Criminal Law—Derogatory Remarks of Judge in Imposing Indeterminate Sentence

Buffalo Law Review

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Recommended Citation
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acts which violate the spirit as well as the letter of this law. In so doing it
declares that false advertising is no less criminal because it is artful.

**DEROGATORY REMARKS OF JUDGE IN IMPOSING INDETERMINATE SENTENCE**

In *People v. Gross* the Court held that a defendant can not be sentenced
to an indeterminate term if the sentencing judge has clearly stated that the
defendant is incapable of reform.21

After his conviction the defendant filed notice of appeal. Instead of
prosecuting it, he instituted a *habeas corpus* proceeding. The Appellate Division (1st Dep't) dismissed the writ, stating that the imposition of the inde-
terminate term raised an irrebuttable presumption that the trial court had
found the defendant capable of being corrected.22 The Court of Appeals
affirmed on the ground that the habeas corpus writ did not lie to review the
sentence.23

The defendant then prosecuted his appeal. The Appellate Division (2nd
Dep't) reversed the conviction, and held that since the judge had affirmatively
stated that the defendant could not be reformed,24 the imposition of the inde-
terminate term was erroneous.25 The Court of Appeals affirmed the
reversal, and resolved the conflict between the First and Second Departments
as to whether the sentence is conclusive or whether the derogatory remarks of
the sentencing judge are dispositive.

If the sentencing judge specifically states that he believes a defendant can
not be rehabilitated, an indeterminate term can not be imposed.26 However, if
the judge does not comment on the defendant's character,27 or if his remarks
are ambiguous,28 the indeterminate sentence is conclusive.

This decision restricts the use of the indeterminate sentence as a punitive
device, and effectively recognizes that it is a rehabilitative instrument. No
longer will a trial judge be permitted to characterize a defendant as incorrigible
and at the same time invoke a corrective sentence in order to impose what is
actually a longer sentence than would otherwise be meted out.20

provides for an indeterminate term of not more than three years. Section 203(e)3 states
that the Article shall not apply to any person who is insane or physically or mentally
incapable of being substantially benefited by being committed to a correctional institution.
24. The sentencing judge said:
You can no more change him the longest day he lives than you will
take the spots off a leopard. He will never be any different. He cannot
be ... I do not think he will ever change.
27. People v. Tower, 308 N.Y. 123, 123 N.E.2d 805 (1954); People v. Warden of
N.Y. City Penitentiary, 171 Misc. 533, 13 N.Y.S.2d 837 (Sup. Ct. 1939).
29. In the instant case the maximum punitive sentence could not exceed one year,
while under an indeterminate sentence the defendant could be imprisoned for a period of
up to three years.