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CRIMINAL LAW—INFANTICIDE—REQUIREMENT
THAT THE VICTIM BE BORN ALIVE

State v. Dickinson, 18 Ohio Misc. 151 (1969)

On December 24, 1967, the defendant, while operating his automobile in Canton, Ohio, attempted to pass another car and, while left of center, crashed head-on with an oncoming automobile. An occupant of the oncoming automobile was seven months pregnant. She was admitted to the Altman hospital suffering from contusions and multiple lacerations of the chest and abdomen and a fracture of the left knee. Slightly less than twelve hours after the collision, the mother aborted a stillborn female infant. After an autopsy of the fetus the coroner ruled that death had been caused by Hypoxia (oxygen insufficiency), "due to placental hemorrhage, due to uterine contusion, (and) as a direct result of the above described traffic accident."¹ According to the testimony of the coroner, the fetus was viable at the time of the accident. The defendant was indicted for homicide by vehicle in the first degree, allegedly having caused the death of the viable but unborn fetus. Defendant pleaded not guilty, waived his right to trial by jury, and was tried by a judge of the court. He was convicted and sentenced to one to twenty years in the Ohio Penitentiary.

This case is unique, because it is the first time a court has imposed a conviction of homicide for the death of a viable unborn fetus caused by an unlawful but unintentional act.

The evidence is persuasive beyond a reasonable doubt that the defendant was operating a motor vehicle while under the influence of alcohol, without due regard for the safety and rights of others, and in such a manner as to endanger the life or property of other persons in lawful use of the streets and highways.²

The soundness of the court's finding depends upon a determination of the following issue: whether the legislature contemplated inclusion of a "viable unborn fetus" in the definition of the word "person" as it is used in the statute. In support of the conviction the court stated:

¹ *State v. Dickinson*, 18 Ohio Misc. 151 (1969).

² This constitutes a violation of §§ 4511.19 and 4511.20 of Ohio Rev. Code. The Homicide by Vehicle statute, § 4511.181 Ohio Rev. Code, reads: "No person shall unlawfully and unintentionally cause the death of *another* while violating § 4511.19, 4511.201 or 4511.251 of the Revised Code." (Emphasis added).

"The vehicular homicide statute clearly limits the crime to the death of a 'person.' In the sense intended that must mean a living individual. The medical evidence establishes the fact that the child was living at the time of the accident, and as a result of the accident was strangled to death. Certainly such a child would be within the contemplation of the statute. As any other living individual, such child was subject to the vicissitudes of life, and in this case that life was ended by a flagrant violation of the law governing operation of motor vehicles."³

The court, for authority in support of its interpretation of § 4511.181 Ohio Rev. Code, relied primarily upon: *Williams v. The Marion Rapid Transit, Inc.*⁴; *Jasinsky, Admr. v. Potts*⁵; and *Stidham, Admx. v. Ashmore*.⁶

In *Williams v. Marion Rapid Transit, Inc.*⁷ the Supreme Court of Ohio considered whether an infant may prosecute a cause of action for injuries received while *en ventre sa mere*.

The court cited § 16 of Article I of the Ohio Constitution⁸ and held that the unborn seven-month fetus was, at the time when the injuries were received, a *person* within the meaning of that word as used by the framers of the Constitution.

The court based its decision upon the fact that when the injuries were received the fetus was viable and capable of non-parasitic existence, a fact made manifest in that case by the child's actually surviving.

In the case of *Jasinsky, Admr. v. Potts*⁹ the Supreme Court of Ohio expounded upon its interpretation of the word "person" as set forth in the earlier *Williams* decision. The interpretation was expanded to cover a case arising under the wrongful death statute, which reads: "When the death of a *person* is caused by wrongful act. . . ." ¹⁰ Specifically, the court established the right of a child's personal representative to maintain an action under

³ *Supra* note 1.

⁴ 152 Ohio St. 114 (1949).

⁵ 153 Ohio St. 529 (1950).

⁶ 109 Ohio App. 431 (1959).

⁷ *Supra* note 4.

⁸ Section 16, Article I, of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have justice administered without denial or delay."

⁹ *Supra* note 5.

¹⁰ Section 2125.01 Ohio Rev. Code (10509-166 GC).

the wrongful death statute in cases where the infant is born alive but subsequently dies of prenatal injuries.

Stidham Adm. v. Ashmore emphasized the point that a viable unborn fetus is a "person," and concluded that a wrongful death action may rightfully be maintained for the death of such a fetus even if the child is not born alive. This writer respectfully disagrees with the principal court's reliance entirely upon civil case authority to support a criminal conviction. The prevailing criminal law position is not in accord with the civil law view set forth in the previously discussed cases cited as authority in the principal case.

It is universally accepted that criminal laws shall be interpreted most favorably to the accused when construction is required.¹² An equally well recognized criminal law rule requires that an infant demonstrate its ability to exist independently of the mother by actually doing so, before the child can be the subject of a homicide.¹³

The court in *Williams v. The Marion Rapid Transit, Inc.* acknowledged this difference between civil and criminal law when it stated: "It is quite difficult to reconcile the rule of recognition of a separate existence of a child in order to punish crime committed against it with complete rejection of such rule in a civil suit. . . ." ¹⁴

Some states have enacted statutes which provide punishment under the name of manslaughter for the killing of an unborn, "quick," child. However, these statutes are expressly limited to intentionally-induced abortions.¹⁵

It seems unnecessary and improper for the court in a criminal proceeding to consider whether a viable unborn fetus is a person, because the law appears settled. Until the statute is amended by the legislature to include a viable fetus, a conviction like that in *Dickinson* would seem to transcend traditional principles of criminal justice.

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¹¹ *Supra* note 6.

¹² *Krichman v. U.S.*, 256 U.S. 363 (1921); *People v. Lund*, 382 Ill. 213, 46 N.E. 2d 929 (1943); and *Schooler v. U.S.*, 231 F. 2d 560 (1956).

¹³ *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923). For a detailed analysis of the rule, see Annot. 159 A.L.R. 525 (1941).

¹⁴ *Supra* note 4.

¹⁵ Section 559.100 Mo. Rev. Stat. Ann. (1949) is an example of such a statute.

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.

CHARLES F. BRUMBACH

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).