

May 1971

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Recommended Citation

Stephen P. Swisher, *Criminal Law--Speedy Trial--The Three Term Rule*, 73 W. Va. L. Rev. (1971).

Available at: <https://researchrepository.wvu.edu/wvlr/vol73/iss2/9>

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Criminal Law—Speedy Trial The Three Term Rule

Petitioner was indicted for murder during the September 1966 term of the Summers County Circuit Court. Terms of Court fixed by the statute provide for three terms of court each year in Summers County, beginning in January, May and September.¹ The first indictment was declared void at the January 1967 term of court,² but at the May 1967 term petitioner was re-indicted on the same murder charge. The September 1967 and January 1968 terms passed without Petitioner being brought to trial,³ and at a special term of court in March 1968, the second indictment was declared void.⁴ During the May 1968 term Petitioner was again re-indicted for the same murder, whereupon he filed a petition in the Supreme Court of West Virginia for a writ of prohibition. Petitioner challenged the continuance of the prosecution on the grounds of the "three term" rule, a statutory limitation on criminal prosecutions which provides that "every person charged . . . , and remanded . . . for trial, shall be forever discharged . . . if there be three regular terms of such court . . . after the . . . indictment is found . . . without a trial."⁵ *Held*, writ denied. When petitioner challenged the indictments, his challenge constituted a "motion at the instance of the accused" which is a statutory exception⁶ to the counting of terms in favor of the discharge of the defendant. Further, since the indictments were declared void, petitioner was never "remanded" for trial within the

¹ W. VA. CODE ch. 51, art. 2, §§ 1-1k (Michie 1966).

² In voiding the first indictment, the circuit court sustained the petitioner's motion to quash the indictment and his plea in abatement, motions obviously initiated by the defendant, because there had been an improper selection of the grand jury which had returned the indictment. *State ex rel. Farley v. Kramer*, 169 S.E.2d 106 (W. Va. 1969).

³ Petitioner was not brought to trial during the Sept. 1967 term, because the court was still acting on various motions filed by him during the May 1967 term. Petitioner was not brought to trial during the January 1968 term, because a heavy snow had prevented the attendance of a sufficient number of petit jurors. *State ex rel. Farley v. Kramer*, 169 S.E.2d 106, 110 (W. Va. 1969).

⁴ *Id.* As with the original indictment, this second indictment was declared void when Petitioner's motion to quash the indictment was sustained, because women had been intentionally excluded from the grand jury.

⁵ W.VA. CODE ch. 62, art. 3, § 21 (Michie 1966) provides: Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court after the presentment is made or the indictment is found against him, without a trial. . . .

⁶ W.VA. CODE ch. 62, art. 3, § 21 (Michie 1966).

meaning of the three term statute. *State ex rel. Farley v. Kramer*, 169 S.E.2d 106 (W. Va. 1969).

The *Farley* case raises the issue of whether a criminal defendant waives the protection of the three term rule by challenging the indictments brought against him. Viewed in these terms, the defendant faces a dilemma. He may be forced to waive one right (speedy trial) in order to exercise another (the right to be tried pursuant to a valid indictment). The West Virginia court avoided this dilemma by confining its analysis to a mechanistic interpretation of the statutory language.

Supported by impressive legal and historical authority, the right of the individual to a speedy trial is securely rooted in Anglo-American legal heritage.⁷ The sixth amendment to the Federal Constitution guarantees to the accused in all criminal proceedings the right to a speedy trial, and this guarantee has been made obligatory on the states by *Klopfer v. North Carolina*.⁸ West Virginia's constitution provides a parallel guarantee⁹ which is implemented by two different statutory provisions. One is the three term rule which is directly involved in the present case. The other requires that the accused be tried at the same term that the indictment is brought unless good cause be shown for continuance.¹⁰

⁷ "Its [speedy trial's] first articulation in modern jurisprudence appears to have been in the Magna Carta . . . ; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166)." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). See also 57 COLUM. L. REV. 846 n.6 (1957).

⁸ 386 U.S. 213 (1967). There has been a difference of opinion as to what provisions of the sixth amendment apply to the states through the due process clause of the fourteenth amendment. For example, in 1942 the sixth amendment right to counsel was held not to be guaranteed to the defendant in state proceedings. *Betts v. Brady*, 316 U.S. 455 (1942). During the past decade however, there has been a growing tendency to apply sixth amendment rights to the states; i.e., the right of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); the right against self-incrimination, *Malloy v. Hogan*, 378 U.S. 1 (1966); and the right to confront witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965). And now the right to a speedy trial has been extended to the states, *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

⁹ W. VA. CONST. art. III, § 14.

¹⁰ W. VA. CODE ch. 62, art. 3, § 1 (Michie 1966), reads in part:

When an indictment is found in a court having jurisdiction, in any county, against a person for a felony, the accused, if in custody, . . . shall, unless good cause be shown for a continuance, be tried at the same term.

See note 5, *supra*, for the relevant portions of the three term statute implementing the state constitutional guarantee.

The Supreme Court of Appeals avoided dealing with *Farley* in a constitutional context, and in so doing it seems that distinct collateral questions were left unresolved. For the purposes of defense attorneys, there is still no certainty that the prosecutor cannot keep initiating indictments irrespective of the three term statute, until one is found to be valid. How much time, really, will be given to the state to try a criminal defendant? Does such uncertainty put the defendant's right to a speedy trial at the mercy of a potentially lethargic government? The uncertainty is complicated even more when it is seen that there is still no answer to the question: does the dismissal of an indictment make those proceedings in which the indictment was brought a nullity? If an indictment is later found void, can the state continue initiating indictments until one is found valid? It does not manifestly appear that either of these questions was directly answered by the court.

I. THE MAJORITY OPINION

The three term rule in West Virginia includes both statutory and judicial exceptions to its operation. Certain terms are not counted toward the discharge of the defendant by express exception in the statute.¹¹ Extensive case law in West Virginia further interprets which terms may be counted in favor of the defendant under the three term statute.¹² The majority's analysis was a direct applica-

¹¹ The statutory provisions for discharge are:

Unless the failure to try him [the defendant] was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or the inability of the jury to agree in their verdict; . . . then the defendant will be discharged from further prosecution. W. VA. CODE ch. 62, art. 3, §21 (Michie 1966).

¹² A partial list of those terms which cannot be counted in favor of the discharge of the defendant under the three term statute are: the term at which the indictment is returned, *State ex rel. Smith v. DeBerry*, 146 W. Va. 534, 120 S.E.2d 504 (1961); a term during which the defendant was outside the jurisdiction of the court, *Id.*; a term during which a writ of error is pending, *State v. Loveless*, 142 W. Va. 809, 98 S.E.2d 773 (1957); a special term of court, *Dillion v. Tanner*, 107 W. Va. 550, 149 S.E. 608 (1929); a term at which the defendant procured a continuance at his own motion, *State v. McIntosh*, 82 W. Va. 483, 96 S.E. 79 (1918); an adjourned term, *Denham v. Robinson*, 72 W. Va. 243, 77 S.E. 970 (1913); and a term during which the defendant failed to appear according to the terms of his recognizance, *Crookham v. State*, 5 W. Va. 510 (1871).

A partial list of those terms which can be counted in favor of the discharge of the defendant includes: a term, during which the trial court, through inadvertence, failed to enter an order disclosing a continuance of the case on the motion of the accused, *State v. Underwood*, 130 W. Va. 166, 43 S.E.2d

tion of these statutory and judicial exceptions to the facts involved in *Farley*.

First, the September 1966 term could not be counted in favor of the petitioner because that was the term when the original indictment was returned.¹³ The January 1967 term was less susceptible to a clear application of the statutory provisions, as it was during that term that the indictment was voided. To resolve this issue against the defendant, the majority interpreted two statutory exceptions against the petitioner. First, since the original indictment was subsequently voided, "no pending presentment or indictment upon which he [the petitioner] could have been tried,"¹⁴ existed during that term. Therefore the majority reasoned that the petitioner had never been "remanded" for trial within the meaning of the three term statute, and consequently he was not entitled to invoke its provisions for discharge.¹⁵ *State ex rel. Smith v. DeBerry*¹⁶ was approvingly cited for the proposition that if the defendant is only awaiting grand jury action he is not really being held for trial.¹⁷

A second statutory exception construed against the petitioner was that since the petitioner had initiated a motion to quash and a plea in abatement, these actions created "a continuance at the motion of the accused"—an exception to the counting of terms under

61 (1947); a term during which the defendant was serving a sentence in the state penitentiary (counted only in relation to a different indictment pending against him in the same court in which he was sentenced), *Hollandsworth v. Godby*, 93 W. Va. 543, 117 S.E. 369 (1923); a term during which the prosecutor entered a *nolle prosequi* if such was entered during the third term, *State v. Crawford*, 83 W. Va. 556, 98 S.E. 615 (1919); and a regular term at which no petit jury has been summoned, *Ex parte Anderson*, 81 W. Va. 171, 94 S.E. 31 (1917).

¹³ The term at which the indictment is returned cannot be counted toward the discharge of the defendant. *State ex rel. Smith v. DeBerry*, 146 W. Va. 534, 120 S.E.2d 504 (1961).

¹⁴ *State ex rel. Farley v. Kramer*, 169 S.E. 2d 106, 109 (W. Va. 1969).

¹⁵ *Id.*

¹⁶ 146 W. Va. 534, 120 S.E.2d 504 (1961).

¹⁷ *State ex rel. Farley v. Kramer*, 169 S.E.2d 106, 115 (W. Va. 1969).

The principle in *DeBerry* seems inapplicable, however, because even if it is conceded that this is the correct rule of law, there were no terms during which the petitioner was simply awaiting action by the grand jury. Further, as Judge Haymond observed in his dissenting opinion, to hold that *Farley* was never held for trial is to imply that a defendant must be held for a specific period of time during a particular term before he can claim that term toward discharge under the provisions of the three term statute. Certainly it cannot be argued that petitioner was not "held" for trial between the time of his indictment during the September 1966 term and the time that the indictment was voided in January 1967. *State ex rel. Farley v. Kramer*, 169 S.E.2d 106, 119 (W. Va. 1969).

the three term statute.¹⁸ Therefore, petitioner was not allowed to count those terms during which he had made a motion to quash the indictment. In support of this proposition, the majority reasoned that: (1) the accused was responsible for the proceedings that actually delayed the trial;¹⁹ (2) "the right to a speedy trial is not violated by unavoidable delays nor by delays caused or requested by defendants;"²⁰ and (3) any motion which forces a continuance will be treated as the equivalent of a formal motion for continuance by the defendant, and thus the defendant will be charged with the delay.²¹ Therefore, up to and including the January 1967 term, the majority counted no terms in favor of the petitioner.

The May 1967 term could not be counted toward the discharge of the defendant because this was a term during which an indictment (the second one) was returned.²² The regular terms of September 1967 and January 1968 could be counted toward the discharge of the defendant, but the March 1968 term could not be counted because it was a special term of court.²³ The May 1968 term could not be counted because that was when the third indictment was brought.²⁴ Following the logic of the majority, there were never three terms of court to which petitioner could apply the three term rule for a discharge from further prosecution.

¹⁸ The defendant is discharged from further prosecution "unless the failure to try him was caused. . . by a continuance granted on the motion of the accused. . . ." W. VA. CODE ch. 62, art. 3, § 21 (Michie 1966).

¹⁹ If the defendant had not instigated any motions to quash the indictment, however, he would have been tried under an illegal indictment.

²⁰ This quotation in *Farley* at 169 S.E.2d 106, 112 is taken from *State v. Hollars*, 266 N.C. 45, 50, 145 S.E.2d 309, 314 (1965), supporting the view that the burden is on the accused to show that the delay in his trial was caused by the negligence of the state, but West Virginia follows the view that no demand for a speedy trial is necessary. See *Ex parte Chalfant*, 81 W. Va. 93, 93 S.E. 1032 (1917).

²¹ "If he [the defendant] instigates a proceeding which forces a continuance of the case at a particular term of court, he will not be permitted to take advantage of the delay thus occasioned." *Ex parte Bracey*, 82 W. Va. 69, 75 95 S.E. 593, 596 (1918). Judge Haymond, dissenting in *Farley*, did not so readily equate a motion to a proceeding, but reasoned that petitioner's challenges to the indictments were merely incidental procedures which were outside the scope of *Bracey*. *State ex rel. Farley v. Kramer*, 169 S.E.2d 106, 121 (W. Va. 1969). But isn't the question of whether the continuance is "forced" really a question of whether the judge and prosecutor act quickly or lethargically? It is perhaps significant that the *Bracey* court did not attribute to the defendant the delay caused by his challenge to the sufficiency of the indictment brought against him. *Ex parte Bracey*, *supra* at 75.

²² *State ex rel. Farley v. Kramer*, 169 S.E.2d 106, 109 (W. Va. 1969).

²³ A special term of court cannot be counted toward the discharge of the defendant. *Dillion v. Tanner*, 107 W. Va. 550, 149 S.E. 608 (1929).

²⁴ *State ex rel. Farley v. Kramer*, 169 S.E.2d 106, 109 (W. Va. 1969).

II. EFFECT OF THE HOLDING

A majority of jurisdictions hold that voiding an indictment makes that proceeding a nullity.²⁵ Therefore, to bring another indictment is nothing more than to institute a new and independent proceeding, to which the discharge statutes can be applied without any reference to the first indictment. Although West Virginia has intimated that it follows the minority view,²⁶ the *Farley* decision follows the majority in practice, if not in so many words. This results from the fact that if the defendant was never "remanded for trial," as the majority reasons, then the three term statute would never run in his favor. Therefore, the state could institute a new indictment at the next term without reference to the original indictment proceedings. Furthermore, if the term at which a defendant challenges the indictment cannot be counted in favor of discharge, in theory the state may continue to bring indictments until one is found to be valid.²⁷

The *Farley* case may also raise a serious constitutional question as to whether a defendant, in order to exercise his constitutional right to a speedy trial, must surrender his constitutional right to have

²⁵ Jurisdictions which hold that the voiding of the original indictment creates a new and independent proceeding with the bringing of a new indictment include *Ex parte Newell*, 188 Cal. 508, 206 P. 61 (1922); *Latson v. State*, 51 Del. 377, 146 A. 2d 597 (1958); *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963); *Greiman v. Dist. Court of Hancock County*, 249 Iowa 333, 86 N.W.2d 819 (1957); *State v. Bige*, 195 Iowa 1342, 193 N.W. 17 (1923); *State v. Rowland*, 172 Kan. 224, 239 P.2d (1952); *State v. Child*, 44 Kan. 420, 24 P. 952 (1890); *Greathouse v. State*, 249 A.2d 207 (1969); *State v. Morton*, 444 S.W.2d 420 (Mo. 1969); *State v. Wigger*, 196 Mo. 90, 93 S.W. 390 (1906) *State v. Burlingame*, 146 Mo. 207, 48 S.W. 72 (1898); *State v. McGowan* 113 Mont. 591, 131 P.2d 262 (1942); *State v. Robinson*, 217 Ore. 612, 343 P.2d 886 (1959); *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969); *Mealy v. Commonwealth*, 193 Va. 216, 68 S.E.2d 507 (1952); *Dulin v. Lillard*, 91 Va. 718, 20 S.E. 821 (1895). *See generally Annot.*, 30 A.L.R.2d 466 (1953).

²⁶ *State v. Crawford*, 83 W.Va. 556, 98 S.E. 615 (1919), held that a term of court at which a *nolle prosequi* was entered could be counted toward discharge of the accused under the three-term rule. "When a prisoner has stood ready for trial through two full terms and substantially through the third one, and, no doubt, until the jury has been discharged and the opportunity for trial at that term annihilated, he has substantially performed all the statutory conditions requisite to his right of discharge . . ." *Id.* at 559, 98 S.E. 617. A minority view is followed by those jurisdictions which hold that the state may not extend the statutory period by dismissal. *E.g.*, *Dudham v. State*, 9 Ga. 306 (1851); *People v. Witt*, 333 Ill. 258, 164 N.E. 682 (1928); *Brooks v. People*, 88 Ill. 327 (1878); *Smith v. State*, 168 Tenn. 265, 77 S.W.2d 450 (1935).

²⁷ Such power placed in the hands of the state could perhaps lead to abuse, since allowing the prosecutor to keep bringing indictments until one is found to be valid could work to keep the defendant under indictment forever, if the state so wished.

the state return a valid indictment. Such analysis, however, is beyond the scope of this comment.

A practical problem may also have been raised by the *Farley* decision, in that the West Virginia Supreme Court of Appeals has now handed down an inflexible rule which leaves very little discretion to the trial court in meeting individual situations. Such flexibility or discretion is probably desirable because an unreasonable or capricious delay by the state has been held to be a denial of due process under the fourteenth amendment.²⁸

In summary it is submitted that the law in West Virginia, as enunciated in *Farley*, is that if the defendant in a criminal proceeding challenges the indictment brought against him, and that indictment is declared void as a result, the defendant will not be allowed to invoke the three term rule for that term or for those terms during which he was awaiting re-indictment. But there are some unanswered constitutional questions, as well as the open issue of whether the trial court can discharge the defendant under the three term statute where the prosecutor has acted in bad faith in bringing an indictment which he knows will be voided.

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Statutes—Relation of an Enactment to Its Title

J. Howard Myers, the petitioner, was charged by the grand jury of the Intermediate Court of Kanawha County in six felony indictments for conspiracy with others to affect the market, price and supply of commodities and printing purchased and being purchased by the State of West Virginia under the provisions of West Virginia Code chapter 5A, article 3. Petitioner instituted a proceeding in prohibition in the West Virginia Supreme Court of Appeals seeking to restrain respondents, George W. Wood, Judge of the Inter-

²⁸ Justice Harlan would have decided the entire *Klopfer* case on the basis of a denial of the process in the context of being a denial of fundamental fairness. *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1969). An unreasonable delay has been held to be fundamentally unfair. *Greathouse v. State*, 249 A.2d 207 (Md. 1969). Isn't this the very essence of the provision in the W. VA. CONST. art. III, § 14, which provides that trial shall be without unreasonable delay?