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Criminal Procedure—Power to Impose Indeterminate Sentence Dependent Upon Current Psychiatric Evaluation

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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.

statute is not necessary under the *Alvich* case, the Court was there considering the method of obtaining the psychiatric report; whereas, here it was not the method that was challenged, but the failure to obtain it at the essential time.

The Court is not restricting the decision in the *Alvich* case but taking that rule as broadly stated there and further defining it. The examination is irrelevant to the conviction but is required to aid the judge in exercising his discretion as to whether to impose a determinate or indeterminate sentence. The requirement is, therefore, that the report submitted to the judge be current according to this statutory purpose. The examination given aften the indictment is mainly for the purpose of determining whether the defendant is sane and capable of understanding the charges against him. As such it is hardly sufficient for the purpose of sentencing. The manner and method of obtaining the report may be satisfied by substantial compliance with the statute, but there may be no deviation from the rule that the report be current.

Bd.

"PRESUMPTION OF CONCURRENCE" OF SENTENCES STRICTLY LIMITED

When a defendant in a criminal proceeding is convicted of more than one offense, the trial court has the discretionary power to impose cumulative rather than concurrent sentences.[30] Some courts have held that where the trial judge failed to specifically exercise his discretion and failed to state that the sentences imposed were consecutive, a presumption arose that the terms were to be concurrent.[31] These decisions were based upon an extension of the Court of Appeals' holding in *People v. Ingber*.[32] In that case, however, the Court only stated that when a defendant sentenced at the same time for two or more offenses had been tried at the same term of court before the same judge, and where the judge omitted through inadvertence to make the terms successive, there was a presumption that the terms were meant to be concurrent.[33]

In *Browne v. New York State Board of Parole*,[34] the Court of Appeals construed *Ingber* strictly, reversing both the Appellate Division[35] and Special Term[36] decisions based on the broader interpretations of that opinion. Petitioner, who was on probation following sentencing as a youthful offender for the misdemeanor of attempted extortion, was subsequently convicted of attempted sodomy, first degree robbery, first degree grand larceny and second and third degree assault. He was sentenced to an indefinite term on each count, the sentences to run concurrently and not consecutively, but no reference was made to his prior sentence for the misdemeanor which was still outstanding.

30. N.Y. Penal Law § 2190; People v. Ingber, 248 N.Y. 302, 162 N.E. 87 (1928).
31. E.g., People ex rel. Winelander v. Denno, 9 A.D.2d 898, 195 N.Y.S.2d 165 (2d Dep't 1959); People ex rel. Gerbino v. Ashworth, 267 App. Div. 579, 47 N.Y.S.2d 551 (1st Dep't 1944).
32. Supra note 30.
33. Id. at 305, 162 N.E. at 88.
34. 10 N.Y.2d 116, 218 N.Y.S.2d 33 (1961).
35. 25 Misc. 2d 1050, 207 N.Y.S.2d 488 (Sup. Ct. 1960).
36. —A.D.2d—, 211 N.Y.S.2d 1014 (2d Dep't 1961).