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Criminal Law—Appeal—Review of Deferred Sentence

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has been pronounced, a change in the law will not affect in any way the execution of the sentence.[84] To justify giving a statute a retroactive effect though, there must be a clear legislative intent that such new law should have that effect.[85]

In the case of *People v. Oliver*,[86] the defendant was indicted for murder when he was fourteen years of age. He was committed as insane to an institution until his release in 1954, when he was twenty-three years of age. At the time the defendant was indicted for murder, minor defendants were subject to most criminal sanctions, including the death penalty.[87] While the defendant was in the hospital, the law was changed to the effect that no child of fourteen or less could be charged with or prosecuted for any crime, even though it be punishable by death.[88] The Court held that the defendant was entitled to the benefits of the statutory change, even though his crime was committed prior to its enactment. The legislative intent to give the statute a retroactive effect was gleaned from the very change in the law, which disclosed the desire to treat juvenile offenders in a more humane fashion. Also the new amendment showed an intent to abrogate the old law.

In the opinion of the writer, the decision is a sound one and is a step forward in the administration of the criminal law. By this decision the change in the statute is now to be applied retroactively, but such application will not be often in view of the probable fact that there are few minor offenders who committed acts prior to 1948, that have not been tried as yet.

Appeal—Review of Deferred Sentence

People v. Cioffi[89] was an appeal from convictions on two counts of assault in the third degree. On the first count defendant was sentenced to an indeterminate term as provided for in the New York Correction Law, section 203,[90] sentence on the second count being deferred until his discharge from a correctional institution under the first sentence.

The Court held itself without jurisdiction to hear an appeal on the second count since judgment in a criminal case is only final upon the sentencing of the

84. *People ex rel. Paster v. Palmer*, 274 App. Div. 856, 82 N. Y. S. 2d 386 (3d Dep't 1948); *People ex rel. Guariglia v. Foster*, 275 App. Div. 893, 90 N. Y. S. 2d 238 (4th Dep't 1949).

85. *Shielcrawt v. Moffett*, 294 N. Y. 180, 61 N. E. 2d 435 (1945); *Garza v. Maid of the Mist Steamboat Co.*, 303 N. Y. 516, 104 N. E. 2d 882 (1952).

86. 1 N. Y. 2d 152, 134 2d 197 (1956).

87. *People v. Roper*, 259 N. Y. 170, 181 N. E. 88 (1932); N. Y. PENAL LAW §§ 486, 2186.

86. Laws 1948, c. 554, eff. March 29, 1948; now N. Y. PENAL LAW § 486.

89. 1 N. Y. 2d 70, 133 N. E. 2d 703 (1956).

90. N. Y. CORRECTION LAW §203(b): The court in imposing sentence shall not fix or limit the term of imprisonment of any person sentenced to any such penitentiary. The term of such imprisonment shall . . . not exceed three years.

court.[91] There may be no appeal unless there has been final judgment.[92] For the purpose of rendering final judgment the court may sentence the defendant to a term in prison, suspend sentence, or impose sentence and suspend its execution.[93]

There being a final judgment on the first count, the Court had jurisdiction and held that it was reversible error to admit testimony that defendant was previously identified by someone else other than the witness. While the New York Code of Criminal Procedure, section 393-b,[94] relaxed the rule that, barring a showing of impeachment, testimony as to a witness's prior identification is not admissable,[95] neveretheless the statutory provision has been held not to allow testimony of a prior identification by one other than the witness.[96]

Powerless to appeal on the second count, because of a deferred sentence which the trial court lacked the authority to invoke,[97] the defendant is seemingly placed in a position where he is without a remedy. It has been pointed out that the provision in New York Code Criminal Procedure, section 472,[98] to the effect that any delay in sentencing may be waived by the defendant, means that it will be so waived unless the defendant expressly requests to be sentenced.[99]

If such a rquest were refused it has been inferred that the trial court would lose jurisdiction over the person of the defendant.[1] If it were granted, the sentencing would make the judgment final, a basis upon which the defendant could appeal.[2] In the instant case there is no evidence that such a request was ever made. Therefore, what seems to be a lack of remedy is in reality a failure to take advantage of a remedy.

A court may not defeat this remedy by sentencing to consecutive indeterminate

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91. *People v. Bork*, 78 N. Y. 346 (1879).
92. *Hogan v. Bohan*, 305 N. Y. 110, 111 N. E. 2d 233 (1953).
93. See note 92 *supra;* see *People v. Shaw*, 1 N. Y. 2d 30, 133 N. E. 2d 681 (1956) interpreting probation as equivalent to a suspended sentence.
94. N. Y. CODE CRIM. PROC. §393-b: When identification of any person is in issue, a witness who has on a previous occasion identified such person may testify to such previous identification.
95. *People v. Jung Hing*, 212 N. Y. 393, 106 N. E. 105 (1914).
96. *People v. Trowbridge*, 305 N. Y. 471, 113 N. E. 2d 841 (1953).
97. *Hogan v. Bohan*, 305 N. Y. 110, 111 N. E. 2d 233 (1953).
98. N. Y. CODE CRIM. PROC. §472: The time appointed must be at least two days after the verdict, if the court intends to remain in session so long, or if not, as remote a time as can reasonably be allowed; but any delay may be waived by the defendant.
99. *People v. Gorney*, 203 Misc. 512, 103 N. Y. S. 2d 75 (Sup. Ct. 1951).
1. See note 99 *supra.*
2. See note 99 *supra.*

terms.[3] Indeterminate sentences must run concurrently unless sentence or the operation of sentence be *suspended* on one court.[4] If the trial judge recommends an early release he can not remand the defendant for further corrective measures and be consistent; however, if the first term has run its maximum the judge can remand him to prison to commence serving a second sentence.[5]

Though the result is that the offender may still have to serve consecutive indeterminate sentences, the inconsistency is avoided by the procedural sleight of hand of suspending one sentence, thus protecting the offender's remedy of appeal.

Habeas Corpus—Running of Sentence

People ex rel. Rainone v. Murphy[6] held that once a Parole Board regains custody of a parole violator his sentence continues to run, notwithstanding what the Board does with the prisoner.

The relator in this habeas corpus proceeding was arrested upon a warrant issued by the New York Board of Parole alleging delinquency in conformity with that Board's belief that he had committed a Federal crime. Thereafter he was turned over to Federal authorities for trial and sentencing. After sentencing, he was returned to the Board which in a short period subsequent thereto returned him to Federal authorities for imprisonment. After service of his federal sentence, he was returned to the custody of the Board and imprisoned in a New York State prison. Relator then sued out the present writ of habeas corpus, claiming that his State sentence had expired.[7]

It is expedient to the rights of the defendant and society that a defendant in the custody of one jurisdiction be surrendered to another jurisdiction for the purpose of trial. A speedy trial is a right of the accused and a benefit to society.[8]

3. *People ex rel. Gordon v. Ashworth,* 290 N. Y. 285, 49 N. E. 2d 410 (1943); The premise underlying an indeterminate sentence is that rather than having the punishment fit the crime it should fit the rehabilitation needs of the offender. *People ex rel. Fusco v. Ryan,* —— Misc. ——, 124 N. Y. S. 2d 541 (Sup. Ct. 1953). A discharge from the penitentiary, upon completion of the sentence before the maximum term, would make recommitment for a second term an incongruity, the finding that he can no longer benefit from further commitment being a prerequisite to an early discharge. *People ex rel. Gordon v. Ashworth, supra.*

4. *People ex rel. Gordon v. Ashworth,* 290 N. Y. 285, 49 N. E. 2d 140 (1943).

5. See note 4 *supra.*

6. 1N. Y. 2d 367, 135 N. E. 2d 567 (1956).

7. In March 1944 realtor was sentenced to from 7 to 10 years imprisonment. He was released on parole in September 1949 and violated parole in April 1950. He was arrested on a warrant issued by the Parole Board in July 1950. In February 1951 he was convicted of a federal felony and imprisoned therefor. In March 1954 he completed his federal sentence and was returned to the Parole Board. In August 1954 he sued out the present writ of habeas corpus.

8. *Ponzi v. Fessenden,* 258 U. S. 254, 264 (1921); *Rigor v. State of Maryland,* 101 Md. 465, 471, 472, 61 A. 631, 634 (1905).