Volume 44 | Number 4 Article 5

6-1-1966

Constitutional Law -- Due Process -- Delay Between Offense and Arrest

George Carson II

a check from an unauthorized person and makes payment to that person, even in the normal course of business and unwittingly, the bank is exercising unauthorized control over the payee's property and withholding it from its rightful owner. A tort arises in favor of the payee against the converting drawee.

Although *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.* was remanded and must be retried,[14] the court's particularly thorough opinion establishes a firm base upon which business, banks, attorneys, and lower courts can rely in future transactions.[15]

It is also important to note that the holding is consistent with the newly adopted Uniform Commercial Code which becomes effective midnight, June 30, 1967.[16] Under the Code, payment over a forged endorsement is specifically covered and is treated as a conversion.[17] The theoretical change from acceptance to conversion is, therefore, also a fortunate step that will enable a smoother transition to the Uniform Commercial Code as well as offer sounder law until it is effective.

PHILIP G. CARSON

Constitutional Law—Due Process—Delay Between Offense and Arrest

The right to a speedy trial is guaranteed by the sixth amendment,[1] but this right becomes operative only upon indictment.[2] In

[14] There are questions of fact and collateral issues which could result in a verdict for either the plaintiff or defendant in the particular case of Modern Homes Constr. Co. v. Tryon Bank & Trust Co. *I.e.,* the drawer is deceased and his estate closed. There was a considerable time lapse between payment by the drawee bank to the absconded agent and the commencement of the payee corporation's action.

[15] Regardless of the outcome in a particular case, the court is perfectly clear and definite in its adoption of the conversion theory.

[16] N.C. GEN. STAT. §§ 25-1-101 to -10-107 (1965). The Uniform Commercial Code is treated in *The Uniform Commercial Code in North Carolina—A Symposium,* 44 N.C.L. REV. 525 (1966). See also 2 N.Y. LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 1079 (1955); Scope, *Purposes and Functions of the Code,* 16 ARK. L. REV. 1 (1961-62); Comment, *Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code,* 62 YALE L.J. 417, 471 (1953).

[17] N.C. GEN. STAT. § 25-3-419 (1965). Faris, *Commercial Paper,* 44 N.C.L. REV. 598, 621 (1966), notes that the Uniform Commercial Code "will" force a change from North Carolina's acceptance theory to the conversion theory. The article was being printed when the court initiated the change before the Code forced it.

[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial. . . ." U.S. CONST. amend. VI.

[2] "[I]f there is unnecessary delay in bringing a defendant to trial, the

several recent cases the Circuit Court of Appeals for the District of Columbia has wrestled with the problem of prejudice to a defendant caused by delay between the time of the offense and the time of indictment.[3] In *Ross v. United States*,[4] where such delay had occurred, the court reversed a conviction for a narcotics violation and established a rule that is disturbingly vague, yet one that cannot be ignored by law enforcement officials.

On May 10, 1962, Ross allegedly sold some narcotics to an undercover police officer who, in order to protect his anonymity, did not swear out a complaint until his undercover activities had terminated seven months later.[5] At trial this officer was the only witness against Ross, and his testimony was given with the aid of notes made at the time of the offense. Ross contended that he did not remember the events of May 10 and was therefore unable to refute the officer's testimony.

The court reversed Ross's conviction on appeal, holding that "there was an undue subordination of appellant's interests which should not, at least in a record as barren of reassuring corroboration as this one, result in a sustainable conviction."[6]

In dissent, Circuit Judge Danaher chastized the majority for finding a "lack of 'reassuring corroboration,' "[7] asserting that they had ignored their recent decision in *Wilson v. United States*[8] where uncorroborated testimony was held to be sufficient to support a conviction. It would appear that the majority, while obviously aware

court may dismiss the indictment. . . ." FED. R. CRIM. P. 48b. See Hardy v. United States, 343 F.2d 233, 234 (D.C. Cir. 1964); Reece v. United States, 337 F.2d 852, 853 (5th Cir. 1964); Mack v. United States, 326 F.2d 481, 486 (8th Cir. 1964); Nickens v. United States, 323 F.2d 808, 809 (D.C. Cir. 1963).

[3] Hardy v. United States, *supra* note 2; Wilson v. United States, 335 F.2d 982 (D.C. Cir. 1964); Redfield v. United States, 328 F.2d 532 (D.C. Cir. 1963); Nickens v. United States, *supra* note 2. The court has considered such delay as denial of procedural due process under the fifth amendment. See Ross v. United States, 349 F.2d 210, 211 (D.C. Cir. 1965); Hardy v. United States, *supra* at 234.

[4] 349 F.2d 210 (D.C. Cir. 1965).

[5] The statute of limitations for this offense is five years. 75 Stat. 648 (1961), 18 U.S.C. § 3282 (1964).

[6] 349 F.2d at 212. Defendant had appealed on the grounds of violations of fifth and sixth amendment rights. *Id.* at 211. As in cases of delay after indictment, see note 24 *infra*, defendant must allege that he was prejudiced.

[7] 349 F.2d at 216.

[8] 335 F.2d 982 (D.C. Cir. 1964).

of *Wilson*,[9] found the lack of corroboration prejudicial only when considered with the delay, rather than prejudicial in itself.

In 1844 an English court indicated that delay between offense and arrest resulted in prejudice to the defendant, although the statute of limitations had not run.[10] No United States court clearly recognized the problem until 1955,[11] and even now such delay would probably not be grounds for dismissal in any jurisdiction in the United States except the District of Columbia Circuit.[12]

In 1963 the District of Columbia Circuit indicated that it might condemn such delay even though the statute of limitations had not run.[13] The court, in a footnote, recognized that "delay between offense and prosecution could be so oppressive as to constitute a denial of due process."[14]

Balancing the policy objectives of effective law enforcement[15] on the one hand and due process on the other, the *Ross* court dis-

[9] 349 F.2d at 211, 212 (citing dissent from denial of rehearing in *Wilson*).

[10] The Queen v. Robins, 1 Cox Crim. Cas. 114 (1844). Defendant was charged with bestiality, an offense forbidden by statute. The charge had been made within the two-year statute of limitations.

[11] Petition of Provoo, 17 F.R.D. 183 (D. Md. 1955). Finding it unnecessary "to decide how far rights under the speedy trial provision of the Sixth Amendment" go, the court considered a seven-month detention before charges were filed in conjunction with other deprivations of the defendant's right to a speedy trial. *Id.* at 202. A student note had recognized the problem three years before this case was decided. Note, 5 STAN. L. REV. 95 (1952).

[12] Other circuit courts have held, by circuit, as follows: United States v. Simmons, 338 F.2d 804, 806 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965) (delay in arrest does not violate rights); Reece v. United States, 337 F.2d 852, 853 (5th Cir. 1964) (right to speedy trial arises after prosecution instituted); Hoopengarner v. United States, 270 F.2d 465, 469 (6th Cir. 1959) (delay between offense and arrest is controlled by statute of limitations); United States v. Jakalski, 267 F.2d 609, 612 (7th Cir. 1959), *cert. denied*, 362 U.S. 936 (1960) (statute of limitations controls institution of prosecution); Mack v. United States, 326 F.2d 481, 486 (8th Cir. 1964) (sixth amendment does not apply until indictment is filed); Venus v. United States, 287 F.2d 304, 307 (9th Cir. 1960) (statute of limitations controls time in which indictment must be returned); Wood v. United States, 317 F.2d 736, 740 (10th Cir. 1963) (delay before arrest not grounds for dismissal); United States v. Fraidin, 63 F. Supp. 271, 279 (D. Md. 1945) (prosecution limited only by statute of limitations). The First, Third and Fourth Circuits have not ruled directly on this question. Research reveals no state that has considered the problem.

[13] Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963).

[14] *Id.* at 810 n.2.

[15] The problems in enforcement of narcotics laws have been commented upon extensively. *E.g.*, Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543, 562-73 (1960); Note, *The Law of Entrapment in Narcotics Arrests*, 38 NOTRE DAME LAW. 741 (1963).

cussed the specific circumstances[16] of the case with regard to the necessity for and prejudice resulting from the delay. According to the prosecution, the delay was necessary to protect the anonymity of the undercover officer.[17] The court found that the delay was unnecessary, being influenced by testimony showing this particular officer had made few new contacts in his last months of undercover work.[18] Thus the delay could be considered unjustified. Of course this conclusion was made from hindsight, whereas the decision of the police not to expose the agent was made in anticipation of further contacts.

Juxtaposed with this policy of allowing some delay for effective law enforcement was the policy of protecting the rights of the accused. Delay could have been doubly injurious to him; his memory was dimmed by time[19] and, perhaps more important, he was charged *en masse* with all of the agent's contacts.[20] The danger of an erroneous charge or mistaken identification had been expressed by Judge Wright, dissenting in *Powell v. United States*:[21]

> I suggest that it defies human experience for any man, particularly a new policeman, to remember and to identify with absolute conviction the particular 102 [51 in *Ross*] faces, as distinguished from hundreds of others, that passed through his mind, many on just one occasion, during the kaleidoscope of his months-long undercover investigation. Indulging the unlikely assumption that he can remember the 102 particular faces, to suggest that he can allocate each face to the appropriate time and place shown in his diary offends credulity.[22]

Considering these circumstances, the *Ross* court found "(1) a purposeful delay of seven months between offense and arrest, (2) a

[16] These circumstances are as follows: (a) defendant alleged and showed prejudice, 349 F.2d at 212; (b) the delay was purposeful, *id.* at 213 (*Quaere*: Is the intent to delay determinative in the finding of prejudice?); (c) the time lapse was seven months, *ibid.* (*Quaere*: Would a shorter time lapse rebut an allegation of prejudice?); (d) defendant was charged with fifty-one other persons, *id.* at 212; (e) the officer testified from notes and admitted his dependency upon them, *id.* at 214; (f) the officer was the only prosecuting witness, *id.* at 211; and (g) only one transaction had been made between officer and defendant, *ibid.* Observe that the prejudice implicit in all factors except (b) and (c) would be lessened by more positive identification.

[17] 349 F.2d at 212.

[18] *Id.* at 212 n.1.

[19] *Id.* at 214.

[20] *Id.* at 213 n.2.

[21] 352 F.2d 705 (D.C. Cir. 1965).

[22] *Id.* at 710.

plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook."[23] The statute of limitations was rejected as the exclusive criterion for determining when an indictment must be made.[24]

The court was faced with a problem of abuse of procedural due process.[25] It justified its decision not to be limited by the statute of limitations by relying upon a combination of three interrelated factors: (a) purposeful delay; (b) prejudice caused by this delay, evidenced by defendant's professed inability to remember;[26] and (c) lack of corroboration or more positive testimony, evidenced by the single prosecuting witness' reliance upon his notes.[27]

Although describing the delay as purposeful, it is apparent that the court meant an *unjustified* purposeful delay. In *Ross,* this was indicated by the failure of the police to prosecute when they had all the information necessary but delayed prosecution in order to protect the undercover agent's anonymity. The police were not using the period within the statute of limitations to solve crimes or apprehend criminals but to delay prosecutions and provide undercover agents with more freedom of action. This delay is an underlying cause of both the prejudice proved by the defendant and the unreliable identification made for the prosecution. Yet if the police justified their delay,[28] assuming the statute of limitations had not run, it is doubtful that the court would give much weight to defendant's allegations of prejudice.

The initial factor for the court's consideration was the defen-

[23] 349 F.2d at 215. The similarity between these findings and the factors the Second Circuit considers when faced with delay in prosecuting after indictment should be noted. Those factors are "the length of delay, the reason for the delay, the prejudice to defendant, and waiver by the defendant." United States v. Fay, 313 F.2d 620, 623 (2d Cir. 1963).

[24] 349 F.2d at 215, where the court holds that the length of delay should not be "controlled *exclusively* by the applicable statute of limitations."

[25] "[A] due regard for our supervisory responsibility for criminal proceedings . . . requires . . . reversal." *Id.* at 216.

[26] The prejudice found by the court was the defendant's inability to remember. The prejudice that results from the officer's failure to recall was considered a problem of corroboration, or more accurately a lack of more positive testimony.

[27] Corroboration may be used to refer to substantiating testimony as provided by a corroborating witness. The court used corroboration to refer to the sufficiency of the identification of the defendant.

[28] The court did not consider what situations might justify delay. Would delay caused by an overworked staff be justified? Would delay in the hope that an addict might lead an investigator to the supplier be justified?

dant's allegation of prejudice, since if prejudice is not alleged and shown, there would be no need for further deliberation. The proof necessary to sustain this allegation will vary with the circumstances of the defendant and the case. As the delay increases, the court could more readily find that the defendant has been prejudiced by a loss of memory. In *Ross* the defendant was "so circumstanced that there would appear to be very little to differentiate one day from another, especially as they begin to recede into the past."[29] Prejudice could also result from the death of a defense witness or the destruction of documents during the unjustified delay. However, even if prejudice is found, it would seem that the court's ultimate decision should not be based solely upon that finding but upon the totality of the evidence, including both the length of delay and the quality of the prosecution's evidence. Thus a defendant having proved an absolute inability to remember would not be acquitted in the face of positive identification.

It appears that the decision in *Ross* could be justified on the ground of the prosecution's failure to present convincing evidence concerning the identity of the defendant rather than the denial of procedural due process. The court was apparently loath to modify its holding in *Wilson v. United States*[30] that one officer's testimony was sufficient for a conviction. Consequently it found a different reason to reverse the conviction of Ross. In so doing the court seemed to establish a new multi-factor approach to situations in which there has been delay in the initiation of prosecution after the case for the prosecution was complete.

No final conclusions can be drawn from *Ross*. If the rationale of the court were applied to offenses upon which no statute of limitations runs, a court might well find unjustified delay in prosecutions after a period of years to be prejudicial as a matter of law. In such a situation even positive identification by a witness might be disregarded by a court.

It seems certain that the court could have reached the same result in *Ross* by modifying *Wilson* and declaring the evidence to be insufficient to support a conviction. Instead, the court, discussing the

[29] 349 F.2d at 213.

[30] 335 F.2d 982 (D.C. Cir. 1964). Such modification would define a minimum standard for sufficiency of identification and testimony concerning the offense. The testimony of one agent could still be sufficient; however, it would have to meet this standard to result in conviction.

problem of unjustified delay, began an inquiry that may have further constitutional implications. Unjustified delay before arrest may come to be forbidden as a violation of due process under the fifth or the fourteenth amendment just as such delay between arrest and trial is now forbidden by the sixth amendment.

Ross v. United States lacks the clarity necessary to preserve certainty in the law. Though the objectives of the court could better be achieved by relying upon a ground other than delay, law enforcement agencies should heed the warning that the statute of limitations is not inviolate if it appears that prosecution was unjustifiably delayed.

GEORGE CARSON, II

Constitutional Law—Due Process—Incompetence of Defense Counsel

The petitioner in *Schaber v. Maxwell*[1] was convicted of murder and sentenced to death. At arraignment the presiding judge had entered an oral plea of not guilty on his behalf. Petitioner waived trial by jury, electing to be tried by a three-judge state court.[2] At the trial, the attorneys appointed to represent petitioner had virtually conceded that he was guilty of the acts alleged and, through their opening statement, indicated that they were relying solely upon the defense of insanity; yet they failed to enter a written plea of not guilty by reason of insanity required by Ohio law, without which the accused is conclusively presumed to have been sane at the time of the commission of the alleged offense.[3] After conviction and sentence, petitioner applied for a writ of habeas corpus in the federal district court alleging that counsel's failure to comply with the Ohio statute constituted incompetence and thus deprived him of effective assistance of counsel guaranteed by due process of law.[4]

[1] 348 F.2d 664 (6th Cir. 1965).

[2] OHIO REV. CODE ANNO. 2945.05 to -.06 (Page 1954).

[3] "A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged." OHIO REV. CODE ANNO. § 2943.03 (*E*) (Page 1954). Section 2943.04 provides that all pleas other than guilty or not guilty shall be in writing, subscribed by defendant or his counsel, and shall immediately be entered upon the court record.

[4] Petitioner had exhausted his remedies in the state courts of Ohio. The Supreme Court of Ohio denied a petition for habeas corpus on the grounds that incompetence of counsel was a matter which must be raised on appeal. Schaber v. Maxwell, 348 F.2d 664, 667 n.3 (6th Cir. 1965).