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Criminal Law—Jury

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Jury

In *People v. Winship*,²⁷ the defendant had been convicted of second degree robbery. During defendant's motions for dismissal and a new trial made prior to sentencing, affidavits were submitted which stated that a prospective juror failed to reveal that he was a member of the Civil Defense Auxiliary Police attached to the Town of West Seneca Police when asked on the *voir dire* whether he had any connection with or was a member of any law enforcement agency. The defense stated that they would have excused this juror had this fact been known; and requested further time to explore the matter. The request was denied and sentence imposed. The prosecution did not submit answering affidavits until after the motion for a hearing was denied.

It has long been the rule that prospective jurors have a duty to reveal all information pertaining to their competency when examined before trial.²⁸ Failure to disclose this information will not necessarily result in a new trial; but the decision lies within the sound discretion of the trial court which must determine whether the defendant has been prejudiced by the juror's silence.²⁹ The Court will insist, however, that all the circumstances relating to the questioning are before the trial court when it rules on the motion for a new trial.³⁰ If sufficient facts have not been ascertained, the Court will withhold the final determination and remit the parties to the trial court for further proceedings,³¹ unless the interests of justice require a new trial.³²

In the instant case the Court of Appeals felt that the trial court was not adequately informed when it denied defendant's request for more time. The Court indicated that the trial court might have been justified in denying a hearing if the prosecution had submitted answering affidavits sufficient to challenge the movant's statements at the time the trial court disposed of the motion. The Court, therefore, in accordance with their practice, withheld the final determination³³ of the appeal so that the defendant could renew his motion for a new trial upon affidavits and notice of the District Attorney.

27. 309 N. Y. 311, 130 N.E. 2d 634 (1955).

28. *McGarry v. The City of Buffalo*, 70 Hun 597 (N. Y. Sup. Ct., Gen. T. 1893); 50 C.J.S. *Juries* §276 (1947).

29. *People v. Rosen*, 251 App. Div. 584, 297 N. Y. S. 877 (3d Dep't 1937), *aff'd*, 275 N. Y. 627, 11 N. E. 2d 790 (1937).

30. *People v. Durling*, 303 N. Y. 382, 103 N. E. 2d 336 (1952).

31. *People v. Durling*, *supra* note 30; *McHugh v. Jones*, 258 App. Div. 111, 16 N. Y. S. 2d 332 (2d Dep't 1939), *aff'd*, 283 N. Y. 534, 29 N. E. 2d 76 (1940).

32. *People v. Leonti*, 262 N. Y. 256, 189 N. E. 693 (1933).

33. The Court also held that it was not error for the trial court to refuse the defendant permission to be absent from the courtroom while the People's witnesses described the person who perpetrated the crime. Reason: N. Y. CODE OF CRIMINAL PROCEDURE §356 . . . but if the indictment be for a felony the defendant must be personally present.

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

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 Provoa*, 17 F. R. D. 183,198, 203 (D.C. Md. 1955), aff'd, *U. S. v. Provoa*, 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 arraignment 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).