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RECAP; *Betterman v. Montana*

Jason Collins

I. FRED. A. ROWLEY FOR PETITIONER BRANDON BETTERMAN

Mr. Rowley's argument began with a general assertion that the Speedy Trial Clause applies through sentencing, claiming the Court has found before that the Clause guarantees an early and proper disposition of criminal proceedings. Amidst early questioning from Justice Ginsburg, he noted that both *Barker v. Wingo*[1] and *Smith v. Hooey*[2] have delineated interests protected by the Speedy Trial Clause that are unique to the convicted: rehabilitation; and the prejudice suffered by a defendant already incarcerated who then suffers a sentencing delay that causes him to lose the ability to seek a concurrent sentence. These interests set the theme for his argument: convicted defendants suffer real prejudice for which the Court must fashion a remedy.

The discussion of a convicted defendant's prejudice suffered after a sentencing delay was extensive and centered on the burden of proof necessary to prove it in court. The Justices keenly questioned him on the peculiar stance he fashioned on prejudice. The Justices wanted to understand why the prejudice interests of a convicted defendant would not be better served by asserting a violation of the Due Process Clause. Mr. Rowley reminded the Court that the Montana Supreme Court had analyzed that claim exactly for Mr. Betterman, but found he suffered no prejudice—even though the Court had acknowledged his delay as extensive. Mr. Rowley argued that this was because the Montana Supreme Court, like other lower courts who refuse to apply the Speedy Trial Clause to sentencing concerns, applied the test developed in *United States v. Lovasco*[3] instead of the *Barker* four-factor test. Mr. Rowley pointed out that a *Lovasco*-type analysis rarely, if ever, results in a finding favorable to a defendant because the *Lovasco* test places the burden on the defendant to make an affirmative showing of prejudice. A *Barker*-type analysis, however, would allow a reviewing court to presume prejudice and result in actual relief for affected defendants. Ultimately, he argued, this would make for smart policy because, as Justice Sotomayor agreed, most modern criminal fact-finding occurs during sentencing since most guilt determinations occur by way of plea bargain.

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[1] 407 U.S. 514, 532 (1972).

[2] 393 U.S. 374 (1969).

[3] 431 U.S. 783 (1977). The Court in *Lovasco* acknowledged that pre-indictment delay did not fall under a Speedy Trial Clause analysis. Instead, the Court examined both the prejudice to the defendant and interests of the government as part of a balancing test under Due Process. During the analysis, the Court noted that "actual prejudice makes a due process claim concrete and ripe for adjudication[.]"

The Court seemed to agree that the types of sentencing delays Betterman suffered are indeed a problem, when they happen. Naturally then, if prejudice is shown or presumed, the Court must be able to fashion a remedy for it. Justice Ginsburg quickly called Mr. Rowley's attention to this issue,[4] implying that dismissal of charges would be an extreme remedy for someone who has been convicted. But Mr. Rowley argued that applying the Speedy Trial Clause after conviction need not be so constrained by the remedy used in the pre-trial setting; other options could apply, like vacating the remaining portion of the sentence, reducing the overall sentence by the amount of the delay, or by the amount of time the defendant suffers anxiety, or is deprived of rehabilitation programs.

II. DALE SCHOWENGERDT FOR THE STATE OF MONTANA, RESPONDENT

Mr. Schowengerdt sought to frame the discussion of remedy and prejudice in the context of the Clause's text and history. He argued that the right is essentially a limitation of the Government's power to bring those who are presumed innocent to trial. If the Government delays, it forfeits that right. But a sentencing delay is different because it has no impact on the Government's authority to try individuals and thus has no bearing on the interests protected by the Clause. There is no anxiety interest over public accusation at sentencing because at sentencing, the accusation is now confirmed; and after conviction, a convict is rightly deprived of his liberty. Justice Ginsburg was again first to question, asking, if she accepted his premise, when a delay would then become a Due Process violation. Mr. Schowengerdt rested his answer on requiring an affirmative showing of prejudice, arguing that the interests articulated by Mr. Rowley—loss of access to rehabilitation and parole—were far too speculative. Interestingly, he related to the Court that Betterman himself had proved this point. Betterman was offered parole in March of 2014 on the condition he complete a rehabilitation program. Betterman quit only sixteen days later and the court rescinded his parole. Such speculative interests are too volatile to be assured a remedy.

But Justice Kagan reminded Mr. Schowengerdt that there is another interest of a defendant awaiting sentencing. Convicted defendants awaiting sentencing face the possible impairment of their defense as time passes, just like defendants who suffer pre-trial delays. This is a central concern, she said, because the modern criminal justice system now revolves around the plea agreements and sentencing instead of trial. This language sounded remarkably like an argument advanced in the Petitioner's brief: that sentencing hearings are like mini-trials, and are likely to be the only real fact-finding done in the course of a prosecution.

[4] The remedy for a Speedy Trial Clause violation is dismissal with prejudice. *Barker*, 407 U.S. at 522.

Mr. Schowengerdt countered by asserting that Due Process and the Writ of Mandamus (to compel sentencing) are still avenues for relief, and that sentencing hearings are different from trials because the rules differ; there is no beyond a reasonable doubt burden of proof; the Confrontation Clause does not apply; the facts are usually not at issue; and importantly, the accused is now convicted—there is no longer a presumption of innocence to protect.

Having explored the scope of the interests potentially at issue, the Court questioned Mr. Schowengerdt on how that prejudice should be analyzed. Mr. Schowengerdt argued for a Due Process analysis under *Lovasco*, but Justice Breyer presented him with an interesting point—why not allow the delay claims to be brought under the Due Process Clause, but instruct courts to apply a Sixth Amendment-type analysis by using the *Barker* factors? Recall that *Barker* instructions are to weigh (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.[5] Mr. Schowengerdt's objection went to the showing of prejudice. Prejudice for a sentencing delay should not only be at the forefront of the factors, he asserted, it should be a necessary factor. *Barker* factors are not each necessary in a pre-trial setting, he reminded the Court. But if they are to be applied for sentencing concerns, then an affirmative showing of prejudice must become a necessary factor.

III. GINGER D. ANDERS, ASSISTANT SOLICITOR GENERAL FOR THE DEPT. OF JUSTICE, AS AMICI SUPPORTING RESPONDENT.

Ms. Anders' initial contention was simple—at least for the impairment of defense concern—the Due Process Clause provides an adequate avenue of relief for these types of injuries, and the standard of showing prejudice should be the same as that articulated in other violations of constitutional rights. A defendant should have to show that the outcome would have been different had he not suffered the prejudice. Justice Kagan did not see how this differed from a *Barker* analysis, but Ms. Anders reminded her that *Barker* allows a reviewing court to *presume* prejudice so no showing of a different outcome would be required. Ms. Anders contended that prejudice should not be presumed for sentencing delays because of the likelihood that the remedy for it—lowering the sentence—interferes with a court's imposition of an appropriate sentence: "it's appropriate to require the defendant to show some actual injury in order to justify the societal cost of lowering [a] sentence." But she argued too, that a convicted defendant's lack of a cognizable liberty interest supports no presumed prejudice.

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[5] *Barker*, 407 U.S. at 530–33.

Justice Sotomayor asked the logical follow-up question: how, if no prejudice is to be presumed, one should analyze the issue. Ms. Anders responded that, in the due process context, the defendant should necessarily be required to show an actual, cognizable effect on his *Barker* factor interests. Under a standard of probability that the result would have been different, he would have to show an effect on his defense at sentencing; or that he served a longer sentence than he should have. Under her Due Process rubric, access to rehabilitation programs, and anxiety would not be a cognizable prejudice. But still, Ms. Anders acknowledged that convicted defendants do at least have a Due Process interest in a "fundamentally fair sentencing proceeding." Her main concern was really the substance of the right and its remedy—as long as the substantive right did not attach to the defendant's liberty interest (since he should have none as a convict), and the remedy did not mean vacatur of sentence, where the right fell among the Constitutional clauses was of little concern to her. But in the end, she claimed the Due Process clause captures the right most succinctly, providing both a substantive right, and a satisfyingly tailored remedy.

IV. MR. ROWLEY'S REBUTTAL FOR PETITIONER BRANDON BETTERMAN

On rebuttal, Mr. Rowley reminded the Court that a *Lovasco*-type analysis, where prejudice may not be presumed, would result in a system where only an actual impairment of defense would result in prejudice being shown. But again, the Court has recognized before other forms of prejudice unique to those who have been convicted. Delays in follow-up prosecutions, as in *Smith*, where the defendant is already incarcerated are particularly ill-suited to a *Lovasco* test. The interest in rehabilitation recognized in *Barker* could be impinged by delays in prosecution as well. He argued further that the *Barker* factor test would be better suited for sentencing delays because it would actually address rehabilitation and anxiety concerns, whereas the *Lovasco* test would simply ignore them. And these concerns are actually heightened because, as the Respondent contended, *sentencing is different*. Sentencing is the only place in the modern criminal justice system where the defendant really challenges the prosecution or even mounts a defense. So it is there at sentencing where a convicted defendant's interest in access to rehabilitation programs is most keen. Thus, *Barker* would be the appropriate framework, and the proper right in which to "to ground that analysis" would be the Sixth Amendment.

V. ANALYSIS

The Court seemed almost resigned to the idea that the right for a speedy sentencing, if it exists, would likely apply under the umbrella of

the Due Process Clause instead of the Speedy Trial Clause. Yet the Court seemed intrigued by Justice Breyer's thought that the right might originate under Due Process, but incorporate a speedy trial analysis consistent with the *Barker* factors. This quasi-Sixth Amendment solution might satisfy both sides in terms of the analysis and establishment of the right, as long as the State is satisfied that the defendant's liberty interests will not be part of the test. The State's objection to the defendant's liberty interests as part of the analysis ties into concerns over the remedy—the State does not want convicted defendants receiving sentence credit as the result of procedural delays or case backlogs. Nonetheless, the Court seems poised to identify the right and there are only so many ways a violation of it can possibly be remedied. Credit for time or sentence reduction is convenient and logically tied in many ways to the nature of the violation. As both parties acknowledged during argument, modern criminal proceedings revolve around negotiation of plea agreements. In the Court's eyes, the commonality of plea bargaining likely lessens the societal interest in preserving a lower court's original sentence when chipping away at it will remedy a Constitutional infirmity.