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Criminal Procedure—Prior Felony Conviction Determined According to New York Statute

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only to protect the quality of appeal, but also to grant the defendant the same right of appeal in quantitative terms. It would be impossible to resolve the debate as to which viewpoint guarantees, in the constitutional sense, the right of review, but when prosecuted at public expense, should this right be completely unlimited? The majority best answers this in stating that "due process and equal protection imposed no obligation on the State to accord a purposeless activity a constitutionally protected status."[50]

R. A. O.

PRIOR FELONY CONVICTION DETERMINED ACCORDING TO NEW YORK STATUTE

Section 1941 of the Penal Code of New York provides that one convicted of a felony in New York is to be punished as a multiple felony offender if he was previously "convicted . . . under the laws of any other state . . . of a crime which, if committed within this state, would be a felony."[51]

In the case of *People ex rel. Goldman v. Denno*,[52] the Court was faced with the following facts. The prisoner was convicted of a felony in New York, and was sentenced to fifteen years to life, pursuant to Section 1941, as a third felony offender. In a prisoner's habeas corpus proceeding, Goldman sought a resentencing since the felonies for which he was convicted prior to the felony in point would not have constituted felonies if committed within New York. The Appellate Division reversed the Supreme Court's dismissal, concluding that only one of the three prior convictions was a felony for purposes of harsher punishment.[53]

The appeal to the highest court in New York occasioned a restatement of the applicable rules for determining whether a foreign jurisdiction's conviction was for a crime which would be a felony if committed in New York. The rule was stated that if one is convicted for violation of a statute under which the act or acts prohibited would be felonies in New York, then the party will be considered a felony offender. But, if the statute under which the party is convicted prohibits acts, some of which constitute felonies in New York, and some of which constitute misdemeanors, an inquiry must be made into the indictment to determine whether the charged acts would have been felonious in New York. If the indictment alleges acts, some of which would be felonies and others which would be misdemeanors, then the conviction may not be regarded as a felony for purposes of determining punishment.

The Court agreed that two of the prior convictions were not properly felonies under New York law. The Court divided on the character of a 1947 conviction under the Federal Narcotics Statutes. These statutes provide that one will be guilty of a felony if he receives, conceals, sells or facilitates the transportation, concealment, and sale of a narcotic drug;[54] whereas, the New

50. Supra note 39.
51. N.Y. Penal Law § 1941(2).
52. 9 N.Y.2d 138, 211 N.Y.S.2d 403 (1961).
53. 9 A.D.2d 955, 196 N.Y.S.2d (2d Dep't 1959).
54. 21 U.S.C. §§ 173, 174.

York statute makes the sale of narcotics, or possession with intent to sell, the only felony. Since according to the rules stated above, the appellant could not be considered a felony offender on the basis of a conviction under a statute which forbids acts which are both felonies and misdemeanors in New York, the Court was compelled to make an examination of the indictment. It charged the several acts forbidden by the statute, including those which are only misdemeanors in this State. The Court divided on a single point: in the 1947 conviction, the clerk of the court, did not recite the entire indictment when reading the charge, but shortened it to "charges you with an unlawful sale." The accused pleaded guilty, and the court below held that such a plea was specifically addressed to the recited charge, which would be a felony in New York. The Court here, in a four to three decision, has held that the indictment is the only charge to which the accused does or may admit guilt, and not to any statement of the clerk. It follows that his conviction was not solely for sale of narcotics, and according to the rules above, it cannot be considered a prior conviction for purposes of Section 1941.[55]

The dissent agrees with the rules as set out by the majority, but has construed the 1947 conviction in a manner different from that of the majority.[56] The plea of guilty, as seen by the dissent, was to that part of the indictment which charged a sale of narcotics, since it was that part which the clerk chose to recite, and seemingly that part which the accused answered to when he said "guilty."

The dissent points out that the judgment and commitment of the United States District Court states that the appellant was convicted of the sale of heroin. The answer which can be read from the majority is that the fact that the court chose to so limit its words does not relax the rule that a plea of guilty is to an indictment, and not to the statement of a clerk. Freedom is too dear to be taken because of such a procedural mishap.

The result in this case, that the appellant be remanded for resentencing as a first felony offender, will no doubt substantially reduce the term of imprisonment. This strikes at the very conscience of the casual reader, for we see that a "bad man" is getting away with something. The Court states that "the rules . . . have been laid down for application in cases involving the worst, as well as the best, of men."[57]

The case is certainly a prime example of the inequities brought about by our many-sided standards of criminal justice, as many sided as there are jurisdictions. The fact remains that the appellant, Goldman, who has been convicted of selling, and receiving, and concealing and facilitating the transportation, concealment and sale of a narcotic, will now receive a punishment

55. Supra note 51.
56. Supra note 52 at 143, 211 N.Y.S.2d at 407.
57. Ibid.

less than that which he would receive had he been indicted only for selling narcotics.

W. L.

DEFENDANT'S CONVICTION REVERSED IN ABSENCE OF ANY STATUTE AUTHORIZING PUNISHMENT FOR OFFENSE CHARGED

In *People v. Chopak*,[58] defendant had pleaded guilty to an information charging her with maintaining substandard temperatures in two rooms of each of two apartments owned by a corporation of which she was president. The offense to which she had pleaded guilty was created by Section 131.03 of the Health Code of New York City.[59]

Defendant does not, on this appeal, question her guilt of the offense charged, but rather the power of the court, in the absence of an authorizing statute, to sentence or punish her for such offense. Although punishment for a violation of Section 131.03 is *presently* authorized by Section 102-c of the New York Criminal Courts Act,[60] defendant is correct in her contention that no such authorization expressly existed at the time the offense was committed. Former Section 102-C, in force on the date of the offense charged, merely provided punishment for violations of Section 225 of the New York City Sanitary Code[61] but made no mention of Section 131.03 of the Health Code. The State contends that Section 131.03 of the Health Code, which had prior to this offense been substituted by the New York City Board of Health for Section 225 of the Sanitary Code, was merely a re-enactment of the latter, and that, therefore, the reference in former Section 102-c to the Sanitary Code (Section 225) must, of necessity, be considered as a reference to its successor (Section 131.03 of the Health Code).

There is no question that Section 131.03 of the Health Code was intended as a substitute for Section 225 of the Sanitary Code. The more difficult question is whether it (Section 131.03 of Health Code) was a re-enactment of Section 225 of the Sanitary Code. If so, it appears clear that the State must prevail, for, as stated in Section 80 of the General Construction Law: "If any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision."[62]

The Court of Appeals, however, rejected the State's argument and reversed the conviction against defendant. The Court held that Section 131.03 of the Health Code, which raised the lowest permissible temperature three degrees Fahrenheit, was not a re-enactment of Section 225 of the Sanitary Code and, therefore, the lower court lacked the power to punish defendant for the offense committed. The Court's conclusion is given weight by their observance of the

58. 9 N.Y.2d 184, 213 N.Y.S.2d 33 (1961).
59. Hereafter referred to as the Health Code.
60. N.Y. Crim. Cts. Act § 102-c.
61. Hereafter referred to as the Sanitary Code.
62. N.Y. Gen. Construction Law § 80.