P.2d 262 (1942); Mealy v. Commonwealth, 193 Va. 216, 68 S.E.2d 507 (1952). *Contra*, Brown v. State, 85 Ga. 713, 11 S.E. 831 (1890); People *ex rel.* Nagel v. Heider, 225 Ill. 347, 80 N.E. 291 (1907); State v. Crawford, 83 W.Va. 556, 98 S.E. 615 (1919).

In some states a dismissal automatically bars reindictment by express statutory provision. See, *e.g.*, ALASKA COMP. LAWS ANN. § 66-18-18 (1949) (for misdemeanors only); GA. CODE § 27-1901 (1933).

[16] See *Ex parte* Altman, 34 F. Supp. 106 (D.C. Cal. 1940); Comment, 5 STAN. L. REV. 95, 96-99 (1952).

[17] See note 9, *supra*.

the majority view, reindictment under such circumstances is permissible.[18] However, the New York Court of Appeals, in *People v. Wilson*,[19] recently held that the second trial was a denial of both the right to a speedy trial and due process of law.[20] The majority opinion pointed out that trial on a new indictment for the same crime after a dismissal for denial of a speedy trial would, in effect, make the right illusory.[21] The length of time that had elapsed between the first and second indictments was an important factor in the decision;[22] the court recognized that a defendant might not be entitled to have the second indictment dismissed if the delay were not so great.[23]

These recent decisions reflect divergent policies toward the right to a speedy trial. The basis of the majority rule is a fear that burdening the state with the duty of bringing about a speedy trial might turn the constitutional safeguard into a technical rule, freeing defendants who were never really injured.[24] This apprehension is unjustified. Even if this burden were on the state, the defendant could waive the right by consenting to a continuance[25] or by obstructive[26] or dilatory[27] tactics.

---

[18] See cases cited note 15, *supra*.

[19] 8 N.Y.2d 391, 171 N.E.2d 310 (1960).

[20] 8 N.Y.2d at 39–, 171 N.E.2d at 312. There is also dictum to the effect that a flagrant denial by a state of the right to a speedy trial would amount to a denial of due process of law under the fourteenth amendment. *In re* Sawyer's Petition, 229 F.2d 805 (7th Cir. 1956).

[21] 171 N.E.2d at 313. The dissent asserted that the legislature intended the statute of limitations, not the right to a speedy trial, to determine when indictments could be found. *Id.* at 314.

[22] Four and one-half years elapsed between the first and second indictments. 171 N.E.2d at 311.

[23] *Id.* at 313.

[24] See People v. Foster, 261 Mich. 247, 246 N.W. 60 (1933); State v. McTague, 173 Minn. 153, 216 N.W. 787 (1927).

[25] People v. Niemoth, 409 Ill. 111, 98 N.E.2d 733, *cert. denied*, 344 U.S. 858 (1951); *Ex parte* Baxter, 121 Kan. 636, 249 Pac. 610 (1926); Glebe v. State, 106 Neb. 251, 183 N.W. 295 (1921); State v. Chadwick, 150 Ore. 645, 47 P.2d 232 (1935).

In some jurisdictions this consent may be inferred from failure to object to a continuance granted at the request of the prosecution. People v. Hocking, 140 Cal. App. 2d 778, 296 P.2d 59 (1956); Harris v. State, 194 Md. 288, 71 A.2d 36 (1950). Other states require express consent in order to constitute a waiver. Nicolay v. Kill, 161 Kan. 667, 170 P.2d 823 (1946).

[26] *Ex parte* Morgan, 57 N.D. 763, 224 N.W. 209 (1929) (procuring absence of witnesses); Hart v. United States, 183 Fed. 368 (6th Cir. 1910), *cert. denied*, 220 U.S. 609 (1911) (failure to appear).

[27] Dilatory pleadings and motions are usually held to be waivers of the right to a speedy trial. *In re* Sawyer's Petition, 229 F.2d 805 (7th Cir. 1956); People v. Clemente, 8 N.Y.2d 1, 167 N.E.2d 327 (1960). Where such motions do not in fact

The purposes underlying the constitutional guarantee should determine where the burden of bringing about speedy trial should lie. The right is intended to prevent long imprisonment before trial, relieve the apprehension that accompanies untried charges, and avoid subjection to the danger of a trial after a long period of time.[28] The minority rule, in placing the burden on the state to speedily bring the case to trial, eliminates prosecution under old indictments. The pholsophy implicit in the rule also promotes decisions such as the *Wilson* case, preventing prejudicial reindictment after dismissal.[29] In addition, placing the burden on the prosecution to try the defendant within a reasonable time comports with the traditional presumption of innocence, which requires the prosecution to prove each element of the crime charged.[30] The minority rule best serves the purposes of the speedy trial requirement and insures the preservation of this fundamental right.

---

cause delay, however, they do not constitute waivers. *In re* Mill, 66 Colo. 261, 180 Pac. 749 (1919).

[28] "We can conceive the anarchy which would result if the power to terminate a criminal proceeding for want of prosecution did not exist. Defendants might have prosecutions hang over their heads, like the sword of Damocles, for years, without an effort being made to bring them to trial." *Ex parte* Altman, 34 F. Supp. 106, 108 (S.D. Cal. 1940). See People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955).

[29] State v. Crawford, 83 W.Va. 556, 98 S.E. 615 (1919). Some demand jurisdictions have reached the same result. See Brown v. State, 85 Ga. 713, 11 S.E. 831 (1896); People *ex rel.* Nagel v. Heider, 225 Ill. 347, 80 N.E. 291 (1907).

Most jurisdictions, however, allow reindictment after dismissal for denial of a speedy trial. See cases cited note 15, *supra*.

[30] 9 WIGMORE, EVIDENCE § 2511 (1940).