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Judicial Discretion in Imposing Sentence

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four dissenting justices indicate their desire to retain the direct burden test originally followed and recently returned to in the *Freeman* and *Carter & Weeks* decisions.

Since Justice Burton did not express his view on the most desirable approach to the problem, the case presents no clear answer to this perplexing problem. The stand taken by those affirming the validity of the tax does indicate that there is serious consideration of again discarding the original direct burden test.

HENRY T. JONES.

JUDICIAL DISCRETION IN IMPOSING SENTENCE

Defendant was found guilty of murder in the first degree. Although the jury recommended life imprisonment, the trial judge imposed the death sentence after considering additional information obtained through the court's probation department, "and through other sources" as prescribed by the New York Criminal Code pre-sentencing procedure statutes.¹ Counsel for the defendant contended that, as construed and applied, the controlling statutes were in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, "in that the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal."² On appeal, the United States Supreme Court *held* that the protection of the due process clause applies where the question for consideration is the *guilt* of the defendant, but a judge in imposing sentence may exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of *punishment* to be imposed within the limits fixed by law. The verdict and sentence of the trial court were accordingly affirmed. *Williams v. People of the State of New York*, 337 U. S. 241, 69 Sup. St. 1079, 93 L. Ed. 1008 (1949).

The Court reasoned that a sentencing judge is not confined to the narrow issue of guilt, and the reasons behind the rules of evidence which apply to criminal trials on the issue of guilt are not present when determining the sentence to be imposed. The Court observed that sentencing judges have long exercised this wide discretion, and it is highly relevant—if not essential—to their exercise of discretion in selecting an appropriate sentence that they possess the fullest information possible concerning the defendant's life and character. The due process clause, according to the opinion, should not be treated as a uniform command that the courts throughout the nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more en-

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1. (The court cites N.Y. Crim. Code sec. 482). The available statute is (N.Y.) McK. Crim. Code 1939 sec. 482: " * * * Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examinations of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant."
 2. *Williams v. People of N.Y.*, 337 U. S. 241, 69 Sup. Ct. 1079, 1081, 93 L. Ed. 1008 (1949).

lightened and just sentence. Justice Rutledge and Justice Murphy dissented, on the ground that due process of law includes at least the requirement that a person accused of a crime shall be accorded a fair hearing throughout all stages of the proceedings against him.

The majority opinion in the instant case follows the widely accepted rule that where a statute gives wide latitude to the court or the jury in the matter of fixing sentence, the defendant's background, occupation and past criminal record are elements which demand consideration in determining the proper sentence.³

In recent years many courts have held it to be the duty of the sentencing judge to look into matters of mitigation and aggravation before pronouncing sentence,⁴ while others using less compelling language have held it to be a proper exercise of judicial discretion.⁵

A federal court in the sixth circuit,⁶ and state courts in Pennsylvania⁷, and South Carolina⁸ while refusing to reverse lower court decisions because of the methods used in obtaining information as to aggravating and mitigating circumstances, have by way of dictum stated that such information should be obtained through proceedings in open court in the presence of the defendant, and the ordinary rules of evidence should be adhered to,⁹ especially where the defendant has been convicted of murder and is to be sentenced to either life imprisonment or death.¹⁰

The South Carolina Supreme Court in 1948 held that statements coming under the ban of the hearsay rule would not be admissible for this purpose.¹¹ A California court, in 1945,¹² held that such facts as were not obtained from the probation officer's reports and the record of the trial, should have been obtained from witnesses called in open court and in the presence of the defendant. The court reversed in this case because the trial court, in imposing the sentence, had been influenced by information received out of court.

3. *Dalhover v. United States*, 96 F. (2d) 355 (C.C.A. 7th 1938); *United States v. Minoru Yasui*, 51 F. Supp. 234 (D. Ore. 1943); *State v. Smith*, 66 Ariz. 376, 189 P. (2d) 205 (1948); *People v. Popescue*, 345 Ill. 143, 177 N. E. 739, 77 A.L.R. 1199 (1931); *State v. Miller* 57 Ga. App. 349, 197 S. E. 310 (1938).
4. *Kopp v. United States*, 55 F. (2d) 878 (C.C.A. 7th 1932); *United States v. Minoru Yasui*, 51 F. Supp. 234 (D. Ore. 1943); *Ishkanian v. United States*, 35 A. (2d) 176 (App. D. C. 1943); *State v. Moody*, 67 Ariz. 74, 190 P. (2d) 920 (1948); *State v. Smith*, 66 Ariz. 376, 189 P. (2d) 205 (1948); *James v. State*, 53 Ariz. 42, 84 P. (2d) 1081 (1938). *Contra*, *State v. Vennum*, 149 Wash. 670, 272 P. 62 (1928), where the court said, "When a court is prepared to pass sentence, there is no requirement that it shall take testimony to assist it in arriving at its judgment. It may, if it so desires; but that is a matter for the trial court alone to decide."
5. *Comm. of Penn. ex rel. Sullivan v. Ashe*, *Warden*, 302 U.S. 51, 58 Sup. Ct. 59, 82 L. Ed. 43 (1937); *Hunter v. United States*, 149 F. (2d) 710 (C.C.A. 6th 1945); *Stobble v. United States*, 91 F. (2d) 69 (C.C.A. 7th 1937); *Bush v. People*, 68 Colo. 218, 187 P. 528 (1920); *People v. Popescue*, 345 Ill. 142, 177 N.E. 739, 77 A.L.R. 1199 (1931); *State v. Reeder*, 79 S.C. 139, 60 S.E. 434 (1908).
6. See *Stephan v. United States*, 133 F. (2d) 87 (C.C.A. 6th 1943).
7. See *Commonwealth v. Johnson*, 348 Pa. 349, 35 A. (2d) 312 (1944).
8. See *State v. Brodie*, 213 S.C. 339, 49 S.E. (2d) 575 (1948).
9. *Ibid.*
10. See *Commonwealth v. Johnson*, 348, Pa. 349, 35 A. (2d) 312 (1944).
11. See *State v. Brodie*, 213 S.C. 339, 49 S.E. (2d) 575, 577 (1948).
12. *People v. Giles*, 70 Cal. App. (2d) 872, 161 P. (2d) 623 (1945).

The South Carolina Supreme Court, in the case of *Simms v. State*,¹³ remanded for resentencing because the sentencing judge had heard, in his chambers, statements made against the defendant by people from the defendant's home community.

Although there appear to be no decisions of the Wyoming Supreme Court on the exact point, there are several Wyoming statutes which, added together, indicate that in this State the decision of the U.S. Supreme Court in the instant case would be followed. Wyo. Comp. Stat. 1945, Sec. 10-1406 confers upon "any person convicted * * * of any offense punishable either in whole or in part by fine" a right to move the court to hear testimony in mitigation of the sentence. This section if taken together with Wyo. Comp. Stat. 1945, Secs. 9-106 and 9-107, which give the court discretion to impose a fine as part of the punishment for any felony or misdemeanor, would seem to give the court discretion to hear testimony in mitigation in any criminal case. Sec. 10-1406 also declares it to be a "duty of the prosecuting attorney to attend such proceedings on behalf of the state and to offer any testimony necessary to give the court a true understanding of the case." This wording tends to infer that some sort of a proceeding is indicated where at least the named persons should be present. Wyo. Comp. Stat. 1945 Sec. 10-1902 provides that the court may direct the county attorney to conduct an investigation as to the circumstances of the offense, and the criminal record, social history and present condition of the defendant and submit this information to the court in writing along with the findings of any physical and mental examinations. This section does not state specifically that such information may be used in mitigation or aggravation of defendant's sentence, but it does provide that this information shall be used in determining whether or not the defendant shall be put on probation or whether or not the trial or sentence should be suspended, and that it shall be used by the institution to which the defendant is committed and by the board of charities and reform. In light of this provision it must necessarily follow that such information, where used for the prescribed purpose, would have an effect upon the judge in his exercise of discretion in imposing the limits of the sentence as provided in Wyo. Comp. Stat. 1945, Secs. 10-1801 and 9-105.

It is evident from a review of the cases that there is a wide divergence, not only in the practice of sentencing and pre-sentencing procedure but also in the underlying philosophy. The rationale of those cases which hold that a trial judge's discretion is not bound by the conventional rules of evidence, and the protections of the due process clause, seems to be that there is and should be a distinction between the trial on the issue of guilt or innocence, and the process of determining the extent of the punishment to be meted out within the limits set by law.¹⁴ The Arizona Court in 1942,¹⁵ used these words in pointing out this distinction: "The court . . . in determining the penalty to be imposed, is

13. *State v. Simms*, 131 S.C. 422, 127 S.E. 840 (1925).

14. See "The Admissibility of Character Evidence in Determining Sentence," 9 U. of Chi. Law Rev. 715 (1942) for a historical development of discretionary sentence statutes.

15. *State v. Levice*, 59 Ariz. 472, 130 P. (2d) 53 (1942).

not bound by the strict rules of evidence applying to *trials*, but may consider many matters not admissible on the issue of guilt or innocence, since such a proceeding is not a trial in the ordinary sense of the word." Federal Courts in Ohio,¹⁶ and Illinois,¹⁷ and the Illinois Supreme Court¹⁸ have expressed this same view in similar language.

Dr. Sheldon Glueck, the noted criminologist and penologist, Professor of Criminal Law at Harvard University, has made a suggestion which might lead to the most satisfactory solution to this problem. In his article, "Principles of a Rational Penal Code,"¹⁹ Professor Glueck suggested that each state set up a "Socio-Penal Commission" to be composed of trained specialists in the social science field, which would take over after the trial court had rendered a verdict, and through the use of scientific examinations and investigation determine the psychiatric, social or peno-correctional treatment appropriate in each individual case.

This type of procedure has been accepted by many states as a better means of dealing with their juvenile delinquent and youth rehabilitation problems. In California²⁰ their commission is called The Youth Authority, and Minnesota²¹ it is called the Youth Conservation Commission. While Professor Glueck's plan is not limited to juvenile or youthful offenders, these programs are very definitely a step in the right direction.

Such a plan as Professor Glueck's should satisfy those demanding a complete investigation in each case as well as those who object to any abandonment by the courts of the evidentiary rules and due process protection, for the investigation and treatment commission would not be a part of the court, but merely supplementary thereto.

DANIEL C. ROGERS, JR.

EAR INJURIES ARISING OUT OF EMPLOYMENT

Appellee suffered permanent loss of hearing caused by the intensity of the noise of long continued gunfire to which he was subjected in his employment as a pistol range instructor from June, 1943 to December, 1944. *Held* that the workman's injury should be considered "personal injury by accident" within the meaning of the Kansas Workmen's Compensation Act. The term accident must be applied in its ordinary sense and to permit the progressive nature of each shot's contribution to the injury to remove the case from the act, would be a strict and technical interpretation unwarranted by the theoretical basis of the compensation Act. *Winkleman v. Boeing Airplane*, 166 Kan. 503, 203 P. (2d) 171 (1949).

16. *Hunter v. United States*, 149 F. (2d) 710 (C.C.A. 6th 1945).

17. *Stobble v. United States*, 91 F. (2d) 69 (C.C.A. 7th 1937); *United States v. Standard Oil Co.*, 155 F. 305 (N.D. Ill. 1908).

18. *People v. McWilliams*, 348 Ill. 333, 180 N.E. 832 (1932).

19. 41 Harv. Law Rev. 453 (1928).

20. C. 1, Div. 25, Cal Welfare and Institutions Code.

21. Laws of Minnesota, Chapt. 595, 1027 (1947).