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Constitutional Law - Speedy Trial. Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969)

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The identity of the plaintiff will now be disregarded, and if the central issue was historically considered a basis for suit at common law within the meaning of the Seventh Amendment, the right to trial by jury will be granted.[30]

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Constitutional Law—SPEEDY TRIAL. *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969).

Petitioner sought a writ of habeas corpus after being convicted of robbery on a reindictment.[1] His petition alleged a denial of a speedy trial in violation of the Sixth Amendment of the United States Constitution,[2] and section eight of the Virginia Constitution,[3] and relied upon a Virginia statute barring prosecution of any person indicted for a felony who is not brought to trial within a specified period.[4] Determining that the first indictment of the petitioner was defective, the Commonwealth had secured a second one, thereby delaying the trial seven months from

30. The dissent, written by Justice Stewart, expresses a fear that the majority's logic will lead to a virtual elimination of all equity jurisdiction, and thereby cause any traditionally equitable cause of action to be artificially broken down into legal issues. Ross v. Bernhard, 90 S. Ct. 733 (1970) (dissenting opinion). The majority of the Court, however, has not indulged in artificial dissection, but rather has given recognition to the dual origin of the derivative suit. *See* note 12 *supra*. The issue test deals only with truly legal issues which have been procedurally buried in equitable forms of action due to the identity of the plaintiff.

1. The reindictment was obtained as a consequence of the trial court holding that a similar indictment, issued against another suspect for the same crime, charged grand larceny and not robbery as contended by the Commonwealth. Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969).

2. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

3. VA. CONST. art 1, § 8:

> That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty . . . .

4. VA. CODE ANN. § 19.1-191 (Repl. Vol. 1960):

> Every person against whom an indictment is found charging a felony and held in any court for trial, whether he be in custody or not, shall be forever discharged from prosecution for the offense, if there be three regular terms of the circuit or four of the corporation or hustings court in which the case is pending after he is so held without a trial . . . .

the date of the first indictment. During this time, petitioner had made no demand to implement his right to a speedy trial.

In upholding the conviction and denying the writ, the Supreme Court of Appeals of Virginia stated that relief under the statute implementing the constitutional guarantee of a speedy trial must be demanded prior to final judgment. Failure to make such timely demand is considered a waiver of the right.[5] In effect, this decision was an endorsement of the demand-waiver rule utilized to justify convictions after a delay by the prosecution in bringing the defendant to trial.[6]

Before 1967, the right to a speedy trial guaranteed by the Sixth Amendment of the United States Constitution had been held inapplicable to state criminal proceedings.[7] Consequently, the states implemented the right through state constitutions, statutory enactment, case precedent or combinations of the three.[8] In 1967, however, the Supreme Court of the United States expressly extended the right to defendants in state actions in *Klopfer v. North Carolina*.[9]

Klopfer, while declaring the right to a speedy trial to be as fundamental as any of the rights secured by the Sixth Amendment, failed to establish specific guidelines.[10] Moreover, examination of the federal standards reveals that there has been a diverse application of the right.[11] In most federal jurisdictions, unless the accused demands a speedy trial

5. Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969) citing Rose v. Commonwealth, 189 Va. 771, 774, 55 S.E.2d 33, 34 (1949).

6. Simply stated, the demand-waiver rule operates to waive the defendant's right to a speedy trial if he makes no demand prior to or at the trial. *E.g.*, Finnegan v. United States, 223 F. Supp. 758, 761 (M.D. Pa. 1963), *aff'd*, 323 F.2d 870 (3rd Cir. 1963); People v. Armes, 37 Ill. 2d 457, 227 N.E.2d 745 (1967). This rule has been applied to justify delay on the theory that delay in criminal cases is welcomed by defendants because it usually operates in their favor. *See, e.g.*, United States *ex rel.* Von Cseh v. Fay, 313 F.2d 620, 623 (2d Cir. 1963); Collins v. United States, 157 F.2d 409, 410 (9th Cir. 1946). *But see* United States v. Dillon, 183 F. Supp. 541, 543 (S.D. N.Y. 1960) (rejecting the demand theory).

7. Ughbanks v. Armstrong, 208 U.S. 481, 487 (1908); Phillips v. Nash, 311 F.2d 513, 515 (7th Cir. 1962); Oberle v. Fogliani, 82 Nev. 428, 420 P.2d 251 (1966).

8. *See* Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L.J. 767 n.4 (1968).

9. 386 U.S. 213 (1967). The Supreme Court overruled the Supreme Court of North Carolina's affirmation of the use of a *nolle prosequi* with leave over the defendant's demand for trial. *Id.* at 222.

10. *See* 46 N.C. L. REV. 387, 388-90 (1968).

11. *See* Cohen, *Speedy Trial for Convicts: A Reexamination of the Demand Rule*, 3 VAL. U. L. REV. 197, 198-201 (1969); Note, *supra* note 8, at 768-70; 46 N.C. L. REV. at 388-90.

before final judgment, he is deemed to have waived that right.[12] Such a requirement appears to be in conflict with other recently asserted standards protecting the constitutional rights of defendants.[13] But these recent developments have not as yet carried over to the application of the demand-waiver rule.[14] Illustrative of a developing trend in the federal courts modifying the rigid application of the rule is *United States v. Reed*[15] in which the accused was discharged after a twenty-six month delay due to government carelessness. *Reed* held that there could be no waiver of the right to a speedy trial where the defendant had no knowledge of the pending charge, or where he was powerless to assert his right because of imprisonment, ignorance, and lack of legal advice.[16]

The Virginia constitutional guarantee of the right to a speedy trial is similar to the guarantee expressed in the United States Constitution.[17] Virginia has gone farther, however, as have many other states,[18] by legis-

12. Typically, courts require that a demand for trial, resistance to postponements, or some effort on the part of the accused be shown to entitle a defendant to a discharge on the grounds of unreasonable delay. Note, *supra* note 8, at 768 n.11. For a discussion of the federal standards as to demand and waiver in light of the recent extension of the Sixth Amendment right to a speedy trial, *see* Cohen, *supra* note 11, at 197-205.

13. *See* Chapman v. California, 386 U.S. 18 (1967) in which the Court noted "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Here the Court was merely applying a rule laid down in Fahy v. Connecticut, 375 U.S. 85 (1963). *See also* Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (placing the right against compelled self-incrimination under the protection of the due process clause of the Fourteenth Amendment); Johnson v. Zerbst, 304 U.S. 458, 467-68 (1938) (imposing a presumption against waiver of fundamental constitutional rights); *accord*, Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956).

14. *See* Hodges v. United States, 408 F.2d 543 (8th Cir. 1969); Bynum v. United States, 408 F.2d 1207 (D.C. Cir. 1968). *But see* State v. Rhodes, 104 Ariz. 451, 454 P.2d 993 (1969); State v. Williams, 157 Conn. 114, 249 A.2d 245 (1968). For a case reflecting both the inroads of constitutional expansion of rights to a speedy trial and adherence to the demand-waiver doctrine, *see* State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (1968).

15. 285 F. Supp. 738 (D. D.C. 1968).

16. *Id.* at 741.

17. *See* notes 2, 3 *supra*.

18. *E.g.*, ARIZ. R. CRIM. P. 236 (1956); CAL. PENAL CODE § 1382 (West 1954); NEV. REV. STAT. § 178.495 (1963); OKLA. STAT. tit. 22, § 812 (1951); UTAH CODE ANN. § 77-55-1 (1953). These statutes should be compared with the FED. R. CRIM. P. 48(b) (1968) which authorized dismissal of an indictment for unnecessary delay in bringing the case to trial.

latively interpreting the provision. The Virginia Code requires discharge of persons not brought to trial within a specified time after indictment.[19]

A discernible split of opinion has developed over this type of statute, however, where there has been a dismissal of the original indictment or information, and a subsequent indictment or information is brought. One view is that the state may compute the statutory period from the time of the later indictment.[20] This assumes that the second indictment represents a new and independent proceeding. The opposing and minority view[21] is that the reindictment statutes, having been enacted by the legislatures to implement the constitutional guarantee of a speedy trial, ought to be given a strict construction by the courts to secure this result. Therefore, the reindictment should have no effect upon the running of the statute.[22]

Brooks v. Peyton,[23] following Virginia precedent,[24] was decided on the basis of the former theory, that a new indictment constitutes a new proceeding and reactivates the statute. This interpretation permits indefinite delay at the discretion of the state and is not dissimilar to the procedural device of "*nolle prosequi* with leave" that was struck down in *Klopfer*.[25] Unless prejudice[26] or oppression[27] as a result of the delay

19. *See* note 4 *supra*. The enumerated exceptions have been omitted.

20. *E.g.*, People v. Sorrentino, 146 Cal. App. 2d 149, 303 P.2d 859 (1956); State v. Goodmiller, 86 Idaho 233, 386 P.2d 365 (1963); State v. Moore, 60 Wash. 2d 144, 372 P.2d 536 (1962); State v. Rhodes, 77 N.M. 536, 425 P.2d 47 (1967); Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969).

21. *E.g.*, Brown v. State, 85 Ga. 713, 11 S.E. 831 (1890); People v. Hamby, 27 Ill. 2d 493, 190 N.E.2d 289, *cert. denied*, 372 U.S. 980 (1963); People v. Wilson, 8 N.Y. 2d 391, 208 N.Y.S. 2d 963, 965-66, 171 N.E.2d 310, 312-13 (1960) (dissenting opinion); State v. Crawford, 83 W.Va. 556, 98 S.E. 615 (1919).

22. *See generally* note 21 *supra*.

23. 210 Va. 318, 171 S.E.2d 243 (1969).

24. Commonwealth v. Adcock, 49 Va. (8 Grath.) 661 (1851); Mealy v. Commonwealth, 193 Va. 216, 68 S.E.2d 507 (1952).

25. *Nolle prosequi* with leave is a procedural device used to temporarily postpone prosecution with the consent of the court from which obtained, and reinstate prosecution at a later date. The facts of the two cases are, however, clearly distinguishable. For a discussion of the consequences of the use of *nolle prosequi*, *see* Klopfer v. United States, 386 U.S. 213, 216 (1967).

26. *See, e.g.*, United States v. Ewell, 383 U.S. 116, 120, 122 (1966); Taylor v. United States, 238 F.2d 259, 262 (D.C. Cir. 1956); United States v. Provoo, 17 F.R.D. 183, 203 (D. Md. 1955); People v. Prosser, 309 N.Y. 353, 356, 130 N.E.2d 891, 893-94 (1955).

27. Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). This opinion does not uphold the tradition that the right applies only where the defendant can show the delay to have been prejudicial to his case. Rather it places emphasis on the oppression caused by the prosecutor's power to delay trial and the anxiety and concern associated with public accusation. *See also* United States v. Ewell, 383 U.S. 116 (1966).

can be demonstrated by the defendant, however, the decision will stand as a reflection of the currently prevailing application of the demand-waiver rule.

FRANK F. ARNESS

Juvenile Courts—PROPER QUANTUM OF PROOF IN JUVENILE HEARINGS. *In re Samuel Winship*, 90 S. Ct. 1068 (1970).

The appellant was found to be a delinquent child[1] in juvenile court proceedings, and was placed in a training school. The child's commitment was upheld by the Court of Appeals of New York,[2] and an appeal was taken to the Supreme Court of the United States. The appellant urged that his commitment be reversed on the ground that his right of due process was violated by the New York statute which allowed a declaration of delinquency to be supported by a preponderance of the evidence,[3] rather than by proof beyond a reasonable doubt. The Supreme Court, in reversing, extended the meaning of due process in juvenile proceedings involving a violation of criminal law by requiring that the alleged act be proved beyond a reasonable doubt.[4]

The juvenile court system as it exists in most states today is regarded as a vehicle for the rehabilitation of delinquent youths rather than as a means of punishment.[5] The proceedings are of a non-criminal nature,[6] and therefore many of those rights which would be guaranteed the juvenile if he were tried in a criminal court for the same offense have

1. "'Juvenile Delinquent' means a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." N.Y. JUDICIARY—FAMILY COURT ACT § 712(a) (McKinney 1963).

2. W. v. Family Court, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969).

3. "Any determination at the conclusion of an adjudicatory hearing that a respondent did an act or acts must be based on a preponderance of the evidence." N.Y. JUDICIARY—FAMILY COURT ACT § 744(b) (McKinney 1963).

4. *In re* Samuel Winship, 90 S. Ct. 1068 (1970).

5. "As originally conceived, the juvenile court was to be a clinic not a court; the judge and all of the attendants were visualized as white-coated experts there to supervise, enlighten and cure—not to punish." DeBacker v. Brainard, 90 S. Ct. 163, 167 (1969) (Douglas, J., dissenting). *See In re* Poulin, 100 N.H. 458, 129 A.2d 672 (1957); *In re* Rich, 125 Vt. 373, 216 A.2d 266 (1966); ILL. ANN. STAT. ch. 37, § 701-2 (Smith-Hurd Supp. 1970).

6. Most state statutes establishing juvenile court systems provide that the proceedings are to be non-criminal in nature. *E.g.*, FLA. STAT. ANN. § 39.10(3) (1961); GA. CODE ANN. § 24-2418 (1959); MINN. STAT. ANN. § 260.21 (1959); N.M. STAT. ANN. § 13-8-65 (1953).