



2-1-1962

# Criminal Law -- Split Sentence -- Trial Judge in North Carolina Not Permitted To Impose Sentence Active in Part and Suspended in Part

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## Recommended Citation

Frank W. Bullock Jr., *Criminal Law -- Split Sentence -- Trial Judge in North Carolina Not Permitted To Impose Sentence Active in Part and Suspended in Part*, 40 N.C. L. REV. 333 (1962).

Available at: <http://scholarship.law.unc.edu/nclr/vol40/iss2/14>

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and an "arbitrary rule"<sup>36</sup> and judicial opinions have joined in assailing the rule as archaic.<sup>37</sup> The cause of death can now be accurately fixed by competent medical testimony, whereas at the time of the rule's inception the cause of death after more than a year and a day was speculative.<sup>38</sup> It is a curious irony that medical science has advanced to the point that it may prolong life for long periods and yet this miraculous advance could very well serve to exonerate a murderer by simply prolonging his victim's life.

It is submitted that the legislature should take notice of this ancient rule in light of current day medical standards and enact legislation abolishing it. Many forms of legislation have been discussed,<sup>39</sup> but a positive repudiation of the rule would best serve the ends of justice. The rights of the accused would still be adequately protected, since the prosecution would still have the burden of proving causation beyond a reasonable doubt. A positive repudiation of the rule would serve to leave the issue of cause of death to the triers of fact, rather than to a legal presumption forged some seven hundred years ago that has long outlived its merit, logic and basis.

CARTER G. MACKIE

#### Criminal Law—Split Sentence—Trial Judge in North Carolina Not Permitted To Impose Sentence Active in Part and Suspended in Part

The first probation law was enacted in Massachusetts in 1878;<sup>1</sup> since that time changes in the philosophy of criminal punishment have resulted in widespread use by courts of the suspended sentence. The exact frequency of use of this type sentence is difficult to ascertain because adequate statistical information is not compiled in a large majority of the states. Figures compiled by the Federal

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<sup>36</sup> CLARK & MARSHALL, *LAW OF CRIMES* 536 (6th ed. 1958).

<sup>37</sup> *Head v. State*, 68 Ga. App. 759, 24 S.E.2d 145 (1943) (should be adjusted by the legislature to conform to medical standards); *Elliott v. Mills*, 335 P.2d 1104 (Okla. Crim. App. 1959) (rule has run the "limit of its logic"); *The King v. Dyson*, [1908] 2 K.B. 454 (doubts present day merits of the rule).

<sup>38</sup> See *Elliott v. Mills*, 335 P.2d 1104, 1114 (Okla. Crim. App. 1959) (concurring opinion), where it was pointed out that at the time of the formulation of the rule, life expectancy was not more than thirty-four years, while today, expectancy is about sixty-nine years. Also, at the time of the rule's inception medical science was in its infancy.

<sup>39</sup> *Id.* at 1115.

<sup>1</sup> Mass. Acts 1878, ch. 198. See generally BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 554 (3d ed. 1959).

Bureau of Prisons, however, reveal that approximately forty-two per cent of the federal offenders sentenced in 1957 were placed on probation.<sup>2</sup>

Since reformation of the criminal, and his ultimate return as a useful member of society, is recognized as a dominant purpose of criminal punishment, judges are becoming increasingly cognizant that the suspended sentence often can work wonders in rehabilitation. Probation assigns the criminal to the community, rather than to prison, for the corrective period. A second chance to remain among law-abiding citizens and to demonstrate habits that meet the approval of society oftentimes will do more to bring about this desired reformation than will a lengthy period behind prison walls. Especially is this true in the case of first-time or youthful offenders.

Early in the development of suspension and probationary practices considerable disagreement occurred among courts as to whether power to suspend sentences existed independently of statute.<sup>3</sup> The United States Supreme Court reached the conclusion that such power was not inherent in common law courts;<sup>4</sup> nevertheless, a respectable minority of jurisdictions never subscribed to that view.<sup>5</sup> North Carolina early espoused the minority position that power to suspend or respite a sentence was lodged as of common right in every tribunal possessing jurisdiction to try criminal cases.<sup>6</sup>

Accordingly the suspended sentence was utilized in North Carolina as early as 1894; in 1937, however, the legislature accorded statutory sanction to the practice<sup>7</sup> and also authorized imposition of

<sup>2</sup> BARNES & TEETERS, *op. cit. supra* note 1, at 561.

<sup>3</sup> See generally Grinnel, *The Common Law History of Probation*, 32 J. CRIM. L. 15 (1941).

<sup>4</sup> *Ex parte* United States, 242 U.S. 27 (1916).

<sup>5</sup> *E.g.*, *Belden v. Hugo*, 88 Conn. 500, 91 Atl. 369 (1914); *People v. Stickle*, 156 Mich. 557, 121 N.W. 497 (1909); *Matter of Hart*, 29 N.D. 38, 149 N.W. 568 (1914); *State ex rel. Gehrman v. Osborne*, 79 N.J. Eq. 430, 82 Atl. 424 (1911); *People ex rel. Forsyth v. Court of Sessions*, 141 N.Y. 288, 36 N.E. 386 (1894); *Weber v. State*, 58 Ohio St. 616, 51 N.E. 116 (1898).

<sup>6</sup> *E.g.*, *State v. Everitt*, 164 N.C. 399, 79 S.E. 274 (1913); *State v. Hilton*, 151 N.C. 687, 65 S.E. 1011 (1909). Power to suspend sentence was expressly held to exist in the various inferior courts of the state as well as in the superior courts. *State v. Tripp*, 168 N.C. 150, 83 S.E. 630 (1914).

<sup>7</sup> N.C. GEN. STAT. § 15-197 (1953). The statute provides: "After conviction or plea of guilty or nolo contendere for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation."

certain terms of probation.<sup>8</sup> Consistent with the express language employed in this later statutory provision, the enumerated probationary conditions have been held to be "cumulative and concurrent rather than exclusive."<sup>9</sup> Thus, though good behavior is the condition most commonly attached,<sup>10</sup> the trial judge has wide discretion in selection of probationary conditions,<sup>11</sup> and the terms imposed generally have been approved unless considered to be unreasonable, unenforceable, or oppressive.<sup>12</sup>

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It should be noted that the granting of a suspended sentence may affect a defendant's rights respecting appeal of a criminal conviction. Since an order suspending a sentence is favorable to the defendant, his consent to its entry is implied if he does not appeal immediately. By this consent his right to appeal on the principal issue of his guilt or innocence is lost. He may not thereafter complain that his conviction was without due process of law; however, he may contest evidence showing a breach of conditions and also raise the question of their reasonableness. *State v. Miller*, 225 N.C. 213, 34 S.E.2d 143 (1945).

<sup>8</sup>N.C. GEN. STAT. §15-199 (Supp. 1959). The statute provides: "The court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, or any other; that the probationer shall: (1) Avoid injurious or vicious habits; (2) Avoid persons or places of disreputable or harmful character; (3) Report to the probation officer as directed; (4) Permit the probation officer to visit at his home or elsewhere; (5) Work faithfully at suitable, gainful employment as far as possible and save his earnings above his reasonably necessary expenses; (6) Remain within a specified area; (7) Deposit with the clerk of the court a bond for his appearance at such time or times as the court may direct; (8) Deposit with the clerk of the court from his earnings a savings account in such installments and at such intervals as the court may direct; and the clerk shall thereupon deposit such funds in the savings account in an institution whose accounts are insured by an agency of the federal government and the principal plus interest earned shall be paid to the probationer upon his discharge or earlier upon order of the court; (9) Pay a fine in one or several sums as directed by the court; (10) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense, in an amount to be determined by the court; (11) Support his dependents."

<sup>9</sup>*State v. Simmington*, 235 N.C. 612, 614, 70 S.E.2d 842, 844 (1952).

<sup>10</sup>*E.g.*, *State v. Gibson*, 233 N.C. 691, 65 S.E.2d 508 (1951); *State v. Peterson*, 228 N.C. 736, 46 S.E.2d 852 (1948); *State v. Sullivan*, 227 N.C. 680, 44 S.E.2d 81 (1947); *State v. Marsh*, 225 N.C. 648, 36 S.E.2d 244 (1945).

<sup>11</sup>See, *e.g.*, *State v. Davis*, 243 N.C. 754, 92 S.E.2d 177 (1956) (defendant not to allow others to remain at her home after dark); *State v. Thomas*, 236 N.C. 196, 72 S.E.2d 525 (1952) (defendant's car confiscated and sold); *State v. Smith*, 233 N.C. 68, 62 S.E.2d 495 (1950) (defendant prohibited from driving car for a year); *State v. Pelley*, 221 N.C. 487, 20 S.E.2d 850 (1942) (cease publication of material pertaining to stock sales); *State v. Smith*, 196 N.C. 438, 146 S.E. 73 (1929) (talk about young girls only in a complimentary manner).

<sup>12</sup>*E.g.*, *State v. Miller*, 225 N.C. 213, 34 S.E.2d 143 (1945); *State v. Shepherd*, 187 N.C. 609, 122 S.E. 467 (1924).

Despite the overwhelming acceptance that employment of the suspended sentence has gained, one particular variant of it, commonly designated a split sentence, has produced wide divergence of opinion respecting its validity. The term has been employed by courts to denote entirely different situations. For example, the Maine court has used it to describe a sentence where a penalty of both fine and imprisonment was initially imposed and where imprisonment was suspended upon enforcement of the fine.<sup>13</sup> On the other hand, in North Carolina the term has been applied to instances where the trial judge sought to make active in part and to suspend in part the period of imprisonment inflicted.<sup>14</sup>

The North Carolina Supreme Court first considered the propriety of this type of judgment in *State v. Lewis*.<sup>15</sup> Two defendants were convicted of assault on a female with intent to commit rape. The trial judge, after pronouncing sentence of four years in prison, stipulated that they should be released upon serving two years and be placed on probation for a five year period. On appeal the form of the judgment was not objected to by the defendants;<sup>16</sup> nevertheless, the court, apparently on its own motion, came to grips with the issue of the validity of the split sentence. The court stated: "We do not doubt the wisdom and salutary effect of a judgment of this kind, but we can find no authority for its rendition."<sup>17</sup>

Although it recognized that power to suspend sentence existed both inherently and through statutory authorization, the court was of the opinion that suspension applied, at least where the sole punishment was imprisonment, only to the sentence as a whole.<sup>18</sup> In striking down the judgment, the court regarded the split sentence in

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<sup>13</sup> *Cote v. Cummings*, 126 Me. 330, 138 Atl. 547 (1927). The Maine court took the position that a court cannot suspend a sentence of imprisonment and enforce a fine imposed as part of the sentence. This result could not be reached in North Carolina since payment of a fine as a condition of suspension of sentence is expressly authorized by statute. N.C. GEN. STAT. § 15-199 (Supp. 1959).

<sup>14</sup> *State v. Lewis*, 226 N.C. 249, 37 S.E.2d 691 (1946).

<sup>15</sup> 226 N.C. 249, 37 S.E.2d 691 (1946).

<sup>16</sup> None of the defendants' exceptions touched on this point. Brief for Appellants, pp. 1-6, *State v. Lewis*, *supra* note 15.

<sup>17</sup> 226 N.C. at 251, 37 S.E.2d at 693.

<sup>18</sup> It is true that the North Carolina statute which provides for suspension and probation, N.C. GEN. STAT. § 15-197 (1953), does not expressly stipulate whether trial judges have authority to suspend only part of a sentence. See note 7 *supra*. However, when two separate offenses are involved, as in the case of breaking and entering and larceny, it is common to require service of sentence for one of the two counts and suspend sentence on the other.

effect as an anticipatory parole which constituted an invasion of the power of pardon, parole and discharge vested in the governor by the constitution.<sup>19</sup> The rule thus formulated in *Lewis* was vigorously reapproved by the court in a later case.<sup>20</sup>

It is interesting to note that in *Moore v. Patterson*,<sup>21</sup> a case decided three years before *Lewis*, the South Carolina Supreme Court reached a diametrically opposed result respecting the validity of the split sentence; this holding was grounded on construction of a statutory provision<sup>22</sup> virtually identical in its terms to the North Carolina suspension and probation statute.<sup>23</sup> The defendant had been sentenced to three years for a felony, and the trial judge had provided that after he served one year the balance of the prison term be suspended and that he then be placed on probation for three years. The court upheld the judgment, reasoning that the legislature did not intend to limit the judge's discretion by allowing them to suspend only entire sentences. It is possible that, had argument concerning the split sentence been presented in *State v. Lewis*, *Moore* would have been cited and the interpretation of the similar statute considered by the North Carolina court.

Surveying the question of validity of the split sentence on a nationwide basis, there seems to be a paucity of authority touching the point in most of the states.<sup>24</sup> Further, in those jurisdictions where the issue has been directly presented the over-all situation

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<sup>19</sup> N.C. CONSR. art. III, § 6 (1868): "The Governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall biennially communicate to the General Assembly each case of reprieve, commutation, or pardon granted, stating the name of each convict, the crime for which he was convicted, the sentence and its date, the date of commutation, pardon, or reprieve, and the reasons therefor."

The court in *Lewis* conceded that it would be difficult to find in the split sentence any direct conflict with the constitution; still it was deemed to be within the spirit of that instrument to leave such matters entirely to the chief executive. 226 N.C. at 251, 37 S.E.2d at 693.

<sup>20</sup> *In re Powell*, 241 N.C. 288, 84 S.E.2d 691 (1954).

<sup>21</sup> 203 S.C. 90, 26 S.E.2d 319 (1943).

<sup>22</sup> S.C. CODE ANN. § 55-591 (1952). The court's decision was based squarely on the language of the statute. Unlike North Carolina, South Carolina has never adopted the view that power to suspend sentences inheres in courts possessing criminal jurisdiction. *Moore v. Patterson*, 203 S.C. 90, 93, 26 S.E.2d 319, 321 (1943).

<sup>23</sup> N.C. GEN. STAT. § 15-197 (1953). See note 7 *supra*.

<sup>24</sup> See Annot., 147 A.L.R. 656 (1943).

generally has not been parallel to the consideration of the problem presented by the North Carolina and South Carolina cases.<sup>25</sup>

Several considerations indicate that should this issue be presented afresh the North Carolina Supreme Court might wish to re-examine the reasoning of the *Lewis* case. Firstly, the court in deciding *Lewis* did not allude to the language employed in G.S. § 15-197. Seemingly a statutory provision authorizing suspension of sentence in full would necessarily be broad enough in its terms to permit suspension of part of the sentence. Further, judicial release of a prisoner after he has begun serving his sentence is not a unique concept in North Carolina;<sup>26</sup> thus, allowance of the split sentence would not seem to be an unwarranted extension of judicial power.

Secondly, a constitutional amendment adopted subsequent to any decision on the validity of the split sentence divested the governor of the parole power and placed it in a board of paroles created by the legislature.<sup>27</sup> This action removed the precise ground of constitutional objection manifested in *Lewis* to the split sentence. Although the same type of adverse argument might be put forward in relation to the new constitutional provision, analysis reveals that

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<sup>25</sup> California by express statutory provision vests trial judges with authority to impose a sentence of imprisonment as a condition for subsequent probation. CAL. PENAL CODE §§ 1203, 1203.1. Kentucky has disallowed imposition of the split sentence. *Woll v. Commonwealth ex rel. Meredith*, 284 Ky. 783, 146 S.W.2d 59 (1940). It should be noted, however, that in this jurisdiction the jury fixes the term of confinement. Louisiana has refused to allow the judge to provide at the time sentence is imposed that the prisoner be released on probation after serving a fixed period of the prescribed term. However, after the prisoner is incarcerated and actually has begun to serve the sentence, the judge may suspend on good behavior. *State v. Johnson*, 220 La. 64, 55 So. 2d 782 (1951). The split sentence is precluded in New York by a statutory provision that imprisonment cannot be interrupted once it has commenced. N.Y. CONSOL. LAWS ANN. art. 196, § 2188 (McKinney Supp. 1961). Oklahoma has held that suspension, if granted, must apply to the entire judgment. *State v. Smith*, 83 Okla. Cr. 188, 174 P.2d 932 (Crim. Ct. App. 1946). Oregon has denied use of the split sentence on the ground that it was an encroachment upon the powers of the governor and the parole board. *Rightnour v. Gladdin*, 219 Ore. 342, 347 P.2d 103 (1959).

<sup>26</sup> An early case, *State v. Whitt*, 117 N.C. 804, 23 S.E. 452 (1895), held that even though the defendant had served six days of a term of imprisonment, the trial judge still could suspend sentence if such change were made during the term of court in which the defendant had been convicted. This rule has been preserved in later decisions. *E.g.*, *State v. Gross*, 230 N.C. 734, 55 S.E.2d 517 (1949).

<sup>27</sup> N.C. CONST. art. III, § 6. This amendment terminated the governor's parole power as of July 1, 1955, and subsequently vested it in a board of paroles.

the allowance of this type sentence would not in any degree diminish the power of the parole board. In instances where sentence is suspended in its entirety the parole board does not become involved in the matter at all. Should the split sentence be utilized there seems to be no sound reason why the parole board could not act once the prisoner is incarcerated exactly as it would in any other case. By statute<sup>28</sup> a prisoner is eligible for consideration for parole upon completing service of one-fourth of the sentence imposed. The parole board's action should be on the basis of the entire sentence, however, and not merely on just the active part. If parole were granted before the expiration of the active term the effect would be cancellation of the remaining conditions imposed by the court.<sup>29</sup>

It should be remembered that both the judge and the parole board are working toward the same objective—the prisoner's ultimate return as a useful member of society. The judge's action when he imposes sentence is prospective; the parole board's action when it reviews the prisoner's record and considers parole is retrospective. The latter complements the former and serves as a safeguard against the court's mistakes.

The usefulness of the split sentence as a working tool in the hands of the trial judge is instantly apparent. He has first-hand knowledge of all the facts and circumstances surrounding a particular case. In fixing punishment he usually will consider the nature of the act, motive and provocation, presence or absence of repeated criminal acts on the part of the offender, instigation or acquiescence, open and deliberate flouting of the law, and the possible effect of the sentence on the offender.<sup>30</sup> Oftentimes offenses are committed under circumstances such that imposition of an extended prison term is not warranted; still the infraction may be so serious that a judge cannot with clear conscience suspend sentence completely. Further, it is well recognized that prolonged association with hardened criminals may have a substantial contaminating effect;<sup>31</sup> the trial judge

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<sup>28</sup> N.C. GEN. STAT. § 148-58 (1958).

<sup>29</sup> For example, under a sentence like the one in the *Lewis* case, the prisoner could be paroled after one year. A subsequent breach of the conditions of parole, however, would result in his return to prison to serve the entire unexpired term, which would be three years. It is immaterial that the time for which he was sentenced may have elapsed. *State v. Yates*, 183 N.C. 753, 111 S.E. 337 (1922).

<sup>30</sup> Coates, *Punishment for Crime in North Carolina*, 17 N.C.L. REV. 205, 224 (1939).

<sup>31</sup> BARNES & TEETERS, *op. cit. supra* note 1, at 553. One solution to this

might well feel that a particular defendant's potential for rehabilitation is good and that an extended prison term would be detrimental to that promise. Under the rule of the *Lewis* case, however, the trial judge is faced with a choice between black or white and has no authority to consider the shades in between.

It is submitted that accordance of authority to trial judges to utilize the split sentence would effectively fill the void between the existing extremes of suspension in entirety or complete active imposition of the sentence. Presumably this could be legislatively accomplished by amending G.S. § 15-197 to provide express authorization for partial suspension.<sup>32</sup> Such action would allow the judge to treat the defendant more as an individual and to adapt the sentence to the offender rather than to the offense. It would effect recognition of "the differences in men which justify differences in treatment and the differences in treatment which will achieve the ends at which we aim."<sup>33</sup>

FRANK W. BULLOCK, JR.

#### Domestic Relations—Abandonment—Divorce Granted to an Abandoning Husband After the Wife's Action for Support

By statute in North Carolina,<sup>1</sup> a husband or wife, having lived separate and apart from the other for two years, may obtain an absolute divorce, provided the residence requirement is satisfied. However, the North Carolina Supreme Court has held that notwithstanding this statute if the husband has abandoned his wife, she may set up the abandonment as a bar to his action for divorce.<sup>2</sup>

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problem might be to provide for separation of defendants serving short split sentences such as is now provided for youthful offenders. N.C. GEN. STAT. § 15-212 (Supp. 1959).

<sup>32</sup> Should the North Carolina court adhere to the same reasoning as in the *Lewis* case, however, they might regard this as an infringement on the power of the parole board, and thus hold the provision of the statute to be of no effect.

<sup>33</sup> Coates, *supra* note 30, at 230.

<sup>1</sup> N.C. GEN. STAT. § 50-6 (1950).

<sup>2</sup> *Byers v. Byers*, 223 N.C. 85, 25 S.E.2d 466 (1943). In this case the court stated: "It is true, the statute under review provides that either party may sue for a divorce or for a dissolution of the bonds of matrimony, 'if and when the husband and wife have lived separate and apart for two years' . . . However, it is not to be supposed the General Assembly intended to authorize one spouse willfully or wrongfully to abandon the other for a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong." *Id.* at 90-91, 25