

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES CHIPPS,

CIV 10-5028-JLV

Petitioner,

v.

OGLALA SIOUX TRIBAL COURT,
OGLALA SIOUX TRIBE PUBLIC
SAFETY COMMISSION, AND
DARWIN LONG, ADMINISTRATOR,
OGLALA SIOUX TRIBAL JAIL,

BRIEF ON SPEEDY TRIAL

Respondents.

The Application for Writ of Habeas Corpus sets out the facts surrounding petitioner's incarceration from July 1, 2009, to the present time without trial or bond.

Because the guarantee of a speedy trial "is one of the most basic rights preserved by the our Constitution", it is one of those "fundamental" liberties embodied in the bill of Rights which the due process clause of the Fourteenth Amendment makes applicable to the States. Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). The protection afforded by this guarantee is "activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." Invocation of the right need not await indictment, information, or other formal charge but begins with the actual restraints imposed by arrest if those restraints precede the formal preferring of charges. United States v. Marion, 404 U.S. 307, 313 (1971).

The Oglala Sioux Tribe Criminal Code at Chapter 8, Criminal Procedures, § 5-1, provides that “(t)he accused shall have the right to a speedy and public trial... .” § 4.1 (c) (2) states that “(b)efore an accused is required to plead in a criminal case in any criminal charges (sic) the Judge shall advise the accused ...that he has the right ...(b) to have a speedy and public trial... .” Moreover, the Indian Civil Rights Act, 25 U.S.C. 1302 (6), also gives defendants in Tribal Court the right to a speedy trial.

Possible prejudice that may result from delays between the time government discovers sufficient evidence to proceed against a suspect and the time of instituting those proceedings is guarded against by statutes of limitation, which represent a legislative judgment with regard to permissible periods of delay. United States v. Marion, 404 U.S. 307, 322-323 (1971). In the present case, the Tribe has a one year statute of limitation for criminal cases. Chapter 8, Criminal Procedures, Section 1-2, time limit for commencing criminal prosecution, provides that “(n)o prosecution for an offense under this Code shall be maintained unless the complaint is filed within one (1) year after the commission of the offense.” This means that any offense in Tribal Court must be prosecuted within 1 year of its commission. However, the right to a speedy trial is invoked after a defendant has been charged and is separate and apart from any questions surrounding the applicability of a statute of limitation. But it would seem beyond fathom that a person could be held without bond and trial for length of time nearly as long as the statute of limitation applicable to the charges.

“The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.” Beavers v. Haubert, 198 U.S. 77, 87 (1905). No length of

time is per se too long to pass scrutiny under this guarantee, Pollard v. United States, 352 U.S. 354 (1957), but on the other hand neither does the defendant have to show actual prejudice by delay. United States v. Marion, 404 U.S. 307, 320 (1971). The United States Supreme Court has adopted an ad hoc balancing approach. “We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” Barker v. Wingo, 407 U.S. 514, 531 (1972). The fact of delay triggers an inquiry and is dependent on the circumstances of the case. Reasons for delay will vary. A deliberate delay for advantage will weigh heavily, whereas the absence of a witness would justify an appropriate delay, and such factors as crowded dockets and negligence will fall between these factors. Barker v. Wingo, 407 U.S. 514, 531 (1972). It is the duty of the prosecution to bring a defendant to trial, and the failure of the defendant to demand the right is not to be construed as a waiver of the right, Johnson v. Zerbst, 304 U.S. 458, 464 (1938); yet, the defendant’s acquiescence in delay when it works to his advantage should be considered against his later assertion that he was denied the guarantee, and the defendant’s responsibility for the delay would be conclusive. Finally, a court should look to the possible prejudices and disadvantages suffered by a defendant during a delay. Strunk v. United States, 412 U.S. 434 (1973).

The United States and various individual States have replaced the Barker factors with legislation. For the federal courts, Congress under the Speedy Trial Act of 1974 imposed strict time deadlines replacing the Barker factors. 18 U.S.C. 3161 (c) (1)

(defendant to be tried within 70 days). In South Dakota state courts, a defendant is to be tried within 180 days. SDCL 1967 23A-44-5.1.

Chapter 2, § 20.27 provides that in determining any case over which it has jurisdiction, the Oglala Sioux Tribal Court shall give binding effect to (a) any applicable constitutional provision, treaty, law, or any valid regulation of the United States.

Emphasis added. § 21 of the same Chapter provides that the Oglala Sioux Tribal Court shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances of the Tribe, not prohibited by federal law.

If the federal law is applied to this case, the prosecution had 70 days to try the defendant from the time that he was arrested in July, 2009. Obviously that time has come and gone and the charges against Charles Chipps must and should be dismissed. Even if this Court would apply the law of South Dakota, where a defendant must be tried within 180 days, the same result would be required. In each case, Charles Chipps has been deprived of his right to a speedy trial. This Court can weigh the speedy trial provisions in state and federal courts in making a determination whether Charles Chipps has been denied a fair trial.

If the Court simply applies the Barker factors, defendant has also been deprived of a speedy trial. First, the length of the delay in this case is over nine months, all nine months being spent incarcerated. Second, the reason for the delay is that the Federal government is going to indict defendant and charge him with a violation of Federal law. That is what the February 10, 2010, motion and order to hold the case in abeyance states. The United States Supreme Court has held that it is unlawful to

deprive a defendant of a speedy trial because of the actions of another sovereign. See Smith v. Hooey, 393 U.S. 374 (1969); Dickey v. Florida, 398 U.S. 30 (1970). Despite the motion and order for abeyance secured by the prosecution, the Attorney General at oral argument indicated that it would try the case if ordered. This concession shows that the case could have been tried within a reasonable time after defendant had been charged in July, 2009, but he was not. Three, the defendant has consistently requested a right to a speedy trial. Four, the prejudice in this case is overwhelming. Defendant has spent over nine months in jail without trial on misdemeanor charges. If acquitted, which surely he will be, this is nine months of his life spend needlessly behind bars. He is an elderly man. While in jail, he has suffered innumerable medical problems, some new and some preexisting. He was hospitalized from incarceration to Sanford Hospital in Sioux Falls. He has asthma, diabetes with urinary complications, high blood pressure, high cholesterol, digestive issues relating to a hiatal hernia, and bleeding ulcers. Since his incarceration, Charles Chipps has experienced difficulty getting the full regimen of medications Sanford Hospital discharged him on. He has made numerous requests and complaints to the jail about this failure. He visited the Pine Ridge clinic and had his prescriptions refilled but sometimes the jail will not provide them to him. For a while he was getting 3 to 4 meds daily out of 14 that have been prescribed with no medication for asthma, high blood pressure or urinary concerns. His weight has gone from 197 pounds to 175 pounds and he suffers significant anxiety about his failing health and inability to do anything about it. His doctors have recommended that his medical condition excuse his incarceration. In addition to the effect on his health, defendant because of delay has been prevented from marshaling

evidence that he will need to defend himself against the charges. He has not been able to see his family. After nine months, the ability to recall becomes less and memories of witnesses fade. During this nine months, the federal government is preparing its witnesses while defendant is incarcerated without the right to have court appointed counsel begin preparing the defense to either the tribal or federal charges.

CONCLUSION

For all the above reasons, the charges against Charles Chipps should be dismissed as violative of his right to a speedy trial.

Dated this 5th day of May, 2010.

/s/ Terry L. Pechota

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CERTIFICATE OF SERVICE

I certify that on this 5th day of May, 2010, the within Brief on Speedy Trial was served on the individuals next herein by depositing a true and correct copy thereof with the United States Post Office at Rapid City, South Dakota, in an envelope with first-class prepaid postage thereon affixed, addressed to said individuals at their last known addresses of record, and via facsimile to their respective last known facsimile numbers, to wit:

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