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Criminal Law - Modification of Sentence After Partial Service

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RECENT DECISIONS

Criminal Law—Modification of Sentence after Partial Service.—Petitioner was found guilty of the larceny of an automobile and sentenced to six months in the county jail. Immediately thereafter petitioner developed pneumonia. His physician informed the court of this fact and that his removal from the county jail was necessary to save his life. The trial court acting upon this representation revoked and annulled this sentence and temporarily discharged the prisoner at the same term of the court. The same court, one year later, sentenced the defendant to serve a period of two years in the state's prison under the above-mentioned conviction. Petitioner contends in a *habeas corpus* proceeding that because he had begun to serve the sentence first imposed upon him, the court was without authority or power to revoke or vacate the sentence, even at the same term of the court, and that because of this lack of power, the sentence imposed at the later date was without legal effect.

Held: Petition denied and defendant was remanded to the custody of respondent.

Where, at the request of a convicted defendant, or at his instance or approval given during the same term at which a criminal sentence is imposed the court has vacated or annulled its presently imposed sentence, and deferred imposing a new sentence until a subsequent term of court, the court may, at such subsequent term, impose a new sentence by reason of the original judgment of conviction, even though such new sentence is greater, or materially different in effect from that first imposed and thereafter vacated. Here the attending physician's representations to the court may be deemed equivalent to a representation by the defendant and a motion on his part to vacate the sentence and release him from custody, pending his treatment for pneumonia. *Smith v. Brown, Sheriff,* (Fla. 1938) 185 So. 732.

Courts in those jurisdictions where the problem of the principal case has arisen have stated the general rule applicable as follows: Where a judgment has been fully or partly satisfied by the defendant, the trial court has no power to amend it by increasing the punishment after the term at which the judgment was rendered or even during the same term.

The foundation of this rule is to be found in the constitutional provision that no person shall be twice put in jeopardy of life or liberty for the same offense. It is evident that the ends of justice will not be served by permitting the state, after the sentence of the court has been served, to reopen the case for any purpose and least of all to add a greater penalty. To permit this would be like punishing the delinquent a second time for the same offense. *State* v. *Addy,* 43 N.J.L. 1103, 39 Am. Rep. 547 (1881); *Rupert* v. *State,* 9 Okla. Cr. 226, 131 Pac. 713, 45 L.R.A. (N.S.) 60 (1913); *Smith* v. *Dist. Ct. of Menasha Co.,* 132 Ia. 603, 109 N.W. 1085 (1906); *State* v. *Meyer,* 86 Kan. 793, 122 Pac. 101, 40 L.R.A. (N.S.) 90 (1912); *Ex parte Cornwall,* 223 Mo. 259, 122 S.W. 666 (1909).

However, in many jurisdictions there are certain recognized exceptions to the general rule. It is well established that the record of a court may be changed or amended at any time during the same term of court in which a judgment is rendered. This rule of the early common law is substantially in force at the present time in this country. Thus, during the same term of court at which a sentence is imposed, but before the defendant has begun serving the sentence, the trial judge may modify it either in form or substance. The

authority thus exercised is probably founded on the practice by which the record is not finally made up until the end of the term or session of the court, when the "roll" is signed and returned. Until then, it remains in the control of the court, and no entry therein is deemed to be final or beyond the power of the court to amend it or alter it, either for error or other sufficient cause. The true test by which to determine whether the power can be executed is to ascertain whether it will effect the legal rights of the parties. If it will not, then it is a legitimate exercise of judicial discretion of which no one has a right to complain. Where a sentence is amended before execution has begun, the prisoner is not subjected by the amended sentence of the court to any punishment for his offense greater than that allowed by law. The sentence never went into operation, and it was the same in effect as if it had never been imposed. While it remains unexecuted it is, in contemplation of law, "in the breast of the court," and subject to revision and alteration. The defendant is not injured or put in jeopardy by it any more than he would be by a conclusion or judgment of the court as to the extent of his punishment, which has not been announced. Until something is done to carry the sentence into execution, by subjecting the prisoner to the warrant in the hands of the officer, no right or privilege to which he is entitled is taken away or invaded by revoking the sentence first pronounced and substituting in its stead an amended one. As a general rule the power of a trial court over a sentence pronounced by it ceases at the end of the term except for purposes of enforcement. *Tillman* v. *State,* 58 Fla. 113, 50 So. 635, 138 Am. St. Rep. 100, 19 Ann. Cas. 91 (1909); *State* v. *Hughes,* 35 Kan. 626, 12 Pac. 28 (1886); *State* v. *Meyer,* 86 Kan. 793, 122 Pac. 101, 40 L.R.A. (N.S.) 90 (1912); *Tanner* v. *Wiggins,* 54 Fla. 203, 45 So. 459 (1907); *In re Black,* 52 Kan. 64, 34 Pac. 414 (1893).

In situations wherein a convicted person has already served part of his sentence, but at his own request has had the original sentence vacated, and then later the court increases it, as in the principal case, many decisions permit the trial court to modify the original sentence. In *King* v. *United States,* 98 F. (2d) 291 (D.C. 1938) it was held that where a void or voidable sentence has been vacated through the prisoner's own demands, he cannot complain if a second sentence increases punishment or that he has been placed in double jeopardy. Until a convicted prisoner receives a sentence which can withstand attack, it may be conceived that his original jeopardy continues without interruption, and that he is therefore not put in jeopardy a second time when he receives his first valid sentence. Moreover, when he himself attacks the first sentence his later jeopardy is of his own choosing.

Other decisions discuss the effect of error in imposing sentence and permit a correction. It is well established that every court exercising a continuing jurisdiction, having an office and a custodian for the preservation of its records, has by law an implied authority to amend its records, to make them conform to the facts and truth of the case, and therefore mere formal or clerical errors or omissions or mistakes in the entries of the clerk concerning matters of procedure in criminal cases may be corrected by *nunc pro tunc* orders. *Smith* v. *Dist. Ct.,* 132 Ia. 603, 109 N.W. 1085 (1906). It is a power which courts have, and liberally exercise, to make their records speak the truth; and, if a clerk has omitted to make an entry, whether before or after final judgment, the court may require him to supply this omission *nunc pro tunc.* When the entry is amended, it is nothing more than perfected evidence of what, in contemplation of law, existed from the time judgment was rendered, and this amended

judgment should be given effect as if no error had occurred in the original entry. *Ex parte Howland,* 3 Okla. Cr. 142, 104 Pac. 927 (1909); *United States* v. *Harrison,* 23 F. Supp. 249 (1938); *Breckenridge* v. *Lamb,* 34 Nev. 275, 118 Pac. 687 (1911). Thus, for example, where a jury assessed defendant's punishment as a fine and imprisonment, but the judgment of the court embraced only a fine and costs, it could be changed by the appellate court on motion of the State to conform to the verdict. *Gipson* v. *State,* 58 Tex. Crim. Rep. 403, 126 S.W. 267 (1910). A practical reason in addition to the above is stated in the case of *In re Bonner,* 151 U.S. 242, 14 Sup. Ct. 323, 38 L.Ed. 149 (1893) to the effect that the common law embodies in itself sufficient reason and common sense to reject the doctrine that a prisoner whose guilt is established by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence.

If an illegal sentence has been pronounced, the court has power to substitute a legal sentence, and its right to do this is not impaired by the circumstance that the illegal sentence has been partly executed, though that circumstance will undoubtedly be considered by the court in determining the extent of the defendant's punishment. *In re Vitali,* 153 Mich. 514, 116 N.W. 1066 (1908).

This view is further illustrated in the case of *United States* v. *Harman,* 68 Fed. 472 (1895), which held that where a sentence different from that authorized by law, has been imposed on defendant convicted of a criminal offense, and the cause remanded to the trial court, such trial court resumes jurisdiction of the cause and has authority to re-sentence the defendant and impose the penalty provided by law, notwithstanding part of the void sentence has been executed.

In Wisconsin in the case of *State ex rel Steffes* v. *Risjord,* 228 Wis. 535, 280 N.W. 680 (1938), the trial court imposed a sentence for fourth degree manslaughter after a jury found the defendant guilty of first degree manslaughter. However, the Supreme Court refused to correct this improper sentence in the absence of an appeal by the defendant. Such a sentence was not void but merely erroneous. Thus, the Supreme Court was precluded from directing the trial judge to impose a proper sentence after a conviction for first degree manslaughter.

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Pledges—Conversion—Unauthorized Purchase by Pledgee.—Defendant, pledgee of a stock certificate, claimed to have purchased the certificate, but still had possession of it. The pledgor's administratrix brought action alleging its conversion by reason of an unauthorized purchase by the pledgee. *Held*: There was no conversion since defendant still had possession of the certificate. *Erickson* v. *Midland National Bank and Trust Co. of Minneapolis* (Minn. 1939) 255 N.W. 611.

A purchase of the pledged collateral by pledgee or his agent at his own sale is prohibited. *State ex rel Shull, Bank Commissioner* v. *Liberty Nat. Bank of Kansas City,* 331 Mo. 386, 53 S.W. (2d) 899 (1932).

But if express permission to purchase it is given in the pledge contract, this prohibition is removed. *Frey* v. *Farmers and Mechanics Bank of Ann Arbor,* 273 Mich. 284, 262 N.W. 911 (1935); *Seder* v. *Gould,* 274 Mass. 223, 174 N.E. 311, 76 A.L.R. 700 (1931). Generally, in the absence of such permission, a purchase and retention of the collateral by pledgee is not held a conversion. The