

DENIAL OF SPEEDY TRIAL—MANDAMUS FOR DISMISSAL

Smith v. Hooey, 89 S. Ct. 575 (1969).

In 1960 Richard M. Smith, while a prisoner in the federal penitentiary at Leavenworth, Kansas, was indicted in Harris County, Texas on a charge of theft. He responded with a timely request for a trial. After his other efforts to obtain a prompt trial proved unsuccessful he eventually, in 1967, filed a motion to dismiss for want of prosecution. When this motion failed to elicit any response from the state, petitioner brought a mandamus proceeding in the Texas Supreme Court asking for an order to show cause why the pending charge should not be dismissed. When his mandamus petition was denied petitioner applied for certiorari to have the United States Supreme Court consider the constitutional questions allegedly raised thereby.

Granting certiorari, the Supreme Court declared that the Sixth Amendment right to a speedy trial had application to the case at hand. The Court reasoned that the timely assertion by defendant-petitioner of his constitutional right to a speedy trial gave rise to a corresponding duty on the part of the state to bring him to trial without undue delay.¹ The Court rejected the state's argument that Texas was, in this instance, free from Sixth Amendment constraints, observing that this argument was based on an erroneous conception of the nature of comity.²

After discussing the history and purpose of the Sixth Amendment guarantees and finding a violation thereof by Texas,³ the Court ruled that the order of the Texas Supreme Court (refusing to grant mandamus) must be set aside⁴ and that the case

¹ Ohio likewise conditions the right to a speedy trial on a timely demand for one. *State v. Butler*, 19 Ohio St. 2d 55 (1969). Quoting from pages 56-57: "The law of Ohio is that the right to a speedy trial is not self-executing. Affirmative action on the part of an accused in the nature of a demand to be tried is necessary to invoke the constitutional protection." See also Amended Senate Bill No. 355 which permits a prisoner to obtain a trial on any charges outstanding against him in Ohio, upon written request and notice to the court where the charges are pending. The bill provides that subject to reasonable continuances, the prisoner must be tried within 180 days of the request, or else the charges must be dismissed.

² Texas had contended that the state courts were without the power and authority to comply with the Constitutional mandate where, as here, the petitioner was under federal detention.

³ 89 S. Ct. 575, pp. 577-579, *passim*.

⁴ That is, that the mandamus should issue and that the state should be compelled to show cause why the criminal charge should not be dismissed.

must be remanded to that court for further proceedings. While the holding may seem somewhat ambiguous and nondispositive at first glance, it becomes clear upon reflection, that the effect of the holding is to compel the Texas Supreme Court to order a dismissal of the charge against Smith. If the Texas Court finds on remand that there has been no breach of constitutional duty, this would be inconsistent with the U. S. Supreme Court's holding. But if such a breach of duty is once acknowledged, then Texas must necessarily fail to show cause why it should not grant a dismissal for want of prosecution.

Therefore, without drawing unjustified inferences, one can interpret the decision in the principal case as follows: Given the recognized right to a speedy trial, and given the corresponding duty on the part of the state to affirmatively secure that constitutional right, the breach of such a duty will result in the inability of the state to show cause why it should not grant a dismissal.⁵ This view of the case is reinforced by the concurring opinions of Justices White and Harlan.⁶

To hold that the state must dismiss is not the same as to hold that mandamus should issue for dismissal. Such a use of mandamus is clearly contrary to the recognized nature of the writ.⁷ However, in the present case it appears that the writ is usable to compel dismissal because of the unusual procedural complexion of the case.

In summary, *Smith v. Hooey* seems to stand for the following propositions: that the constitutional right to a speedy trial is not self-executing; that once the right is affirmatively demanded, there arises a duty on the part of the state promptly to try the petitioner; and that the state cannot escape that duty by showing that it honestly misconstrued the law.

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⁵ It logically follows that, as a procedural matter, mandamus is a proper proceeding to effectuate dismissal *under the given set of facts* existing in this case.

⁶ See 89 S. Ct.

⁷ *Wilbur v. U.S.*, 281 U.S. 206, 50 S. Ct. 320 (1930); *State ex rel. De Ville Photography, Inc. v. McCarroll, Judge*, 168 Ohio St. 337, 154 N.E. 2d 640 (1958).