Buffalo Law Review

Volume 13 | Number 1 Article 24

10-1-1963

Criminal Law and Procedure—Right to Prompt Trial Not Lost by Incarcerated Prisoner Where Request For New Trial Not Forwarded To Prosecutor By Prison Authorities

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use it had passed. It has been said that the development of the law is more continuous than it is sporadic, and the fact that its course is capable of prediction is some consolation. Each decided case that has gone through the courts cannot be reexamined and redecided with each enlargement of the law, and the refusal of the Court to expand the scope of coram nobis to these situations appears sound. There seemingly cannot be an effective corrective remedy for the individual who suffers the injustice that may result from a range of practicing law characterized as something less than brilliant, down through and including poor, as distinguished from shockingly inadequate, legal representation. Rather, the remedy must continue to be a preventive one, sustained by high standards of integrity and excellence within the legal profession.

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RIGHT TO PROMPT TRIAL NOT LOST BY INCARCERATED PRISONER WHERE REQUEST FOR NEW TRIAL NOT FORWARDED TO PROSECUTOR BY PRISON AUTHORITIES

Defendants were charged, by a Bronx County indictment filed September 20, 1957, with the crimes of kidnapping, robbery in the first degree, and assault in the second degree. They were convicted of robbery in the first degree and assault in the second degree on December 4, 1958 and sentenced to prison terms. The Appellate Division unanimously reversed these convictions and directed a new trial on March 1, 1960. Defendants were incarcerated when they were notified on March 2, 1960 of the reversal of the conviction. On that day, they both made request through the chief clerk of the prison, pursuant to law, that the Bronx County indictment (underlying the conviction that had been reversed) be disposed of within 180 days.[1] This request was not forwarded to the district attorney of Bronx County. On January 16, 1961, ten months after the request for disposal had been made, the defendants were produced in the Bronx County Court for trial on the basis of the indictment. Defendants moved that the indictment be dismissed on the ground that they had not been brought to trial within the 180 day period. This motion was denied on the ground that the district attorney had not received any request from the defendants that the indictment be disposed of and that therefore, the 180 day period had not commenced to run. Defendants pleaded guilty to attempted robbery in the third degree. On appeal from the judgments entered on the pleas with specific request that the order denying the motion for dismissal of the indictment be reviewed, the Appellate Division reversed the convictions and dismissed the indictment with prejudice.[2] The People appeal by permission of an associate judge of the Court of Appeals; *held*, affirmed unanimously, the failure or refusal by the commissioner of correction or his agent to send on to the district attorney requests of two prisoners that another case against them be brought on for trial within

1. N.Y. Code Crim. Proc. § 669-a.
2. People v. Masselli, 17 A.D.2d 367, 234 N.Y.S.2d 929 (1st Dep't 1962).

180 days did not defeat the prisoners' right to prompt trial or the dismissal of the indictment. *People v. Masselli*, 13 N.Y.2d 1, 191 N.E.2d 457, 240 N.Y.S.2d 976 (1963).

The guarantee of a speedy trial serves a number of salutary purposes. It protects the accused, if incarcerated, against prolonged imprisonment while awaiting trial; it frees the accused from the mental anguish and the suspicion of the public which are attendant upon an untried accusation of crime; and, it acts like a statute of limitation by preventing the accused being brought to trial after such a lapse of time that witnesses might be unreliable and proof of his guilt or innocence might be suspect, and by removing the possibility of his harassment by the threat of being prosecuted for crimes committed in the distant past. A public function is also served by the incentive placed upon public prosecutors to promptly dispose of criminal charges since a failure to do so could result in the charges being dismissed and prosecution being precluded. It is generally the policy of the law that criminal cases be disposed of promptly.[3] The right of an accused to have his case brought on for trial promptly is guaranteed by the federal constitution[4] (though this provision does not apply to the states) and either by constitutional provision or by statute in most of the states.[5] It has been held in some jurisdictions that unless the defendant makes known his desire for a speedy trial promptly and affirmatively he is deemed to have waived the right.[6] A harsh example of this view is the case of a defendant who was convicted of second degree murder almost twenty-eight years after an indictment for homicide.[7] The federal courts have generally embraced the view that a failure on the part of the defendant to promptly and affirmatively demand a speedy trial is a waiver of his right under the constitution.[8] The second view is that the state initiates the action and it is the state which must see that the defendant is protected by being given a speedy trial. The prevailing view in New York is the latter.[9]

In New York, the right to a speedy trial is guaranteed by statute.[10] The Court of Appeals has held that even in the absence of any affirmative action on the part of the defendant an indictment must be dismissed unless promptly brought to trial.[11] In 1957, an additional safeguard was provided the accused by the enactment of a statute providing that a prisoner may demand a speedy trial and such a trial must be had within 180 days after his demand or the indictment will be dismissed with prejudice.[12] The procedure set up is essentially

3. 22A C.J.S. *Criminal Law* § 467(2) (1961).
4. U.S. Const. amend. VI.
5. 22A C.J.S. *Criminal Law* § 467(2) (1961).
6. See, *e.g.*, Pietch v. United States, 110 F.2d 817, 819 (10th Cir. 1940); McCandless v. District Court, 245 Iowa 599, 61 N.W.2d 674 (1953); State v. McTague, 173 Minn. 153, 216 N.W. 787 (1927); State *ex rel.* Davis v. Bayless, 38 Okla. Crim. 129, 259 Pac. 606 (1927).
7. State v. O'Leary, 25 N.J. 104, 135 A.2d 321 (1957).
8. United States v. Provoo, 17 F.R.D. 183 (D. Md. 1955), *aff'd*, 350 U.S. 857 (1955).
9. People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955).
10. N.Y. Code Crim. Proc. §§ 8, 668; N.Y. Civ. Rights Law § 12.
11. People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955).
12. N.Y. Code Crim. Proc. § 669-a.

that the prisoner may request that he be brought to trial within 180 days, after causing the district attorney of the county in which the indictment is pending to have notice of his request, for a final disposition of such indictment; and, that the notice above mentioned shall be given or sent to the commissioner of correction who shall promptly forward it to the appropriate district attorney.[13] The issue raised in the instant case is whether, after the prisoners have complied with the statute, a failure or refusal of the commissioner of correction or his agent to forward notice to the proper district attorney can defeat the right of the prisoner to a prompt trial or dismissal of the indictment. The Court of Appeals answered in the negative.

In reaching the present decision, the Court considered first the actions of the prisoners. It found that they had complied with the statutory requirement of notice of their request. Notice had been given to the chief clerk of the prison, the agent of the commissioner of correction. The court then considered the actions of the prison officials. The prison officials had refused to forward the requests to the district attorney and had also refused to provide other information required by law. The duty imposed by the statute was not discretionary but was mandatory. Therefore the prison officials simply failed to comply with the duty imposed upon them. The district attorney argued that the default or neglect of the Correction Department officials should not be charged to the prosecution. To this argument the Court replied that since both the district attorney and the commissioner of correction were the agents of the state, it would not be proper to charge the default or neglect of either or both of them to the prisoners who were helpless in the matter. Since the obvious purpose of the statute was to give prisoners the option of requiring that pending, untried indictments be promptly disposed of, it would wholly defeat the purpose to allow the default or neglect of agents of the state to defeat the right of the prisoners and would render the statute ineffectual. Therefore, as between the state and the prisoner, the burden for such a default should fall upon the state.

The interpretation which the Court puts upon the statute in question is certainly the only logical one to reach. To have decided to the contrary would have wholly defeated the purpose of the statute and would have rendered it ineffectual. Though district attorneys may feel that they are at the mercy of prison officials who may neglect to notify them of requests such as the present one, this is not altogether true. As the Court pointed out, the district attorney could inquire into the matter without difficulty. It may appear that criminals should not be set free simply because of a default or neglect on the part of some agent of the state;[14] but, the Court relied upon what seems to be a complete answer to this objection: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its

13. N.Y. Code Crim. Proc. § 669-a(1)(a)-(b).
14. See 12 Buffalo L. Rev. 138, 141 (1962).

failure to observe its own laws, or worse its disregard of the charter of its own existence."[15]

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CORAM NOBIS AS PROPER REMEDY FOR TESTIMONY NOT PERJURED AND NOT KNOWINGLY USED

Defendant was indicted for his participation in a holdup robbery. In defendant's 1957 trial the only testimony naming defendant as one of the two robbers was given by the driver of the getaway car, whose story required corroboration. This was supplied by the District Attorney's stenographer who put in evidence an unsigned statement of the defendant admitting his guilt. The defense to the statement was defendant's testimony that during the period of interrogation he had been threatened, assaulted and plied with wine and that therefore his admission of guilt was not voluntary. In rebuttal several police officers who had participated in the questioning testified they witnessed none of the intimidation and coercion alleged by defendant. Only one of these officers, City Detective James F. Casey, the detective in charge, testified he had been there for the entire period of detention—the others admitting only brief contact with defendant. Defendant was convicted of first degree robbery, second degree grand larceny, and second degree assault. Subsequently, a writ of error coram nobis was denied after a hearing despite the admission by Detective Casey that his testimony had been false—that actually he had been absent from the interrogation for several hours—on the finding of the County Judge that the false testimony given at the criminal trial was not perjurous, the prosecutor was not aware of the falsity and that the untrue testimony was not material. On appeal by permission, *held*, reversed and new trial ordered. Unintentional false testimony is "in its way as much of a 'fraud' on the court as if it were deliberate . . . . Coram nobis proceedings have as their prime purpose the redress of such frauds." *People v. Robertson*, 12 N.Y.2d 355, 190 N.E.2d 19, 239 N.Y.S.2d 673 (1963).

The common law writ of error coram nobis was given statutory recognition in New York in 1947.[1] Until shortly before such recognition, however, a court of original jurisdiction was generally held not to have the power to reopen a conviction based on fraud or misrepresentation after judgment had been rendered and the defendant had commenced to serve his time.[2] Coram nobis was not in use in New York,[3] and habeas corpus did not lie as long as the defendant was imprisoned by a court having competent jurisdiction over both

15. Mapp v. Ohio, 367 U.S. 643, 659 (1961), as cited in People v. Masselli, 13 N.Y.2d 1, 191 N.E.2d 457, 240 N.Y.S.2d 976 (1963).

1. N.Y. Code Crim. Proc. § 517, as amended by N.Y. Sess. Laws 1947, ch. 706, § 1; revised and clarified by N.Y. Sess. Laws 1954, ch. 806, § 1, N.Y. Sess. Laws 1962, ch. 698, § 8.

2. For a concise history of coram nobis in New York, see Frank, Coram Nobis ¶ 2.02 (1953).

3. *Ibid.*