LEE *v.* STATE.

Opinion delivered February 29, 1932.

1. CRIMINAL LAW—SPEEDY TRIAL.—Under Crawford & Moses' Dig., § 3132, providing that, if any person indicted and committed to prison shall not be brought to trial before the end of the second term of the court having jurisdiction, he shall be discharged, *held* that a person indicted in a State court and subsequently confined in the Federal penitentiary until after the end of the second term of the State court was not entitled to dismissal of the charge in the latter court.
2. CRIMINAL LAW—RIGHT TO SPEEDY TRIAL.—One indicted in a State court could have demanded a trial while imprisoned in the Federal penitentiary, and the State's failure to procure his presence for trial *held* to deprive him of no rights.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; affirmed.

STATEMENT BY THE COURT.

This appeal involves the question of the right of a person indicted for any felony to be discharged therefrom if he should not be brought to trial thereafter before the end of the second term of the court having jurisdiction of the offense.

The agreed statement of facts shows that the eight indictments against appellant charging embezzlement were returned by the Garland County grand jury on the 19th day of March, 1928. He was arrested on February 22, 1928, on information filed by the federal authorities before the United States Commissioner at Hot Springs, waived his examination, and was bound over to the Federal grand jury and released under a $10,000 bond. Indictments were returned by the Federal grand jury at Helena on March 20, 1928, and, on March 21, he entered a plea of guilty before the United States District Court at Helena and was sentenced to five years' imprisonment in the United States Penitentiary at Atlanta, and a $5,000 fine was imposed. He was transferred to the Federal penitentiary and arrived there on March 25, 1928. He disclosed, when eligible to parole, on March 20, 1929, that there were several indictments against him in the State

court, and action on the parole was postponed until the indictments were disposed of, and he telegraphed the sheriff of Garland County requesting information about the indictments, and a few days later the warden of the penitentiary at Atlanta received instructions to hold the defendant for the State courts when his sentence was completed. No other effort was made by the State officials to serve the warrants or return the defendant for trial on said indictments.

He stated that the pending indictments in the State courts were the sole reason for his failure to be paroled from the Federal penitentiary from which he was discharged on November 16, 1931, having served within 4 days of 2 years additional time in the Federal prison by reason of the said indictments; that he was given no opportunity to demand trial in the State courts on account of his imprisonment, and that he made bond immediately after his release from the penitentiary to the sheriff of Garland County, and returned there to file this motion. He stated that, after the March term for 1929, two terms of court had been passed without any effort made to bring him to trial, or any opportunity to demand trial. That, at the time of the filing of his motion herein, seven terms had passed during which he was not given an opportunity to demand trial.

J. S. Utley and *W. H. Childers,* for appellant.

Houston Emory, Prosecuting Attorney, for appellee.

KIRBY, J., (after stating the facts). The statute upon which the motion for discharge is based, § 3132, Crawford & Moses' Digest, reads as follows:

"If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

This statute has been construed and applied first in *Stewart* v. *State,* 13 Ark. 720, in *Ware* v. *State,* 159 Ark.

540, 252 S. W. 934, where all the cases are reviewed, and in *Fulton* v. *State,* 178 Ark. 841, 12 S. W. (2d) 777. In the last cited case it was held that the person committed to the penitentiary, who had no opportunity to demand a trial on other indictments, did not waive his right to discharge from such indictments under said statute.

This case, however, furnishes no authority for the granting of the motion to discharge the defendant from the indictments herein because the prisoner there was prevented from making such motion while he was in the custody of the State, serving a sentence upon a conviction for violation of her laws, the State having the exclusive custody of the convict there, and could and should have brought him into open court that he might demand a trial, and he waived no right to discharge under this statute by its not having done so. Here the appellant was in the custody of the United States Government, in her penitentiary, upon a plea of guilty to a violation of its laws, which furnished no ground for the dismissal of charges pending against him on indictments in the State court because of his not having had opportunity to demand a trial therein, and this is so without regard to whether the State could have sooner procured his presence under the comity rule from the United States Government, as announced in *Ponzi* v. *Fessenden,* 258 U. S. Reports, 254, 42 S. Ct. 309. In *Rigor* v. *State,* 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719, it was said by the Supreme Court of Maryland:

"The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt."

Appellant made no effort to demand trial while he was imprisoned in the United States Penitentiary, which he could have done, and the fact that the State could have procured his presence in her court for trial on the indictments and did not do so deprived him of no right he was entitled to, and the court did not err in denying his motion for a discharge from the indictments pending in her court. The judgment is affirmed.

McHANEY, J. On the authority of *Fulton* v. *State*, 178 Ark. 841, 12 S. W. (2d) 777, I think the case should be reversed. The distinction attempted to be made between that case and this is, in my opinion, not a valid one. I therefore dissent.