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Speedy Trial-Equal Protection or Due Process?

CASE COMMENTS

SPEEDY TRIAL—EQUAL PROTECTION OR DUE PROCESS?

The possibility that constitutional rights once waived may nevertheless, in a later proceeding, be reasserted is suggested by *United States ex rel. Pierce v. Lane*,[1] a federal habeas corpus proceeding involving an Indiana state prisoner.

The federal district judge ordered the petitioner discharged from the state penitentiary upon finding that he had been denied his constitutional guarantee of a speedy trial. The petitioner had been convicted of first degree murder in an Indiana state court in 1936 and sentenced to life imprisonment. Within two hours after sentence, he had been transported to the state penitentiary and upon his arrival was immediately placed in solitary confinement. On different occasions he sought to file, or have filed in his behalf, motions for a new trial; but these communications were suppressed by prison officials, and he was not allowed to communicate with his lawyer until after the statutory time for appeal had passed.[2] At that time Indiana provided no procedural method for belated appellate review. However, in 1948, the Supreme Court of Indiana ruled that it was within the equitable powers of courts of general jurisdiction to grant a motion for new trial after term,[3] and upon the denial of the motion the way was opened for belated appellate review.[4]

The petitioner filed his motion for a new trial early in 1949 alleging that the following errors were committed in the 1936 trial: the evidence was insufficient to support the conviction, evidence was improperly admitted, the court improperly permitted the jury to separate, and the court improperly overruled a motion for a continuance. The 1949 motion for a new trial was granted. Two trials followed. The first trial ended in a deadlocked jury. The second trial, in 1954, resulted in a conviction of second degree murder and the imposition of a life sentence. On appeal the conviction was affirmed.

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[1]193 F. Supp. 395 (N.D. Ind. 1961).

[2]Id. at 396.

[3]Walker v. State, 226 Ind. 552, 82 N.E.2d 245 (1948).

[4]"The general rule of appellate practice is that matters which constitute grounds for a new trial must first be presented by motion for that purpose, and cannot be assigned as independent errors." Hedrick v. Hall, 155 Ind. 371, 58 N.E. 257 (1900).

Late in 1959, the petitioner began a federal habeas corpus proceeding alleging that the 1954 trial resulting from his motion was not speedy within the meaning of the Federal Constitution.

It is arguable whether the petitioner's contention of lack of speedy trial would have been meritorious if it had been asserted at the time of the 1954 trial. The time within which a trial must be had is usually reckoned from the date of the commencement of the prosecution against the accused.[5] If the original trial ends inconclusively or a new trial is granted, the time is computed from the date the lower court received the order or the appellate mandate.[6] Also, the provisions of the sixth amendment are limitations on federal procedure and are not directly applicable to state trials;[7] however, since the principles laid down in the Bill of Rights serve as guideposts of due process, a number of courts have struggled to make the guarantee of speedy trial applicable to the states via the due process clause of the fourteenth amendment.[8] Lower federal courts have interpreted decisions of the Supreme Court as applying this guarantee to state proceedings.[9] The test whether a guarantee of the Bill of Rights is absorbed by the due process clause of the fourteenth amendment is whether the particular guarantee is of the "very essence of a scheme of ordered liberty."[10] It is conceivable that this test would encompass the guarantee of a speedy trial in a state court, but the Supreme Court has never passed directly on this point.[11]

Even conceding that the fourteenth amendment does guarantee a right of speedy trial to a defendant in a state court, and that the defense of lack of speedy trial would have been valid if it had been as-

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[5]See People v. Godlewski, 22 Cal.2d 677, 140 P.2d 381, 384 (1943); see generally 22A C.J.S. Criminal Law § 467(4) (1961); 57 Colum. L. Rev. 846 (1957).

[6]"The procedure since the receipt of the mandate from this [appellate] court is all that may properly be considered at this time in determining whether or not petitioner has been denied a speedy trial." Application of Hayes, 301 P.2d 701, 704 (Okla. Crim. 1956).

[7]"The right to a speedy trial afforded by the Sixth Amendment does not apply to criminal prosecutions in state courts." United States ex rel. Cseh v. Fay, 195 F. Supp. 432, 433 (S.D.N.Y. 1961).

[8]United States ex rel. Hanson v. Ragen, 166 F.2d 608, 610 (7th Cir. 1948). See note 9 infra.

[9]"[I]t is made clear in Smith v. O'Grady, supra, that the procedural guarantee of the Sixth Amendment to the federal constitution is protected against State invasion through the Fourteenth Amendment." Boyd v. O'Grady, 121 F.2d 146, 148 (8th Cir. 1941).

[10]Palko v. Connecticut, 302 U.S. 319, 325 (1937). By implication, the Supreme Court said that only those guarantees that were of the "very essence of a scheme of ordered liberty" were absorbed by the due process clause of the Fourteenth Amendment.

[11]See 57 Colum. L. Rev. 846 (1957).

serted at the 1954 trial, the failure of the petitioner to assert that defense constitutes a waiver. The cases are in accord that where the accused does have the right to a speedy trial, it is personal to him and may be waived.[12] Some courts hold that constitutionally protected rights are waived by conduct inconsistent with the exercise of the right;[13] others hold that the waiver must be voluntary,[14] and intelligent,[15] and that no affirmative action is necessary to secure those rights.[16] However, if the accused proceeds to trial without asserting that his constitutional right has been violated, he is deemed to have waived that right.[17]

The federal district court in the principal case posed the sole question of whether the action of the State of Indiana in obstructing a timely appeal in 1936 and then convicting the petitioner of second degree murder in 1954 constituted a denial of the right to a speedy trial. At the outset, the court decided that the right to a speedy trial is afforded defendants in state proceedings by the due process clause of the fourteenth amendment and concluded that this right had been denied to the petitioner.

A question raised in the principal case was whether the petitioner, by voluntarily seeking a new trial, was "estopped" from alleging lack of speedy trial. The State contended that since the petitioner had sought the benefits of a new trial he waived his right to attack the procedure by which it was obtained as unconstitutional. The court, however, reasoned that the petitioner had not waived his right to assert lack of speedy trial because the belated motion for new trial was the only procedural method by which he could obtain appellate review. In a situation where a defendant has idly sat by for a number of

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[12]United States ex rel. Hanson v. Ragen, 166 F.2d 608, 610 (7th Cir. 1948); Ex parte Meadows, 71 Okla. Crim. 353, 112 P.2d 419, 427 (1941); State v. Pierson, 313 Mo. 841, 123 S.W.2d 149, 152 (1938); Keller v. State, 126 Ohio St. 342, 185 N.E. 417, 418 (1933).

[13]Pierce Oil Corp. v. Phoenix Ref. Co., 259 U.S. 125, 128-29 (1922); United States ex rel. Hanson v. Ragen, 166 F.2d 608, 610 (7th Cir. 1948) (petitioner caused the delay); Collins v. United States, 157 F.2d 409, 410 (9th Cir. 1946) (failure to demand trial); Worthington v. United States, 1 F.2d 154 (7th Cir. 1924) (failure to demand trial).

[14]Commonwealth v. Kilgallen, 379 Pa. 315, 108 A.2d 780, 785 (1954); Wendlandt v. Industrial Comm'n, 256 Wis. 62, 39 N.W.2d 854, 856 (1949).

[15]Webber v. Tunney, 186 Misc. 270, 59 N.Y.S.2d 455, 456-57 (Sup. Ct. 1945).

[16]State v. Carrillo, 41 Ariz. 170, 16 P.2d 965, 966 (1932); Shafer v. State, 43 Ohio App. 493, 183 N.W. 774, 775 (1932).

[17]United States v. Kaye, 251 F.2d 87, 91 (2d Cir. 1958); King v. State, 23 Ariz. 49, 201 Pac. 99, 100 (1921); People v. Newell, 192 Cal. 659, 221 Pac. 622, 626 (1924). But see People v. White, 2 N.Y.2d 220, 140 N.E.2d 258, 261, 159 N.Y.S.2d 168, 172 (1957) (dicta which implied that the defense may be raised during trial).

years without availing himself of his appellate remedies and then seeks and obtains a new trial, the prohibition against allowing him to attack the new trial as not speedy is obvious. The very delay of which he complains was occasioned by his own inaction.[18] But here, the petitioner was prevented from filing a motion for a new trial and no method for belated filing existed until 1948. Prior to this time there had never been any opportunity available to the petitioner which he had refused.

The court appears to be correct in its conclusion that the petitioner, by filing his motion for new trial, did not waive his right to assert the defense that the trial was not speedy; but it failed to realize that the defense was subsequently waived when not asserted at the 1954 trial.[19] Its decision, in effect, allows one to raise a defense in a federal habeas corpus proceeding which had previously been waived.[20]

Objectively, it would appear that the action by the State of Indiana in 1936 in obstructing the petitioner's attempt to file or have filed motions for a new trial was a denial of equal protection, *i.e.*, a denial in the sense that everyone convicted of a crime in Indiana was afforded an opportunity: (1) to file a motion for new trial, and (2) upon denial thereof, to receive appellate review.[21] While the right to make a motion for a new trial happens to fall within the ambit of equal protection in Indiana, it is not, as such, a due process requirement. Due process secures a minimum protection of rights which are implicit in a concept of "ordered liberty,"[22] while equal protection is broader in its scope and overlaps the requirements of due process. Equal protection goes further than insuring a minimum of protection and secures to each person the protection of specific laws that is accorded to other persons in like circumstances.[23] It has been repeatedly held that the right to a new trial is not a requirement of due process;[24] however,

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[18]See note 13 supra.

[19]See note 17 supra.

[20]"It has been held that a defendant may not initially claim that he has not had a speedy trial in a habeas corpus ... proceeding." People v. White, 2 N.Y.2d 220, 140 N.E.2d 258, 261, 159 N.Y.S.2d 168, 172 (1957).

[21]See Schaaf v. State, 221 Ind. 563, 49 N.E.2d 539, 541 (1943), which held that, while appeal may not be denied entirely, the appellant must bring himself within statutory bounds in order to give the appellate court jurisdiction. See Lewis v. State, 142 Ind. 30, 41 N.E. 310, 313 (1895), which held that in order for errors to be assigned for review in the Supreme Court of Indiana, they must first have been presented in a motion for a new trial.

[22]See note 10 supra.

[23]Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923); Gardner v. Michigan, 199 U.S. 325, 334 (1905).

[24]"No imperative and mandatory duty or requirement rests upon the state to provide a mode of obtaining a new trial or review of the proceedings in favor of

since Indiana statutes afford it to those convicted of crimes, the right is encompassed by equal protection of the law. The purpose of a new trial is to allow the trial court to correct its own errors, and so to avoid the time and expense involved in appellate review.[25]

Since the Supreme Court of Indiana has the power to modify, reverse or affirm trial court decisions, and may, where necessary or proper, grant a new trial,[26] it is arguable that the petitioner could have been seeking a directed verdict of acquittal on appellate review;[27] and that his sole reason for filing the motion for a new trial was to perfect his right to an appellate review. However, since the State of Indiana is free to regulate its appellate procedures, and the motion for a new trial is not an empty procedural requirement,[28] the subjective desires of the petitioner cannot control the court's ruling on the motion. Also, since a number of the errors assigned by the petitioner were statutory grounds for a new trial,[29] it would appear that his objective was to secure a new trial, not to obtain appellate review for its own sake. The purposes of a new trial and appellate review are both aimed at correcting errors committed in the original trial,[30] therefore the peti-

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one convicted of a criminal charge by a proper judicial tribunal. The granting of such a right is not a necessary element of due process...." Ward v. State, 171 Ind. 565, 86 N.E. 994, 995 (1909). "[N]ew trials are not essential to due process of law, either in judicial or administrative proceedings." 12 Am. Jur. Constitutional Law § 637 (1938). See Orfield, Criminal Procedure from Arrest to Appeal 498 (1947).

[25]"Primarily, the office of a motion for a new trial is to afford the court an opportunity to correct errors in the proceedings before it without subjecting parties to the expense and inconvenience of appeal...." Weber v. Kirkendall, 44 Neb. 766, 63 N.W. 35, 36 (1895). See People v. Beal, 315 Ill. 71, 145 N.E. 695, 696 (1924); Chadron Loan & Bldg. Ass'n v. Scott, 96 N.W. 220 (Neb. 1903).

[26]Ind. Ann. Stat. § 9-2321 (Repl. Vol. 1956).

[27]"When a judgment against the defendant is reversed, and it appears that no offense whatever has been committed, the court rendering such decision on appeal must direct that the defendant be discharged...." Ind. Ann. Stat. § 9-2324 (Repl. Vol. 1956).

[28]See note 25 supra.

[29]"The court shall grant a new trial to the defendant for the following causes, or any of them:

First. Irregularity in the proceedings of the court, or jury, or for any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial.

Second. When the jury has separated without leave of the court after retiring to deliberate upon the verdict.

Third. When the jury has received and considered any evidence, paper or document not authorized by the court.

* * *

Ninth. When the verdict of the jury or the finding of the court is contrary to law, or is not sustained by sufficient evidence." Ind. Ann. Stat. § 9-1903 (Repl. Vol. 1956). See text, supra, for the errors which were assigned by the petitioner.

[30]See note 25 supra.