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Criminal Law-Effect of Breach of Duty by Ministerial Officer-Sentences of State and Federal Courts

CRIMINAL LAW—EFFECT OF BREACH OF DUTY BY MINISTERIAL OFFICER—SENTENCES OF STATE AND FEDERAL COURTS—On June 2, 1930, the federal court convicted the petitioner of impersonating a federal officer, sentenced him to six years in prison, and issued a warrant for his commitment on the same day, directing the marshal to deliver him to the United States penitentiary "forthwith." The marshal neglected to carry out the order, retained custody of the prisoner, and later over the protests of the petitioner turned him over to state authorities who had previously filed an information (on May 14, 1930) charging forgery against him. The state arraigned him for trial, and on July 31, 1930,

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foreign transaction is matter of substance or procedure, will examine the entire nature of the transaction, including the statute or principal of law which created the alleged right and the interpretation thereof; but will not inquire whether the foreign court will call the various rules involved in the transaction substantive or procedural." But observe in, note 10, the comment by McClintock on this section. The final draft of the Restatement materially rephrases this section.

[10] McClintock, supra, note 7, says, "The statement of the comment that the forum 'will not enquire whether the foreign court would call the various rules involved in the transaction substantive of procedural' is manifestly contrary to the general theory of the Restatement that in the field of conflict of laws one deals principally with the jurisdiction of states to create rights and the enforcement of the rights so created in other jurisdictions."; Burns Mortgage Co. v. Fried (1934), 292 U. S. 487, 54 S. Ct. 813; Precort v. Driscoll (1931), 85 N. H. 280, 157 A. 525; Halsey v. McLean (1816), 94 Mass. 438.

[11] Supra, note 2.

[12] Supra, note 10.

[13] Supra, note 2.

[14] Compiled General Laws Florida, 1927, Secs. 5704, 5705.

petitioner changed his former plea of "not guilty" to "guilty." The state court then sentenced him for an indeterminate period of one to fourteen years in the state prison. After serving five years in the state prison he was released on parole and then the marshal took him to the federal penitentiary to serve out his time under the sentence of the federal court. In habeas corpus proceedings petitioner sought to have the time served in the state prison counted upon his federal sentence. On June 29, 1932, a federal statute was enacted which provided that the sentence of a federal prisoner was to start from the date on which the prisoner was received at the place of detention (18 U.S.C.A., Sec. 709a). The majority of the court held that the petitioner was entitled to count the time spent in the state prison upon his federal sentence.[1]

In this case the prisoner has committed different and distinct offenses against two jurisdictions. Logically it should follow that he should have to serve both sentences to satisfy the debt exacted by society. But by the decision of the majority the unauthorized act of the marshal destroyed all rights the federal government had to have its power vindicated. It is respectfully suggested that the opposite decision should have been reached.

The majority did not take into consideration that the effect of the unauthorized act of the marshal was abetted by failure of the petitioner to maintain his plea of "not guilty." It has been decided that a federal court is not required to allow the effect of its judgment to be nullified in any part by act of a petitioner or of a state court.[2] Moreover, in absence of positive statutes covering the subject, inaction, procrastination, or delay on the part of public officials does not prejudice the rights of a sovereign.[3]

The majority opinion held that the sentence of the petitioner started "at the time of his sentence and the commitment and custory thereunder by the marshal." No mention was made of the statute stating that sentence was to start only when the prisoner was delivered to the place of detention. Upon a review of the authorities, it is found that the 1932 statute merely codified the prevalent practice and thus did not prejudice the petitioner's position. In 16 Corpus Juris, section 3228, it is said "as a general rule the term of imprisonment for which D is sentenced begins with the first day of actual incarceration in prison."[4] Two other rules are quoted as being minority views. (1) Sentence begins from the time sentence is pronounced.[5] (2) Sentence begins from the time of date of entry in the judgment.[6] It is evident then that it is error for

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1 Smith v. Swope (1937), 91 F. (2d) 260.

2 Ex Parte McCullen (1928), 29 F. (2d) 852.

3 State v. School District No. 3, Chautauqua Co. (1885), 34 Kan. 237, 8 P. 208; State v. Dixon (1913), 90 Kan. 594, 135 P. 568, 47 L. R. A. (N. S.) 905; Dement v. Rokker (1888), 126 Ill. 174, 19 N. E. 33; Terre Haute & I. R. Co. v. State ex rel. Ketcham, Att. Gen. (1902), 159 Ind. 438, 65 N. E. 401.

4 Bradford v. People (1896), 22 Colo. 157, 43 P. 1013; Miller v. Evans (1901), 115 Ia. 101, 88 N. W. 198, 56 L. R. A. 101; Clifford v. State (1869), 30 Md. 575; Mims v. State of Minn. (1880), 26 Minn. 494, 5 N. W. 369; People ex rel. Stokes, Warden (1876), 66 N. Y. 342; Arnold v. Schmidt (1913), 155 Wis. 55, 143 N. W. 1055; State v. Grottkau (1888), 73 Wis. 589, 41 N. W. 1063, 9 Am. S. R. 816.

5 Ex parte Adams (1911), Ala. 105, 54 So. 501; Ex parte Meyers (1869), 44 Mo. 279.

6 Braxton v. State (1912), 103 Miss. 127, 60 S. 66; Rhea v. United States (1897), 6 Okla. 249, 50 P. 992.

a court to attribute any effect to the warrant of commitment for determining when a sentence shall begin.

At most the warrant is but an order or process by which the court directs a ministerial officer to take a person to prison or detain him there.[7] It supplies authority for a warden to receive a prisoner and to hold him for a given length of time; when the warrant expires so does the authority to hold the prisoner any longer.[8] The commitment represents merely a ministerial act, as distinguished from a judicial function; therefore, the decision of *Bernstein v. United States*[9] should control the court's decision. It was there decided "if, for *any* reason, execution of the sentence has been delayed, the court at a subsequent term may change the commitment order and may compel the petitioner to serve the added time".[10]

The federal court has power to vacate any order entered in respect to a remittitur when it learns that serving of federal sentence has been interfered with by the prisoner's serving of a state sentence for an entirely different offense than that imposed by the federal court.[11] So it could have done here.

It is conceded that ordinarily sentences run concurrently in the absence of specific provisions in a judgment to the contrary.[12] The American Law Institute substantiates our view that the sentences should not have been deemed to be concurrent; it holds "sentences of imprisonment for offenses not charged in the same indictment or information shall be served consecutively unless expressly directed otherwise."[13] Sentence to imprisonment in a federal penitentiary cannot be satisfied by servitude in a state prison.[14]

By the decision of the majority the petitioner began serving his sentence at the date of the sentence and commitment and custody thereunder by the marshal; it would follow then that at the time he was on trial before the state court he was serving his sentence. Both the federal courts[15] and the state courts[16] hold that where one who is already serving a sentence is convicted in another court the sentences will not run concurrently. How then could the sentences be concurrent here? W. E. O.

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[7] People ex rel. Wojek v. Henderson (1937), 295 N. Y. S. 173, 178, 134 Misc. 228; Commonwealth v. Barker (1882), 133 Mass. 399; People v. Hagen (1902), 170 N. Y. 46, 49, 62 N. E. 1086.

[8] United States v. Marrin (1915), 227 F. 314.

[9] (1918), 254 F. 967; see authorities collected in 3 A. L. R. 1569.

[10] Bernstein v. United States (1918), 254 F. 967.

[11] Ex parte McCullen (1928), 29 F. (2d) 852.

[12] United States v. Patterson (1887), 29 F. 775; Ex parte Lawson (1924), 98 Tex. Cr. R. 544, 266 S. W. 1101; Zerbst v. Walker (1933), 67 F. (2) 667, "Even though of different courts"; contra: Hightower v. Hollis (1904), 121 Ga. 159, 48 S. E. 969.

[13] Code of Criminal Procedure, Official Draft, June 15, 1931, Sec. 402, p. 105.

[14] Ex parte Aubert (1931), 51 F. (2d) 136; Ex parte Lamar (1921), 274 F. 160.

[15] Ex parte McCullen (1928), 29 F. (2d) 852; Bernstein v. United States (1918), 254 F. 967; Ex parte Aubert (1931), 51 F. (2d) 136.

[16] State v. Ryder (1930), 119 Neb. 704, 230 N. W. 586. "When sentence is pronounced upon one already serving a sentence from another court a second sentence doesn't begin until the sentence which the prisoner is serving has expired."