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Criminal Law—Validly Sentenced Defendant Cannot be Resentenced

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dling motions made pursuant to Section 668. It was well settled in New York, as stated in *People v. Proesser*,[6] that the defendant's failure to take any affirmative steps toward securing a speedy trial would not constitute a waiver of his rights under Section 668, but any affirmative act of the defendant, which showed his intention not to insist on a speedy trial, would constitute a waiver of his right to dismissal for failure to prosecute. The fact situation in *People v. Godwin*,[7] was similar to the case under discussion. The defendant spent 21 months in jail after he was indicted before he was brought to trial. The defendant then delayed the trial for 2 additional months after the 21 month delay, by requesting adjournments. The Court of Appeals in a unanimous decision, held that this constituted a waiver of the defendant's right to a dismissal of the indictment.

The decision in the present case,[8] appears to over-rule the *Godwin* decision.[9] This change however, appears to be one toward a more just and realistic approach to dealing with motions made pursuant to Section 668. The purpose of this section is to protect accused persons from prolonged imprisonment; relieve them of the anxiety and public suspicion which accompany indictment; and to help insure justice by holding trials when evidence is fresh, and the memory of witnesses strong.[10] Once the trial has been delayed, the damage has been done. At this point the defendant is entitled to a dismissal. It is unjust that the defendant will waive his rights by requesting necessary adjournments. Now the defendant can request an adjournment, in order to insure himself of the best possible defense, without having to waive any rights which may have previously accrued to him under Section 668.

VALIDLY SENTENCED DEFENDANT CANNOT BE RESENTENCED

In May of 1957, defendant Alvich was indicted for first degree sodomy and second degree assault. Alvich pleaded guilty to the assault charge and in June of 1957 he was sentenced, under Section 2189-a of the New York Penal Law,[11] to indefinite probation and required to undergo psychiatric treatment during the probationary period.[12] There was no disposition of the sodomy charge.

6. 309 N.Y. 353, 130 N.E.2d 891 (1955).
7. 2 N.Y.2d 891, 161 N.Y.S.2d 145 (1957).
8. Supra note 5.
9. Supra note 7.
10. Supra note 6.
11. N.Y. Penal Law § 2189(a):
Indeterminate sentences of one day to life. No person convicted of a crime punishable in the discretion of the court with imprisonment for an indeterminate term, having a minimum of one day and a maximum of his natural life, shall be sentenced until a psychiatrist examination shall have been made of him and a complete written report thereof shall have been submitted to the court. Such examination shall be made in the manner prescribed by sections [659, 660, 661, & 662(e)] of the code of criminal procedure. Such report shall include all facts and findings necessary to assist the court in imposing sentence.
12. N.Y. Penal Law § 243 provides that if a person commits the crime of assault in the second degree with intent to commit sodomy in the first degree he may be sentenced

In August of 1958, Alvich was arraigned for parole violation and the prosecutor made a motion to have the prior judgment and sentence of June 1957 set aside. On December 22, 1958 the prior judgment and sentence were set aside on the ground that the requirement of Section 2189-a requiring psychiatric examination before sentencing was not fulfilled. Defendant was subsequently sentenced to imprisonment for two to four years.

Defendant was unsuccessful in challenging the imposition of the new sentence before the Appellate Division,[13] but the Court of Appeals, in the case of *People v. Alvich*,[14] held that since the judgment and sentence of June 1957 were validly imposed they could not be treated as void.

In holding for the defendant, the Court of Appeals had to determine what was required by way of psychiatric examination by Section 2189-a because, if it was not complied with, the judgment and sentence would have been invalidly rendered and the new sentence would stand.

The record disclosed that on two occasions in 1957, while defendant was awaiting arraignment, he was examined by a county appointed psychiatrist to determine whether or not he was capable of understanding the charges against him. The psychiatrist's report was made available to the District Attorney and to the court who used them in determining the sentence to be imposed. The Court also relied on the report of a psychiatrist engaged by the defendant.

Because the court below relied on the reports of at least two psychiatrists the Court of Appeals held that Section 2189-a was substantially complied with and that technical compliance wasn't necessary so long as the Court received the required information to sentence the defendant.[15]

Since a judgment validly rendered cannot be treated as void and set aside arbitrarily, it seems that the prosecutor should have proceeded under Section 935 of the Code of Criminal Procedure,[16] since once he proved a parole violation, the court would have the power to impose any sentence it could have imposed when the sentence of indefinite probation was imposed.

The question of waiver of the requirements of Section 2189-a was brought up on appeal. The defendant claimed that Section 2189-a was enacted primarily for the benefit of those sentenced pursuant to it and that since it was his

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to an indeterminate sentence with a minimum of one day and a maximum of which shall be the duration of his natural life.

13. People v. Alvich, 8 A.D.2d 956, 190 N.Y.S.2d 772 (2d Dep't 1959).

14. 7 N.Y.2d 125, 196 N.Y.S.2d 65 (1959).

15. N.Y. Penal Law § 2189-a in effect provides that psychiatric examination is to be used to determine whether or not the defendant understands the charges against him and whether or not he can be rehabilitated.

16. N.Y. Code Crim. Proc. § 935:
Whenever within the period of probation any probationer shall violate his probation, the court may issue a warrant for his arrest and may commit him without bail. On his being arraigned and after an opportunity to be heard the court may revoke, continue or modify his probation. If revoked, the court may impose any sentence it might have originally imposed.

right to have it complied with, he could waive his right and enforce the prior sentence.

The District Attorney claimed that Section 2189-a was enacted for the benefit of the public to be sure that sex offenders would be rehabilitated before release from prison or probation and therefore the requirements could not be waived by the defendant. Since the Court found Section 2189-a was substantially complied with it did not have to pass on the question of waiver and therefore the question remains to be adjudicated in a future case.

Commitment to Mental Hospital After Conviction Constitutes Judgment

Upon the relator's entry of a plea of guilty, in 1935, to a charge of grand larceny, he was committed to Napanoch in accordance with Section 438 of the Correction Law. This section provides that only "A male mental defective over 16 years of age convicted of a criminal offense . . ." may be sent to this institution. At the time of this commitment, he was not present in the court. In 1940, about two years after his release from another mental hospital to which he had been transfered, the relator was convicted of burglary and sentenced as a second offender. In *People ex rel. Vischi v. Martin,* the relator brought a *habeas corpus* proceeding alleging that his committment to Napanoch was improper and therefore he should not have been convicted as a second offender. The Court of Appeals unanimously reversed the Appellate Division's affirmance of the order of the County Court dismissing the writ.[17]

In his attempt to vacate his conviction as a second offender, the relator argued that under Section 438, commitment to Napanoch constitutes a conviction of the crime charged and therefore is a judgment for purposes of the Code of Criminal Procedure. Section 473 of the Code, however, requires that the defendant be present in the court when judgment for a felony conviction is pronounced. In addition, Sections 471,[18] 472,[19] and 480[20] of the Code require other procedures which must be followed in the pronouncement of judgment, which were not compiled with at the time of the Napanoch commitment. Therefore, that conviction should be vacated and he should be remanded for resentencing as a first offender.

Respondent, the warden of Attica State Prison, contended that relator's commitment to Napanoch was a conviction, but not a judgment, and therefore the above requirements of the Code are not applicable. The two reasons

17. 8 A.D.2d 768, 187 N.Y.S.2d 339 (4th Dep't 1959), rev'd 8 N.Y.2d 63, 201 N.Y.S.2d 753 (1960).

18. Provides that "After a plea or verdict of guilty . . . the court must appoint a time for pronouncing judgment."

19. Provides that "The time appointed [for pronouncing judgment] must be at least two days after the verdict . . ."

20. Provides that "When the defendant appears for judgment he must be asked by the clerk whether he have any legal cause to show why judgment should not be pronounced against him."