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Criminal Law—Sentence—Multiple Punishment

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reappeared before the grand jury on the next day, repudiated his previous testimony, and related the events as they actually transpired.

The Court of Appeals, uponweighing all the facts in this case, concluded that such a recantation was but a calculated effort to escape the consequences of perjury prosecution, and refused to apply the recantation doctrine to cover this type of situation. The Court established the criterion that a recantation to be an effective defense against perjury, must be prompt, committed before harm is done to the inquiry, and before the recanter has reason to believe the truth has been discovered. The defendant failed to meet the last requirement, and the majority of the Court affirmed his conviction.

The dissent stated that a grand jury investigation, has for its sole purpose, the discovery of the truth, and every inducement should be made to the witness to aid in its elicitation.[30] The inducement would be destroyed if a witness could not correct a false statement except by running the risk of a perjury prosecution.

This decision does not, as the dissenters hold, almost eliminate the practical usage of the recantation rule. The defendant, by his actions, made unavailable the recantation defense. His recanting was not prompt, and although obviously lying, he refused to change his testimony during this initial appearance on the witness stand, while given every opportunity to do so. In *People v. Gillette,*[31] upon which the dissent strongly relies, the alleged incorrect statements were immediately corrected in the succeeding interrogation. This defense has also been upheld when then erroneous statements were made on direct examination and corrected on cross examination.[32] The majority in affirmance has sensibly refused to stretch the recantation defense to cover a defendant in cases where he waits too long in presenting his recantation to the court.

Sentence—Multiple Punishment

In view of N.Y. Penal Law section 1938,[33] it has frequently been held that a court may not impose consecutive sentences where the same act is the basis for convictions obtained on a multiple count indictment.[34] However, in *People*

30. People v. Gillette, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908).
31. Note 30 *supra.*
32. People v. Brill, 100 Misc. 92, 165 N.Y. Supp. 65 (Sup. Ct. 1917); People v. Glass, 191 App. Div. 483, 181 N.Y. Supp. 547 (2d Dep't 1920).
33. N.Y. PENAL LAW §1938 provides:
> An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of these provisions, but not under more than one; and a conviction or acquital under any one bars a prosecution for the same act or omission under any other provision.
34. People v. Repola, 280 App. Div. 735, 117 N.Y.S.2d 283 (1st Dep't 1952), *aff'd without opinion* 305 N.Y. 740, 113 N.E.2d 42 (1953).

ex rel. Mauer v. Jackson,[35] where the defendant pleaded guilty to the offenses of attempted robbery in the first degree and assault in the first degree, the Court of Appeals held that concurrent sentences could be imposed.

The Court rested their decision on dual grounds. It was first held that robbery, and assault with the intent to kill are separate acts which may command separate punishments, thus rendering section 1938 inapplicable. Here it was pointed out that although a simple assault merges with the act of robbery,[36] an assault with the intent to kill is a separate and distinct act since such an intent is not a necessary element of the crime of robbery.[37]

Secondly, and most notably, the Court held that concurrent sentences do not impose a double punishment on the defendant.[38] The Court felt that such sentences merge into a single punishment measured by the sentence for the highest grade offense. It was pointed out that section 1938 condemns only multiple punishment and is silent as to multiple convictions and concurrent sentences.

Defendant contended that concurrent sentences effected a double punishment since his chances for parole would be injured.[39] The Court rejected this, saying that even without concurrent sentences the record of multiple convictions would appear on defendant's record.

The practical effect of the above decision is to restrict the operation of section 1938 to cases involving consecutive rather than concurrent sentences. It is also noteworthy that this interpretation helps to insure against the defendant going unpunished if an error is found in the conviction for the highest degree crime.

Appeal And Error

Section 542 of the Code of Criminal Procedure states, "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

35. 2 N.Y.2d 259, 159 N.Y.S.2d 203 (1957).

36. Zovick v. Eaton, 259 App. Div. 585, 20 N.Y.S.2d 477 (3rd Dep't 1940); Richardson v. Morhaus, 182 Misc. 299, 43 N.Y.S.2d 221 (Sup. Ct. 1943).

37. N.Y. PENAL LAW §2124 provides:

> Robbery in first degree. An unlawful taking or compulsion, if accomplished by force or . . . when committed by a person:
> 1. Being armed with a dangerous weapon . . . .

38. This is an apparent reversal of the Court's former position in affirming lower court cases holding contra: *People v. Nelson*, 309 N.Y. 231, 128 N.E.2d 391 (1955); *People v. Goggin*, 281 N.Y. 611, 22 N.E.2d 174 (1939).

39. This argument has been accepted in other jurisdictions. People v. Craig, 17 Cal.2d 453, 110 P.2d 403 (1941).