Buffalo Law Review

Volume 11 | Number 1 Article 59

10-1-1961

Criminal Procedure—Time Off for Good Behavior Does Not Reduce Maximum Term on an Indeterminate Sentence

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right to a speedy trial, but the question of what lesser delays would also be a denial of the right can only be answered in future cases.

R. D. S.

TIME OFF FOR GOOD BEHAVIOR DOES NOT REDUCE MAXIMUM TERM OF AN INDETERMINATE SENTENCE

Every prisoner serving an indeterminate sentence becomes, upon serving the minimum term, eligible for parole.[11] Whether a prisoner, so eligible, will be released on parole is left completely to the discretion of the Parole Board.[12] Section 230 of the Correction Law allows such prisoners to become eligible for parole before serving their original minimum terms. This is possible if the prisoner's general conduct is good and if he performs his work assignments willingly. Under the plan, a prisoner can earn a ten-day reduction of his minimum term for every month served. Such credit does not shorten the sentence but only allows the prisoner to be eligible for parole earlier by that amount of time earned by good behavior.[13] The Parole Board, however, will not release a prisoner solely in recognition of his conduct while serving his sentence.[14] It will parole him only after thoroughly analyzing his character, checking his background, and deciding that if allowed to return to society, he would live within the law.[15]

In *People ex rel. Clemente v. Warden of Auburn Prison*,[16] the question arose as to whether Section 230 applies to reduce the maximum term of confinement of an indeterminate sentence as well as the minimum term. If this were true, the Parole Board would have no discretion in releasing the prisoner but would have to release him when his time off earned by good behavior added to the time he had already served equalled the maximum term of his sentence. In deciding the case, the Court of Appeals confirmed a number of lower court decisions in New York which have held inferentially that time off earned by good behavior can only be credited toward the reduction of the minimum and not the maximum term of an indeterminate sentence.[17]

Having previously been denied parole, the petitioner applied for a writ of habeas corpus claiming that the six months and ten days reduction of his sentence earned by good behavior, granted under Section 230, should have applied to reduce the maximum term of the 2½ to 5-year sentence which he received in 1956 after conviction of the crime of first degree perjury. The

11. N.Y. Correction Law § 212.
12. Ibid.
13. People ex rel. Williams v. Jackson, 5 A.D.2d 922, 172 N.Y.S.2d 37 (3d Dep't 1958).
14. N.Y. Correction Law § 213.
15. Ibid.
16. 9 N.Y.2d 216, 213 N.Y.S.2d 55 (1961).
17. People ex rel. Williams v. Jackson, supra note 13; People ex rel. von Moser v. New York State Parole Bd., 179 Misc. 397, 39 N.Y.S.2d 200 (Sup. Ct. 1943), aff'd, 266 App. Div. 896, 42 N.Y.S.2d 728 (3d Dep't 1943); People ex rel. Mason v. Brophy, 235 App. Div. 432, 257 N.Y. Supp. 165 (4th Dep't 1943).

petitioner's writ was sustained by the Cayuga County Court but was unanimously dismissed by both the Appellate Division and the Court of Appeals.[18]

The county court judge, in sustaining the petitioner's writ, relied upon *People ex rel. Vanilla v. Denno*,[19] and his construction of Section 230 of the Correction Law.

Clearly, however, the *Vanilla* case cannot be used as authority to decide the instant case. The prisoner in the *Vanilla* case was sentenced to a definite term rather than an indeterminate term. Therefore, it cannot possibly be used as authority for the proposition that time off earned by good behavior applies to reduce the maximum term of an indeterminate sentence. This is because, except for a few specified offenses enumerated in Section 1945 of the Penal Law, the Parole Board has no authority to release a prisoner sentenced to a definite term. A prisoner serving a definite sentence who earns time off by good behavior will have that amount of time subtracted from the term of the sentence, and the prisoner will be set free earlier by that amount of time off earned. The Parole Board cannot look into his record and deny his release once the time off has been awarded. Therefore, though the maximum term of an indeterminate sentence and the definite sentence both mark the maximum period of confinement, there can be no analogy drawn between the two for parole purposes. Further, the prisoner in the *Vanilla* case, who committed his crime before 1926, earned a reduction of his sentence through compensation for work performed which, once earned, was as a matter of right applied to reduce his sentence. In 1926, this practice was abolished and any time so earned was, except for prisoners who committed their crimes before July 1, 1926, cancelled.[20] The petitioner served his sentence under the present Correction Law which provides that release of a prisoner serving an indeterminate sentence, through parole, is solely within the discretion of the Parole Board.

In denying the writ, the Court of Appeals construed Section 230 of the Correction Law strictly. Subdivision 2 of that Law states: "Every prisoner confined in a state prison or penitentiary . . . may receive, for good conduct. . . , a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence. . . ." Subdivision 3 declares: ". . . In the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. . . ." Section 241 of the Correction Law refers twice to the reduction of the minimum term, but nowhere in this or in any other section of the Correction Law is it even intimated that time off earned by good behavior can be credited to reduce the maximum term of an indeterminate sentence.

Plainly, the county court judge was wrong in his interpretation of the

18. People ex rel. Clemente v. Warden of Auburn Prison, 10 A.D.2d 57, 197 N.Y.S.2d 391 (4th Dep't 1960).
19. People ex rel. Vanilla v. Denno, 7 N.Y.2d 29, 194 N.Y.S.2d 486 (1959).
20. N.Y. Sess. Laws 1926, ch. 736.

Vanilla case and Section 230 of the Correction Law. The instant case clearly settles the fact that time off earned by good behavior may reduce only the minimum term of an indeterminate sentence, and it clarifies the Court's position in the *Vanilla* case.

R. D. S.

POWER TO IMPOSE INDETERMINATE SENTENCE DEPENDENT UPON CURRENT PSYCHIATRIC EXAMINATION

In New York, a sexual psychopath may be given an indeterminate sentence at the discretion of the judge upon conviction of a related crime. This sentencing may not be imposed without a psychiatric examination containing "all facts and findings necessary to assist the Court in imposing sentence."[21] The Code of Criminal Procedure regulates the procedure and reporting of the examination.[22] The relator, in *People ex rel. Lawson v. Denno*,[23] was convicted of the crime of rape and was serving an indeterminate sentence imposed by the trial judge on an examination given prior to conviction. Relator petitioned for a writ of habeas corpus challenging the power of the court to do this.

In *People v. Spry*,[24] the Appellate Division construed these statutory provisions to require such an examination subsequent to conviction of the crime in order to assist the court in imposing sentence. In further refinement of this rule, the Court of Appeals said, in *People v. Alvich*,[25] that every departure from this requirement will not deprive the court of the power to sentence, but that substantial compliance with its essential requirements is sufficient. In that case there was a continuing examination and observation prior to conviction and up to the time of sentencing. The issue presented in *People ex rel. Lawson v. Denno*[26] was whether a psychiatric examination given prior to conviction would be within the substantial compliance rule.

The writ of habeas corpus was granted by the Supreme Court[27] on the basis that as the examination was for the purpose of assisting the court in sentencing such a defendant, the statute contemplates the holding of the examination following conviction, and that a failure to comply with this requirement would deprive the court of the power to impose an indeterminate sentence. The Appellate Division[28] reversed the granting of the writ on the basis of *People v. Alvich*[29] as there was substantial compliance with the essential requirements of the statute. The Court of Appeals reversed this order of the Appellate Division and remanded for resentencing according to Section 2189-a of the Penal Law. The Court said that while strict compliance with the

21. N.Y. Penal Law § 2189(a).
22. N.Y. Code Crim. Proc. §§ 658-661, 662(e).
23. 9 N.Y.2d 181, 212 N.Y.S.2d 401 (1961).
24. 5 A.D.2d 835, 170 N.Y.S.2d (2d Dep't 1958).
25. 7 N.Y.2d 125, 196 N.Y.S.2d 65 (1959).
26. Supra note 23.
27. 196 N.Y.S.2d 314 (County Ct. 1959).
28. 10 A.D.2d 978, 201 N.Y.S.2d 905 (2d Dep't 1960).
29. Supra note 25.