Buffalo Law Review

Volume 9 | Number 1 Article 61

10-1-1959

Criminal Law—Double Jeopardy: New York "Waiver" Doctrine Survives Impact of Green Case

Buffalo Law Review

the harshness of the statute in accordance with the legislative purpose, and is consistent with the accepted method of treating out of state convictions for purposes of the recidivist statutes in general.

EFFECT OF OUT OF STATE CONVICTION UPON RECIDIVIST STATUTES

Sections 1941 and 1942 of the New York Penal Law require a sentencing judge, in applying the recidivist statutes, to consider defendant's out-of-state convictions. When the crime is a felony where committed, but only a misdemeanor if committed in New York, the statutes require that the foreign felony conviction be treated as only a misdemeanor.[34]

Since the foreign indictment usually alleges more than the bare statutory crime, do the New York courts consider only the statute, the indictment, or both, in determining whether the foreign felony conviction is to be treated as a misdemeanor in New York?

The New York rule, set out in *People v. Olah*,[35] is that if the crime as defined by the foreign statute could under any set of facts be only a misdemeanor if committed in New York, the New York courts will treat the crime as a misdemeanor, even though the indictment charges an act which would be a felony if committed in New York.[36]

In *People v. Jackson*[37] defendant contended that since one of the two acts defined by the foreign statute under which he was convicted was only a misdemeanor under New York law,[38] the indictment should be disregarded, and the foreign felony conviction must be treated as a misdemeanor in New York.

The Court of Appeals rejected this contention, holding that the indictment must be considered when it plainly charges only that crime which would be a felony under New York law.[39]

The Court noted, that the purpose of the *Olah* rule is to eliminate discrimination in New York courts against defendants because they have been convicted of foreign felonies which might not be felonies if committed in New York. This decision limits the effect of the *Olah* rule, but preserves its intent, for it denies discrimination in favor of such defendants.

DOUBLE JEOPARDY—NEW YORK "WAIVER" DOCTRINE SURVIVES IMPACT OF GREEN CASE

Defendant's failure to except to an erroneous jury charge precludes his raising that exception on appeal.[40] In *People v. Cipolla*,[41] the trial judge erroneously charged that sodomy second degree is included in or is a lesser

34. N.Y. PEN. LAW §§ 1941-1942.
35. 300 N.Y. 96, 89 N.E.2d 329 (1949).
36. People v. Martin, 308 N.Y. 823, 125 N.E.2d 873 (1955); People v. Kronich, 308 N.Y. 866, 126 N.E.2d 307 (1955).
37. 5 N.Y.2d 243, 183 N.Y.S.2d 343 (1959).
38. N.Y. PEN. LAW § 405.
39. N.Y. PEN. LAW § 404.
40. N.Y. CODE CRIM. PROC. § 420-a; People v. Cohen, 5 N.Y.2d 282, 184 N.Y.S.2d 340 (1959).
41. 6 N.Y.2d 922, 190 N.Y.S.2d 996 (1959).

degree of sodomy first degree,[42] and the defendant failed to except this charge. The jury convicted him of sodomy second degree, but made no finding as to sodomy first degree.

The Court of Appeals affirmed the Fourth Department's dismissal of the sodomy second degree conviction, because the indictment failed to charge that crime,[43] but rejected defendant's contention that the jury had impliedly acquitted him of sodomy first degree, and ordered a new trial as to that crime.

The Appellate Division had allowed defendant to argue the error in the trial court's charge on appeal, and had dismissed the sodomy first degree conviction, holding that the jury's failure to find defendant guilty of that crime effected an implied acquittal.[44]

In reversing the Appellate Division, the Court of Appeals affirmed the New York rule, expressed in *People v. Palmer*,[45] that a defendant convicted of a lesser included crime who obtains a reversal of his conviction on appeal, is deemed to have "waived" his right not to be tried again as to the higher crime charged in the indictment.[46] This decision determines New York's position in the controversy sparked by *Green v. United States*,[47] which eliminated

---

42. It was not until this decision that such a charge was held to be erroneous. Defendant contended on appeal that the rape and sodomy statutes are *in pari materia*, and since rape second degree is not included in or is not a lesser degree of rape first degree, the Court should accordingly hold that sodomy second degree is not included in or is not a lesser degree of sodomy first degree. N.Y. SESS. LAWS 1950, c. 525; Gov. Mem. on Approved Bills, N.Y. STATE LEGIS. ANNUAL (1950) 353; Spence, *The Law of Crime Against Nature*, 32 N.C.L. REV. 312, 319-320 (1954); People v. Burch, 281 App. Div. 348, 120 N.Y.S.2d 82 (4th Dep't 1953); People v. Andrewski, 282 App. Div. 827, 122 N.Y.S.2d 853 (4th Dep't 1953).

43. People v. Goyette, 282 App. Div. 980, 125 N.Y.S.2d 510 (3d Dep't 1953); People v. Allen, 5 Denio (N.Y.) 76 (1847); Dedieu v. People, 22 N.Y. 178 (1860); People v. Santoro, 229 N.Y. 277, 128 N.E. 234 (1920). *Cf.* dicta in People v. Miller, 143 App. Div. 251, 128 N.Y. Supp. 549 (1st Dep't 1911); People v. Colburn, 162 App. Div. 651, 147 N.Y. Supp. 689 (2d Dep't 1914); People v. Quinn, 8 Misc. 2d 546, 161 N.Y.S.2d 977, *aff'd* 171 N.Y.S.2d 792 (1st Dep't 1957).

44. 7 A.D.2d 698, 179 N.Y.S.2d 459 (4th Dep't 1958). The constitutional right involved is not federal, but state. N.Y. CONST. art. I, § 6. In preparation for appeal, respondent considered but did not present the federal question argument that a retrial as to sodomy first degree was a denial of due process. A retrial apparently does not violate due process. Palko v. Connecticut, 302 U.S. 319 (1937); Brock v. North Carolina, 344 U.S. 424 (1953); Hoag v. New Jersey, 356 U.S. 464 (1958); Ciucci v. Illinois, 356 U.S. 571 (1958).

45. 109 N.Y. 413, 17 N.E. 213 (1888).

46. Where the graver crime does not include the lesser offense, the reversal of the conviction and the new trial order as to the less serious crime does not disturb the disposition as to the graver crime. Guenther v. People, 24 N.Y. 100 (1861); People v. Dowling, 84 N.Y. 478 (1881); People v. Cox, 67 App. Div. 344, 73 N.Y. Supp. 774 (3d Dep't 1901); People v. Migliori, 271 App. Div. 798, 65 N.Y.S.2d 260 (2d Dep't 1946); Comment, 7 BUFFALO L. REV. 461, 472 (1958); Note, 24 BROOKLYN L. REV. 349, 351 (1958). Since this case involved a non-included crime being treated as an included crime, a contrary decision would not have overruled the *Palmer* case. This decision indicates the Court of Appeals' willingness to adhere to the *Palmer* rule where in fact it need not be applied.

47. 355 U.S. 184 (1957). In the *Green* case defendant was convicted of murder second degree under an indictment charging felony murder, which are non-included crimes. The jury failed to return a verdict as to the graver crime. The Court reversed the conviction as to murder second degree and held, 5-4, that to retry defendant for the graver

the "waiver" rule in the federal system.[48]

DISMISSAL OF INDICTMENT FOR LACK OF PROSECUTION

After a delay of twenty-one months, (through no fault of their own) the defendants made a motion pursuant to Section 668 of the New York Code of Criminal Procedure to have the indictments against them dismissed for failure to prosecute. In granting the motion the trial judge stated, "The facts are such as to bring the matter squarely within the holding of the Court of Appeals in *People v. Prosser*." The Appellate Division affirmed,[49] but on appeal the order was reversed by the Court of Appeals in a four-three decision.[50]

Section 668 of the Code of Criminal Procedure provides:

> If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

The words of the statute make it evident that Section 668 confers a purely discretionary power upon the court. It is because the power granted is one of discretion that the problem in the case of *People v. Alfonso* arises.[51]

As stated earlier, the County Court based its decision on *People v. Prosser*.[52] In that case the Grand Jury returned five indictments in 1946 against the defendant. Soon after the defendant pleaded guilty to two of the indictments, and was sentenced as a fourth felony offender, to imprisonment for an indeterminate term of 15 years to life. In 1952 the defendant was released from prison, since he had been improperly sentenced as a fourth felony offender. The District Attorney then re-arraigned the defendant on one of the three indictments to which, six years before, he had pleaded not guilty. On that re-arraignment he moved under Section 668 to dismiss for failure to prosecute and because he had been denied his right to a speedy trial. The County Judge denied the motion and the defendant was convicted. The Appellate Division affirmed the conviction. On appeal the Court of Appeals reversed, holding that, as a matter of law, the defendant's motion to dismiss should have been granted. A delay of six years was so great that the denial amounted to an abuse of discretion by the County Judge. Since there was an untoward delay of six years, without a waiver by defendant of his right to a speedy

---

non-included crime would place him twice in jeopardy, because he had been impliedly acquitted of that crime.

The doctrine of "waiver" is concededly fictional. The *Green* case explores opposing considerations concerning the waiver doctrine, and has been noted in over a dozen law reviews.

48. Note the impact of the *Green* decision upon a state court, in People v. Gomez, 50 Cal. 2d 640, 328 P.2d 976 (1958).

49. A.D.2d 892, 177 N.Y.S.2d 1018 (2d Dep't 1958).

50. 6 N.Y.2d 225, 189 N.Y.S.2d 175 (1959).

51. *Ibid.*

52. 309 N.Y. 353, 130 N.E.2d 891 (1955).