UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 46 | Number 2 Article 10

2-1-1968

Criminal Law -- Sentencing -- Denial of Credit for Time Served or Longer Sentence Imposed at Retrial

Pender R. McElroy

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

Pender R. McElroy, *Criminal Law -- Sentencing -- Denial of Credit for Time Served or Longer Sentence Imposed at Retrial*, 46 N.C. L. Rev. 407 (1968).

Available at: http://scholarship.law.unc.edu/nclr/vol46/iss2/10

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

dent facing an expulsion hearing should be given those procedural due process rights granted to the college student and to the juvenile. Both society and the student will benefit if some procedural safeguards are granted to the high school suspension hearing rather than arbitrary procedural laxness.

ERIC MILLS HOLMES

Criminal Law—Sentencing—Denial of Credit for Time Served or Longer Sentence Imposed at Retrial

In *Patton v. North Carolina*[1] Eddie W. Patton was tried in the Superior Court of North Carolina for armed robbery in October, 1960. He was unrepresented by counsel and entered a plea of nolo contendere at the close of the state's evidence. He was convicted, received a sentence of twenty years and did not appeal. However, after serving nearly five years in prison, he applied for a state post-conviction hearing which resulted in a new trial based on the denial of his constitutional right to counsel at the first trial. Represented by counsel at the second trial in February, 1965, Patton pleaded not guilty and was convicted by a jury on the original indictment charging armed robbery. The trial judge purported to give Patton credit for the nearly five years served on the original twenty year sentence and then sentenced him to twenty years imprisonment.

The effect of this sentence is an increased punishment. Had he not appealed Patton would have been eligible for parole in October, 1965. If he had not been paroled, and without taking earned time factors into account, he would have completed the first sentence in October, 1980. As a result of the sentence at the second trial, Patton will not be eligible for parole until February, 1970, and the sentence will not terminate until February, 1985. Because he obtained a new trial, Patton will remain in prison five years longer than if he had not asserted his right to seek a fair trial.

After the second trial, Patton applied to the federal district court for a writ of habeas corpus. The writ was granted[2] and the Court of Appeals for the Fourth Circuit affirmed.

---

[1] 381 F.2d 636 (4th Cir. 1967).

[2] Patton v. North Carolina, 256 F. Supp. 225 (W.D.N.C. 1966); *noted in* 1966 DUKE L.J. 1172; 80 HARV. L. REV. 891 (1967); 20 VAND. L. REV. 660 (1967); 12 VILL. L. REV. 380 (1967). *See generally* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L.J. 606 (1965) [hereinafter cited as Van Alstyne].

Harsher sentencing imposed upon a successful criminal appellant at retrial can be accomplished by denying credit for the time served under the original sentence or by imposing a longer sentence. This practice is widespread[3] and is most often justified upon two grounds. It has been said that when the conviction at the first trial is overturned upon appeal or through other appropriate procedural methods it is then "void," with the result that the sentence imposed at the first trial is to be ignored thereafter.[4] It is also said that when the appellant seeks post-conviction relief he waives whatever benefit he may have enjoyed under the first sentence.[5] These theories had their origin in a different setting. In order to justify the use of habeas corpus as a tool of review, federal courts granted the writs "only if the court ordering imprisonment was without jurisdiction—*i.e.*, if the order was 'void.'"[6] Then, to prevent a defendant from contending that double jeopardy protection barred a retrial, the courts generally held that the first sentence was void or that the defendant waived his rights under the previous conviction.[7]

Patton is significant not only for its result, but because it is

---

[3] The North Carolina Supreme Court allows longer sentences with credit or sentences without credit except that the increased sentence when added to the time appellant has already served may not exceed the maximum sentence allowed for the offense. State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966); State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965); State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964); 44 N.C.L. Rev. 458 (1966). State v. Pearce, *supra*, was decided after the Patton decision was rendered in the district court. In refusing to follow that decision, the North Carolina Supreme Court stated, "We adhere to our former decisions." State v. Pearce, *supra* at 708, 151 S.E.2d at 572.

[4] *See e.g.*, United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); United States v. Harmon, 68 F. 472 (D. Kan. 1895). *See generally* Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 Minn. L. Rev. 239 (1951) [hereinafter cited as Whalen].

[5] Whalen 240-44. Van Alstyne 610, suggests two additional rationales used by other courts:

> In other jurisdictions it is said that the appellate court has no authority to revise a sentence imposed by a trial court within statutory limits, and that the defendant should look to the executive department for an exercise of the clemency power. Elsewhere, in rejecting double jeopardy claims, courts have held with Justice Holmes that a new trial and sentence is simply a continuation of the same case, and thus the previous sentence of the defendant does not foreclose independent consideration of an appropriate sentence at the second trial in that case.

[6] Whalen 242.

[7] Whalen 240-44. *See generally* Comley, *Former Jeopardy*, 35 Yale L.J. 674 (1926).

the first case at the level of the court of appeals in which the constitutional issues have been fully considered. The court stated the issue as "whether a defendant may be sentenced to a longer term of imprisonment at his second trial than he received after his first conviction, vacated on constitutional grounds."[8] It found that a defendant may not be so sentenced and based its decision on three grounds arising from the United States Constitution.

The first ground grows out of the due process clause.[9] Had Patton remained in prison without appealing his unconstitutional conviction, he could have served out his term to 1980 and could have been eligible for parole in 1965.[10] On the other hand, Patton could choose to seek his constitutional right to a fair trial by utilizing appropriate post-conviction remedies. The state tells Patton and those similarly placed that if he chooses to seek the fair trial, he does so upon the condition that he give up the right to have the first sentence remain the same[11] and risks a more severe sentence if convicted at the second trial. The court held that forcing upon the defendant the risk of harsher punishment as a condition for securing a constitutional right violates the due process clause of the fourteenth amendment. "Enjoyment of a benefit or protection provided by law," the court said, "cannot be conditioned upon the 'waiver' of a constitutional right."[12] Although not explicitly spelled out by the court, it follows by implication that the benefit of a constitutional right cannot be conditioned upon the waiver of a

---

[8] 381 F.2d 636.

[9] In Hill v. Holman, 255 F. Supp. 924 (M.D. Ala. 1966), the court held that denial of credit for time served in this situation was a denial of due process. The court said:

> The constitutional requirements of due process will not permit the State of Alabama to require petitioner Hill, or any other prisoner for that matter, to be penalized by service in the state penitentiary because of an error made by the state circuit court.

Id. at 925.

[10] N.C. GEN. STAT. § 148-58 (1964) provides:

> All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate . . . .

[11] Under the North Carolina decisions the sentence of a defendant may not be increased after the term of the trial court has expired and service of sentence has commenced. State v. Lawrence, 264 N.C. 220, 141 S.E.2d 264 (1965); State v. McLamb, 203 N.C. 442, 166 S.E. 507 (1932); State v. Warren, 92 N.C. 825 (1885). This rule is followed in all jurisdictions. Van Alstyne 615.

[12] 381 F.2d at 640.

benefit or protection provided by state law, in this case the protection of not having the sentence lengthened.[13]

The doctrine of unconstitutional condition is well established[14] and its application in this situation should not be startling. As the court pointed out, the Supreme Court has been concerned in several cases with restrictions on a convicted defendant's access to post-conviction relief.[15] In an analogous situation the Fourth Circuit has held that the trial judge must take into account the time a defendant was incarcerated while awaiting trial.[16] In *United States v. Walker*[17] the same court considered a case where the defendant had been sentenced in his absence to three years. He successfully attacked the sentence on the ground of his absence and was resentenced to five years. It was held that the district court had unintentionally penalized the defendant for asserting his constitutional right to seek correction and that a constitutional right cannot be so conditioned.[18]

---

[13] Van Alstyne 616.

[14] *See, e.g.,* Speiser v. Randall, 357 U.S. 513 (1958); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926). *See generally* 73 HARV. L. REV. 1595 (1960). In Frost & Frost Trucking Co. v. Railroad Comm'n, *supra,* a state law operated to prevent a private carrier from enjoying the benefit of state highways unless it submitted to being regulated as a common carrier by the railroad commission and being subjected to common carrier liability. Noting that under the due process clause a private carrier could not be forcibly converted into a common carrier by legislation, the Court held that the state could not condition use of the state highways upon the relinquishment of a constitutional right.

[15] 381 F.2d at 640. *See, e.g.,* Fay v. Noia, 372 U.S. 391 (1963); Douglas v. California, 372 U.S. 353 (1963); Green v. United States, 355 U.S. 184 (1957); Griffin v. Illinois, 351 U.S. 12 (1956). In Fay v. Noia, *supra,* Noia and two other defendants were convicted of felony murder in 1942. Noia was sentenced to life imprisonment, his two companions to death. Noia did not appeal for fear that if he was again convicted he too would would receive the death penalty. The other two defendants, who did not have this fear, appealed successfully on the ground that their confessions had been coerced. They were released in 1955 since the state did not have a case without the confessions. Noia then decided to appeal, but the state courts refused relief because his appeal had not been timely. The Supreme Court held that Noia should have been granted a petition for habeas corpus in the federal courts because the "grisly choice" which he faced caused him not to appeal and his choice not to appeal could not "realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures." 372 U.S. at 440.

[16] Dunn v. United States, 376 F.2d 191 (4th Cir. 1967). The result in this case seemed to be based largely on the legislative history behind a federal statute requiring that such credit be given where the statute defining the offense requires the imposition of a minimum mandatory sentence.

[17] 346 F.2d 428 (4th Cir. 1965).

[18] The court in *Walker* relied upon Green v. United States, 355 U.S. 184

While adopting the district court's holding on due process and equal protection grounds, the court of appeals extended the lower court's holding considerably. At the lower court the holding had been that if a harsher sentence is given at the second trial, there must be a "discernable" reason and "facts tending to rationally support the imposition of such a penalty. . . ."[19] The court of appeals placed an absolute ban on harsher sentences even if there was additional testimony introduced at the second trial tending to support a harsher sentence. In this respect the court followed the First Circuit in *Marano v. United States.*[20] That court said, "The danger that the government may succeed in obtaining more damaging evidence on a retrial is just as real as the danger, for example, that the judge on his own may wish to reconsider unfavorably to the defendant, the factors which led to his original disposition."[21] It also pointed out that imposition of a harsher sentence by the same judge who felt he had been too lenient the first time or by a different judge "having a different approach towards sentencing . . . might well be substantial deterrents to a decision to appeal."[22] In sum, the court said, "A defendant's right of appeal must be unfettered."[23]

In placing this absolute ban on harsher resentencing, the court in *Patton* drew upon the reasoning of the Supreme Court with respect to the right to counsel. In *Gideon v. Wainwright*[24] it was recognized that the lack of counsel created an opportunity for unfairness although in a particular case it may not have prejudiced the defendant's rights. To eliminate this opportunity the presumption of injury was made conclusive. Therefore in *Patton* the court held

(1957). In that case Green had been convicted of second degree murder, had successfully appealed, and upon retrial had been convicted of first degree murder on the original indictment. The Supreme Court held that Green could not be tried a second time for first degree murder because such a trial placed him in double jeopardy. It is significant to note that while placing its decision on double jeopardy grounds, the Court was greatly concerned with the fact that the defendant "must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment." The Court concluded that the defendant should not be placed "in such an incredible dilemma." *Id.* at 193.

[19] Patton v. North Carolina, 256 F. Supp. 225, 236 (W.D.N.C. 1966).

[20] 374 F.2d 583 (1st Cir. 1967).

[21] *Id.* at 585.

[22] *Id.*

[23] *Id.*

[24] 372 U.S. 335 (1963).

that "the new sentence shall not exceed the old."[25] Thus, the court makes it impossible to punish the defendant for attacking his original conviction. The possibility that abuses may go undetected is removed, and the doubtful task of determining whether reasons are discernable or rationally support the imposition of a harsher sentence is eliminated.

The second basis of the *Patton* decision was the equal protection clause of the fourteenth amendment. Since in North Carolina there can be no increase in a defendant's sentence after the term of the trial court has expired and the defendant has begun serving his sentence,[26] the threat of a harsher sentence falls only upon one class of prisoners—those who seek post-conviction relief. Conceding that the state might create a system to review and, if necessary, increase sentences, the court made clear that it cannot arbitrarily classify those who are exercising their right to obtain a fair trial as the only group subject to such an increase. Such "an arbitrary classification [is] offensive to the equal protection clause."[27]

---

[25] 381 F.2d at 641.

[26] Note 11 *supra.*

[27] 381 F.2d at 642. In Griffin v. Illinois, 351 U.S. 12 (1956), two indigent defendants were convicted of armed robbery in state court. In order to appeal it was required by state law that the appellant furnish the appellate court a bill of exceptions or report of the proceedings at the trial. The defendants moved in the trial court that such records be provided to them without cost since they were indigent. The motion was denied. The Supreme Court recognized that constitutionally a state is not required to provide appellate review, but it held that a state providing such review may not "do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18. In Gray v. Hocker, 268 F. Supp. 1004 (D. Nev. 1967), a state statute required that the time for service of criminal sentences be computed from the date they were imposed. The effect of the statute was to preclude the trial judge at a retrial of a successful criminal appellant from allowing credit for time served under the overturned sentence. Relying on Griffin v. Illinois, *supra,* the court held the statute unconstitutional as applied because it deprived the appellant of equal protection of the laws. In Gainey v. Turner, 266 F. Supp. 95 (E.D.N.C. 1967) the court had before it essentially the same fact situation as in *Patton.* It held that harsher resentencing violated the due process and equal protection clauses. In its discussion of equal protection the court found "no rational basis for distinguishing as a class those who successfully attack [their convictions] and those who do not." It found "no legitimate or permissable [governmental] objective that is served by a state's resentencing practice that results in a denial of credit for time served in the absence of justifiable reasons that appear in the record." The court pointed out that the state of North Carolina had enacted no legislation providing for sentence review which showed that "the legislature has not considered a review of sentences of compelling state interest." It finally found that since the classification was arbitrary and there was no compelling state interest served, "no nexus between the classification and the objective of government can save the re-

The equal protection ground is relevant to another dimension of this problem. The proposition that harsher resentencing is prohibited as an unconstitutional condition on the right to a fair trial would have no application to a defendant whose original trial was free of constitutional error but had been overturned on some other ground.[28] The equal protection clause, however, does apply in that situation and would protect that defendant from harsher resentencing.[29]

The *Patton* court utilized still a third ground for its decision although noting that it was not necessary to do so.[30] It held that "the constitutional protection against double jeopardy would be violated if an increased sentence or a denial of credit is permitted on retrial."[31]

In order to invoke the double jeopardy protection provided in the fifth amendment the court had to get over the hurdle of whether or not that protection is applicable to the states through the fourteenth amendment. The problem was solved in a footnote[32] where the court relied upon *United States ex rel. Hetenyi v. Wilkens*[33] from the Court of Appeals for the Second Circuit. In that case it was pointed out by then Judge Thurgood Marshall that under the Supreme Court cases "[t]he Due Process clause of the Fourteenth Amendment imposes some limitations on a state's power to reprosecute an individual for the same crime."[34] The court in *Hetenyi* held that the double jeopardy clause is applicable to the states because the "basic core" of the double jeopardy guarantee is as fundamental as "those other guarantees of the Bill of Rights already held by the Supreme Court . . . to be absorbed . . . ."[35] Although this ap-

---

sentencing practice in question." The court held that under Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928), these three elements had to be found for the sentencing practice "to withstand attack under the Equal Protection Clause." 266 F. Supp. at 101-02. *Accord,* Patton v. Ross, 267 F. Supp. 387 (E.D.N.C. 1967).

[28] They were given as fair a trial as the Constitution requires, and therefore are not required to waive the protection of their original sentence as a condition of obtaining a constitutionally fair trial. Van Alstyne 615-16.

[29] Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967).

[30] 381 F.2d at 643.

[31] 381 F.2d at 643.

[32] 381 F.2d at 643 n.20.

[33] 348 F.2d 844 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966).

[34] *Id.* at 849.

[35] *Id.* at 853. The first amendment, New York Times v. Sullivan, 376 U.S. 254 (1964); the fourth amendment, Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963); the self-incrimination clause of the fifth amendment, Malloy v. Hogan, 378 U.S. 1 (1964); the right to counsel

proach seems to be a reasonable ramification of the selective incorporation theory, in the absence of a direct holding by the Supreme Court to that effect it is not one of the *Patton* court's stronger points.

As for the double jeopardy holding itself, the court relied primarily on that aspect of double jeopardy which prohibits multiple punishment for the same offense.[36] The court saw "no constitutionally significant distinction"[37] between prohibiting an increase in a defendant's sentence once service commenced, and a harsher sentence upon retrial for the same offense following a successful appeal.

Patton had also asserted that he was " 'impliedly acquitted' "[38] of any punishment beyond the twenty years originally received and therefore placed in double jeopardy when subjected to a harsher sentence. This argument was based on *Green v. United States*[39] in which the Supreme Court held that where an accused had been convicted of second-degree murder and had successfully appealed, he could not then be retried for first degree murder. The theory there was that by returning a verdict of second-degree murder when it also could have returned a verdict of first-degree murder, the jury had impliedly acquitted him of the latter charge. The *Patton* court admitted with the defendant, however, "that to maintain that he was 'acquitted' at the first trial of any penalty greater than twenty years, is as much a fiction as that he has 'waived' the benefit of his initial sentence by appealing his conviction."[40]

---

and confrontation clauses of the sixth amendment, Gideon v. Wainwright, 372 U.S. 335 (1963); Pointer v. Texas, 380 U.S. 400 (1965); the cruel and unusual punishment prohibition of the eighth amendment, Robinson v. California, 370 U.S. 660 (1962).

[36] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873). In *Lange* the petitioner had been convicted of a federal offense for which the punishment was a fine or imprisonment. Petitioner was sentenced to a term of imprisonment and payment of a fine. He was freed on a writ of habeas corpus and brought before the same judge who had imposed the original sentence for resentencing. The second time the judge sentenced petitioner only to a term of imprisonment. The Supreme Court held that he had to be released altogether because he had paid his fine, the money having passed out of the legal control of anyone but Congress, and had served five days on the first sentence. To have required him to serve the second sentence, after having paid the fine, would have placed him in double jeopardy. The Court did "not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Id.* at 173.

[37] 381 F2.d at 645. The court also applied this double jeopardy holding in Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967).

[38] 381 F.2d at 645.

[39] 355 U.S. 184 (1957).

[40] 381 F.2d at 645. In Stroud v. United States, 251 U.S. 15 (1919),

The *Patton* decision is welcome and in our enlightened system of criminal justice could be considered long overdue. It is fundamentally unfair for a state to deprive a prisoner of several years of his freedom on the basis of an erroneous trial for a particular crime, and then upon a retrial for the same crime refuse to take those years into account when resentencing him.

Not everyone will be in agreement with the *Patton* rule, and it is significant to note the reasons why. In the recent case of *Shear v. Boles*[41] the federal district court defended vigorously the right of a trial judge to impose a harsher sentence at a second trial after a successful appeal. There it was said that a federal habeas corpus court should exercise "judicial restraint" because of "the fear of undermining the traditional role of the trial judge."[42] The argument is that the trial judge has "the benefit of presentence reports, . . . can observe, first hand, the demeanor of the defendant . . . and is most aware of the actual as well as the extenuating circumstances of the defendant's crime."[43] These are points well taken in a defense of the traditional discretion of the trial judge in sentencing.

It should be pointed out that if the defendant did not plead guilty or nolo contendere at the first trial and received a full trial

---

the defendant had been convicted of first degree murder and received a life sentence. That conviction was reversed, he was retried for first degree murder, and after a second conviction he was sentenced to death. The Supreme Court upheld the sentence in the face of double jeopardy arguments. The court in *Patton* distinguished *Stroud* in that it appeared "that the case was argued to the Court on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder." 381 F.2d at 644. The muliple punishment aspect of double jeopardy was not considered in *Stroud*. In People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963), the California Supreme Court held that the double jeopardy protection of the California constitution would prohibit a second conviction for the same degree of the same offense after a successful appeal of the first conviction in which a non-constitutional error had been committed. The court relied upon the "implied acquittal" rationale of Green v. United States, 355 U.S. 184 (1957).

[41] 263 F. Supp. 855 (N.D.W.Va. 1967).

[42] *Id.* at 859. In United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967), it was said:

> It is submitted it would be a flagrant trespass of an independent state judiciary, to question its discretionary judgment, in the imposition of a sentence, where the trial judge, in the possession of all the facts relative thereto, in a proceeding in a Federal court on a writ of habeas corpus—already ruled on by the highest tribunal of the state—would vacate the same, unless it clearly flouted constitutional standards of due process.

Id. at 812.

[43] Shear v. Boles, 263 F. Supp. 855, 859 (N.D.W.Va. 1967).

with the state introducing as much evidence as it legally may, the trial judge at that trial had all of the desired information and exercised his discretion as to sentencing to the fullest extent. When the judge at a retrial revises an original sentence thus imposed, he is in effect reviewing the original sentence. The equal protection clause militates against such selective review of the sentences of only those convicted defendants who appeal.

Further resistance to the *Patton* rule will come from those who fear that at the second trial new evidence will appear clearly showing that the first sentence was inadequate. This evidence generally will be introduced to bear on the defendant's guilt but will ultimately induce the judge to impose a harsher sentence; it will be of a nature showing that defendant's conduct was unusually heinous. Were harsher resentencing allowed after such new evidence, abuses would surely result. The prosecution could endeavor to turn up evidence more damaging to the defendant at the second trial, just as the same judge might want to change his mind at the second trial.[44] Theoretically the prosecution will have had a full opportunity at the first trial to introduce all evidence which might in the end bear on the sentence. There would seem to be no compelling reason to give the prosecution a second chance. It is true that there may be instances when it would have been impossible for the new evidence to have been unearthed for use at the first trial. In such a case the defendant would unfairly benefit. The considerations supporting the general application of the rule should outweigh the possibility that such a case might arise, and there should be no abolition of the rule just because of this limited situation. There is no reason that an exception could not be made for this type of situation, assuming workable standards could be laid down.

The Court of Appeals for the First Circuit, while prohibiting harsher resentencing as a general proposition, would allow it based on events occurring subsequent to the first trial and contained in a presentence report.[45] Defendants who do not appeal do not have their sentences increased because of their bad behavior, however; thus, it is a denial of equal protection to increase the sentences of those who do appeal. The state has adequate means to allow for bad behavior subsequent to trial, *e.g.*, denial of parole.

The court in *Shear* points out that where a defendant pleads

[44] Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1967).
[45] *Id.*

guilty following arrest, thus avoiding the necessity for a trial, "the first sentencing judge may not have had a meaningful opportunity to weigh . . . the defendant's . . . character and to consider the other important, intangible factors which play a vital role in the determination of a sentence."[46] When the defendant pleads not guilty at the second trial, presumably the judge at that trial is afforded such an opportunity. Many convicted defendants have pleaded guilty after arrest and are serving the sentences received without appealing. No judge will ever have an opportunity to weigh the character of those defendants or to consider other intangible factors and adjust their sentence accordingly. It is only by denying an equal measure of protection to an appealing defendant that his sentence can be lengthened.

In *United States ex rel. Starner v. Russell*[47] the Court of Appeals for the Third Circuit, in justifying harsher sentences at retrial, noted that federal and state courts generally follow the practice of extending leniency when the defendant pleads guilty and do not do so when the defendant chooses to go to trial.[48] The implication apparently is that leniency at the first trial justifies the harsher sentence at the second trial. This practice is a clear illustration of penalizing the defendant merely for seeking a full and fair trial.

It could be argued that the result in *Patton* will lead to the imposition of a harsher sentence in the first trial so that if the defendant appeals and gets a new trial the second trial judge will not be restricted to a sentence that might seem to him to be inadequate. This practice would seem to be highly unlikely in view of the gross unfairness to all defendants so sentenced and of the many other factors that influence the trial judge in imposing sentences.

It should be asked whether the *Patton* decision might be applicable to other situations. Suppose a driver, after having been stopped on the highway by a law enforcement officer for exceeding the speed limit, is asked to open his trunk to let the officer examine its contents. If the driver complies with the request he may not receive a traffic ticket but only a warning. If he refuses, he is sure to receive the ticket. The driver complies and in his trunk is found incriminating evidence that leads to his conviction for a crime completely unrelated to the speeding. Has the driver "waived"

---

[46] Shear v. Boles, 263 F. Supp. 855, 860 (N.D.W.Va. 1967).
[47] 378 F.2d 808 (3d Cir. 1967).
[48] *Id.* at 812.

his right to be free from unreasonable search and seizure, or is the waiver one that is forced and not of free choice as is the purported waiver of the defendant who decides to appeal his conviction?

Suppose a person is arrested and charged with a crime. The officials offer the accused and his attorney the following proposition: if the accused will plead guilty to a lesser charge the state will reciprocate by recommending leniency and by other rewards usually offered where guilty-plea bargaining is carried on. The accused and his attorney, after weighing the chances of conviction and of receiving a heavier sentence if there is a not guilty plea, decide to accept the offer.[49] Is this situation essentially different from the situation of the convicted defendant who weighs his chances of a heavier sentence and decides not to appeal?[50]

Suppose a state statute provides that a defendant indicted for first degree murder may plead guilty, with the consent of the court and the district attorney, and in that event he may only be sentenced to life imprisonment if convicted.[51] Such a statute would mean that if the defendant pleads not guilty, there would be a trial at which he might receive the death penalty. Can the state constitutionally allow the defendant to exercise his right to a jury trial only at the peril of receiving the death penalty?

Finally, suppose a defendant is convicted of a crime in a court of limited jurisdiction within the state such as a city court. A fine is imposed along with court costs. He then appeals to a court of general jurisdiction such as the state superior court for a trial de novo. He is again convicted, but a heavier fine is imposed and the defendant has to pay the higher court costs. Is this such a restriction on the right to appeal as would be prohibited by the *Patton* court?

PENDER R. MCELROY

---

[49] A similar situation is posed in L. HALL & Y. KAMISAR, MODERN CRIMINAL PROCEDURE 505 (1966).

[50] It should be pointed out that guilty-plea bargaining is an entirely acceptable and presently necessary function. Further, the choice of the defendant is admittedly more freely made than the choice in the Patton situation.

[51] N.Y. PEN. LAW §§ 1045(2), 1045a (McKinney, Supp. 1966). This statute is presently being challenged on the ground that it conditions the exercise of the right to a hearing upon the risk of death. Brief for Petitioner-Appellant at 14-16, Moore v. State, pending in the Supreme Court of New York, Appellate Division, Fourth Department.