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Criminal Law -- Sentences to Different Places of Confinement -- Concurrent or Consecutive under North Carolina Law

Robert B. Midgette

have not passed on this question either by court decision or by legislative action.

It is the conviction of this writer that the presumption should be abolished. At the time of its creation the presumption was in keeping with the then prevailing domestic relations; today it has no sound basis. However, the doctrine should not be abrogated in its entirety. Even now there still may be a few women who, either because of a marriage vow to obey their husbands or for other reasons, would follow their husband's orders—even to the extreme of violating the law. These women should be entitled to prove coercion as a defense. It is therefore suggested that a statute on the order of the English act[65] should be passed placing the burden of proof on the wife, yet allowing her the opportunity to prove actual coercion and be excused.

DAVID S. EVANS

Criminal Law—Sentences to Different Places of Confinement—Concurrent or Consecutive under North Carolina Law

A new statute[1] was enacted during the 1955 session of the North Carolina General Assembly which provides as follows:

> "When by a judgment of any court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison solely because the concurrent sentences are for different grades of offenses or that it is required that they be served in different places of confinement."

This note is an attempt to analyze the effect of this statute on the law of North Carolina. The determination of this question necessitates a review of the North Carolina case law governing the imposition of concurrent and consecutive sentences prior to the enactment of the 1955 legislation.

The great weight of authority in this country takes the view that a court has power derived from the common law to impose consecutive or cumulative sentences on the conviction of separate offenses charged in separate indictments or separate counts of the same indictment.[2] North

[65] CRIMINAL JUSTICE ACT, 1925, 15 & 16 GEO. 5, c. 86, § 47: "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband."

[1] N. C. GEN. STAT. § 15-6.2 (1955).
[2] 15 AM. JUR., *Criminal Law* § 464 (1938).

Carolina is in accord with this view;[3] but as in all other jurisdictions the exercise of that power must conform with certain standards in order for the court's intention to impose consecutive sentences to be effectuated: (1) The last sentence must explicitly state that the latter term of imprisonment is to commence at the expiration of the former.[4] (2) The reference to the former sentence in the latter must be so certain and definite that there can be no doubt as to the times at which the latter term of imprisonment will begin and expire.[5] The Supreme Court has declared that uncertainties and ambiguities contained in sentences purporting to be consecutive will not be resolved by resort to evidence *dehors* the record.[6] The court has required of the trial courts a great degree of particularity in the imposition of consecutive sentences,[7] but the standard of certainty required is in no event higher than the nature of the case will permit.[8] The reasons underlying these requirements of certainty and definiteness have been explained by the Supreme Court:

"The question here is not merely one of the intention of the

[3] State v. Duncan, 208 N. C. 316, 180 S. E. 595 (1938) where defendant was convicted of several offenses charged in separate counts of same indictment; *In Re* Black, 162 N. C. 457, 78 S. E. 273 (1913) where defendant was convicted of several offenses charged in separate indictments and tried by the same court; *In Re* Parker, 225 N. C. 369, 35 S. E. 2d 169 (1945) where defendant was convicted of several offenses charged in separate indictments and tried in different courts.

[4] *In Re* Black, 162 N. C. 457, 78 S. E. 273 (1913); State v. Duncan, 208 N. C. 316, 180 S. E. 595 (1938); State v. Stonestreet, 243 N. C. 28, 89 S. E. 2d 734 (1955).

[5] *In Re* Parker, 225 N. C. 369, 35 S. E. 2d 169 (1945). Petitioner was sentenced to seven years in the State prison for automobile theft by the Lenior County Superior Court. After his escape and before his recapture, he was sentenced to three years in the State prison for larceny by the Martin County Superior Court, that sentence "to begin at the expiration of the sentence in case number C. P. 31355." Evidence *aliunde* showed that the letters "C. P." meant Central Prison and that the numbers following designated the number attached to the case by the prison for administrative purposes. The court held that this was not a sufficient reference to the previous sentence, that the second sentence was indefinite and ambiguous, and that the sentences must therefore run concurrently.

[6] *Id.* at 374, 35 S. E. 2d at 172: "It is true, of course, that the intention of the court imposing the sentence should prevail where clearly expressed. . . But we do not think this implies that such intention should be sought through evidence *dehors* the record—at least such as is here made necessary;—that it is open to the same sort of proof as if the judge were writing a will or making a contract."

[7] *Id.* at 372, 35 S. E. 2d at 171. The court cited certain deficiencies in the second sentence which caused it to run concurrently with the first: "It does not name the county or court in which trial was had and in which the judicial record was made and is kept, or the date or term of court, or even the name of the defendant; nor does it give any description of the offense for which the defendant was convicted, or designate the term of the sentence imposed—by means of which the Lenoir County sentence, the expiration of which is to determine from the beginning of the Martin County sentence, could be identified from the judicial records themselves and the sentence given significance." However the court in *In Re* Smith, 235 N. C. 169, 69 S. E. 2d 174 (1952), declared that it did not intend that the indicia listed in the Parker case should be all-inclusive in every case.

[8] State v. Cathey, 170 N. C. 794, 87 S. E. 532 (1915). A reversal of a previous sentence or a diminution of a previous sentence for good conduct will not cause a subsequent sentence to begin on the expiration of the previous sentence to fail.

> judge imposing the sentence, and the method of ascertaining it; it is also a question of the adequate expression of that intent within acceptable standards of certainty in dealing with the liberty and lives of those charged with violations of the law."[9]

If the intention of the court to impose consecutive sentences is not adequately expressed in accordance with the above requirements of certainty and definiteness, the sentences will be presumed to run concurrently. The rule as stated in several decisions of the North Carolina Supreme Court is as follows:

> "In the absence of a statute to the contrary, and unless it sufficiently appears otherwise in the sentence itself, it is generally presumed that sentences imposed in the same jurisdiction, to be served at the same place or prison, run concurrently, although imposed at different times, and by different courts and upon a person already serving sentence."[10]

The state has the burden of showing that the sentences are consecutive; this burden is carried when the sentence is certain and definite within itself.[11] The court has declared that no presumption will be indulged in favor of sustaining a sentence as cumulative.[12]

In *In Re Smith*,[13] however, the court held that sentences to different places of confinement are by their very nature cumulative and that two sentences in order to run concurrently must be to the same place of confinement. In that case defendant, already serving a sentence in the State prison, was sentenced to the Jackson County jail for a term of eighteen months to be assigned to the roads under the supervision of the State Highway and Public Works Commission. The court stated that the sentences could not run concurrently even if it were conceded that the second sentence lacked the required degree of certainty and definiteness to impose consecutive sentences in a situation where the place of confinement in each sentence is the same. The rule of *In Re* Smith was reiterated in a recent decision of the North Carolina Court[14] where the sentences were imposed prior to the enactment of the 1955 statute above. The court commented that the statute had apparently changed the rule of *In Re Smith* as to sentences imposed after the enactment, but unfortunately made no further observations on the effect of the statute on North Carolina law.

[9] *In Re* Parker, 225 N. C. 369, 373, 35 S. E. 2d 169, 172 (1945).
[10] *Id.* at 372, 35 S. E. 2d at 171; *In Re* Smith, 235 N. C. 169, 171, 69 S. E. 2d 174, 175 (1952).
[11] *In Re* Parker, 225 N. C. 369, 35 S. E. 2d 169 (1945).
[12] *Ibid.*
[13] 235 N. C. 169, 69 S. E. 2d 174 (1952). See also *Ex Parte* Bentley, 240 N. C. 112, 81 S. E. 2d 206 (1912), in accord with *In Re* Smith.
[14] *In Re* Swink, 243 N. C. 86, 89 S. E. 2d 792 (1955).

The provisions of the 1955 enactment present difficulties of interpretation important not only to those concerned with the administration of the law but perhaps even more so to those whose lives and liberty are directly affected by the legislation. A comparison of the statute with prior North Carolina case law raises these questions:

(1) To what extent is the rule of *In Re Smith* abrogated? If a sentence to confinement in the State prison is imposed upon one previously sentenced to confinement in a county jail or any other place of confinement, the statute clearly provides that the difference of places of confinement is not enough in itself to cause the sentences to run consecutively. This is a clear departure from prior North Carolina law and the weight of authority in this country.[15]

If the writer might speculate, the intention of the legislature in enacting the new law would seem to be a grant to the courts of the power of discretion necessary to render justice in all cases, *i.e.,* to impose sentences in a manner most compatible with the public good and the rehabilitation of the individual prisoner. The rule of *In Re Smith* was apparently repugnant to the senses of the enactors. If this assumption is true, then the statute may fall short of the goal set for it. The statute speaks only of "additional time in prison"; its language does not provide that a prisoner shall not be required to spend additional time in a county jail when it is the desire of the court to impose a subsequent jail sentence to run concurrently with a previous sentence to a term in the State prison. If the word "prison" is given a literal construction, that it means the State prison, then it would seem that the rule of *In Re Smith* is still applicable in this situation. On the other hand, if "prison" is construed to mean any place of confinement, then the statute would accomplish its purpose in this situation. In view of the fact that the word "prison" has been used previously in the same statute to mean the State prison as opposed to all other places of confinement, the latter construction would be liberal indeed.[16] The statute is at least an important step toward the elimination of the *In Re Smith* doctrine, a stringent rule which in some cases may be a stumbling block to the

[15] 24 C. J. S., *Criminal Law* § 1996 (1941). But the new North Carolina rule imposed by the statute is not without legal precedent. See Capone v. United States, 51 F. 2d 609 (7th Cir. 1931), *cert. denied,* 284 U. S. 669 (1931), where it was held that a sentence to a county jail ran concurrently with a sentence to a federal prison. This case is an exception to the federal rule usually stated. See United States v. Remus, 12 F. 2d 239 (6th Cir. 1926), *cert. denied,* Remus v. United States, 271 U. S. 689 (1926).

[16] Quaere: Should not the word "prison" as used in the phrase "any additional time in prison" be construed as meaning any place of confinement even though such construction would violate the rule that identical words used in the same section of a statute should be given like meanings? All laws are to be construed sensibly; what otherwise would be a strained construction is unobjectionable if necessary to avoid a foolish or unjust result.

administration of justice; however whether it constitutes such a complete rejection of the North Carolina law that a court is now vested with the power to use its discretion as to the imposition of concurrent or consecutive sentences in this situation depends upon the extent to which the Supreme Court is willing to pursue the apparent intention of the legislature.

The imposition of several sentences to terms in separate county jails raises still another problem under the new enactment. In no sense does the 1955 statute authorize the imposition of concurrent sentences to confinement in separate jails; however there is some doubt as to whether the rule of *In Re* Smith prohibited such concurrent sentences. The rule was stated: "Two sentences, in order to run concurrently, must be to the same place of confinement."[17] "Place" would seem to indicate geographical position rather than a type of penal institution; however in the *Smith* case the sentences in question were to terms in separate types of institutions, *viz.* the State prison and the Jackson County jail. The rule as stated in some jurisdictions is that the presumption of concurrency of sentences exists when the sentences are to imprisonment in the same institution or same type of institution.[18] This latter rule, rather than a strict interpretation of the rule of the *Smith* case, has been adopted in effect by the State Highway and Public Works Commission as a matter of practice, but only where both of the sentences to separate county jails provide that the prisoner is to work under the supervision of that commission. It would appear likely that the Supreme Court would interpret the rule of the *Smith* case to conform with this logical administrative policy.

However, where a prisoner has been sentenced to a term in a county jail and assigned to the jail itself or some other county institution other than under the State Highway and Public Works Commission, a subsequent sentence to a different county jail regardless of assignment has been administratively construed to run consecutively to the first sentence because of the *In Re Smith* rule. The same is true where the chronological order of such sentences is reversed. The statute is not applicable in this situation. Unless the *Smith* rule is construed to mean that two sentences in order to run concurrently must be to the same institution or the same type of institution, two such sentences could not run concurrently particularly in the absence of the connotation of "same place" furnished by provisions in both sentences for assignment to the State Highway and Public Works Commission.

(2) How is the presumption of concurrency of sentences affected by the statute? The presumption as declared by the Supreme Court arose

[17] 235 N. C. 169, 172, 69 S. E. 2d 174, 176 (1952).
[18] 24 C. J. S., *Criminal Law* § 1996 (1941).

only when two sentences were imposed against the same person to the same place of confinement.[19] Now that a prison sentence may be imposed to run concurrently with any other sentence, it would logically follow that the presumption of concurrency should arise in this situation, notwithstanding that the places of imprisonment are different. Stated another way, *cessante ratione legis cessat.* It would seem that the presumption should exist in every situation where one sentence may run concurrently with another. The statute was apparently intended to eliminate every vestige of the old rule that a sentence to the State prison could not run concurrently with any other sentence.[20] With that objective as a background for the interpretation of the statute, it would seem the better view that in the absence of a definite and certain expression of the intention of the court to the contrary, one sentence shall be presumed to run concurrently with any other unless the sentences are cumulative as a matter of law. If the difference in places of confinement is no ground for holding that one sentence must run consecutively to a prior sentence, it can only be fair to the prisoner that the state must show the required certainty and definiteness of the latter sentence in order to make the sentences run consecutively.

The questions presented here must be dealt with when this statute is presented to the courts for construction. If the intention of the enactors is to grant to the courts the power of discretion to impose concurrent or consecutive sentences as they deem appropriate, that intention may well be frustrated as a result of the restrictive wording of the statutory provisions. The power of discretion to impose concurrent or consecutive sentences necessary to a court in order to render justice in all cases would be most effectively afforded by a remedial statute proposed as follows:

Concurrent Sentences for Offenses of Different Grades or to be Served in Different Places.

Where two or more sentences to confinement are imposed against the same person, regardless of whether said sentences are to different places of confinement or are for different grades of offenses, it shall be presumed that the sentences are to be served concurrently unless the contrary clearly appears; and any reasonable doubt or ambiguity must be resolved in favor of the prisoner.

ROBERT B. MIDGETTE

[19] See note 10 *supra.*
[20] *In Re* Smith, 235 N. C. 169, 69 S. E. 2d 174 (1952).