Florida Law Review

Volume 9 | Issue 1 Article 7

March 1956

Criminal Law: Correction of Illegal Sentences

James E. Moore

CASE COMMENTS

CRIMINAL LAW: CORRECTION OF ILLEGAL SENTENCES

Bascelio v. Mayo, 81 So.2d 649 (Fla. 1955)

Petitioner was convicted of unlawful possession of marijuana and sentenced to eleven years imprisonment in the state penitentiary. The statute[1] prescribed a five-year maximum term of imprisonment for a first offense of possession of narcotics. HELD, inasmuch as the record failed to show that the conviction was other than a first offense, the sentence was void. Remanded for imposition of proper sentence.

A sentence may be illegal for various reasons. It may impose a punishment different from that fixed by statute,[2] or prescribe that punishment be executed at an unauthorized place,[3] or it may, as in the instant case, prescribe a punishment in excess of the statutory maximum.[4] There is some conflict, however, as to the effect of an excessive sentence.[5] The early English common law viewed a sentence that deviated from the letter of the law as wholly void and unenforceable on the ground that its imposition ousted the court of jurisdiction.[6] Any correction or modification of a sentence could take effect only as a pardon.[7] Thus the courts were unable to correct a sentence to make it valid and unable to give any effect to it because it was invalid. The winner in this judicial stalemate was the guilty person, who walked away a free man.

Early American courts split on the English rule. Some followed it on the basis that in the absence of statute the common law was con-

---

[1]FLA. STAT. §398.22 (1953).

[2]*E.g., Ex parte* Browne, 93 Fla. 332, 111 So. 518 (1927); Littlejohn v. Stells, 123 Ga. 427, 51 S.E. 390 (1905).

[3]*E.g., In re* Bonner, 151 U.S. 242 (1894); *Ex parte* Moon Fook, 72 Cal. 10, 12 Pac. 803 (1887); Moulton v. Commonwealth, 215 Mass. 525, 102 N.E. 689 (1913); *In re* Allen, 139 Mich. 712, 103 N.W. 209 (1905); Davis v. Davis, 42 S.D. 294, 174 N.W. 741 (1919).

[4]*E.g.,* Collingsworth v. Mayo, 77 So.2d 843 (Fla. 1955); *Ex parte* Cox, 3 Idaho 530, 32 Pac. 197 (1893); *Ex parte* McClure, 6 Okla. Crim. 241, 118 Pac. 591 (1911).

[5]See Carmody v. Reed, 132 Minn. 295, 156 N.W. 127 (1916).

[6]King v. Ellis, 5 B. & C. 395, 108 Eng. Rep. 147 (K.B. 1826); King v. Bourne, 7 Adol. & El. 58, 112 Eng. Rep. 393 (K.B. 1837); Whitehead v. Queen, 7 Q.B. 582, 115 Eng. Rep. 608 (1845).

[7]See McCormick v. State, 71 Neb. 505, 510, 99 N.W. 237, 239 (1904).

trolling.[8] A number of courts, however, rejected the rule without the aid of legislative expression.[9] One court held that there was inherent power in appellate courts to correct illegal and improper sentences.[10] Another found sufficient reason and common sense embodied in the common law to reject a "monstrous" doctrine that permitted the guilty to escape punishment altogether.[11] Despite the incompatibility of the early decisions, it is now well settled, at least in so far as excessive sentences are concerned, that the legal portion of the sentence is valid and that appellate courts may take corrective action without permitting the guilty person to escape punishment.[12]

Courts are not in harmony as to the particular manner of correcting excessive sentences. If, at the time the corrective power is invoked, the accused has already served such portion of the sentence as the trial court could have legally imposed, he is given an absolute discharge.[13] But when less than the legal maximum time has been served, there is a division of authority as to the course that should be followed. Some courts hold the sentence invalid and remand the cause to the trial court for imposition of a legal sentence.[14] Others, by holding invalid the part that is excessive and illegal, correct the sentence pursuant to statute without referring it back to the court that imposed it.[15] The latter method is generally followed when the valid and invalid parts of the sentence are considered separable.[16] A number of

---

[8]*E.g., Ex parte* Cox, 3 Idaho 530, 32 Pac. 197 (1893); McDonald v. State, 45 Md. 90 (1876); Shepherd v. Commonwealth, 43 Mass. (2 Met.) 419 (1841); Elliott v. People, 13 Mich. 365 (1865).

[9]*E.g.,* Dodge v. People, 4 Neb. 220 (1876); Williams v. State, 18 Ohio St. 46 (1868); Benedict v. State, 12 Wis. 348 (1860).

[10]McCormick v. State, 71 Neb. 505, 511, 99 N.W. 237, 240 (1904) (dictum).

[11]Beale v. Commonwealth, 25 Pa. 11, 22 (1855) (dictum).

[12]*E.g.,* Smith v. State, 74 Fla. 44, 76 So. 334 (1917); Adams v. State, 9 Ala. App. 89, 64 So. 371 (1913); *In re* Dunlap, 70 Cal. App. 770, 234 Pac. 338 (1925); *In re* Chase, 18 Idaho 561, 110 Pac. 1036 (1910); *In re* Kershner, 9 N.J. 471, 88 A.2d 849 (1952).

[13]*Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874); *Ex parte* Haley, 1 Ala. App. 528, 56 So. 245 (1911); *Ex parte* Bulger, 60 Cal. 438 (1882); *In re* Bolden, 159 Mich. 629, 124 N.W. 548 (1910); *In re* Lackey, 6 S.D. 526, 62 N.W. 134 (1895); *Ex parte* Lewis, 10 Utah 47, 41 Pac. 1077 (1893).

[14]*E.g.,* Smith v. Waters, 201 F.2d 666 (10th Cir. 1953); Jones v. Mayo, 61 So.2d 480 (Fla. 1952); Henry v. Alvis, 162 Ohio St. 62, 120 N.E.2d 588 (1954); *Ex parte* Smith, 95 Okla. Crim. 370, 246 P.2d 389 (1952).

[15]*E.g.,* Burch v. State, 55 Ala. 136 (1876); *Ex parte* Bethurum, 66 Mo. 545 (1877); Halderman's Petition, 276 Pa. 1, 119 Atl. 735 (1923).

[16]*E.g., Ex parte* Mitchell, 70 Cal. 1, 11 Pac. 488 (1886); Reese v. Olsen, 44 Utah 318, 139 Pac. 941 (1914); *Ex parte* Mooney, 26 W. Va. 36 (1885).