



12-1-1969

## Supreme Court of Texas is without Jurisdiction to Grant a Writ of Mandamus to Direct a District Judge to Dismiss an Indictment in a Criminal Case on the Ground that Relator was Denied a Speedy Trial.

John A. Pizzitola

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### Recommended Citation

John A. Pizzitola, *Supreme Court of Texas is without Jurisdiction to Grant a Writ of Mandamus to Direct a District Judge to Dismiss an Indictment in a Criminal Case on the Ground that Relator was Denied a Speedy Trial.*, 1 ST. MARY'S L.J. (1969).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol1/iss2/10>

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foundation owns 49 per cent of the corporation and the remaining 51 per cent ownership control the foundation? Or, if carried to its logical extreme, the foundation has no ownership rights of the corporation, either legal or beneficial, and the stockholders of the corporation control the foundation?

Also to be considered are the rights of minority stockholders. Would the result in *Richardson* be the same if the minority interest were not connected to the foundation? If so, what problems are presented by the reduction of the minority interest's equity due to the assessment of additional income taxes? Where the foundation's stock ownership is less than 100 per cent, should the entire contribution be treated as a dividend; conversely, should the minority interest be denied the indirect benefit of a charitable contribution deduction?

At what point is the Congressional mandate of section 170<sup>11</sup> reconciled with the legislative intent of sections 502 and 511-515? And is significance to be awarded the determination of fact by the trial court:

Whether or not a corporate distribution is a dividend or something else . . . presents a question of fact to be determined in each case.<sup>12</sup>

*Barry H. Edelman*

WRIT OF MANDAMUS—SUPREME COURT OF TEXAS IS WITHOUT JURISDICTION TO GRANT A WRIT OF MANDAMUS TO DIRECT A DISTRICT JUDGE TO DISMISS AN INDICTMENT IN A CRIMINAL CASE ON THE GROUND THAT RELATOR WAS DENIED A SPEEDY TRIAL. *Pope v. Ferguson*, 445 S.W.2d 950 (Tex. Sup. 1969).

Relator was convicted of bank robbery in a United States district court on March 11, 1961. He was sentenced by the federal court to twenty-five years in the custody of the Attorney General of the United States. An indictment for armed robbery of the same bank was returned in the state district court in Limestone County, Texas, on November 30, 1960. It is this state indictment that relator seeks to have dismissed. Relator was incarcerated in the United States penitentiary at Leavenworth, Kansas, in October of 1961, and at all times since has been a federal prisoner. From the federal penitentiary, dating from July 1966 until May 21, 1969, the relator proceeded with the following: (1) motion in the state district court to quash the indict-

<sup>11</sup> Int. Rev. Code of 1954, § 170(a)(1) provides that "there shall be allowed as a deduction." . . . (emphasis supplied.)

<sup>12</sup> *Lengsfeld v. Commissioner*, 241 F.2d 508 (5th Cir. 1957).

ment and remove detainer—motion overruled until the case is set for trial on the merits; (2) motion for speedy trial or alternatively to dismiss the indictment; (3) petition for writ of habeas corpus ad prosequendum—denied; (4) petition to Texas Supreme Court for writ of mandamus directing the district judge to grant a speedy trial or dismiss—motion overruled; and (5) presently, the relator seeks a writ of mandamus from the Texas Supreme Court directing the district judge to dismiss the state indictment on the ground he was denied a speedy trial. Held—*Petition for writ of mandamus denied*. The Supreme Court of Texas is without jurisdiction to grant a writ of mandamus to direct a district judge to dismiss an indictment in a criminal case on the ground that relator was denied a speedy trial.

“The writ of mandamus, in its modern form, may be defined as a command or order issuing from a court of competent jurisdiction requiring some officer, inferior court, or corporation to perform some duty enjoined by law.”<sup>1</sup> The Texas Supreme Court acquires its mandamus jurisdiction through the constitution and relevant statutes enacted by the legislature. The Texas Constitution states, “[T]he legislature may confer original jurisdiction on the supreme court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.”<sup>2</sup>

In original mandamus proceedings, the jurisdiction of the Texas Supreme Court is founded upon articles 1733 and 1734, Texas Revised Civil Statutes Annotated.<sup>3</sup> The supreme court may issue writs of mandamus agreeable to the principle of law regulating such writs, against any district judge,<sup>4</sup> and may “compel a judge of a district court to proceed to trial and judgment in a cause agreeable to the principles and usages of law.”<sup>5</sup>

The Supreme Court of the United States gave Texas courts a guideline for determining what was meant by principles and usages of law, declaring that if the party aggrieved has a remedy by writ of error or appeal, the writ of mandamus will not be issued.<sup>6</sup> This interpretation subsequently was followed in Texas in *Aycock v. Clark*,<sup>7</sup> and has been consistently adhered to since the *Aycock* decision.<sup>8</sup> In stronger words, the Texas Supreme Court has designated the writ to be an extraordin-

<sup>1</sup> State *ex rel.* Elmendorf v. San Antonio St. Ry. Co., 30 S.W. 266 (Tex. Civ. App. 1895, writ *dism'd*).

<sup>2</sup> TEX. CONST. art. V, §3.

<sup>3</sup> TEX. REV. CIV. STAT. ANN. arts. 1733, 1734 (1962).

<sup>4</sup> TEX. REV. CIV. STAT. ANN. art. 1733 (1962).

<sup>5</sup> TEX. REV. CIV. STAT. ANN. art. 1734 (1962).

<sup>6</sup> *Ex parte Newman*, 81 U.S. 152, 20 L. Ed. 877 (1871).

<sup>7</sup> *Aycock v. Clark*, 94 Tex. 375, 60 S.W. 665 (1901).

<sup>8</sup> *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648 (1958); *City of Houston v. Miller*, 436 S.W.2d 368 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ *ref'd n.r.e.*); *Gonzales v. Stevens*, 427 S.W.2d 694 (Tex. Civ. App.—Corpus Christi 1968, writ *ref'd n.r.e.*).

ary remedy, and the writ of mandamus will not issue where the relief sought could be obtained by appeal.<sup>9</sup>

The writ of mandamus may be issued to compel performance of a ministerial act by a trial judge,<sup>10</sup> but will not be issued to control the judicial discretion of the judge.<sup>11</sup> The fundamental rights guaranteed by the Constitution cannot be subject to judicial discretion.<sup>12</sup> The right to a speedy trial is of such a fundamental nature.<sup>13</sup> The supreme court's authority to issue writs of mandamus in civil cases is extended to criminal cases,<sup>14</sup> and is governed by the same statutes.<sup>15</sup> Although mandamus may not be used to control judicial discretion when there is an abuse of judicial discretion and no adequate remedy of appeal, mandamus will lie to correct the action of the trial judge.<sup>16</sup>

Article V, section 5 of the Texas Constitution provides that the Texas Court of Criminal Appeals shall have exclusive appellate jurisdiction over all criminal cases.<sup>17</sup> The supreme court must remain within the boundary of its jurisdiction in this area of law normally set aside for the court of criminal appeals.<sup>18</sup> It is for this reason that the supreme court may not interfere with the court of criminal appeals' appellate jurisdiction, thus leaving the supreme court only with the authority to issue writs in criminal cases where there is no adequate remedy of appeal or writ of error. In *State v. Olsen*, the supreme court held that the writ of mandamus would issue on a void judgment.<sup>19</sup> In *Olsen*, on preliminary trial the trial court had rendered a void judgment concerning the issue of insanity at the time of the offense, and the judgment operated as an acquittal which was not appealable.<sup>20</sup>

The interesting feature of the principal case is that the relator twice petitioned the Supreme Court of Texas and was denied twice, but on completely different grounds. In his first petition relator sought either a speedy trial or dismissal. The motion was overruled on the strength of *Cooper v. State*.<sup>21</sup> In *Cooper*, the petitioner was also in a federal penitentiary seeking dismissal of a state indictment. The court held that the state is without power or authority to have a federal prisoner,

<sup>9</sup> *Jones & Co. v. Wheeler*, 121 Tex. 128, 45 S.W.2d 957 (1932).

<sup>10</sup> *Arberry v. Beavers*, 6 Tex. 457 (1851).

<sup>11</sup> *Rush v. Browning*, 103 Tex. 649, 132 S.W. 763 (1910).

<sup>12</sup> *State ex rel. Moreau v. Bond*, 114 Tex. 468, 271 S.W. 379 (1925), *Wilson v. Bowman*, 381 S.W.2d 320 (Tex. Sup. 1964).

<sup>13</sup> *Wilson v. Bowman*, 381 S.W.2d 320 (Tex. Sup. 1964).

<sup>14</sup> *Id.*

<sup>15</sup> TEX. REV. CIV. STAT. ANN. arts. 1733, 1734 (1962).

<sup>16</sup> *Stakes v. Rogers*, 139 Tex. 650, 165 S.W.2d 81 (1942).

<sup>17</sup> TEX. CONST. art. V § 5: "The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law."

<sup>18</sup> *State v. Tunstall*, 51 Tex. 81 (1879).

<sup>19</sup> *State v. Olsen*, 360 S.W.2d 398 (Tex. Sup. 1962).

<sup>20</sup> *Id.*

<sup>21</sup> *Cooper v. State*, 400 S.W.2d 890 (Tex. Sup. 1966).

under a completely separate sovereignty, brought forth for trial in the state courts. To have a prisoner brought into the state for trial, the federal prison authorities would necessarily have to give their permission. Therefore, the prisoner was not denied a speedy trial.<sup>22</sup> Following the *Cooper* case, the Texas Supreme Court again denied a petition for writ of mandamus in which petitioner alleged a denial of speedy trial.<sup>23</sup>

Later, the reasoning in the *Cooper* case was abolished by the Supreme Court of the United States in *Barber v. Page*.<sup>24</sup> In *Barber*, the Court held that failure of the state of Oklahoma to produce a prosecuting witness because he is in a federal penitentiary is inexcusable.

The Supreme Court of the United States, in the case of *Smith v. Hooey*,<sup>25</sup> extended the rule set out in *Barber* and held that the state of Texas had a constitutional duty to make a good faith effort to bring the petitioner before the district court for trial. The failure to do so amounted to a denial of a speedy trial.

In the instant case the relator's second petition for writ of mandamus was filed after the *Smith* decision, petitioner relying on that decision for dismissal of indictment alone, and not alternatively for speedy trial. However, in the *Smith* decision the jurisdiction of Texas courts was of no concern. The case was reversed and remanded for further proceedings. In a concurring opinion, Justice White pointed out that the decision whether Texas must dismiss the criminal proceedings against the petitioner is left open to the Texas courts to be adjudicated in the manner permitted by Texas procedure.<sup>26</sup> There is no doubt that a federal prisoner, on his request therefor, is entitled to a speedy trial in a state criminal charge. Once the state commences a criminal prosecution, it has a duty to follow it through to completion. The mere fact the defendant is in a federal penitentiary is not sufficient justification for unreasonable delay of a speedy trial.<sup>27</sup> The Attorney General, upon request of authority of the state, may transfer a federal prisoner to a state penal or correctional institution for purposes of trial on state charges.<sup>28</sup> The state authority presents the Attorney General with a certified copy of the indictment and the Attorney General will release the prisoner if he feels it is within the public interest.<sup>29</sup>

Dismissal of indictments for denial of speedy trial has been allowed

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<sup>22</sup> *Id.*

<sup>23</sup> *Lawrence v. State*, 412 S.W.2d 40 (Tex. Sup. 1967).

<sup>24</sup> *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

<sup>25</sup> *Smith v. Hooey*, 393 U.S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969).

<sup>26</sup> *Id.*

<sup>27</sup> *People v. Piscitello*, 165 N.E.2d 849 (N.Y. 1960).

<sup>28</sup> 18 U.S.C.A. § 4085 (1948).

<sup>29</sup> *Id.*

in state courts by writ of habeas corpus ad prosequendum,<sup>30</sup> writ of prohibition,<sup>31</sup> and any other appropriate motion to have indictment dismissed.<sup>32</sup>

In *Barker v. Municipal Court of Salinas Judicial District*, writ of mandamus issued to dismiss the complaint against the petitioner.<sup>33</sup> The state officials declined over a period of eighteen years to take necessary steps to obtain custody of petitioners and bring them to trial. The court held that this inaction on the part of the California state officers amounted to a gross neglect of their obligations and writ of mandamus issued dismissing the complaint. The distinguishing feature of the *Barker* case is the fact that although mandamus issued to dismiss the complaint, the court held that the state officials had grossly neglected their obligations. This gross negligence distinguishes it from the present case.

Although a motion is allowed to set aside an indictment on the basis that the accused was denied his constitutional right of a speedy trial,<sup>34</sup> the dismissal of any indictment must adhere to the rules of the Texas Code of Criminal Procedure. To dismiss a criminal charge after indictment, the state attorney must authorize the dismissal with the consent of the trial judge.<sup>35</sup> The trial judge may not dismiss a criminal case without a proper motion on the part of the state.<sup>36</sup> In essence, a defendant must demand a speedy trial before he can complain of the denial of his right to a speedy trial.<sup>37</sup>

In the instant case, the relator is merely seeking a dismissal of the indictment. In denying the relator's motion, the court pointed out that the trial judge's first denial of his writ of habeas corpus ad prosequendum was prior to the *Smith* decision, and therefore *Cooper* and *Lawrence* governed. The relator's decision to have his case tried under the present ruling of *Smith* would likely be adhered to by the trial judge. If the judge fails to hear relator's motion to quash or to try his case, the relator may again apply to the Texas Supreme Court for a writ of mandamus to compel the district judge to take the proper course of action.

The Texas court system is unusual in that the highest courts for civil and for criminal matters are separated. Appellate jurisdiction over criminal matters is vested entirely in the Texas Court of Criminal

<sup>30</sup> Naugle v. Freeman, 450 P.2d 904 (Okla. Crim. App. 1969).

<sup>31</sup> Dickoff v. Dewell, 9 So. 2d 804 (Fla. 1942).

<sup>32</sup> Commonwealth v. McGrath, 205 N.E.2d 710 (Mass. Sup. 1965).

<sup>33</sup> *Barker v. Municipal Court of Salinas Judicial District*, 415 P.2d 809 (Cal. 1966).

<sup>34</sup> Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925).

<sup>35</sup> TEX. CODE CRIM. PROC. ANN. art. 32.02 (1965).

<sup>36</sup> State v. Anderson, 119 Tex. 110, 26 S.W.2d 174 (1930).

<sup>37</sup> Hernandez v. State, 4 Tex. Ct. App. 425 (1878); Laube v. State, 417 S.W.2d 288 (Tex. Crim. App. 1967).