Appendix L

STATE OF VERMONT

ESSEX COUNTY, SS.

DISTRICT COURT OF VERMONT
UNIT NO. 3, ESSEX CIRCUIT
DOCKET NO. 91-7-85 Ecr

STATE OF VERMONT

VS

CHARLES "EDDIE" WISEMAN

DISTRICT COURT OF VERMONT
JUN 12 1985

FINDINGS, CONCLUSIONS AND ORDER

On June 6, 1985, the court heard Defendant's Motion to Dismiss for Lack of Speedy Trial. Defendant was represented by himself and through co-counsel, Jean A. Swantko, Esquire. The State was represented by William Gray, Esquire, and David Suntag, Esquire.

Based on the evidence, the record, the memoranda and the arguments of counsel, the court makes the following findings:

1. Defendant was issued a citation for simple assault in July of 1983; he was arraigned on August 10, 1983. Conditions of Release were imposed.

2. As early as September 1983, problems arose concerning the availability of the State's witnesses, Roland, Constance and Darlyn Church. Both the State and the defense requested a continuance on motion dates until the Churches could be deposed.

3. On September 23, 1983, Defendant filed a Motion to Disqualify the Attorney General's office. The Motion was heard on January 5, and January 25, 1984.

4. On September 26, 1983, Defendant filed a Motion to Dismiss due to Pre-Trial Publicity and Inability to get a Fair Trial. The court heard the Motion on January 25 and January 30, 1984; the court rendered it decision on March 13, 1984.

5. On November 1 and 2, 1983, Defendant deposed each member of the Church family, but the Church family refused to be personally questioned by Defendant.

6. On December 2, 1983, the Defendant, in compliance with court order, filed the following motions:

Motion to Dismiss/Selective Prosecution;
Motion to Dismiss for Constitutional Reasons (Free Exercise; Vagueness;)
Motion to Compel Deposition Testimony;
Motion for Defendant to Act as Co-counsel.

Motions were heard in January 1984, and denied on March 13, 1984.

7. On January 11, 1984, the court sua sponte raised the issue of assignment of counsel for Defendant at public expense, and after a hearing on January 24, 1984, denied Defendant assigned counsel. On January 25, 1984, Defendant filed a Motion for Interlocutory Appeal regarding assignment. Defendant also raised the speedy trial issue for the first time.

8. In February of 1984, Defendant requested a sequestered jury trial in Essex County. On March 13, 1984, the Motion was denied without prejudice for renewal of the motion before trial, at the discretion of the judge who presides at trial.

9. During March of 1984, the State indicated it needed three weeks notice to get the Church family witnesses at trial.

10. On March 21, 1984, Defendant stated he was ready for trial, and he requested trial as soon as possible.

11. On April 30, 1984, Ret. Justice F. Ray Keyser, was specially assigned to the case.

12. A status conference was held on May 10, 1984. Pursuant to that conference, an Order dated June 1, 1984, set the trial date for June 25, 1984, in St. Johnsbury; the court also re-assigned the public defender, rendering the Defendant's pending Interlocutory Appeal moot.

13. At a pre-trial conference on June 19, 1984, the State requested a continuance, claiming that despite "diligent efforts", it could not locate the material witnesses, and to proceed without them would severely prejudice the State's case. Defendant objected and again raised his speedy trial claim. The court granted a continuance until August 13, 1984, but warned the State that "the case will be tried or will be dismissed, one or the other," at that time.

14. On June 22, 1984, the now well-known raid on the Northeast Kingdom Community Church (NEKCC) took place.

15. At a hearing pursuant to the raid on July 12, 1984, the State of Vermont, attempting to justify that raid, claimed that all children in NEKCC were at risk because they lived in the same community with the Defendant.

16. On July 26, 1984, due to the pre-trail publicity, the court on its own motion changed the trial venue to Bennington County. The trial date was changed from August 13 to August 20 to accomodate the change of venue. The Defendant objected and again raised the speedy trial rights.

17. On August 6, 1984, the Church family in an interview with the Barre-Montpelier Times Argus given in their home in Cambridge,Maine recanted their deposition testimony.

18. On August 20, 1984, the State appeared at trial without the material witnesses and attempted instead to rely on unsigned depositions.

19. The court suppressed those depositions because

1) the State had not used all "reasonable" means to get the witnesses to trial;

2) Defendant had never had the opportunity, provided by the Vermont Constitution, to personally confront and cross-examine his accusers; and

3) given the subsequent recantations, the depositions standing alone were untrustworthy.

20. Instead of electing to go forward with the trial, the State sought permission to take an interlocutory appeal. The State argued that it was not taking the appeal for purposes of delay, "I'm doing it for purposes of trying to get those witnesses back; being able to use them."

21. The court granted the State permission to take an interlocutory appeal over the objection of Defendant, who once again asserted his speedy trial rights.

22. Later in August, the Church family returned to live in Island Pond and they re-joined the NEKCC. On August 28, 1984, Roland Church held a press conference in Island Pond; he claimed he lied and exaggerated in his deposition. He was in Vermont, and he stated he would no longer avoid any attempt to subpoena him.

23. The State made no attempt to interview or depose the Church family after their return to Vermont.

24. The State proceeded with its Interlocutory Appeal, filing its brief on November 16, 1984.

25. On January 11, 1985, Defendant filed a Motion to Dismiss the Interlocutory Appeal and Motion for Remand. These Motions were accompanied by affidavits asserting that witnesses at issue were in fact available. Defendant also reasserted his speedy trial rights.

26. On January 23, 1985, the Vermont Supreme Court remanded the case to the trial court for its determination of witness availability.

27. The hearing on remand was delayed because of a medical emergency involving the assigned trial judge. It was held on April 11, 1985. At that time, the State appeared and argued that the Defendant had the burden of proving the availability of the witnesses against him. The trial court ruled that it was indeed the State's burden, and it recessed the hearing for one week to give the State the opportunity to subpoena the witnesses.

28. On April 18, 1985, the Church family appeared at the hearing and gave the court assurances that they would appear at trial. The court concluded the witnesses were "available."

29. At that hearing, the State in its examination of Roland Church, conceded that it had made a tactical decision not to detain the witnesses to assure their appearance at trial in Bennington during the summer of 1985. (See transcript of April 18, 1985, hearing, pg. 28.)

30. Per order dated April 18, 1985, the court on its own motion returned the venue to Caledonia Circuit, St. Johnsbury, and set a tentative trial date of June 17, 1985, should the Supreme Court remand the case.

31. On April 26, 1985, the Supreme Court dismissed the State's appeal.

32. At the pre-trial conference held on June 6, 1985, and pursuant to Defendant's speedy trial motion, the Defendant took the stand and testified as to the personal prejudice he has experienced as a result of this pending case.

33. For almost two years, the Defendant has experienced a financial and emotional disruption of his personal life.

34. Defendant has received both written and oral threats to his life.

35. His profession as a preacher has been harmed because the publicity surrounding this charge has evoked great hatred and hostility directed toward him. When he has attempted to speak in public, he has been shouted down with cries of "Child Beater!"

36. The pending charges against him formed one of the basis for the State's raid on Island Pond wherein his home was entered and his children and his possession seized.

37. His daily routine and family life have been disrupted by the countless hours consumed by court hearings; stress and anxiety result from his "living under a cloud."

38. The foregoing findings as to personal prejudice were undisputed.

39. It has been approximately twenty-three months from the date of the citation to the date of the speedy trial hearing.

CONCLUSIONS OF LAW

"That in all prosecutions for criminal offenses, a person hath a right to... a speedy public trial by an impartial jury of the country... ." VT. CONST. Ch. I, Art 10th. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... ." U.S. CONST. Amend VI.

The right to a speedy trial is a Vermont and federal constitutional guarantee. In 1967, the U.S. Supreme Court established that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. Klopper v. North Carolina, 386 U.S. 213 (1967). In 1972, the U.S. Supreme Court for the first time, set out the criteria by which the speedy trial right is to be judged. Barker v. Wingo, 407 U.S. 514 (1972). In State v. Dragon, 130 Vt. 570, 573 (1972), the Vermont Supreme Court adopted the Barker criteria:

1) Length of delay,
2) Reason for the delay,
3) Defendant's assertion of his right, and
4) Prejudice to Defendant,

Motions to dismiss on speedy trial grounds are addressed to the discretion of the court and involve a balancing test in which the conduct of both the prosecution and the Defendant must be weighed. State v. Dragon, 130 Vt. at 573.

I.

Length of the Delay

It has been almost two years since the issuance of the citation to Defendant for simple assault, a misdemeanor. Defendant cites State v. Franklin, 136 Vt 568, 570 (1978), for the proposition that passage of over eighteen months from citation to trial not brought about by the Defendant constitutes prejudice as a matter of law. That case, however, is distinguishable, for while it involved delay of over eighteen months, thirteen months of that delay represented failure of the court to issue findings and conclusions on a motion to suppress.

In a later case, the Vermont Supreme Court held that the length of the delay, rather than being dispositive of the constitutional question, operates as a "triggering device" for further inquiry. State v. Williams, 143 Vt. 396, 401 (1983).

Administrative Order number 5, promulgated by the Supreme Court provide guidelines designed to promote the prompt and efficient disposition of criminal cases. The order does not, however, confer a right on the Defendant. State v. Unwin, 139 Vt. 186 (1980). In the usual case under A.O. 5, delays accompanying pre-trial motions are excluded from the computation of time limits described in order. 12 V.S.A. App. VIII A.O. 5 §4 (a).

In the instant case, the time from citation to the speedy trial hearing is twenty-three months. Defendant was cited in July 1983. All relevant pre-trial motions were filed and resolved by March 21, 1984, and the Defendant was ready to go to trial.

The remaining period, from March 21, 1984, through June 6, 1985, represents a period of approximately fifteen months. This fifteen-month delay is sufficient to trigger a consideration of all the factors in the balancing test. State v. Snide, 144 Vt. 436, 441 (1984).

II.

Reason for Delay

In evaluating the reasons for delay, different weights are accorded different reasons. Barker v. Wingo, 407 U.S. at 531. A deliberate attempt to hamper the defense should be weighed heavily against the government. A neutral reason, such as overcrowded courts, should be weighed less heavily, yet considered since responsibility ultimately lies with the government and not the defendant. Delays caused by defendant's own trial strategy or foot-dragging will be weighed against the defendant. State v. Unwin, 139 Vt. at 195-196. State v. Dragon, 130 Vt. at 373. The State must make a "diligent, good faith effort "to bring the Defendant to trial. Moore v. Arizona, 414 U.S. 25, 26 (1973).

The State had difficulty, from the inception of the case, getting cooperation from the material witnesses. In June of 1984, the State claimed the absence of those witnesses would severely prejudice their case and sought a continuance in June of 1984, in order to procure the witnesses' attendance at trial in August. When the court granted that continuance, it was accompanied by a warning to the State: try the case in August, or it will be dismissed.

By its own admission, the State made the tactical decision not to detain the witnesses in August 1984 in order to assure their presence at trial. See 13 V.S.A. §6646 and Findings of Fact at No. 27. Instead the State decided to try the case on the depositions of the material witnesses. When the court prohibited the depositions from being used as substantive evidence, the State chose not to go ahead with the trial but to take an interlocutory appeal.

Within days of their filing that appeal, the State knew the witnesses had returned to Vermont, but the State chose to disregard the Ethical Considerations for public prosecutors embodied in EC. 7-13.

> With respect to evidence and witnesses, ...a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

The witnesses were possibly "available" in Vermont as early as August of 1984. But the State chose to pursue their appeal rather than bring the Defendant to trial, despite the State's claims at the hearing for the interlocutory appeal that they were "trying to get the witnesses back," to use them.

The almost fifteen month delay in this case, following the disposal of all relevant pre-trial motions, was not brought about by the Defendant. The delays are due solely to the tactical decisions of the State and must be weighted against the government in the balancing process.

III.

Assertion of the Right

As early as January 25, 1984, the Defendant asserted his right to a speedy trial. On March 21, 1984, Defendant demanded that this matter be tried immediately. On four other occasions, including Defendant's Motion to Dismiss the Appeal and Motion for Remand directed to the Vermont Supreme Court, the Defendant asserted his right.

Defendant had made timely and aggressive assertions of his right to a speedy trial.

IV.

Prejudice to Defendant

The question of prejudice to the Defendant is the most important factor to consider in analyzing speedy trial issues. State v. Williams, 143 Vt. 396, 406 (1983), citing State v. Bristol, 143 Vt. 245, 249 (1983); State v. Unwin, 139 Vt. at 197.

The U.S. Supreme Court in Barker v. Wingo identified three interests which the speedy trial right was designed to protect from prejudice:

1) to prevent oppressive pre-trial incarceration;
2) to minimize anxiety and concern of the accused;
3) to limit the possibility that the defense will be impaired.

In a pre-Barker case, the Vermont Supreme Court stated essentially these same three interests. See State v. Mahoney, 124 Vt. 488, 490 (1965). The protection may be invoked even though a person is not imprisoned. Id.

In Moore v. Arizona, 414 U.S. 25, 26, the Court observed that in Barker v. Wingo, it had "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial... ."

> We regard none of the four factors identified above [length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum,

> these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Moore v. Arizona, 414 U.S. at 26, quoting Barker v. Wingo, 407 U.S. at 533.

Prejudice to the Defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings. Id. at 26-27.

> Inordinate delay between arrest, indictment and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. ...Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends.

United States v Marion, 404 U.S. 307, 320 (1971).

Indeed, the Defendant has made ample showing of personal prejudice, as outlined in U.S. v. Marion, and this fourth factor is satisfied.

V.

Having considered each of the relevant factors, and applying the balancing test to the unique facts of this particular case, the court concludes that Defendant has been denied the right to a speedy trial. The "only possible remedy" for denial of the right to speedy trial is dismissal of the charges with prejudice. Strunk v. United States, 412 U.S. 434 (1973).

Inasmuch as the court concludes that Defendant has been denied the right to a speedy trial, it is unnecessary for the court to reach the Defendant's other motions.

ORDER

Accordingly, Defendant's Motion to Dismiss for Lack of a Speedy Trial is hereby GRANTED.

Dated at _____ this ____ day of June, 1985.

F. RAY KEYSER, RET. JUSTICE
Assigned Judge

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Eds: Church is Miss

MONTPELIER, Vt. (AP) - A judge has dismissed the last remaining child abuse case against the Northeast Kingdom Community Church, a sect raided by authorities last year in order to check 112 children for signs of abuse.

Acting Judge Ray Keyser ruled Wednesday that charges against sect elder Charles (Eddie) Wiseman should be dismissed because of a lack of speedy trial.

Wiseman was charged with simple assault in connection with an alleged intermittent seven-hour beating in 1983 of Darlynn Church, a 13-year-old sect member. He was first cited in the case 23 months ago and was to go to trial next week.

State Attorney General Jeffrey Amestoy and William Gray, the state's special prosecutor in the case, said they would ask Keyser for a rehearing on his decision.

``To be quite candid, I am surprised and disappointed,'' Gray said. ``We did not expect it. We were all set to go to trial.''

The child abuse charge against Wiseman partially spurred the raid against the 450-member sect. State authorities rounded up 112 sect children in an attempt to check them for signs of abuse, but a judge vetoed the effort, saying the raid was ``grossly illegal.''

For almost two years the defendant has experienced a ancial and emotional disruption of his personal life,'' Keyser aid in his 14-page decision released at St. Johnsbury District Court. ``The defendant has received both written and oral threats to his life. His profession as a preacher has been harmed because the publicity surrounding this charge has evoked great hatred and hostility directed toward him.''

Wiseman's lawyer, Public Defender Jean Swantko, said she is ``thrilled.'' She had filed five separate motions to dismiss the case before a hearing last week, saying Wiseman had been prepared to go to trial since March 1984.

CHURCH 'OVERJOYED'

Church said she is ``overjoyed'' at the dismissal, saying her earlier report of a beating was false and ``I don't want to bring false witness'' against Wiseman.

Her father, Roland Church, and his family defected from the group soon after the alleged May 1983 incident.

But by September 1983 he said he was frustrated with how long the case was taking, and said in an interview that he ``wanted to forget the whole thing.'' In August 1984, he recanted his earlier testimony and said his daughter was not beaten ``severely.''

The state took the case to trial at Bennington District Court on Aug. 22, 1984, without the Church family as witnesses. Keyser then suppressed the state's unsigned depositions from the Churches, but the state Supreme Court sent the case back to Keyser in January after Swantko filed affidavits that said the Churches were available to testify.

The case was further delayed until last April because Keyser was ill.