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Criminal Law--Effect of Order Setting Aside Sentence After Imprisonment Under First Judgment Begun

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that if the defendant participated in the crime he did so as a principal in the second degree. The court held that under the evidence the defendant could not properly be found guilty of attempted rape, but only as a principal in the second degree because attempted rape is not a lesser included offense of a principal in the second degree. Also on a new trial he could not be found guilty of rape as charged in the original indictment because the jury had in effect acquitted him of that offense. Therefore the defendant could not be tried for a crime higher than that of attempted rape. See also, *State v. Foley,* 131 W. Va. 326, 47 S.E.2d 40 (1948).

The jurisdictions which hold that on retrial a defendant may be convicted of the higher offense under the original indictment may have some merit in their contention that equality of justice both to the defendant and society results. *Cf. Palko v. United States, supra; United States v. Ball,* 163 U.S. 662 (1896). It is, however, submitted that the principal case followed the view that is most consistent with the philosophy of the criminal law in not subjecting the defendant to repeated expense and embarrassment, and compelling him to live in a continuing state of insecurity and anxiety. *Green v. United States, supra* at 223. For regardless of the theory which allows conviction of the higher degree of the offense upon retrial after appeal from conviction of the lower degree of the offense, whether it be "waiver" or "continuing jeopardy," the defendant gives up a right already adjudicated in order to secure justice on another. Such right should not be restricted by consideration of the danger that on retrial he may be convicted of a more serious crime. Comment, 14 WASH. & LEE L. REV. 228 (1957).

J. E. J.

CRIMINAL LAW—EFFECT OF ORDER SETTING ASIDE SENTENCE AFTER IMPRISONMENT UNDER FIRST JUDGMENT BEGUN.—Petitioner, after pleading guilty to charge of armed robbery, was sentenced to ten years in the penitentiary. After a few hours of confinement, petitioner escaped from county jail where he was being held, was captured, and was brought before the court a few days later. The earlier sentence was set aside and petitioner was given a thirty-year sentence. The only commitment issued and sent to the warden of the penitentiary was on the second judgment. Petitioner brings habeas corpus proceeding for release from penitentiary. *Held,* that

a new judgment increasing sentence after imprisonment had begun under a valid judgement is void from the beginning, and the previous judgment remained in full force and effect. Petitioner remanded to the warden to serve the valid sentence, and a reasonable time given to obtain commitment pursuant to the valid judgment. *State ex rel. Roberts v. Tucker,* 100 S.E.2d 550 (W. Va. 1957).

Nothing new or novel is presented in the majority opinion of the principal case, but certain points acknowledged to be the law in most jurisdictions have now been adopted by the West Virginia court.

It is well established that once a valid sentence has been imposed and execution has begun, a court has no power to increase that sentence. See, *e.g., United States v. Benz,* 282 U.S. 304 (1931); *Frankel v. United States,* 131 F.2d 756 (6th Cir. 1942); *State ex rel. Williams v. Riffe,* 127 W. Va. 573, 578, 34 S.E.2d 21, 23 (1945) (dictum). See also 5 WHARTON, CRIMINAL LAW AND PROCEDURE § 2191 (1957); Annot., 168 A.L.R. 706 (1947).

By the weight of authority, the court has no power to change a valid sentence in any way once execution has begun. *Ex parte Fontino,* 135 Cal. App. 362, 27 P.2d 413 (1933); *State v. Meyer,* 86 Kan. 793, 122 Pac. 101 (1912); see Annot., 168 A.L.R. 706 (1947).

Some jurisdictions allow a mitigation of sentence after execution has begun. *United States v. Benz,* 282 U.S. 304 (1931); *State v. Butler,* 72 Md. 98, 18 Atl. 1105 (1890); *State ex rel. Williams v. Riffe, supra* at 578, 24 S.E. at 23 (dictum). *Contra, Yutz v. Pearman,* 33 F.2d 906 (E.D.S.C. 1929); *State v. Ensign,* 38 Idaho 539, 223 Pac. 230 (1924); *Auldridge v. Wombe,* 157 Ga. 64, 120 S.E. 620 (1923).

Equally well established is the rule that one validly convicted and sentenced is confined on account of the judgment and sentence against him, and not by virtue of any commitment papers, and absence of commitment papers will not invalidate the confinement. *In re Swink,* 243 N.C. 86, 89 S.E.2d 792 (1955); *People v. Cox,* 401 Ill. 432, 82 N.E.2d 463 (1948); *Sprinkles v. Downey,* 302 Ky. 822, 195 S.W.2d 760 (1946).

The distinctive feature of the principal case is presented in Judge Given's concurring opinion. He points out the possibility of a sentence being set side and the validity of the order setting

aside the sentence not being determined until a subsequent time, during which time the prisoner is still confined. This presents the question of whether the prisoner is legally held during this period. Judge Given then offers this solution: "All such uncertainties would be avoided by simply saying that a trial court is empowered to set aside a sentence, at the term at which the sentence was imposed, and that any subsequent order or sentence is invalid only in so far as the court thereby exceeds its jurisdiction." *State ex rel. Roberts v. Tucker, supra* at 554.

Such a rule would be analogous to the present rule in West Virginia concerning the rendering of the original judgment in criminal cases: if a judgment is in excess of that which the court rendering it had by law the power to pronounce, such judgment is void for the excess only. *State ex rel. Browning v. Tucker,* 98 S.E.2d 740 (W. Va. 1957); *State ex rel. Dye v. Skeen,* 135 W. Va. 90, 62 S.E.2d 681 (1950); *Ex parte Mooney,* 26 W. Va. 32 (1885).

However, if such a rule were adopted, still, what would be done with the prisoner after the sentence is set aside and until a new sentence is pronounced? When would it be decided if the court had exceeded its jurisdiction? Perhaps a prisoner would begin a sentence under which the court exceeded its jurisdiction, but the question of jurisdiction might not be solved until all or part of an excess sentence had been served.

Two possibilities are suggested under neither of which would the question of unlawful detention arise:

(1) Adopt the rule followed by many states under which no valid sentence may be set aside after execution has begun, even at the same term. See *Emerson v. Boyles,* 170 Ark. 621, 280 S.W. 1005 (1926); *People v. Turney,* 273 Ill. 546, 113 N.E. 105 (1916); *State v. Meyer, supra; Ex parte Fontino, supra.*

(2) Adopt the law, preferably by statute, setting forth the time when a sentence may be set aside and new sentence imposed, with the rights of the prisoner set forth. Such an enactment, similar to the following New Jersey statute, would solve the problem raised by Judge Given.

"After conviction and sentence the court before which the conviction was had may, at any time within the period of thirty days from the date judgment is entered on such conviction, but not thereafter . . . open and vacate the judgment entered on any

conviction and resentence the defendant, as right and justice may seem to require and discharge the defendant from custody on bail pending such resentence. No such judgment shall be opened or vacated if a writ of error is pending to review the judgment." N.J. REV. STAT. § 2:190-15 (1937).

While a solution would be desirable, the absence of cases in which the suggested problem has arisen suggests the possibility that such a solution is less essential in practice than in theory.

J. S. T.

CRIMINAL LAW—PLEA OF NOT GUILTY—COERCION BY JUDGE.—Defendant entered a plea of not guilty upon arraignment before the United States District Court of Western Oklahoma. The plea was entered without benefit of an attorney which the court had offered but the defendant had refused. Immediately thereafter the court stated to the defendant that if he was found guilty upon trial he would get the maximum punishment provided by law for putting the government to the expense of a trial by not entering a plea of guilty. At the trial the defendant withdrew his plea of not guilty and entered a plea of guilty and sentence was imposed. *Held,* reversing the lower court, that the fundamental standards of procedure in criminal cases require that a plea of guilty be entered freely, voluntarily and without semblance of coercion. The trial court's statements were reasonably calculated to coerce the defendant into a guilty plea. *Euziere v. United States,* 249 F.2d 293 (10th Cir. 1957).

A plea of guilty entered other than voluntarily by the defendant has consistently been held incapable of supporting a sentence imposed thereon for the obvious reason that it deprives the defendant of a trial by jury and violates his rights guaranteed under the due process clause of the Constitution. *United States v. Swaggerty,* 349 U.S. 959 (1952); *O'Hara v. People,* 41 Mich. 623, 3 N.W. 161 (1878); *Flowers v. State,* 90 Okl. Cr. 390, 214 P.2d 728 (1950). It would appear under proper circumstances that there is no reason why such a plea should not be accepted by the court. *Brown v. State,* 92 Fla. 592, 109 So. 627 (1926); *People v. Merhige,* 212 Mich. 601, 180 N.W. 418 (1920). It would in fact, as stated in the principal case, save the expense and time required by a jury trial. Recognizing this our judicial tribunals have laid down stringent rules to insure the protection of the defendant's constitutional rights