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Criminal Law—Speedy Trial

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This writer feels that even if the facts are as stated in the defendant's affidavits (juror an auxiliary policeman, etc.), the Court will refuse to order a new trial if the trial court again denies defendant's motion. For, although a member of the Civil Defense Auxiliary Police may on occasion have the powers of a peace officer,[34] his work in this area, on a volunteer basis, is not enough to identify him with the prosecuting authorities so as to show that the defendant was prejudiced by the presence of this particular juror at his trial.[35]

Speedy Trial

The defendant in a criminal case is entitled to a speedy trial.[36] While such right is established to prevent lengthy imprisonment while awaiting trial and public suspicion which attends an untried accusation of crime, of equal importance, it prevents the loss of means of establishing the defendant's innocence in that, due to long delay, witnesses may be lost or their memories dulled.[37]

Section 668 of the New York Code of Criminal Procedure provides the means of enforcing this right.[38] The Court in *People v. Prosser,*[39] held that a defendant, by not acting under Section 668, does not waive his right to a speedy trial.

Some jurisdictions have held that if the defendant does not act with reasonable promptness in an affirmative manner to seek a speedy trial, such right thereto shall be deemed to have been waived.[40]

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34. N. Y. DEFENSE EMERGENCY ACT §§ 105, 106.

35. See *Cavness v. U. S.,* 187 F. 2d 719 (9th Cir. 1951), *cert. denied,* 341 U. S. 951 (1951), where the court refused to order a new trial on the ground that a juror failed to reveal that he was a reserve police officer. See also Annots., 140 A. L. R. 1183 (1942), 38 A. L. R. 2d 624 (1954).

36. N. Y. CODE CRIM. PROC. §8.

37. REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING (1849), p. 342, quoted in MCKINNEY'S CONSOL. LAWS OF N. Y., Book 66, pt. 2, p. 553; *Petition of Provoo,* 17 F. R. D. 183,198, 203 (D.C. Md. 1955), *aff'd, U. S. v. Provoo,* 350 U. S. 857 (1955).

38. N. Y. CODE CRIM. PROC. §668: If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

39. 309 N. Y. 353, 130 N. E. 2d 891 (1955). The defendant, having pleaded guilty to two of five indictments, after serving six years of his sentence, was released from prison. Upon his release, the district attorney had the defendant returned for rearraignment on one of the three indictments which had not been tried and on subsequent trial the defendant was convicted. This conviction was reversed on the ground that the indictment should be dismissed inasmuch as the defendant was denied his right to a speedy trial.

40. *Pietch v. U. S.,* 110 F. 2d 817, 819 (10th Cir. 1940); *State v. McTague,* 173 Minn. 153, 154, 155, 216 N. W. 787, 788 (1927).

The more persuasive view, however, held by the Court of Appeals in the *Prosser* case, is that the burden of providing a speedy trial is upon the state, not on the defendant.[41] The state initiates the action and the state must see that the defendant is arraigned. It is likewise incumbent upon the state to see that the defendant has a speedy trial.

The legislature expressly excepted from Section 668 of the New York Code of Criminal Procedure a defendant who has neither applied nor agreed to a postponement. If it had been the intent of the legislature to deem the right to a speedy trial likewise waived by inaction under the statute, it would have so specified in the statute.

A defendant may, however, consent to delay in bringing the indictment to trial and, by this consent, thus waive his right to a speedy trial.[42] This agreement need not be by express terms or by stipulation but can be implied if, for instance, the case has been placed on the calendar and the defendant interposes no objection to the District Attorney's motion for postponement.

> "The actual result of the present decision, therefore, is merely to impose upon the officers, charged with enforcing the law and who secured the indictment, the quite reasonable, far from burdensome, duty of noticing it for trial."[43]

Evidence

From normal experience we know that refusal to answer a question or accusation is often as much an affirmation of guilt as a positive answer. Thus in New York, a defendant's silence is competent evidence for the jury's consideration.[44] The prosecution is limited to this extent: the defendant must fully comprehend the question or accusation;[45] he must have full liberty to answer;[46] and the circumstances must justify an inference of assent or acquiescence.[47] However, evidence of this kind of conduct after a defendant is arrested is not admissible and evidence of this nature will be excluded.[48] This latter rule was the

41. *State v. Carillo*, 41 Ariz. 170, 172, 16 P. 2d 965 (1932); *State v. Chadwick*, 150 Or. 645, 650, 47 P. 2d 232 (1935); *Flanary v. Commonwealth*, 184 Va. 204, 35 S. E. 2d 135 (1945).
42. *People v. Perry*, 196 Misc. 922, 96 N. Y. S. 2d 517 (County Court 1949).
43. *People v. Prosser*, 309 N. Y. 353, 361, 130 N. E. 2d 891, 896 (1955).
44. *People v. Allen*, 300 N. Y. 222, 90 N. E. 2d 48 (1949).
45. *People v. Koerner*, 154 N. Y. 355, 374, 48 N. E. 730, 736 (1897).
46. *People v. Allen*, 300 N. Y. 222, 90 N. E. 2d 48 (1949).
47. See note 46 *supra*.
48. *People v. Rutigliano*, 261 N. Y. 103, 107, 184 N. E. 689, 690 (1933) (dictum); *People v. Abel*, 298 N. Y. 333, 335, 83 N. E. 2d 542, 543 (1949).