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Constitutional Law - Due Process - Right of Second Offender to Pre-Sentence Hearing Regarding Prior Conviction

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CONSTITUTIONAL LAW — DUE PROCESS — RIGHT OF SECOND OFFENDER TO PRE-SENTENCE HEARING REGARDING PRIOR CONVICTION — Relator was convicted of burglary in 1953 and of voluntary manslaughter in 1954. While passing sentence after the latter conviction, the court declared that it was exercising its discretion under the Habitual Criminal Act¹ by imposing a double penalty on the relator. Neither relator nor his counsel objected to the procedure or demanded a hearing regarding the prior conviction.² On petition for writ of habeas corpus, which was denied by the lower court, relator admitted the fact of his prior conviction. He asserted, however, that although the habitual criminal statute in terms contains no provision granting alleged second offenders notice and a hearing regarding the prior conviction, the trial court's failure to accord him such notice and hearing violated procedural due process. On appeal, *held*, cause remanded for

¹ PA. STAT. ANN. tit. 18, §5108 (1945). A person need not be formally indicted and convicted as a previous offender in order to be sentenced under the Habitual Criminal Act. PA. STAT. ANN. §5108 (e) (1945).

² In his petition for writ of habeas corpus, relator asserted that he had no knowledge of a right to a hearing regarding his prior conviction. The question of waiver was decided favorably to him. *But see* Williams v. Oklahoma, 358 U.S. 576 (1959). See also New York v. Mattera, 179 N.Y.S.2d 970 (1958); Plasters v. Hoffman, 180 Kan. 559, 305 P.2d 858 (1957); Kendrick v. United States, 238 F.2d 34 (D.C. Cir. 1956); Pennsylvania *ex rel.* Firmstone v. Burke, 175 Pa. Super. 128, 103 A.2d 476 (1954).

resentencing.³ In order to avoid a constitutional due process question, the Habitual Criminal Act will be construed to require the trial court to give an alleged second offender, before sentencing, notice and a hearing as to the prior conviction, even though the defendant is in fact a second offender and subject to an increased term. *Pennsylvania ex rel. Dermendzin v. Myers*, 397 Pa. 607, 156 A. 2d 804 (1959).

The Supreme Court of Pennsylvania based its decision in the principal case primarily upon *United States ex rel. Collins v. Claudy*.⁴ In that case, the Court of Appeals for the Third Circuit found a denial of due process where a trial court sentenced a defendant under the Pennsylvania Habitual Criminal Act without informing him that he was being so sentenced, even though he was in fact a second offender.⁵ The court in the principal case inferred from *Collins* that defendant was entitled to notice to enable him to present matters in mitigation of the prior offense; therefore, a hearing as well as notice was required. Neither *Collins* nor the instant case seems to give sufficient weight to a long line of federal decisions concerning post-conviction, pre-sentence procedure.⁶ These cases, beginning with the 1949 decision of the Supreme Court in *Williams v. New York*,⁷ established the rule that the failure of the trial court to afford the defendant, after an adverse verdict or a plea of guilty,⁸ an opportunity to make a statement or present evidence in mitigation of his offense is not a denial of due process.⁹ Although no case in this line of decisions is concerned with pre-sentence procedure under a multiple offender statute, there seems to be nothing in the Pennsylvania act requiring a departure from their rule. Any presenta-

³ Release of relator on writ of habeas corpus was denied, since he was still properly imprisoned by virtue of the portion of the sentence imposed solely for the voluntary manslaughter conviction. See *Pennsylvania ex rel. Grierson v. Ashe*, 353 Pa. 1, 44 A.2d 239 (1945). See generally Sedler, *Habeas Corpus in Pennsylvania After Conviction*, 20 U. Prrt. L. Rev. 652 (1959).

⁴ 204 F.2d 624 (3d Cir. 1953).

⁵ See *Pennsylvania ex rel. Arnold v. Ashe*, 156 Pa. Super. 451, 40 A.2d 875 (1945); *Pennsylvania v. Johnson*, 348 Pa. 349, 35 A.2d 312 (1944); *Levell v. Simpson*, 142 Kan. 892, 52 P.2d 372 (1935). But cf. *Delaware v. Moore*, 49 Del. 29, 108 A.2d 675 (1954); *Hill v. Hudspeth*, 161 Kan. 376, 168 P.2d 922 (1946).

⁶ See *Hoover v. United States*, 268 F.2d 787 (10th Cir. 1959); *Application of Hodge*, 262 F.2d 778 (9th Cir. 1958); *Thomas v. Teets*, 220 F.2d 232 (9th Cir. 1955); *Pence v. United States*, 219 F.2d 70 (10th Cir. 1955); *Klingstein v. United States*, 217 F.2d 711 (4th Cir. 1954); *Price v. United States*, 200 F.2d 652 (5th Cir. 1953); *Friedman v. United States*, 200 F.2d 690 (8th Cir. 1952), cert. denied, 345 U.S. 926 (1953); *Taylor v. United States*, 179 F.2d 640 (9th Cir. 1950), cert. denied, 339 U.S. 988 (1950); *United States ex rel. Pascal v. Burke*, 90 F. Supp. 868 (E.D. Pa. 1950); *Sacks v. Canal Zone*, 176 F.2d 292 (5th Cir. 1949), cert. denied, 338 U.S. 858 (1949).

⁷ 337 U.S. 241 (1949). See Comment, 49 COLUM. L. REV. 567 (1949); Note, 48 MICH. L. REV. 523 (1950).

⁸ Although the case of *Williams v. New York*, *supra* note 8, did not involve a guilty plea, eight of the ten cases cited in note 6 *supra*, following and developing the *Williams* rule, did involve pleas of guilty.

⁹ *Thomas v. Teets*, *supra* note 6; *United States ex rel. Pascal v. Burke*, *supra* note 6.

tion of mitigating circumstances that could have been excluded, consistently with due process, upon a plea of guilty to a first offense seems to be equally excludable upon conviction of a second offense. In each case, the court has before it none of the details concerning the first offense, and the defendant's purpose is to supply the court with such details and with other matters favorable to him, in order to influence the court toward imposition of a lighter sentence. That the rule developed from *Williams* is analogous to cases involving multiple offender statutes is not to say, however, that an alleged second offender could be precluded from pleading the non-existence of any prior conviction and from having a hearing on that issue.¹⁰ Nor could he be prevented from challenging the validity of the prior conviction.¹¹ Where, however, the defendant admits the existence and does not challenge the validity of the prior conviction, as in both *Collins* and the principal case, the error in failing to inform him that he is being sentenced pursuant to a habitual criminal statute, under the rule derived from the *Williams* line of cases seems to involve no violation of procedural due process under the Fourteenth Amendment.¹² Certainly, the *Williams* rule may be subject to question; a hearing wherein the defendant, especially one who has pleaded guilty, may present matters in mitigation of his offense may seem much more fair. Nevertheless, in view of that rule and in view also of the unmistakable legislative intent to provide no hearing for second offenders under the Pennsylvania Habitual Criminal Act,¹³ *Collins* appears to provide an infirm foundation for the holding in the principal case.¹⁴

John Edward Porter, S.Ed.

¹⁰ See *Rhea v. Edwards*, 136 F. Supp. 671 (D.C. Tenn. 1955).

¹¹ See *Gayes v. New York*, 332 U.S. 145, 149 n.3 (1947). See also *United States ex rel. Hamby v. Ragen*, 178 F.2d 379 (7th Cir. 1949); *United States v. Moore*, 166 F.2d 102 (7th Cir. 1948).

¹² But where the court relies on a pre-sentence report containing materially untrue statements in determining sentence, and denies access to such report to the defendant, due process is denied. *Townsend v. Burke*, 334 U.S. 736 (1948); *Ex parte Hoopsick*, 172 Pa. Super. 12, 91 A.2d 241 (1952).

¹³ Notice and hearing on the issue of prior convictions is specifically provided in the act for accused fourth offenders. PA. STAT. ANN. tit. 18, §5108(d) (1945). Provision for any similar procedure in the case of alleged second offenders is noticeably absent.

¹⁴ Perhaps the decision would have rested more securely upon an interpretation of the notice and hearing due process requirements of the Pennsylvania Constitution, which, of course, may be found to be more stringent than those of the Fourteenth Amendment. PA. CONST. art. 1, §9.