NORTH CAROLINA LAW REVIEW

Volume 41 | Number 2 Article 10

2-1-1963

Criminal Law -- Presentence Investigation -- Right of Confrontation

William E. Shinn Jr.

Criminal Law—Presentence Investigation—Right of Confrontation

In every criminal prosecution the accused enjoys the constitutional right to be present at his trial.[1] *State v. Pope*[2] presented for the first time in North Carolina the question of whether this right extends to a presentence investigation.[3] After the defendant had been found guilty of felonious breaking and entering and of larceny, but prior to sentencing, the trial judge, in the company of the solicitor, the deputy clerk, and two state's witnesses, retired to chambers to clerically compile the counts in the indictment. Neither the defendant nor his counsel was present at this conference. Here, information was elicited for the first time which tended to implicate the defendant in the commission of other crimes for which no warrants had been issued. Before pronouncing sentence, the judge confronted the defendant with this information and gave him an opportunity to refute or explain it. The defendant declined to comment, but on appeal from a denial of his motion to set aside the judgment and vacate the sentence, he contended that his exclusion from the presentence investigation amounted to a violation of his fundamental rights and a denial of due process of law. The North Carolina Supreme Court rejected these contentions[4] and affirmed the lower court conviction. They warned, however, that all information coming to the notice of the trial court which might conceivably aggra-

[1] "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony . . . ." N.C. CONST. art. 1, § 11. "This, of course, implies that he shall have the right to be present." State v. Overton, 77 N.C. 485, 486 (1887).

[2] 257 N.C. 326, 126 S.E.2d 126 (1962).

[3] When a defendant is convicted of a crime, the punishment for which is left, within certain defined limits, to the discretion of the judge, an investigation may be conducted with regard to any circumstances which tend to aggravate or mitigate the punishment. The investigation may be conducted by the judge himself, or consist merely of the submission of a presentence report prepared by a probation officer. N.C. GEN. STAT. § 15-198 (1953), State v. Pope, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). See also State v. Barbour, 243 N.C. 265, 90 S.E.2d 388 (1955), and State v. Summers, 98 N.C. 702, 4 S.E. 120 (1887). See generally Annot., 77 A.L.R. 1211 (1932).

[4] The court noted the distinction between the trial and sentencing stages of the proceedings, recognizing that whereas the issue of guilt or innocence in the former demands the defendant's presence at all times to confront his accusers, the same reason does not prevail in the latter. 257 N.C. at 333, 126 S.E.2d at 132.

vate the punishment should be disclosed to the defendant, with an opportunity afforded to refute or explain it.[5]

Although the subject of the defendant's right to be present at a presentence investigation has received little judicial attention, those courts which have directly decided the question are not in agreement. Some states have judicially extended the defendant's right to be present at the trial to a presentence investigation,[6] while other states have failed to recognize such a right.[7] Notwithstanding dictum to the contrary,[8] the federal courts have generally denied the defendant a right to be present at this time.[9] Those courts which demand the defendant's presence rely mainly on constitutional grounds,[10] although one court suggests the defendant's common-law right to be present when sentence is pronounced as a possible basis for such a rule.[11] On the other hand, the opposing view, possibly in deference

[5] *Id.* at 335, 126 S.E.2d at 132.

[6] In the Matter of Fowler, 49 Mich. 234, 13 N.W. 530 (1882); State v. Simms, 131 S.C. 422, 127 S.E. 840 (1925); State v. Harvey, 128 S.C. 447, 123 S.E. 201 (1924); Phelps v. State, 158 Tex. Crim. 510, 257 S.W.2d 302 (1953); State v. Stevenson, 64 W. Va. 392, 62 S.E. 688 (1908). Note that in West Virginia, the right to be "personally present during the trial" is reserved by statute rather than by the constitution. W. VA. CODE ANN. § 6191 (1961). This statute has been construed as requiring the defendant's presence "when any step affecting him is taken from *arraignment to final judgment inclusive.*" State v. Vance, 124 S.E.2d 252, 259 (W. Va. 1962). (Emphasis added.)

[7] Driver v. State, 201 Md. 25, 92 A.2d 570 (1952); Commonwealth v. Myers, 193 Pa. Super. 531, 165 A.2d 400 (1960). See also Commonwealth v. Johnson, 348 Pa. 349, 35 A.2d 312 (1944), where the Pennsylvania court reversed a judgment in which the record failed to disclose that no *ex parte* evidence was heard by a three judge court sitting *en banc* to determine the degree of *guilt.* The court stresses the fact that they are not reversing because *ex parte* evidence might have been heard in the determination of *sentence.*

[8] "We think, however, that such information should have been disclosed to the judge in open court and in the presence of the appellant." Stephan v. United States, 133 F.2d 87, 100 (6th Cir. 1943).

[9] Zeff v. Sanford, 31 F. Supp. 736 (N.D. Ga. 1940).

[10] These courts have held that since a defendant has a *right* to have everything bearing on his case open and above board, State v. Harvey, 128 S.C. 447, 123 S.E. 201 (1924), it would be clearly unconstitutional to permit evidence to be introduced and considered in the absence of a *convicted* defendant, In the Matter of Fowler, 49 Mich. 234, 13 N.W. 530 (1882). "Our system of jurisprudence is based on the doctrine of confrontation. An accused is not confronted by witnesses who speak in his absence." Phelps v. State, 158 Tex. Crim. 510, 512, 257 S.W.2d 302, 303 (1953).

The Montana court in construing their statutory presentence procedure, note 13 *infra,* finds support for demanding the defendant's presence in the sixth amendment to the United States Constitution. Kuhl v. District Court, 366 P.2d 347, 362 (Mont. 1961).

[11] "One of the purposes of requiring that the defendant be present may

to administrative convenience, favors limiting the right to be present solely to that period in which the alleged guilt of the defendant is determined.[12]

Statutory provisions in nine states provide that all information in aggravation or mitigation of punishment must be presented in open court.[13] At least two states have construed these statutes as also requiring the defendant's presence.[14]

In reaching its conclusion in the principal case, the court recognized that the modern philosophy of fitting the punishment to the offender rather than the crime,[15] demands that a sentencing judge not be restricted to the formalistic requirements of trial procedure in gathering information to assist him in determining an appropriate sentence.[16] While it may be conceded that the practice of individualizing punishment is commendable, it nevertheless may be argued that the means employed to achieve this goal are frequently open to criticism. The rationale employed to deny the defendant a right

well be to give him an opportunity to show that accusations made against him, other than the one of which he stands convicted, are without foundation, and a chance to object to the consideration of improper evidence." People v. Giles, 70 Cal. App. 2d 872, —, 161 P.2d 623, 628 (1945). This argument is supported by no authority. For a statement of the reason for the common-law rule, see Ball v. United States, 140 U.S. 118, 131 (1891).

[12] Thus, the right to be present is limited to that period between *arraignment* and *verdict*. Commonwealth v. Myers, 193 Pa. Super. 531, 540, 165 A.2d 400, 405 (1960). Compare this with the West Virginia interpretation of its statutory provision requiring the defendant's presence at the trial, *supra* note 6. Those courts which refuse to extend the right to a presentence investigation nevertheless insist that "the manifestly correct practice . . . is to hear all the testimony in the case, including the testimony which relates to the fixing of the penalty, in the presence of the defendant and his counsel . . . ." Commonwealth v. Johnson, 348 Pa. 349, 355, 35 A.2d 312, 314-15 (1944).

[13] ARIZ. CRIM. RULES § 336; CAL. PEN. CODE §§ 1203, 1204; IDAHO CODE § 19-2516 (1948); MINN. STAT. § 631.20 (1947); MONT. REV. STAT. §§ 94-7813, 7814 (1949); N.D. CENT. CODE ANN. § 29-26-18 (1960); OKLA. STAT. § 974 (1958); ORE. REV. STAT. §§ 137.080, 137.090 (1959); UTAH CODE ANN. § 77-35-13 (1953).

[14] People v. Giles, 70 Cal. App. 2d 872, 161 P.2d 623 (1945); People v. Sauer, 67 Cal. App. 2d 664, 155 P.2d 55 (1945); Kuhl v. District Court, 366 P.2d 347 (Mont. 1961), in which the reception of information offered by a probation officer in the absence of the defendant constituted a violation of the Montana statute.

In courts-martial trials, evidence bearing on the subject of punishment is heard immediately after a plea or verdict of guilty. MANUAL FOR COURTS-MARTIAL UNITED STATES § 75 & app. 8 (1951). This implies the defendant's presence.

[15] Weihofen, *Retribution Is Obsolete*, 39 NAT. PROB. & PAR. ASSOC. NEWS 1 (1960).

[16] 257 N.C. at 333, 126 S.E.2d at 133.

to be present at the presentence investigation[17] fails to take into account the fact that in many criminal cases, the paramount interest in the proceeding is not the guilt or innocence of the accused, but rather the type and amount of punishment to be inflicted.[18] In North Carolina, the trial judge, for purposes of sentencing, may avail himself of information concerning every facet of the defendant's background.[19] If the defendant's liberty is to be deprived on the basis of such information, justice requires that the information be accurate.[20] One method of promoting accuracy is to confront the defendant with such information and give him an opportunity to rebut it.[21] The principal case purports to insure such safeguards,[22] yet, in effect, reposes the defendant's protection in the discretion of the trial judge.[23] Although a sentence based on false information concerning the defendant's background is vitiated under due process standards,[24] such a holding is of little comfort to a defendant

[17] See note 4 *supra.*

[18] A study made in 1956 of 32 superior courts in North Carolina revealed that 47.7% of all felony cases were disposed of by pleas of guilty. Hall, The Administration of Criminal Justice in North Carolina, 1956 (unpublished research in N. C. Inst. Govt. Library). "About ninety percent of all defendants in federal courts plead guilty." Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 HARV. L. REV. 1281, 1290 (1952). See generally ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 546 (1947) and Note, 58 COLUM. L. REV. 702, 706 (1958).

[19] N.C. GEN. STAT. § 15-198 (1953) provides for furnishing the court with a probation report concerning the criminal record, social history, and present condition of the defendant. "The investigation may adduce information concerning defendant's criminal record, if any, his moral character, standing in the community, habits, occupation, social life, responsibilities, education, mental and physical health, the specific charge against him, and other matter pertinent to a proper judgment." 257 N.C. at 335, 126 S.E.2d at 133.

[20] Wyzanski, *supra* note 18, at 1291.

[21] "Anglo-American law has relied traditionally upon an adversary system to ascertain the facts. Impartiality has not been considered a sufficient safeguard." Knowlton, *Should Presentence Reports Be Shown to a Defendant,* 79 N.J.L.J. 409, 417 (1956).

[22] The court instructed judges to disclose all information coming to their notice which might conceivably aggravate the punishment, and afford the defendant an opportunity to refute or explain such information. 257 N.C. at 335, 126 S.E.2d at 133.

[23] In order for the defendant to know the contents of probation reports and other oral testimony, it is obvious from this holding that such knowledge will be dependent on the trial judge's decision whether to disclose or conceal the information. "Certainly due process should not depend on the unrestrained discretion of one man in determining whether the information considered should be disclosed." Note, 34 MINN. L. REV. 470, 472-73 (1950).

[24] *Ex parte* Hoopsick, 172 Pa. Super. 12, 91 A.2d 241 (1952). See also Townsend v. Burke, 334 U.S. 736 (1948), and Smith v. United States, 223

sentenced on the basis of false information if the trial judge inadvertently fails to disclose such information to the defendant before sentencing.

The procedural problem at the sentencing stage is characterized, on the one hand, by a desire to grant the sentencing judge the utmost leeway in access to information properly bearing on the question of punishment, and, on the other, by the necessity that the defendant be confronted with such information to insure its accuracy. Although the principal case dealt primarily with the propriety of receiving oral testimony in the defendant's absence, the problem frequently arises with regard to a written report considered by the judge prior to sentencing. In *Williams v. New York*[25] the United States Supreme Court held that the due process clause of the fourteenth amendment is not violated when the defendant is denied the opportunity to confront and cross-examine informants who contribute to a probation report considered by the judge before sentencing.[26] Perhaps the more serious question is whether the defendant should be allowed to examine the report itself and chal-

F.2d 750 (5th Cir. 1955). *Townsend* appears to have been determined largely on the ground that the defendant was not represented by counsel when sentence was imposed. However, one writer has questioned the benefit of counsel in a situation in which the judge fails to disclose the false premises on which he bases his stentence. Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257, 267 (1952).

[25] 337 U.S. 241 (1949), portions of which are quoted in *Pope* in support of the court's holding that the instant procedure was not in violation of the due process clause of the North Carolina Constitution, art. 1, § 17. 257 N.C. at 332-34, 126 S.E.2d at 131-32.

[26] Mr. Justice Black reasoned that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentence would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." 337 U.S. at 250. *But see* Jay v. Boyd, 351 U.S. 345 (1956), in which Mr. Justice Black in a dissenting opinion vigorously objects on due process grounds to the Attorney General's use of confidential information as a basis for refusing to suspend deportation of a former Communist.

A closely analagous situation is the procedure by which the sanity of a convicted murderer is determined subsequent to sentence but prior to execution. In Solesbee v. Balkcom, 339 U.S. 9 (1950), the Supreme Court over due process objections approved a procedure in which the defendant was denied an opportunity to present his own evidence or confront the evidence submitted by the state on the issue of sanity. In a dissent, Mr. Justice Frankfurter addressed himself to the majority's argument that such a procedure was necessary to obviate delay: "[T]he risk of an undue delay is hardly comparable to the grim risk of the barbarous execution of an insane man because of a hurried, one-sided, untested determination of the question of insanity." 339 U.S. at 25. The decision in this case was approved in Caritativo v. California, 357 U.S. 549 (1958).

lenge its accuracy.[27] Statutes in at least three states expressly provide for such inspection by the defendant.[28] The originally proposed Federal Rules of Criminal Procedure included a provision[29] which would have insured inspection of a probation report by the defendant. This provision was deleted in the final draft,[30] however, and the practice now varies between making the report public in some districts, and treating it as confidential in others.[31] Arguments against a procedure of inspection stress the possibility that such a procedure would seriously hamper the efficient administration of criminal justice, and possibly result in a retrial of collateral issues.[32] It seems just as probable, however, that if the report is true, it will not be contested at all, either because it is not detrimental to the defendant, or because it is capable of comparatively easy proof, as in the case of establishing the fact of a prior conviction. Conversely, those portions of the report which are challenged are likely to be statements which are most prejudicial to the defendant and more difficult to

[27] It is questionable whether *Williams* decided this issue. Note, 23 So. CAL. L. REV. 105, 107 (1949). For a statement of the narrow holding in *Williams*, see Gonzales v. United States, 348 U.S. 407, 412 n. 4 (1954), and White v. United States, 215 F.2d 782, 789 (1954).

[28] ALA. CODE ANN. tit. 42, § 23 (1959); CAL. PEN. CODE § 1203 (Supp. 1962); VA. CODE § 53-278.1 (1958). See Linton v. Commonwealth, 192 Va. 437, 65 S.E.2d 534 (1951) where the failure to allow defense counsel to cross-examine the probation officer was reversible error. N.C. GEN. STAT. § 15-207 (1953) provides that the probation report is privileged information and may only be seen by the court and "others entitled under this article." One writer has interpreted this to include disclosure to the defendant and his counsel. Sharp, *The Confidential Nature of Presentence Reports*, 5 CATHOLIC U.L. REV. 127, 131 (1955). In the absence of case authority to substantiate either position, it seems reasonable to argue that the section does not make disclosure to the defendant mandatory.

[29] "After determination of the question of guilt the report shall be made available, upon such conditions as the court may impose, to the attorney for the parties and to such other persons as the court may designate." FED. R. CRIM. P., REPORT OF THE ADVISORY COMMITTEE 34 (1944).

[30] See FED. R. CRIM. P. 32(c).

[31] "[I]n 65 districts the presentence report is available only to the judge. In 30 districts the report is available also to other interested parties and in all but two of these the United States Attorney receives a copy. In 11 districts the defense counsel has access to the report." *Pilot Institute On Sentencing*, 26 F.R.D. 231, 329 (1961). See generally Chandler, *Latter-Day Procedures In the Sentencing and Treatment of Offenders in the Federal Courts*, 37 VA. L. REV. 825, 834 (1951).

[32] Morgan v. State, 142 So. 2d 308, 312 (Fla. 1962). The rules of evidence in the California presentence procedure appear to be rather rigid. People v. Valdivia, 5 Cal. Rptr. 832, 182 Cal. App. 2d 149 (1960), 34 So. CAL. L. REV. 231 (1961); People v. Neal, 97 Cal. App. 2d 688, 218 P.2d 556 (1950).

prove, such as conclusions deduced from hearsay or rumor.[33] The risk of injustice to the defendant if such statements are false would seem to outweigh contrary considerations of administrative convenience.[34]

A further argument against allowing disclosure and challenge is that such a rule might discourage confidential informants, thus rendering unavailable much of the information now relied upon by judges.[35] This possibility is conceded, although it would seem to be an unavoidable consequence of any system of criminal administration which requires that defendants be informed of the evidence against them.[36]

Judging from the tenor of opinions which deny the defendant access to probation reports and the right to be present when oral testimony is presented, the inescapable conclusion is that, but for insuperable procedural difficulties, the courts think it only fair that there be some means by which a defendant may be confronted with information bearing on the subject of punishment.[37]

The English courts seem to have reached a flexible solution. An act of Parliament[38] provides that after conviction "without prejudice to any right of the accused to tender evidence as to his

[33] "The presentence probation report in Williams v. New York illustrates this problem. The probation department there concluded that Williams was a 'psychopathic liar' whose ideas 'revolve around a morbid sexuality,' that he was 'a full time burglar,' 'emotionally unstable,' 'suffers no remorse,' and was deemed to be 'a menace to society.'" His criminal record consisted of a charge of theft when he was 11 years old and a conviction as a wayward minor. Such a record would not support such generalizations as above. The conclusions were drawn from information solicited from various people who accused Williams of committing other crimes for which he had never been prosecuted. Note, *Due Process and Legislative Standards in Sentencing,* 101 U. PA. L. REV. 257, 276-77 (1952). On conclusions of probation officers based on these uncorroborated accusations, the trial judge overrode the jury's recommendation of life imprisonment and imposed the death penalty on Williams, a convicted murderer.

[34] Rubin, *Probation and Due Process of Law,* 31 FOCUS 40, 44 (1952); Note, *Right of Criminal Offenders To Challenge Reports Used In Determining Sentence,* 49 COLUM. L. REV. 567, 571-72 (1949).

[35] United States v. Durham, 181 F. Supp. 503, 504 (D.D.C.), *cert. denied,* 364 U.S. 854 (1960).

[36] Rubin, *op. cit. supra* note 34, at 45.

[37] See Zeff v. Sanford, 31 F. Supp. 736, 738 (N.D. Ga. 1940); Driver v. State, 201 Md. 25, 32, 92 A.2d 570, 573 (1952); Commonwealth v. Johnson, 348 Pa. 349, 355, 35 A.2d 312, 314-15 (1944). The court in the principal case admits that it is better practice to receive all reports and representations from probation officers in open court. State v. Pope, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

[38] Prevention of Crime Act, 1908 8 Edw. VIII, ch. 59 § 10(5).

character and repute, evidence of character and repute may, if the court thinks it fit, be admitted as evidence bearing on the question whether the accused is or is not leading persistently a dishonest or criminal life." If the accused challenges any statement, the judge has two alternatives. He must either disregard the challenged statement,[39] or require legal proof of it.[40] Such a procedure accommodates both interests by allowing the judge to consider all unchallenged information, while at the same time insuring its accuracy by requiring proof of those statements which are challenged.

While the decision in the *Pope* case worked no obvious injustice on the particular defendant, its limited protection to defendants in general should provoke serious legislative attention to the possible adoption of a statutory presentence procedure. This procedure, while reserving the necessary discretion in the sentencing judge, should be geared to insure the utmost accuracy of any information, oral or written, which is offered in aggravation or mitigation of punishment. New concepts of administering sentences should not neglect the protection of the individual they seek to benefit.

WILLIAM E. SHINN, JR.

Estoppel by Judgment—Client Not Estopped in Action Against Attorney

A resident of Virginia and his wife engaged a North Carolina attorney to defend them in an action brought against them in North Carolina. The attorney failed to file any pleadings and a default judgment was entered against his clients. Subsequently, they employed other counsel and moved to set aside the default judgment on the ground of excusable neglect.[1] The attorney also retained counsel and joined in the prosecution of the motion. The court found that the neglect of the attorney was not attributable to his clients,[2] but

[39] Rex v. Campbell, 6 Crim. App. R. 131, 132 (1911).
[40] *Ibid.*

[1] N.C. GEN. STAT. § 1-220 (1953) provides: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment . . . taken against him through his mistake . . . or excusable neglect . . . ."

[2] If a party has employed counsel and given him the necessary information about the case, the attorney agreeing to file an answer and protect his interest, failure of the attorney to perform his duty is excusable neglect on the part of the client. Gunter v. Dowdy, 224 N.C. 522, 31 S.E.2d 524 (1944); Edwards v. Butler, 186 N.C. 200, 119 S.E. 7 (1923); Mann v. Hall, 163 N.C. 50, 79 S.E. 437 (1913).