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Criminal Law—Defendant Serving Indeterminate Sentence can be Sentenced to State Prison

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POWER OF APPELLATE DIVISION TO REVIEW AN INDETERMINATE SENTENCE

The imposition of an indeterminate sentence is always reviewable by the Appellate Division,[30] but the Appellate Division may not *reduce* such a sentence to the minimum determinate term for that offense.[31] This is because the Appellate Division has no power to reduce a sentence imposed to one lighter than the minimum penalty provided for that offense,[32] and an indeterminate sentence is the minimum penalty provided by law.[33] It is also because there can be no indulgence in the presumption that the sentencing court imposed a sentence to serve an indeterminate term as a punishment more severe than the minimum determinate term.[34]

People v. Zuckerman[35] recently determined that, although the Appellate Division has no power to review an indeterminate sentence when it is excessive if the defendant seeks a *reduction* of that sentence, it can review an indeterminate sentence when it is excessive if the defendant seeks a *suspension,* because the Appellate Division's power to review an indeterminate sentence depends entirely on the defendant's choice of remedy, and not on whether the sentence is appropriate.[36]

Since the Appellate Division may not only suspend but may vacate an indeterminate sentence, where it is inappropriate,[37] its lack of power to review an indeterminate sentence is apparently confined to the single instance where the defendant seeks a reduction of his indeterminate sentence.

DEFENDANT SERVING INDETERMINATE SENTENCE CAN BE SENTENCED TO STATE PRISON

A defendant cannot be sentenced to a State prison if the minimum sentence which can be imposed upon him is less than a year,[38] nor can he be sentenced to a county penal institution if the maximum sentence which can be imposed upon him is more than a year.[39] Although a defendant sentenced to an indeterminate term apparently cannot be sentenced to either place because his minimum sentence is less than a year and his maximum sentence is more than a year,[40] Section 212 of the Correctional Law provides that every person sentenced to an indeterminate term and confined to a State prison must

30. People v. Gross, 5 N.Y.2d 131, 181 N.Y.S.2d 499 (1959).
31. People v. Porfido, 279 App. Div. 1036, 112 N.Y.S.2d 110 (2d Dep't 1952).
32. N.Y. CODE CRIM. PROC. § 543.
33. The Parole Commission may release or parole a prisoner immediately upon commitment. N.Y. CORRECTIONAL LAW §§ 203-204.
34. People v. Porfido, *supra* note 31.
35. 5 N.Y.2d 401, 185 N.Y.S.2d 8 (1959).
36. The Appellate Division erroneously interpreted the *Porfido* case as holding that it lacked the power to review the indeterminate sentence because it was excessive, without distinguishing that case on the choice of remedy sought.
37. People v. Moran, 281 App. Div. 865, 119 N.Y.S.2d 441 (1st Dep't), *aff'd* 306 N.Y. 662, 116 N.E.2d 496 (1953).
38. N.Y. PEN. LAW § 2182(2).
39. N.Y. PEN. LAW §§ 2181, 2182(1).
40. Defendant in this case was sentenced to a term of one day to life.

serve the minimum determinate sentence before he can be released.[41] In *People v. Martin*[42] defendant contended that Section 212 could not by implication apply to earlier penal statutes determining the place of imprisonment, because the provisions of the Penal Law are not altered by subsequent inconsistent statutes which do not explicitly refer to earlier law, and therefore he should be set free.

Section 2500 of the Penal Law declares that no prior penal statute "shall be deemed repealed, altered or amended by the passage of any subsequent legislation inconsistent therewith, unless such statute shall explicitly refer thereto and directly repeal, alter or amend this chapter accordingly." Although Section 2500 was originally literally construed,[43] there was an early recognition that a legislature cannot declare in advance the intent of subsequent legislatures.[44] Consequently, the courts have limited the prohibition of Section 2500 to mean that the courts will not construe a subsequent statute as repealing, altering or amending a prior statute unless the intent to do so is clear and unmistakable.[45]

The Court in the present case held that the clear and unmistakable intent of Section 212 of the Correction Law was to enable the courts to sentence a defendant to a State prison for an indeterminate term, since a contrary decision would render Section 212 meaningless. While it appears that the intent of Section 212 was to declare the powers of the Parole Commission, and the reference to the serving of an indeterminate term in a State prison is incidental to that intent, the practical necessity to arrive at this result requires a determination that Section 212 was enacted to apply to this situation. While the defendant's contentions are ingenious, they cannot prevail at the expense of allowing convicted felons to go free.

DEMURRER TO A SINGLE COUNT OF AN INDICTMENT: PEOPLE'S RIGHT TO APPEAL FROM ALLOWANCE THEREOF

The defendant, a physician, was indicted on nineteen counts of allegedly defrauding an insurance company of $612 on nine different occasions. On each occasion the same type of medical service was fraudulently claimed to have been rendered by the defendant to persons insured by the company, and the value of these services was less than $100 in each case. The indictment con-

41. N.Y. CORRECTION LAW § 212 in part provides:
Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole.

42. 6 N.Y.2d 371, 189 N.Y.S.2d 884 (1959).

43. People v. Gallagher, 58 Misc. 512, 111 N.Y. Supp. 473 (County Ct. 1908); People v. Jensen, 99 App. Div. 355, 90 N.Y. Supp. 1062 (1st Dep't), *aff'd* 181 N.Y. 571, 74 N.E. 1122 (1905); American Soc. v. Gloversville, 78 Hun 40, 29 N.Y. Supp. 257 (1894); People v. Hatter, 22 N.Y. Supp. 688 (County Ct. 1893).

44. Mongeon v. People, 55 N.Y. 613 (1874).

45. People v. Dwyer, 215 N.Y. 46, 109 N.E. 103 (1915); People v. Cleary, 13 Misc. 546, 35 N.Y. Supp. 588 (County Ct. 1895), and cases cited therein.