Buffalo Law Review

Volume 8 | Number 1 Article 54

10-1-1958

Criminal Law—Power of Parole Board to Suspend Sentence

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Power of Parole Board to Suspend Sentence

> A sentence of imprisonment is a solemn pronouncement. As a safeguard to the prisoner the Legislature has provided in section 2188 of the Penal Law that: "[t]he court, judge, justice or magistrate authorized to impose sentence upon conviction may * * * (1) suspend sentence, or may impose sentence and suspend the execution of the judgment. * * * *Provided, however, that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced.*" (Emphasis added.) Similarly, section 470-a of the Code of Criminal Procedure entitled "Suspension of sentence; suspension of execution of judgment", provides: * * * *Provided, however, that the imprisonment directed by the judgment shall not be suspended or interrupted after such imprisonment shall have commenced.*" [Emphasis added.][13]

The Court of Appeals in *People ex rel. Rainone v. Murphy*,[14] a 1956 case, considered the legislative purpose underlying the above statutes in relation to the power of the Parole Board to suspend sentence. The case concerned a prisoner who, while serving a state sentence, was surrendered to federal authorities to serve a federal sentence. The Court held in that case that the Parole Board had no power to suspend the sentence in light of the statutory rules forbidding the courts to do so. Although the board is not expressly forbidden to suspend, as are the courts, the power is not to be implied. Discussing the subject, the Court states:

> The prisoner by his own act of delinquency amounting to a violation of parole, may interrupt the running of the sentence. However, *it begins to run again when he is apprehended and returned to the custody of the Parole Board.* [Emphasis added.] . . . Regardless, however, of what the *Parole Board* does with the prisoner, *after it has regained custody of him* his state sentence continues to run . . . [T]he Parole Board, having the power only to ameliorate *punishment* under the sentence by parole, can itself do nothing insofar as the running of the sentence is concerned.[15]

In *People ex rel. Kenny v. Jackson*,[16] decided this term, the prisoner was sentenced in 1940 to Elmira Reformatory for a maximum of ten years. In 1941, he was released on parole. In 1942, he was arrested and convicted on a second felony and sentenced to from five to ten years. He was taken to state prison and started serving the unfinished time on the first sentence. In 1943, he was paroled on his first sentence and started serving his second sentence (thus receiving credit on his first sentence while serving his second). He, at this time signed a statement to the effect that he understood that violation of proper conduct would

13. People ex rel. Rainone v. Murphy, 1 N.Y.2d 367, 372, 153 N.Y.S.2d 21, 26 (1956).
14. 1 N.Y.2d 367, 153 N.Y.S.2d 21 (1956).
15. *Id.* at 373, 153 N.Y.S.2d at 26-27.
16. 4 N.Y.2d 229, 173 N.Y.S.2d 591 (1958).

result in revocation of parole and of the permission to start the new (second) sentence at that time. The prisoner was paroled under the second sentence in 1946 while still on parole from the first sentence and in 1947 was arrested and convicted of a misdemeanor,[17] thereby breaking his parole.[18] In 1948, he again started to serve his sentences.

Pursuant to section 218 of the Correction Law, the Parole Board ordered that the balance of the maximum sentences be served—consecutively, not concurrently. When the longer of the two remaining periods had been served, this habeas corpus action was begun on the theory that the Parole Board had no power once the sentences had been started concurrently to suspend one until the other had been served.

But in this case the Court of Appeals *held* (4-3): "By the provisions of section 218 of that law [Correction Law] the board was empowered to require the prisoner 'to serve out in prison the balance of the maximum term for which he was originally sentenced.' Nothing more than that was done here." The Court felt that the *Rainone* case concerned a different question and that the decision did not bind them to restrict the power of the Parole Board in a case such as this.

However, the dissent felt that the reasoning of the *Rainone* case compelled the Court to take a consistent view on the facts of the instant case. The construction of the statutes leading to the divisions of authority outlined in *Rainone* and resulting in the Court's declarations (outlined above), the dissent argued, should deny any board power to make the remaining sentences consecutive. By making the sentences consecutive, the board is in effect suspending the running of the sentence.

The majority seems willing to allow the power of suspension to the board when the prisoner's own culpable conduct has been the motivating cause as opposed to voluntary action on the part of the board as in the *Rainone* case. Although this may be a reasonable distinction, the result would seem to conflict with the division of authority and reasoning outlined in *Rainone.*

Waiver of Jury Trial

Article I, section 2 of the New York State Constitution states in part:

> A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death,

17. Incarceration as a misdemeanant suspends the running of sentences. Spearling v. Moran, 277 App.Div. 778, 97 N.Y.S.2d 380 (2d Dep't 1950); see also note 14, *supra.*

18. CORRECTION LAW §218.