Florida Law Review

Volume 8 | Issue 2 Article 6

June 1955

Criminal Law: Power of District Court to Grant Probation After Prisoner Has Commenced Service of Consecutive Sentences

Eugene L. Roberts

that petitioner failed to appear in person at the pretrial conference as required by the order, but the failure to appear could be susceptible of satisfactory explanation. It is difficult to find any justification for the imposition of punishment without affording the accused an opportunity to defend himself.

JAMES E. MOORE

CRIMINAL LAW: POWER OF DISTRICT COURT TO GRANT PROBATION AFTER PRISONER HAS COMMENCED SERVICE OF CONSECUTIVE SENTENCES

Phillips v. United States, 212 F.2d 327 (8th Cir. 1954)

Prisoner entered a plea of guilty to an indictment charging violation of the National Motor Vehicle Theft Act[1] in five separate counts and was sentenced to serve a period of imprisonment under each, the sentences to run consecutively. During service of the third sentence he moved for suspension of execution of the unserved sentences on the fourth and fifth counts. The district court denied the motion as beyond its jurisdiction. On appeal, HELD, when the prisoner commenced service of his first sentence the district court lost jurisdiction either to suspend sentence or to place the prisoner on probation, since under the Probation Act[2] the five periods constituted one sentence. Judgment affirmed, Judge Collet dissenting.

Probation, at least as far as the federal system is concerned, is a creature of statute. In the absence of specific statutory authority a court lacks inherent power either to grant probation[3] or to suspend execution of sentence after the prisoner has been found guilty or has pleaded guilty to an offense for which punishment is prescribed by law.[4] The required statutory authority for federal courts was provided by the Probation Act of 1925,[5] which remained in effect until the criminal code was revised in 1948 and the present probation act became operative.

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[1] 18 U.S.C. §2312 (1952).
[2] 18 U.S.C. §3651 (1952).
[3] United States v. La Shagway, 95 F.2d 200, 201 (9th Cir. 1938) (dictum).
[4] *Ex parte* United States, 242 U.S. 27 (1916).
[5] 43 STAT. 1259 (1925), 18 U.S.C. §7426 (1946).

The trial court loses power to grant probation as soon as a prisoner commences service of his sentence, since the prisoner then comes under the control of the executive branch of government.[6] The Supreme Court enunciated this principle in 1927 in *United States v. Murray* and *Cook v. United States,*[7] based on its interpretation of the purpose for which the probation act was enacted, namely, promotion of the reclamation of youthful prisoners by avoiding their confinement with hardened criminals.[8] Probation is proper when the sentence is to become effective at the expiration of a prior sentence imposed by another court,[9] and it may be granted even after expiration of the term at which the defendant was convicted if he has not commenced service of his sentence.[10]

The 1925 probation act did not authorize the trial court to impose imprisonment on some counts and grant probation on others, but several district courts assumed this power and were upheld on review.[11]

There is a division of authority in regard to the nature of service under "consecutive sentences." The Probation Act of 1948 provides: "Probation may be limited to one or more counts or indictments"; but the situation in the instant case has apparently been passed on by only one other appellate court since enactment of this statute.[12] That court stated that "a prisoner serving the first of several consecutive sentences is not serving the other sentences."

There are two objections to the suspension of a sentence to be served at a future time when the person is presently serving another sentence. The first is based on the fact that the purpose of the probation act, according to the *Murray* and *Cook* cases, is to relieve a

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[6]*E.g.,* Bozel v. United States, 139 F.2d 153 (6th Cir. 1943), *cert. denied,* 321 U.S. 800 (1944); United States v. Craig, 95 F.2d 202 (9th Cir. 1938); United States v. La Shagway, 95 F.2d 200 (9th Cir. 1938); Davis v. United States, 15 F.2d 697 (W.D. Ark. 1926); Reeves v. United States, 35 F.2d 323, 325 (8th Cir. 1929) (dictum).

[7]275 U.S. 347 (1928).

[8]*Id.* at 357.

[9]Kelley v. United States, 209 F.2d 638 (10th Cir. 1954).

[10]Pernatto v. United States, 107 F.2d 372 (3d Cir. 1939); Nix v. James, 7 F.2d 590 (9th Cir. 1925); Kriebel v. United States, 10 F.2d 762 (7th Cir. 1926); United States v. Weiss, 28 F. Supp. 598 (E.D. Pa. 1939).

[11]Weber v. Squier, 124 F.2d 618 (9th Cir. 1941), *cert. denied,* 315 U.S. 810 (1942); White v. Steigleder, 37 F.2d 858 (10th Cir. 1930); Buhler v. Pescor, 63 F. Supp. 632 (W.D. Mo. 1945); United States v. Pendergast, 28 F. Supp. 601 (W.D. Mo. 1939). *Contra,* United States v. Greenhaus, 85 F.2d 116 (2d Cir.), *cert. denied,* 299 U.S. 596 (1936).

[12]Kirk v. United States, 185 F.2d 185, 187 (9th Cir. 1950).

deserving defendant of any imprisonment whatsoever.[13] In the 1948 revision of the probation act, however, Congress expressly authorized the limitation of probation to one or more counts of an indictment containing several counts. Obviously Congress did not regard relief from all imprisonment as the sole purpose of probation.

The second objection is that such action infringes the pardoning power of the executive branch.[14] If, however, the view is adopted that a prisoner serving the first of several consecutive sentences is not serving the other sentences, he has not passed to executive control[15] with respect to the other sentences and therefore remains subject to control by the judiciary. The probation act itself makes no attempt to merge consecutive sentences into one.

The device of imposing individual sentences on the various counts of an indictment has a practical advantage. A general sentence not exceeding the aggregate of the maximum individual sentences is valid; but, if the separate sentence device is employed and on appeal the sentence on one or more of the counts is held to be unjustified, the matter may be disposed of by reversing the sentence as to the bad count or counts and affirming the others.[16]

Under the Parole Act[17] a prisoner does not become eligible for parole until he has served one third of his sentence or, as regards a life sentence, fifteen years. By reserving the power to grant probation before the expiration of the statutory period governing parole, the judiciary creates an additional incentive for the prisoner to rehabilitate himself. By committing the prisoner to a term of imprisonment while reserving the right to grant probation, a court can avoid the danger of granting probation initially in a doubtful case and of thereby permitting the probationer to commit another crime while on probation. At the same time it can reduce the hazard of requiring

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[13]275 U.S. 347, 357 (1928): "The great desideratum [of the Probation Act] was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. . . . Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence."

[14]U. S. CONST. art. II, §2; Nix v. James, 7 F.2d 590, 593 (9th Cir. 1925) (dictum).

[15]Specifically, under provisions of 18 U.S.C. §4082 (1952), the prisoner is delivered into the custody of the Attorney General or his authorized representative.

[16]Neely v. United States, 2 F.2d 849, 853 (4th Cir. 1924) (dictum).

[17]18 U.S.C. §§4201-4207 (1952).