Michigan Law Review

Volume 45 | Issue 7

1947

CRIMINAL LAW-RESENTENCE-RIGHT TO CREDIT FOR TIME SERVED UNDER VOID SENTENCE

Bruce L. Moore
University of Michigan Law School

CRIMINAL LAW—RESENTENCE—RIGHT TO CREDIT FOR TIME SERVED UNDER VOID SENTENCE—Plaintiffs in error were convicted and sentenced from one to twenty years with recommendations that they serve four to five years. On writ of error, the judgment in each case was reversed and the cause was remanded for entry of a proper sentence because the statute under which sentence was imposed was unconstitutional. A new sentence of from one to twenty years was imposed in each case. Plaintiffs in error had served three and one-half years in the one case, and over four years in the other case, under the original sentence. Error is assigned because no credit was allowed in the new sentence for time served in prison under the original invalid sentences. *Held*, on resentence the court is not required to give credit for time served in prison under a void sentence. The court may, however, in its discretion, give credit for time served by shortening the maximum under the new sentence. *People v. Starks*, (Ill. 1947) 71 N.E. (2d) 23; *People v. Judd*, (Ill. 1947) 71 N.E. (2d) 29.

It is well settled that where a criminal sentence is imposed and is later determined to be erroneous or void, the court may set the sentence aside and pronounce a valid sentence.[1] This is true even though there has been partial execution of the original sentence.[2] And, in such a case, the new sentence may increase the punishment beyond that provided in the first sentence.[3] The action of

[1] Tinkoff v. United States, (C.C.A. 7th, 1937) 86 F. (2d) 868, cert. den., 301 U.S. 689, 57 S. Ct. 795 (1937); Commonwealth v. Murphy, 174 Mass. 369, 54 N.E. 860 (1899), 48 L.R.A. 393 (1900), affd., 177 U.S. 155, 20 S. Ct. 639 (1900); State v. Mehlhorn, 195 Wash. 690, 82 P. (2d) 158 (1938); Nelson v. Foley, 54 S.D. 382, 223 N.W. 323 (1929); King v. United States, 69 App. D.C. 10, 98 F. (2d) 291 (1938).

[2] Cases cited, supra, note 1.

[3] King v. United States, 69 App. D.C. 10, 98 F. (2d) 291 (1938); Commonwealth v. Murphy, 174 Mass. 369, 54 N.E. 860 (1899), affd., 177 U.S. 155, 20 S. Ct. 639 (1900). In Robinson v. United States, (C.C.A. 6th, 1944) 144 F. (2d) 392, defendant was sentenced to life imprisonment for kidnapping. On his writ of error the case was reversed and the new trial and sentence resulted in imposition of the death penalty. See, also, Stroud v. United States, 251 U.S. 15, 40 S. Ct. 50 (1919),

the court in resentencing one lawfully convicted of a crime does not constitute a double jeopardy.[4] The new sentence having been pronounced at the instance of the defendant, he is deemed to have waived any constitutional objection he might have had.[5] Subject to two restrictions there is no general agreement as to whether the court must allow credit for the time served under an invalid sentence. Where the time served under the original sentence equals or exceeds the legal maximum for the offense, the cases agree that the prisoner should be discharged.[6] And, where less time has been served, it has been held that under certain situations the court may not ignore the time served under the invalid sentence. Where the new sentence imposes a definite period of confinement, the total time which must be served under the new sentence plus the previous confinement may not exceed the maximum legal penalty.[7] This is also true where the new sentence is for an indefinite period of confinement, but as a practical matter this consideration seems to present no difficulty here, because seldom is the maximum time under the indefinite sentence actually served. The time allowed on the new sentence for good behavior generally offsets the time previously served, so that there is little likelihood that the total time the prisoner will actually serve will be more than the maximum provided by law. Where the case is not subject to the aforementioned restrictions, there is more or less general agreement that the court may consider the previous imprisonment and allow credit for this time in imposing the new sentence.[8] In point of fact, such credit is more often allowed than not. But the cases are in conflict as to whether allowing such credit is mandatory. In this connection, a distinction is sometimes made between sentences which are merely erroneous and those which are absolutely void.[9] Where the original sentence is merely erroneous,

where the death penalty was similarly substituted for the invalid sentence of life imprisonment.

[4] Bryant v. United States, (C.C.A. 8th, 1944) 214 F. (2d) 51; Robinson v. United States, (C.C.A. 6th, 1944) 144 F. (2d) 392; King v. United States, 69 App. D.C. 19, 98 F. (2d) 291 (1938); Commonwealth v. Murphy, 174 Mass. 369, 54 N.E. 860 (1899), affd., 177 U.S. 155, 20 S. Ct. 639 (1900).

[5] A further reason given for this holding is that a convicted person cannot by his own act avoid the jeopardy in which he stands, then assert it as a bar so as to escape fulfilling the punishment for his crime. Furthermore, it is considered that a person is not placed in jeopardy by an unlawful or void sentence. See cases supra, note 4.

[6] Bennett v. Hollowell, 203 Iowa 352, 212 N.W. 701 (1927); People v. Huber, 389 Ill. 192, 58 N.E. (2d) 879 (1945); Ex parte Bulger, 60 Cal. 438 (1882).

[7] In In re Leypoldt, 32 Cal App. (2d) 518, 90 P. (2d) 91 (1939), three and one half months had been served under a void sentence which was set aside, and defendant was resentenced to three months. The maximum imprisonment for the offense was six months. Held, resentence void as to excess over six months including the time previously served. See, also, Koslowski v. Board of Trustees of Newcastle County Workhouse, (Del. Super. 1921) 118 A. 596; Debenque v. United States, 66 App. D.C. 36, 85 F. (2d) 202 (1936); King v. United States, 69 App. D.C. 10, 98 F. (2d) 291 (1938).

[8] Although the Illinois court does not require that credit be given, it is recognized that such credit "may" be given. People v. Wilson, 391 Ill. 463, 63 N.E. (2d) 488 (1945), allowed such credit by reducing the maximum time to be served under the new sentence. See, also, In re Wilson, 202 Cal. 341, 260 P. 542 (1927), and 15 AM. JUR., Criminal Law, § 477.

[9] Ex parte Gunter, 193 Ala. 486, 69 S. 442 (1915); In re Wilson, 202 Cal. 341, 260 P. 542 (1927); and see 9 A.L.R. 958 (1920).

as, for example, error in the place of confinement, a majority of the cases allow credit for time served thereunder, and such credit is frequently required.[10] If the original sentence is entirely void, however, as where it is imposed under an unconstitutional statute, there is considerable authority that the court is not required to give credit for time served.[11] The reason for not requiring credit is that a void sentence is in law considered no sentence at all, and the case is the same as though no sentence had yet been pronounced on a defendant who has been properly convicted. The defendant, therefore, has not served any part of the valid sentence. Clearly, such a result may frequently impose genuine hardship and substantially lengthen the time of imprisonment. For this very reason some courts have required that the new sentence allow credit for time served under the sentence set aside, and failure to allow such credit is reversible error.[12] *Bruce L. Moore*

[10] A sentence, though erroneous, is still of legal significance, and time served thereunder should not be ignored. Owen v. Commonwealth, 214 Ky. 394, 283 S.W. 400 (1926); In re Silva, 38 Cal. App. 98, 175 P. 481 (1918); State v. Fairchild, 136 Wash. 132, 238 P. 922 (1925); and 9 A.L.R. 958 (1920).

[11] Ex parte Gunter, 193 Ala. 486, 69 S. 442 (1915); McCormick v. State, 71 Neb. 505, 99 N.W. 237 (1904); Ogle v. State, 43 Tex. Crim. Rep. 219, 63 S.W. 1009 (1901); Ex parte Wilson, 202 Cal. 341, 260 P. 542 (1927). Such cases are criticized in 9 A.L.R. 958 (1920) as being more consistent with dry logic than with natural justice. There is no requirement that credit be allowed where sentence is imposed under federal law. See Debenque v. United States, 66 App. D.C. 36, 85 F. (2d) 202 (1936); King v. United States, 69 App. D.C. 10, 98 F. (2d) 291 (1938).

[12] Jackson v. Commonwealth, 187 Ky. 760, 220 S.W. 1045 (1920); State v. Mehlhorne, 195 Wash. 690, 82 P. (2d) 158 (1938). Some courts require that credit be given without distinguishing between erroneous and void sentences. In re Silva, 38 Colo. App. 98, 175 P. 481 (1918); Jackson v. Commonwealth, ibid. Of course, allowance of credit may be required by statute. See People ex rel. Barrett v. Hunt, (N.Y. S. Ct. 1939) 12 N.Y.S. (2d) 127; In re Cowan, 284 Mich. 343, 279 N.Y. 854 (1938).