

April 2013

Criminal Law--Defendant Not Allowed Credit for Time Served Under Void Conviction if Subsequently Convicted of Same Offense (Morgan v. Cox, 75 N.M. 472 (1965))

St. John's Law Review

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Recommended Citation

St. John's Law Review (1966) "Criminal Law--Defendant Not Allowed Credit for Time Served Under Void Conviction if Subsequently Convicted of Same Offense (Morgan v. Cox, 75 N.M. 472 (1965))," *St. John's Law Review*. Vol. 41 : No. 1 , Article 7.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol41/iss1/7>

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in California, rather than a specially convened court, would be better able, in the first instance, to investigate complaints against judges. If the charges stated in the complaint appear to have a reasonable basis, then upon the request of the commission, a court on the judiciary could be convened to try the merits of the case and reach a determination. In addition, provision could be made for removal of the cause to the legislature for the purpose of the initiation of impeachment proceedings.

It is submitted that the promulgation of such a constitutional amendment dealing with judicial removal is the preferred solution to the many problems brought to light by the instant case.



CRIMINAL LAW — DEFENDANT NOT ALLOWED CREDIT FOR TIME SERVED UNDER VOID CONVICTION IF SUBSEQUENTLY CONVICTED OF SAME OFFENSE. — Because the trial court lacked jurisdiction, petitioner's felony conviction was held void, and he was released on a writ of habeas corpus after serving one and a half years of his original sentence. Thereafter, he was retried for the same crime, and was validly convicted and sentenced once more to serve from one to three years. On appeal, the question before the reviewing court was whether the time served under his former sentence should be applied to his present term. By stipulation, it was agreed that if previous time served was ruled applicable to his present sentence, the petitioner was entitled to immediate release. The Supreme Court of New Mexico *held* that credit may not be given for a term served under a void conviction, as distinguished from a prior invalid sentence, if the petitioner is subsequently validly convicted of the same offense. *Morgan v. Cox*, 75 N.M. 472, 406 P.2d 347 (1965).

An analysis of the background against which the decision in the instant case was reached reveals little uniformity among the several states in their respective approaches to the problem of the felon who has served a portion of a prison term under a prior void conviction or invalid sentence and is subsequently validly convicted or sentenced for the same crime. However, a study of the varying decisions and statutory solutions adopted by different jurisdictions serves to awaken increased interest and sympathy for the plight of prisoners who have served time in excess of the maximum penalty established by the legislature for their crimes simply because they have "successfully" challenged their original convictions and obtained new trials.

With respect to jurisdictions applying the common-law approach to this problem, the differing positions may be divided into three

basic categories.¹ In the first category are those states which refuse credit for time served under either former void convictions or void sentences. In one Illinois decision,² for example, the first sentence was imposed under a statute which was declared unconstitutional, thereby rendering the sentence void. Nonetheless, the appellate court later sustained a second valid sentence, allowing the plaintiff in error no credit for the time already served, holding that the court lacked power to do so. Illinois courts have repeatedly refused to abandon this strict position,³ deciding in another case that, "we do not make laws, but are authorized only to interpret them."⁴ Thus, in Illinois, the crediting of time already served under a former void conviction or sentence is considered an undue infringement on the executive branch's power to pardon or parole.⁵

The second category represents a more liberal view toward the re-sentencing problem, inasmuch as it allows credit for time served under an invalid sentence, although continuing to deny credit for time served under a prior void conviction.⁶ There are two separate lines of reasoning supporting this approach.⁷ Some states hold that seeking a new trial constitutes a waiver of the consequences of the petitioner's previous conviction.⁸ For example, in *State ex rel. Lopez v. Killigrew*,⁹ an Indiana court concluded that the defendant, by requesting and obtaining a coram nobis proceeding, accepted any legal consequences which resulted from treating the first trial as if it had never taken place.¹⁰ Moreover, it was held that the second trial would not subject the defendant to double

¹ For a general summary of the various positions see *Lewis v. Commonwealth*, 329 Mass. 445, 449-50, 103 N.E.2d 922, 924-25 (1952); *Annot.*, 35 A.L.R.2d 1283, 1284-85 (1953). For a summary of positions taken by the various jurisdictions concerning the consequences of a void conviction see *Van Alstyne, In Gideon's Wake: Harsher Penalties And The "Successful" Criminal Appellant*, 74 YALE L.J. 606, 610 (1965).

² *People ex rel. Boyle v. Ragen*, 400 Ill. 571, 81 N.E.2d 444 (1948).

³ *People v. Williams*, 404 Ill. 624, 89 N.E.2d 822 (1950); *People v. Wilson*, 391 Ill. 463, 63 N.E.2d 488 (1945).

⁴ *Supra* note 2, at 573, 81 N.E.2d at 445.

⁵ *People v. Wilson*, *supra* note 3, at 468, 63 N.E.2d at 491; see *People v. Starks*, 395 Ill. 567, 71 N.E.2d 23 (1947), *cert. denied*, 344 U.S. 821 (1948).

⁶ In *Jackson v. Commonwealth*, 187 Ky. 760, 764, 220 S.W. 1045, 1046 (1920), the court stated that "it would be an injustice, as well as flagrant invasion of their legal rights, to require them to serve their terms, or any part thereof, twice."

⁷ *Whalen, Jr., Resentence Without Credit For Time Served: Unequal Protection Of The Laws*, 35 MINN. L. REV. 239, 240 (1951).

⁸ *E.g.*, *Commonwealth v. Murphy*, 174 Mass. 369, 371, 54 N.E. 860, 861 (1899). The United States Supreme Court upheld the "waiver" theory in *Trono v. United States*, 199 U.S. 521, 533 (1905).

⁹ 202 Ind. 392, 174 N.E. 808 (1931).

¹⁰ But note, Indiana statute permits the trial court to correct retroactively the imposed sentence when it appears that the defendant has previously served under an erroneous sentence. IND. ANN. STAT. Rule 2-40B (Supp. 1965).

jeopardy because the purpose of the constitutional prohibition was to restrict the power of the state for the protection of the accused, and, therefore, the defendant himself might constitutionally waive that protection.¹¹ The other line of reasoning is based on the separation of powers doctrine. Thus, it is argued that the legislature alone has the power to fix the term of punishment,¹² and that commutation of the sentence is solely within the pardoning powers of the executive.¹³ Several midwestern states, such as Wisconsin,¹⁴ have adopted this position with respect to void convictions.

At least one jurisdiction, Florida, illustrates a third category which allows credit regardless of whether the time has been served under either an invalid sentence or a void conviction.¹⁵ This position rests entirely on the grounds of fairness and equity. It is exemplified by the holding in *Helton v. Mayo*,¹⁶ that credit should be allowed or "otherwise the petitioner would be done a grave injustice."¹⁷

In the absence of statute, the modern view is to give credit to the prisoner who has served time under a void sentence, although a majority of common-law jurisdictions still refuse this concession to a defendant who has served under a prior void conviction.¹⁸

Societal concern with the treatment of those whose prior sentence or conviction is void is illustrated by a recent growth in the number of statutes in the area. By 1950, three states had enacted statutes which required that time served under a void conviction be credited to the prisoner on his new conviction for the same offense.¹⁹ At present, a total of nine states, including New York, have adopted similar statutes.²⁰ However, it should

¹¹ It should be noted that these prohibitions are found in state constitutions. In Indiana, the prohibition against double jeopardy is found in IND. CONST. art. 1, § 14. But even in the absence of a specific provision in the state constitution, the common-law rule against double jeopardy is frequently adopted as a part of procedural due process. *E.g.*, *Kohlfluss v. State*, 149 Conn. 692, 695, 183 A.2d 626, 627 (1962). The fifth amendment prohibition in the federal constitution is not, at present, a feature of procedural due process under the fourteenth amendment. *Van Alstyne, supra* note 1, at 609 n.11.

¹² See *State v. Woodward*, 68 W.Va. 66, 69 S.E. 385 (1910).

¹³ See *Ogle v. State*, 43 Tex. Crim. 219, 63 S.W. 1009 (1901).

¹⁴ *State ex rel. Drankovich v. Murphy*, 248 Wis. 433, 22 N.W.2d 540 (1946) (dictum).

¹⁵ See *Vellucci v. Cochran*, 138 So. 2d 510 (Fla. 1962).

¹⁶ 153 Fla. 616, 15 So. 2d 416 (1943).

¹⁷ *Ibid.*

¹⁸ *Supra* note 1.

¹⁹ ARK. STAT. ANN. § 43-2728 (1947); CAL. PEN. CODE § 2900.1; IOWA CODE ANN. § 793.26 (1950).

²⁰ The six additional states include: KY. REV. STAT. ANN. § 197.041 (1962); MICH. STAT. ANN. § 28.1083 (supp. 1963); MINN. STAT. ANN. § 609.145 (1963); N.Y. PEN. LAW § 2193(4); N.D. CENT. CODE § 29-28-34 (1960); WASH. REV. CODE § 9.95.063 (1965).

also be noted that Montana has passed a statute interpreted as prohibiting the crediting of such time to the subsequent sentence.²¹ Thus, legislators have not exerted a consistently liberalizing force in this field.

The growth in the number of statutes dealing with this problem has been partially inspired by pressure from the judiciary; such was the case in New York. Prior to the statute in that state, a New York court, in *People v. Ashworth*,²² criticized the common-law rule which denied credit for years served under a void conviction. The court urged, as had previous courts, that the legislature consider appropriate amendments to the existing statutes, which would vest the courts with the necessary authority to credit for time served. The common-law rule was superceded by the legislature in 1960. As a consequence, the crediting of time served under a void conviction is now a mandatory requirement in New York State.²³ This enactment places a prisoner, who has served under a void conviction, on a par with one who has served under an invalid sentence.

It has been suggested that the underlying reason for refusing to credit a prisoner with time served is to discourage frivolous appeals lest they needlessly overwhelm the appellate courts.²⁴ Proponents argue that the existence of such a harsh rule discourages those petitions for retrial which offer little prospect of a subsequent acquittal.²⁵

Perhaps another causal factor is a possible anticipatory defensive reaction to a threatened raising of the double jeopardy issue if the court were to accord the first conviction any validity whatever.²⁶

The precise issue of allowing credit for time served under a void conviction has repeatedly been called to the attention of the United States Supreme Court by writ of certiorari, but, as yet, there has been no decision by that tribunal directly bearing on the problem. The unconstitutionality of failure to credit a prisoner with time served under a former void conviction for the same offense has been asserted under several differing grounds. One approach takes the position that this practice violates the equal

²¹ MONT. REV. CODE § 94-7602 (1947). *State v. Ellsworth*, 375 P.2d 316 (Mont. 1962).

²² 56 N.Y.S.2d 5 (Sup. Ct. 1945); see also *People ex rel. Montana v. McGee*, 171 Misc. 533, 16 N.Y.S.2d 162 (Sup. Ct. 1939).

²³ N.Y. PEN. LAW § 2193(4).

²⁴ Agata, *Time Served Under a Reversed Sentence or Conviction — A Proposal and a Basis for Decision*, 24 MONT. L. REV. 3, 21 (1963); Whalen, Jr., *supra* note 7, at 248.

²⁵ See Note, 97 U. PA. L. REV. 855, 862-64 (1949).

²⁶ Whalen, Jr., *supra* note 7, at 243-44. If the court were to accord the first conviction any validity whatever, a second trial would be prohibited. Cf. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874); see generally Note, *Double Jeopardy: The Re prosecution Problem*, 77 HARV. L. REV. 1272 (1964).

protection clause of the fourteenth amendment.²⁷ Arguments on the basis of double jeopardy have also been propounded, but they have not succeeded in the federal courts.²⁸ Disappointment at the lack of success of the latter arguments has prompted one author to express his belief that unless individual states remedy the situation, at least to the extent of limiting any sentence on reconviction to the maximum received for the same offense at the former trial, the United States Supreme Court will correct the situation through an application of the fifth and fourteenth amendments.²⁹ It has also been contended that refusal to credit time served under a prior void conviction constitutes a cruel and unusual punishment.³⁰ Although, in general, the eighth amendment restricts the *form* of punishment rather than its *duration*,³¹ if the punishment is not in proportion to the offense in either form or duration, its constitutionality is highly questionable.³² It is, of course, the excessive duration which forms the basis for a constitutional objection under this theory.

Two out-of-state decisions primarily relied upon by the Court in deciding the instant case were *State ex rel. Drankovich v. Murphy*³³ and *Ex parte Wilkerson*.³⁴ In *Drankovich*, the reviewing Wisconsin court held that any previous time served should not be taken into consideration by the trial court because that tribunal lacked any discretion in the matter. The court in *Drankovich* proposed, as an alternative remedy, that the prisoner in this predicament might apply to the governor for a pardon. That court did not feel its decision was inequitable because the prisoner had been fully advised as to the consequences of a new trial before he appealed.³⁵ In *Wilkerson*, the Oklahoma court noted the lack of any statutory authority to grant credit for time served under a former void conviction, and, in addition, it sharply criticized an earlier decision³⁶ which had granted credit for time served by a defendant imprisoned during the pendency of his appeal. The Oklahoma court suggested, as in the *Drankovich* case,³⁷ that the prisoner's sole remedy was to

²⁷ Whalen, Jr., *supra* note 7, at 251; *contra*, *Beach v. Commonwealth*, 282 S.W.2d 821 (Ky. 1955).

²⁸ Whalen, Jr., *supra* note 7, at 243-44. See also *Stroud v. United States*, 251 U.S. 15 (1919).

²⁹ Van Alstyne, *supra* note 1, at 624.

³⁰ See generally Whalen, Jr., *Punishment For Crime: The Supreme Court And The Constitution*, 35 MICH. L. REV. 109, 111-22 (1951).

³¹ Note, *Cruel and Unusual Punishments*, 34 CATHOLIC U.L. REV. 117, 118 (1953).

³² *Id.* at 121; see generally Beckett, *Criminal Penalties in Oregon*, 40 ORE. L. REV. 1, 13-40 (1960).

³³ *Supra* note 14.

³⁴ 76 Okla. Crim. 204, 135 P.2d 507 (1943).

³⁵ *Supra* note 14, at 440, 22 N.W.2d at 543.

³⁶ *Ex parte Williams*, 63 Okla. Crim. 395, 75 P.2d 904 (1938).

³⁷ *Supra* note 14.

appeal for executive clemency, citing the state constitution for authority conferring this power.³⁸ *Wilkinson* further held that the time already served under a void conviction was not execution of a legal sentence; hence, the subsequent imposition of a valid sentence did not constitute punishment twice imposed for the identical offense.

The Court in the instant case recognized that the situation presented was comparable to that of a prisoner seeking credit for time served while his appeal is pending.³⁹ In 1963, this same New Mexico Court had held that it was proper for the trial court, in its discretion, to permit the effective period of incarceration to run from the date of the sentencing itself so as to give a prisoner the benefit of time served while his appeal was pending.⁴⁰ This conclusion was reached despite the fact that, in effect, it shortened the time to be served. Thus, if a prisoner has been validly convicted and sentenced and he appeals this conviction unsuccessfully, the time served while the appeal is pending could be credited to his present term. Moreover, in another decision, the Court held that if the prisoner's sentence was found to be invalid, then he would be credited with the time already served when he was subsequently validly re-sentenced.⁴¹ However, that decision involved a prisoner who had been validly convicted, the defect being in his sentence alone. The basic difference between that decision and the case at bar is the fact that in the instant case the trial court lacked jurisdiction to validly convict the petitioner.

Finding the original conviction invalid, the instant Court proceeded on the theory that the first trial was a nullity, and that even its consequence, viz., the period of the prisoner's imprisonment, had been completely blotted from the legal record. Pursuing this reasoning to its logical conclusion, the Court determined that credit for the petitioner's time served under his void conviction could not be applied to his present term.

Just prior to this decision, in *Floyd v. Cox*,⁴² this Court, following the authority of *Sneed v. Cox*,⁴³ had permitted time served under a prior void conviction to be credited to a prisoner, analogizing it to time served under a previous invalid sentence. At that time, it had appeared that the developing New Mexico case law was following the liberal example set by the state of Florida.

However, the Court in the instant case concluded that *Floyd* had been improperly decided. In so deciding, the Court took a

³⁸ OKLA. CONST. art. 6, § 10 (1907).

³⁹ *Morgan v. Cox*, 75 N.M. 472, —, 406 P.2d 347, 348 (1965).

⁴⁰ *State v. White*, 71 N.M. 342, 378 P.2d 379 (1963) (dictum).

⁴¹ *Sneed v. Cox*, 74 N.M. 659, 397 P.2d 308 (1964). See also *McCutcheon v. Cox*, 71 N.M. 274, 377 P.2d 683 (1962).

⁴² Cited in *Morgan v. Cox*, *supra* note 39, at —, 406 P.2d at 348.

⁴³ *Sneed v. Cox*, *supra* note 41.

step backward, establishing that in the future New Mexico would follow its earlier, more conservative precedent⁴⁴ in this difficult and controversial area. It is to be noted that in reinstating older rules and repudiating a liberal precedent such as *Floyd*, the decision, while admittedly settling the law in New Mexico on this point, also arouses some doubts as to the justification for such a seemingly harsh result. This observation seems especially appropriate in the light of the current liberal statutory trend with respect to this problem among the several states.⁴⁵

As previously noted, the discouragement of appeals is seen by some authorities as a necessity to promote the efficient functioning of appellate courts. Unfortunately, this reasoning, however meritorious its objective, would seem unlikely to foster fairness in the administration of the criminal law. Certainly, it would appear that a prisoner should not suffer additional penalties for insisting upon his rights to a new trial, if a substantial defect existed which rendered his first trial a nullity.

That the consequences of obtaining a new trial can often be harsh is evident from current judicial practices, whereby prisoners who succeed in obtaining new trials can receive substantially more severe sentences at their second trial, such sentences being frequently upheld on appeal.⁴⁶

An analysis of the reasoning which typically supports the refusal to credit a prisoner with time served under a prior void conviction suggests patent injustice. Criticizing the practice of simply ignoring such time served, because all subsequent occurrences under a prior void conviction are considered legally non-existent, one judge remarked, "The government's brief suggests in the vein of the Mikado that because the first sentence was void appellant 'has served no sentence but has merely spent time in the penitentiary', and that since he should not have been imprisoned as he was, he was not imprisoned at all."⁴⁷

Moreover, the theory that a petitioner asserting the invalidity of a former trial thereby "waives" all rights resulting thereunder is equally inapposite. To be operative, a "waiver" of this nature must be untainted by coercion. Clearly, any other interpretation of "waiver" merits no place in an enlightened jurisprudence.

While the arguments which underlie the rule of this case seem ill-founded, attempts to moderate the inherent harshness of this

⁴⁴ *Jordan v. Swope*, 36 N.M. 84, 8 P.2d 788 (1932).

⁴⁵ See statutes cited, notes 19 & 20 *supra*.

⁴⁶ *State v. Williams*, 261 N.C. 172, 134 S.E.2d 163 (1964). In another case, a defendant had been sentenced to life imprisonment at the first trial; he received the death penalty at the second. *State v. Kneeskern*, 203 Iowa 929, 953, 210 N.W. 465, 473 (1926).

⁴⁷ *King v. United States*, 98 F.2d 291, 293-94 (D.C. Cir. 1938).

type of result are, unfortunately, often ineffectual. The pardoning power, often suggested as an ameliorating force in this area, is usually vested solely in the governor of the state. Beset with many responsibilities in addition to the exercise of this power, a governor might find it difficult to strike a proper and judicious balance in its use. Another consideration is the inefficiency which must necessarily result from the exercise of the pardoning power on an *ad hoc* basis.

It is therefore submitted that the most effective remedy for this problem would take the form of statutory enactment. Legislation would not only provide a precise and definite solution, but an imperative one as well. Continued legislative acquiescence in the present situation might well be taken as approval of the currently accepted doctrine as enunciated in the case at bar. This need for legislation has been recognized and adopted by an increasing number of jurisdictions and probably indicates a developing trend in this area of law.

In any event, the fact that some form of change is needed becomes apparent from thoughtful reflection upon the nature of punishment itself. While the purpose of punishment in primitive societies may have been retribution directed at the criminal himself, such a philosophy is inappropriate in a civilized society. Rather, it should be the aim of society to rehabilitate the criminal, and to deter other would-be wrongdoers from committing similar prohibited acts. A rule which denies a prisoner credit for time already served under his original conviction, upon a second conviction for the same crime, has no valid purpose in and of itself. The application of this harsh doctrine results only in resentment of society by men who are required, under the rule of the instant case, to throw years, futilely spent in prisons, into the bottomless pit of legal anachronism.



EVIDENCE — CRIMINAL PRETRIAL HEARING — EVIDENCE ADMITTED AT PRETRIAL HEARING IN DEFENDANT'S ABSENCE IS INVALID BASIS FOR CONVICTION. — On an indictment for a felony, a pretrial hearing was held in the absence of the defendant, at which a motion was made to suppress evidence alleged to have been illegally seized. No explanation was given for the defendant's absence, but his counsel was present at the hearing and actively advocated the defendant's position. The motion was denied, and at the subsequent trial, the defendant and his codefendant were convicted. In reversing both convictions, the New York Court of Appeals *held* that a conviction based upon evidence ruled admissible