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Criminal Law—Commitment to Mental Hospital After Conviction Constitutes Judgment

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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."

for this position were that the relator's 1935 plea of guilty made any adjudication of guilt unnecessary, and secondly, his committment to Naponch, a mental institution, postponed the sentencing until he was mentally capable of being sentenced.[21]

The Court of Appeals held that a commitment to Napanoch under Section 438 of the Correction Law constitutes both a conviction and a judgment. For Section 438 specifically provides that only upon conviction shall a male be committed, and therefore committment is judgment. The Court went on to hold that the failure of the lower court to comply with those sections of the Code relating to the pronouncement of judgment, Section 473 in particular, entitled the relator to be remanded for commitment to Napanoch, but not to a complete vacatur of this conviction. If, upon this remand, he can show legal cause why he should not have been so committed, in accordance with Section 480 of the Code,[22] only then will his conviction as a second offender be set aside.

RIGHTS OF DEFENDANT UNDER SECTIONS 472 OR 480 OF THE CODE OF CRIMINAL PROCEDURE

Does a violation of Section 472 or Section 480 of the Code of Criminal Procedure work a vacatur of both the sentence and the conviction of the defendant?

The Court of Appeals was faced with this question in the cases of *Peo. ex rel. La Shombe v. Jackson*[23] and *Peo. ex rel. Emanuel v. McMann*.[24]

In the *La Shombe* case, the relator was convicted of second degree assault in 1947. Subsequently, in 1955, he pleaded guilty to four counts of an indictment and was sentenced as a second felony offender. In his habeas corpus application, the relator contended that he was improperly sentenced as a second offender because the court, in the prior conviction of 1947, had failed to accord him a two-day delay prior to pronouncing sentence as required by Section 472. Relator argued that such omission requires the vacatur of the original sentence and conviction of 1947, and that he should be resentenced as a first felony offender for the 1955 conviction. The Clinton County Court sustained the writ and the Appellate Division reversed on the law and facts.[25]

In the *Emanuel* case, the relator was also sentenced as a second felony offender. He, too, sought resentencing as a first offender on the basis that the first sentence and conviction should be vacated since the trial court in the first conviction failed to comply with the requirements of Section 480, in that the clerk did not ask him if he had any legal cause as to why judgment should

21. See 7324 Cases In Points, Case 8, Respondents' Brief, pp. 6-8. Respondent relied on People v. Eckert, 179 Misc. 181, 39 N.Y.S.2d 79 (County Ct. 1942).
22. Supra note 20.
23. 7 N.Y.2d 345, 197 N.Y.S.2d 177 (1960).
24. 7 N.Y.2d 342, 197 N.Y.S.2d 174 (1960).
25. 8 A.D.2d 650, 184 N.Y.S.2d 949 (3d Dep't 1959).