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Criminal Procedure—Denial of Right to Speedy Trial May Prevent Reindictment

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The Court indicated, however, that the defendant, merely by testifying, did not receive automatic immunity for all time, as to "any transaction, matter or thing" revealed by him, under Section 2447 of the Penal Law.[1] Complete immunity from prosecution may be obtained by a prospective defendant only by strict compliance with the procedural requirements of the immunity statutes[2] or by virtue of immunity provisions of the State Constitution. By not interposing his privilege against self-incrimination in answer to a particular question, the defendant failed to meet the technical requirements of Section 2447.

The *Laino* decision is based on sound law and completely in line with the precedent of the *Steuding* case. It goes further, however, and answers a question left open by the majority in *Steuding*,[3] when it holds that the defendant is not entitled to complete immunity under Section 2447 from prosecution for the crime for which he had been indicted. In general terms, such decisions are in accord with the traditionally accepted policy of courts to protect the fundamental, constitutional privilege of freedom from self-incrimination.

P. W. D.

DENIAL OF RIGHT TO SPEEDY TRIAL MAY PREVENT REINDICTMENT

Section 8 of the Code of Criminal Procedure and Section 12 of the Civil Rights Law both plainly state that in criminal actions the defendant has a right to a speedy trial. Section 668 of the Code of Criminal Procedure which enforces this right declares: "If a defendant, indicted for a crime, . . . 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."

However, there are other sections of the Code of Criminal Procedure, which under certain circumstances, may conflict with a defendant's right to a speedy trial. Section 142 allows the prosecution of a felony to be commenced anytime during a five-year period following the commission of that felony.[4] Section 673 states that an order for the dismissal of an action is not a bar to another prosecution if the offense committed was a felony.[5]

1. N.Y. Penal Law § 2447:
In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.
2. In re Doyle, 257 N.Y. 244, 177 N.E. 489 (1931).
3. Supra note 89 at 217, 189 N.Y.S.2d at 168.
4. N.Y. Code Crim. Proc. § 142:
A prosecution for a felony, other than murder or kidnapping, or a prosecution for the crime of conspiracy to commit a felony must be commenced within five years after its commission. . . .
5. N.Y. Code Crim. Proc. § 673:

In *People v. Wilson*,[6] the defendant, who had been indicted in January 1955 for felonies committed in June 1954, was not arraigned on that indictment until October 1956. His motion for dismissal, on the ground that he had been denied a speedy trial, was denied by the County Court; but the Appellate Division reversed and dismissed the action, ". . . without prejudice to the right of the respondent to proceed as permitted in Section 673 of the code. . . ."[7]

Thereafter, the State, by the right given in Section 673, filed a new indictment against the defendant for the same felonies. The defendant then made a motion to dismiss this second indictment because his right to a speedy trial had been previously denied. The defendant claimed the delay was that period of twenty-one months between the first indictment and his arraignment on that charge. He did not claim there was any delay in prosecuting the new indictment.

The issue then is whether a defendant's right to a speedy trial will be upheld, by immunity from further prosecution, when the State claims the power to reindict a defendant even though the first indictment was dismissed because the defendant had been denied a speedy trial.

The County Court denied the defendant's motion to dismiss this second indictment,[8] and this judgment was affirmed by the Appellate Division.[9] The Court of Appeals reversed and dismissed the indictment against the defendant.

Both the majority and the dissent mentioned the issue of whether the right to a speedy trial is so fundamental a right as to be protected by the due process clause of the Fourteenth Amendment. The majority, although declaring the right to be a fundamental one, never really treated the problem. The dissent declared that the right is not so fundamental as to be protected by the Fourteenth Amendment. But the opinions of neither the majority nor the dissent are based on the due process clause of the Fourteenth Amendment.

The majority noted that the right to a speedy trial in New York is guaranteed as if it were set forth in the State Constitution. They cited *People v. Prosser*,[10] which declared that a speedy trial serves an important threefold function: it protects the defendant from lengthy imprisonment before trial; it alleviates the apprehensions and public suspicion which naturally result from any indictment; and it assures the defendant of the opportunity to prove his innocence before the ability to prove it is lost by the passage of time. For these reasons, the majority ruled that the right to a speedy trial is a fundamental one.

The defendant was not brought to trial at the next term of the court in which the indictment was triable, and the State had not shown good cause for

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An order for the dismissal of the action . . . is a bar to another prosecution for the same offense, if it be a misdemeanor; but . . . it is not a bar, if the offense charged be a felony.

6. 8 N.Y.2d 391, 208 N.Y.S.2d 963 (1960).
7. 5 A.D.2d 690, 169 N.Y.S.2d 286 (2d Dep't 1957).
8. 15 Misc. 2d 858, 182 N.Y.S.2d 842 (County Ct. 1959).
9. 10 A.D.2d 297, 200 N.Y.S.2d 792 (2d Dep't 1960).
10. 309 N.Y. 353, 130 N.E.2d 891 (1955).

the delay. Therefore, applying Section 668, the majority dismissed the second indictment. The majority did not rule Section 673, which allows reindictment in felony cases, unconstitutional; but they held that under this fact situation it could not be literally applied. This is so even though Section 142 allows the prosecution of a felony to be commenced anytime during a five-year period following the commission of that felony. The twenty-one-month delay in prosecution of the first indictment was held, by the majority, to be a denial of the defendant's right to a speedy trial.

The majority decided that the speedy trial of a defendant in a criminal action is more vital than a strict application of a statute limiting the time during which the state may prosecute a felon and a statute which allows reindictment in the case of a felony. In so ruling, they concluded that the purpose behind such statutes, of allowing the State ample time and opportunity to convict those who have committed major crimes, could not match in importance the three-fold purpose served by giving a defendant a speedy trial.

The dissent based its decision on a strict interpretation of Sections 142 and 673. The dissent contended that Section 668 only specifies the situation in which a defendant may apply for a dismissal but does not give him a right to dismissal. It decided that the right to a speedy trial can only be given effect through the limitation of Sections 142 and 673 because the right is not guaranteed in the State Constitution. They agreed with the majority and the *Prosser* case which ruled that a long delay causes the defendant to be subjected to undue hardships. But the dissent contended that the defendant can be relieved of these hardships solely by lifting the original indictment. A defendant can be reindicted, under Section 673, as long as the five-year statute of limitation, declared in Section 142, has not run its course. The dissent believed that if this new indictment is prosecuted speedily the defendant will not suffer the same hardships that the delay in prosecuting the first indictment caused.

This reasoning does not seem logical. The hardships imposed upon the defendant by the original delay will not be mitigated by dropping the original indictment if a reindictment is allowed, no matter how speedily this new indictment may be prosecuted. This is because the hardships were directly caused by a delay in prosecution, and this delay, once it has occurred, can never be rectified. Moreover, if considered from the time of the original indictment, this new indictment has only increased the delay. Granted that under Section 142, the State is allowed five years to prosecute a felon; still if a defendant's right to a speedy trial is to have any real meaning, this Section must not be strictly construed in cases of this nature.

It is difficult to calculate how much of a guide this decision will be to future cases. Whether a defendant has been denied a speedy trial depends upon the facts and circumstances of each individual case. Therefore, there can be no definite time limit which can, for all cases, mark when a speedy trial has been denied. A twenty-one-month delay without good cause is a denial of the

right to a speedy trial, but the question of what lesser delays would also be a denial of the right can only be answered in future cases.

R. D. S.

TIME OFF FOR GOOD BEHAVIOR DOES NOT REDUCE MAXIMUM TERM OF AN INDETERMINATE SENTENCE

Every prisoner serving an indeterminate sentence becomes, upon serving the minimum term, eligible for parole.[11] Whether a prisoner, so eligible, will be released on parole is left completely to the discretion of the Parole Board.[12] Section 230 of the Correction Law allows such prisoners to become eligible for parole before serving their original minimum terms. This is possible if the prisoner's general conduct is good and if he performs his work assignments willingly. Under the plan, a prisoner can earn a ten-day reduction of his minimum term for every month served. Such credit does not shorten the sentence but only allows the prisoner to be eligible for parole earlier by that amount of time earned by good behavior.[13] The Parole Board, however, will not release a prisoner solely in recognition of his conduct while serving his sentence.[14] It will parole him only after thoroughly analyzing his character, checking his background, and deciding that if allowed to return to society, he would live within the law.[15]

In *People ex rel. Clemente v. Warden of Auburn Prison*,[16] the question arose as to whether Section 230 applies to reduce the maximum term of confinement of an indeterminate sentence as well as the minimum term. If this were true, the Parole Board would have no discretion in releasing the prisoner but would have to release him when his time off earned by good behavior added to the time he had already served equalled the maximum term of his sentence. In deciding the case, the Court of Appeals confirmed a number of lower court decisions in New York which have held inferentially that time off earned by good behavior can only be credited toward the reduction of the minimum and not the maximum term of an indeterminate sentence.[17]

Having previously been denied parole, the petitioner applied for a writ of habeas corpus claiming that the six months and ten days reduction of his sentence earned by good behavior, granted under Section 230, should have applied to reduce the maximum term of the 2½ to 5-year sentence which he received in 1956 after conviction of the crime of first degree perjury. The

11. N.Y. Correction Law § 212.
12. Ibid.
13. People ex rel. Williams v. Jackson, 5 A.D.2d 922, 172 N.Y.S.2d 37 (3d Dep't 1958).
14. N.Y. Correction Law § 213.
15. Ibid.
16. 9 N.Y.2d 216, 213 N.Y.S.2d 55 (1961).
17. People ex rel. Williams v. Jackson, supra note 13; People ex rel. von Moser v. New York State Parole Bd., 179 Misc. 397, 39 N.Y.S.2d 200 (Sup. Ct. 1943), aff'd, 266 App. Div. 896, 42 N.Y.S.2d 728 (3d Dep't 1943); People ex rel. Mason v. Brophy, 235 App. Div. 432, 257 N.Y. Supp. 165 (4th Dep't 1943).