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Constitutional Law--Right to a Speedy Trial

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and clarify the Ohio statutes and save them from a charge of obscurity.

Besides making the *Roth* test mandatory by statute, the holding in *Blumenstein* will undoubtedly accelerate its evaluation in the courts so that if this standard is to be found wanting, as all such standards have been so found since ancient times, it may be brought sooner to the attention of the Supreme Court of the United States.

FRANK BERNDT

CONSTITUTIONAL LAW — RIGHT TO A SPEEDY TRIAL

Porter v. United States, 270 F.2d 453 (D.C. Cir. 1959)

In *Porter v. United States,*[1] the defendant was arrested, indicted for rape, arraigned upon a plea of not guilty, and imprisoned when he found it impossible to raise the cost of a bail bond. Failing to get what he considered an adequate defense from a court-appointed lawyer, he wrote a letter from prison to the Chief Justice of the District Court for the District of Columbia, in which he claimed his right to "due process of law" had been denied. His claim was based on the fact that his trial in the District Court had been postponed five times resulting in a delay of one hundred and fifty days.[2] In his letter to the judge, Porter asked for a motion for a direct acquittal or a motion for a speedy trial, whichever was proper in his situation. The District Court refused these motions.

Although the court's opinion in this case recognized the presence of three important issues, the decision was based on one — whether there was infringement of Porter's constitutional right to a speedy trial.[3] This right is reserved in the Sixth Amendment of the Bill of Rights:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .[4]

and is reiterated in the Federal Rules of Criminal Procedure:

1. 270 F.2d 453 (D.C. Cir. 1959), *cert. denied,* 363 U.S. 805 (1960).

2. According to the record of the District Court, the dates and reasons for the postponements were as follows:

2-18-58	defense counsel was snowbound;
3-11-58	at government request because complaining witness was ill;
3-31-58	the length of the preceding cases prevented its being heard;
4-24-58	prosecutor was engaged in trial;
5-1-58	at government request because witness was on leave;
5-20-58	trial was held.

3. The two issues of this case raised by the court but considered insignificant to its conclusion were: (1) whether the constitutional guaranty to a speedy trial is a personal right which is waived by the failure of the accused to demand trial; and (2) whether there is a responsibility on the court to appoint a new attorney in the situation where the accused and the court-appointed attorney differ as to the method of defense and where it appears the defense is not being presented in a manner most favorable to the accused.

4. U.S. CONST. amend. VI.

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.[5]

The Court of Appeals, by a 2-1 majority, affirmed the District Court's decision, holding that Porter's right to a speedy trial had not been denied. In a one paragraph opinion, the majority based its decision on the finding in *King v. United States.*[6]

The fact situation in the *King* case was similar to that in the *Porter* case. In reaching the decision that King had not been denied his right to a speedy trial, the majority of the court emphasized two factors: (1) that sixty days of the one hundred and forty-day delay were at the request of the accused and not the prosecutor; and (2) after postponement as requested by the defendant, the court's calendar system necessitated continued delay.[7] Recognizing that the constitutional right to a speedy trial is relative and must be determined in light of all the factors in each case, the majority refused to void the calendar system so long as a better method was unknown and further refused to bring the *King* case within the limits of the constitutional guaranty.[8]

A close analysis of the reasoning of the court in the *King* case and that of the dissenting judge in the *Porter* case is necessary to accentuate the problems presented in these cases.

The court in the *King* case emphasized the fact that the defendant had requested the delays. Repeatedly this has been held to estop the accused from asserting a denial of his right to a speedy trial.[9] In *Moreland v. United States*[10] the court said, "A defendant cannot complain that he has been denied a speedy trial by reason of delay which he himself caused."[11] Similarly in *United States v. Lustman,*[12] it was said, "The Sixth Amendment prohibits only an unreasonable delay and a defendant

5. FED. R. CRIM. P. 48 (b).

6. 265 F.2d 567 (D.C. Cir. 1959), *cert. denied,* 359 U.S. 998 (1959).

7. When a case was set for trial in a district court, there was no way of knowing if court rooms would be vacant, if judges would be available, or if the case would be ready on that date. If the trial date was reached and a postponement required or requested, the case was not moved to the succeeding day, but to the first available date following the cases on the calendar, usually resulting in a delay of thirty days with each postponement. This procedure was followed disregarding the fact that the accused was imprisoned during this period.

8. King v. United States, 265 F.2d 567, 570 (D.C. Cir.), *cert. denied,* 359 U.S. 998 (1959). See Beavers v. Haubert, 198 U.S. 77 (1905); Day v. Davis, 235 F.2d 379 (10th Cir.), *cert. denied,* 352 U.S. 881 (1956).

9. United States *ex rel.* Hanson v. Ragen, 166 F.2d. 608 (7th Cir.), *cert. denied,* 334 U.S. 849 (1948); Shepard v. United States, 163 F.2d 974 (8th Cir. 1947); United States v. Stracuzza, 158 F. Supp. 522 (S.D.N.Y. 1958), *aff'd,* 362 U.S. 511 (1960).

10. 193 F.2d 297 (10th Cir. 1951).

11. *Id.* at 298.

12. 258 F.2d 475 (2d Cir.), *cert. denied,* 358 U.S. 880 (1958).

cannot exploit a delay which is attributable primarily to his own acts or to which he has consented."[13] It appeared that the court in the *King* case recognized the duty of the prosecutor to protect the constitutional rights of the accused, and the court would have protected them if the delays had been at the prosecutor's request. It seemed so until the *Porter* case, where the same court ignored the factor it had considered significant in the previous case. There was no mention of the delays caused by the prosecutor, in fact there was no majority opinion on this subject.

Judge Bazelon, dissenting in the *Porter* case, did not ignore this factor. He pointed out that three of the five delays were at the request of the prosecutor while the accused requested none. This, he said, violated the prosecutor's duty to protect the constitutional rights of the accused,[14] a duty which increased with each delay of the trial. As stated in *United States v. Dillon,*[15] "It is the duty of the public prosecutor, not only to prosecute those charged with crimes, but also to observe the constitutional mandate guaranteeing a speedy trial."[16] Based on the fact that the delays were caused by the accused in the *King* case and by the prosecutor in the *Porter* case, Judge Bazelon differentiated the latter case and supported the opposite result.

The second factor emphasized by the majority in the *King* case was the problem that resulted from the procedure used by the district courts in placing cases on their calendars. The court recognized the imperfections but dismissed them as "necessary evils" to the administration of justice. The dissenting opinion considered these imperfections in a different manner:

> The majority appears to conclude that the 6th amendment does not require a calendar system which is idealistically perfect, but only one which is reasonable in view of the hard facts. While I agree that the constitutional right to a speedy trial is consistent with necessary delays inherent in the processes of justice, I cannot agree that it permits processes that make for unnecessary or avoidable delay.[17]

Here is the question that the court was forced to answer — To what extent would it permit administrative inadequacies to infringe upon constitutional rights? Judge Bazelon, basing his dissent on the supremacy of constitutional rights, declined to give these inadequacies any weight.

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13. *Id.* at 477.

14. Porter v. United States, 270 F.2d 453, 454 (D.C. Cir. 1959) (dissent), *cert. denied,* 363 U.S. 805 (1960). See State v. Crosby, 217 Ore. 393, 342 P.2d 831, (1959); State v. Chadwick, 150 Ore. 645, 47 P.2d 232 (1935).

15. 183 F. Supp. 541 (S.D.N.Y. 1960).

16. *Id.* at 543.

17. King v. United States, 265 F.2d 567, 572 (D.C. Cir.) (dissent), *cert. denied,* 359 U.S. 998 (1959).

CONCLUSION

It is appropriate at a time when the rights of men are being tested in courts throughout the country that the rights of a person, imprisoned without a trial for one hundred and fifty days because he was without the cost of a bail bond, be carefully examined. Although the dilemma the court faced in both the *King* case and the *Porter* case was relatively simple in fact, it has widespread ramifications; for example, what is the prosecutor's duty to see that the accused is not denied his constitutional rights; and, when does the inherent power of a court to control its calendar violate the constitutional right to a speedy trial? Rather than meet these questions on the constitutional issue, the majority of the court in the *Porter* case deemed the causes of the delays insignificant and called the court procedure a weakness in the administration of justice.

The questions left unanswered by these cases demonstrate the indecision that hovers over this area. It appears reasonable that the dissenting opinion in the *Porter* case should establish the guideposts for a reevaluation of the rights belonging to a person finding himself imprisoned for a long period without a trial. From that opinion it is justifiable to conclude: first, that the prosecutor has an intense duty to preserve the constitutional guarantees of a person in this situation; and second, that the federal district courts should adopt a calendar procedure that meets the problem.[18] The mere recognition of these principles will not suffice. The courts must depend on the foresight of men to develop systematic and efficient administration of justice in a manner that protects the liberties of human beings.

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18. Since the *Porter* case the District Court for the District of Columbia has changed its calendar rule by placing the continued case on the docket for the next available date, but by placing it near the top of that day's list rather than at the bottom. This assures its hearing on that date and results in a maximum delay of three weeks. 108 U. PA. L. REV. 414 (1960). This article states that the problem still remains in most federal courts and suggests as a solution a uniform and definitive provision similar to that adopted in the District of Columbia.

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