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Criminal Procedure--Sentencing--Unreasonable Delay in Imposing Sentence Caused Trial Court to Lose Jurisdiction Subsequently to Impose Sentence (People ex rel. Harty v. Fay, 10 N.Y.2d 374 (1961))

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is in another state *by a holder who is subject to the jurisdiction of that state,* the specific property is not presumed abandoned in this state . . . if:

(a) It may be claimed as abandoned or escheated under the laws of such other state; and

(b) The laws of such other state make reciprocal [provisions similar to the provisions made under this statute].[36]

If, under the circumstances of the present case, both New York and Pennsylvania had adopted the Uniform Act (and considering for the moment that no other state had a claim) the problems with which the Court was confronted might well have been avoided. Pursuant to sections 9 and 13 of the act,[37] New York, if that were the state in which the money was held, would have the right to escheat. But by operation of section 10, New York would be obliged to give up its interest to all monies owing to residents of Pennsylvania, which monies could then be escheated by Pennsylvania. Since all *interested* parties would be before the court, Western Union would thereby be secured against a "double escheat."

The solution offered by the Uniform Act can only be effective, however, when all states interested in the intangible have enacted the law. While there has been criticism of the Uniform Act, for example, the possible overreaching by states to persons or property beyond its proper control,[38] in general it is quite satisfactory. The growing number of states passing escheat laws makes a solution to the problem imperative.[39] It would seem that the enactment of the Uniform Act by these states might, to a large extent, offer that solution.

CRIMINAL PROCEDURE—SENTENCING—UNREASONABLE DELAY IN IMPOSING SENTENCE CAUSED TRIAL COURT TO LOSE JURISDIC-

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[36] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 144-45 (1954) (emphasis added).

[37] Section 9 provides: "All intangible personal property, not otherwise covered by this act . . . that is held or owing in this state in the ordinary course of the holder's business . . . is presumed abandoned." *Id.* at 144.

Section 13 provides for the delivery of all property, presumed abandoned in §§ 2 to 9 of the act, to the state. *Id.* at 148.

[38] Ely, *Escheats: Perils and Precautions,* 15 BUS. LAW. 791, 805-08 (1960).

[39] See McBridge, *Unclaimed Dividends, Escheat Statutes and the Corporation Lawyer,* 14 BUS. LAW. 1062 (1959); Note, *A Uniform Disposition of Unclaimed Property Act for Colorado,* 29 ROCKY MT. L. REV. 102 (1956).

TION SUBSEQUENTLY TO IMPOSE SENTENCE.—On February 10, 1953 relator pleaded guilty in the Bronx County Court to the crime of robbery in the second degree; sentencing was set for April 9th of that year. However, before relator could be sentenced, he was transferred to Westchester County where he pleaded guilty to another robbery charge and was sentenced therefor to an indefinite term, not to exceed five years, in the Elmira Reception Center.[1] In 1955 relator was released and placed on parole. A year and one-half later, he violated his parole and was returned to custody. In April 1958, at the expiration of the maximum term for which he had been originally sentenced, relator was again released. Some months later, when he was arrested and pleaded guilty to other charges, he was sentenced on the 1953 indictment and placed on probation for five years. However, because of violation of this probation, relator was brought before the court in November 1959, six and one-half years after his plea of guilty, and sentenced on that plea to one and one-half to three-years imprisonment. The Court of Appeals, reversing an order of the Appellate Division which denied relator habeas corpus relief, *held* that the unreasonably long and unexplained delay in imposing sentence caused the trial court to lose jurisdiction subsequently to impose sentence. *People* ex rel. *Harty v. Fay,* 10 N.Y.2d 374, 179 N.E.2d 483, 223 N.Y.S.2d 468 (1961).

In New York the statutory scheme for the rendition of judgment [2] is prescribed by various sections of the Code of Criminal Procedure.[3] The code provides that judgment must be pronounced

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[1] Upon relator's subsequent transferral to the New York State Vocational Institute, the superintendent thereof wrote to the clerk of the Bronx County Court concerning the disposition of certain warrants which had been lodged as detainers against the relator, one of which was based on the 1953 indictment. Apparently no reply was received. In 1955, immediately prior to relator's release, the authorities of the institute again requested information, this time from the Bronx County District Attorney, as to the disposition of the relator's indictment. The district attorney requested that the warrant be returned to his office.

[2] Some authorities have drawn a distinction between "judgment" and "sentence." The Report of the Commission on the Administration of Justice in New York State (1936) defines "judgment" as "the adjudication by the court that the defendant has been convicted or acquitted," whereas "sentence" is defined as "the pronouncement by the court of the penalty imposed on the defendant after judgment of conviction." However the code and the cases arising thereunder use the terms interchangeably. See PAPERNO & GOLDSTEIN, CRIMINAL PROCEDURE IN NEW YORK STATE § 389 (1960).

[3] N.Y. CODE CRIM. PROC. § 471 provides: "Time for pronouncing judgment, to be appointed by the court. After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, if the judgment be not arrested, or a new trial granted, the court must appoint a time for pronouncing judgment."

N.Y. CODE CRIM. PROC. § 472 states: "Time for pronouncing judgment,

within "as remote a time as can reasonably be allowed," [4] but it fails to indicate what constitutes a reasonable time, and does not specify whether an unreasonable delay in sentencing would cause the court to lose jurisdiction to impose sentence. Therefore, both of these problems have been left to be resolved by the courts.

Prior to the present case the Court of Appeals was never squarely faced with these questions.[5] However, analogous situations involving deferral of sentencing have arisen.

In *Richetti v. New York State Bd. of Parole,*[6] petitioner was sentenced in 1932 to a twenty-year term as a second felony offender. In 1945, upon the conditions set forth in Section 242 of the New York Correction Law, his sentence was commuted by the governor. After sixteen months on parole, petitioner was charged with being an accessory to a felony, for which he was indicted and found guilty in 1947. Sentencing was deferred indefinitely however, and in June 1947, petitioner was returned to prison as a parole violator. The issue before the court was whether an adjudication of guilt coupled with an indefinite deferment of sentence constituted a conviction within the meaning of Section 242 of the New York Correction Law.[7] The court answered the question in the negative, stating that section 242 required an actual imposition of sentence. The court also pointed out that the question of whether a court has the *power* to defer sentence indefinitely was not presented to it.

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to be appointed by the court. The time appointed must be at least two days after the verdict, if the court intend to remain in session so long, or if not, as remote a time as can reasonably be allowed; but any delay may be waived by the defendant."

N.Y. CODE CRIM. PROC. § 482 provides: "If no sufficient cause shown, judgment to be pronounced. . . . 1. If no sufficient cause appear to the court why judgment should not be pronounced, it must thereupon be rendered."

[4] N.Y. CODE CRIM. PROC. § 472.

[5] In People v. Gorney, 203 Misc. 512, 103 N.Y.S.2d 75 (Sup. Ct. 1951), the defendant moved by way of a writ of error coram nobis for an order vacating his life sentence as a fourth offender. He contended that on his 1916 plea of guilty the court, by deferring sentence without fixing a day certain therefor and without adjourning the term for that purpose, lost jurisdiction subsequently to impose sentence upon him, thus rendering a 1917 judgment void. The court, while holding that the question was not properly before it on the defendant's coram nobis application, stated that Section 472 of the Code of Criminal Procedure expressly provides that any delay in sentencing may be waived by the defendant.

[6] 300 N.Y. 357, 90 N.E.2d 893 (1950).

[7] The determination of this question was relevant since under the applicable provisions of Section 242 of the New York Correction Law, the defendant, if convicted of a felony, would have been required to serve the full sentence on the 1932 conviction which was unexpired at the time of his release in addition to the sentence imposed for the felony.

Three years later in *Hogan v. Bohan*,[8] the Court of Appeals was faced with the question left unanswered in *Richetti*. In this case a felon, while on parole from a grand larceny conviction, pleaded guilty to the crime of forgery in the second degree. Section 219 of the New York Correction Law requires that a parolee who commits a felony serve the maximum sentence which was unexpired at the time he was released on parole—in this case almost seven years. In an attempt to prevent section 219 from applying, the sentence was deferred on the assumption that the defendant would not then be treated as a parole violator convicted of a felony. The district attorney brought an article 78 proceeding in the nature of mandamus to compel the judge to pronounce sentence. The court, citing provisions of Sections 471, 472 and 482 of the New York Code of Criminal Procedure, stated:

> [T]he plan is unmistakable; the court is afforded time to reach decision without running the risk of losing jurisdiction of the defendant by expiration of its term—as was the case at common law [citing cases]. *But pronounce judgment, impose sentence, it must.* And that mandate appears even more clear, when it is realized . . . that the process of appeal is completely frustrated by the court's act of deferring sentence.[9]

Although making the imposition of sentence mandatory, the court did not indicate what consequences would flow from a failure to comply with its mandate or how long a court may validly defer sentencing.

In a subsequent case, *People v. Ryan*,[10] the Kings County Court determined that a one-year delay in imposing sentence did not contravene the *Hogan* decision. The *Ryan* case concerned a coram nobis application to vacate a 1939 conviction. In 1938 the defendant had been indicted for various felonies. At the same time he was also being detained as a parole violator on a prior sentence. The court advised the defendant that if he pleaded guilty to attempted grand larceny in the second degree, he would be sent back for the parole violation with the recommendation that only a one-year sentence be imposed. The court further stated that when the defendant returned after serving the one-year sentence for the parole violation, a deferred sentence would be imposed for the attempted larceny. The following year, 1939, when the defendant returned to the court, he was sentenced to Elmira Reformatory but execution of the sentence was suspended. In 1953, relying on the *Hogan* decision for the proposition that a sentence can not be indefinitely deferred, the defendant attempted

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[8] 305 N.Y. 110, 111 N.E.2d 233 (1953).
[9] *Id.* at 112, 111 N.E.2d at 234 (emphasis added).
[10] 132 N.Y.S.2d 283 (Kings County Ct. 1954).

to vacate and set aside the 1939 judgment of conviction. His application was denied on the ground that "section 472, Code Cr. Proc. provides that the time appointed for pronouncing judgment can be fixed, 'as remote a time as can reasonably be allowed; but any delay may be waived by the defendant.' [The court] fixed a definite time for sentence, to wit: the date of defendant's return from Riker's Island. It was to the defendant's benefit to waive the delay and he did." [11]

The Court of Appeals in *Hogan* ruled that the imposition of sentence can not be indefinitely deferred. The county court apparently felt that a deferral of sentencing until a defendant's release from prison was a sufficiently definite designation of time so as to comply with both the code and the Court of Appeals' mandate. However, again there was no indication that an unreasonably long delay in imposing sentence would result in loss of jurisdiction.

Courts of other jurisdictions, both federal and state, when faced with the question posed by a delay in the imposition of sentence, have come to varying conclusions as to its consequences.

In *Mintie v. Biddle,*[12] an Eighth Circuit case, appellant was indicted and pleaded guilty to the commission of criminal fraud. Since the government desired to use him as a witness against his codefendant, who was at large, it was announced in his presence that no sentence would be imposed until his accomplice could be brought to trial. No further action was taken by the court for thirty-four months, at which time appellant was sentenced to a prison term of one year and one day. The circuit court felt that postponing judgment until the codefendant could be brought to trial was an indefinite deferral, and as such caused the trial court to lose jurisdiction to lawfully impose sentence.

A contrary rule was announced by the United States Supreme Court in *Miller v. Aderhold.*[13] Petitioner had been convicted of mail theft, but sentence was suspended and he was discharged from custody; at a subsequent term he was sentenced to four-years imprisonment by another judge. Petitioner contended that with the expiration of the district court's term, it had lost power to sentence him. The Court rejected this contention, stating that although the suspension order was void, the district court was not deprived of the power to impose sentence at a subsequent term. While noting that the area was in confusion and that the greater number of cases supported the conclusion reached in the *Mintie* case, the Court nevertheless held that the failure of the

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[11] *Id.* at 285.
[12] 15 F.2d 931 (8th Cir. 1926).
[13] 288 U.S. 206 (1933).

petitioner to move for timely sentencing constituted a consent to the delay.

An Oklahoma case closely analagous to the case under discussion is *Collins v. State*.[14] In that case a state court found the appellant guilty of violating the state liquor law and set a date for imposing sentence. However, prior to the sentencing date, the appellant was imprisoned by a federal court on another charge. The state court therefore stayed further proceedings, including sentencing, until appellant's release from federal custody. Over four and one-half years later, contesting a motion for judgment on the state court's verdict, the appellant argued that that court had lost jurisdiction to impose sentence. The Oklahoma Criminal Court of Appeals, citing various sections of the Oklahoma Code (which are substantially similar to Sections 471, 472 and 482 of the New York Code of Criminal Procedure), held for the appellant, since "under the foregoing provisions it is the duty of the court, on a conviction or plea of guilty, to impose sentence within a reasonable time." [15]

In reaching its decision in the present case, the Court noted that New York's strong public policy against unreasonable delays in criminal causes has traditionally been strictly enforced. While this policy has been predominantly applied to delays in indictment,[16] the fact that sentencing is an integral part of a criminal proceeding seems to require its application with equal force to the imposition of sentence. The Court considered the vital interests of a convicted defendant in a prompt pronouncement of sentence. A lack of judgment prevents a convicted defendant from prosecuting an appeal, renders him ineligible for pardon or commutation of sentence, and, in postponing the service of his sentence, delays his return to society—cogent arguments for speedy sentencing.

Ordinarily, a court may delay the pronouncement of judgment for the purpose of hearing and determining motions for a new trial or in the arrest of judgment.[17] Such a delay is generally based on considerations in favor of the defendant. In the present case, however, the delay was not due to any request of the relator, but was solely a result of the state's failure to take any positive action. It might be argued that the relator could have cured this situation by demanding to be sentenced, and, in the absence of such a request, should be held to have consented to the delay.[18]

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[14] 24 Okla. Crim. 117, 217 Pac. 896 (1923).

[15] *Id.* at 121, 217 Pac. at 897.

[16] See, *e.g.*, People v. Wilson, 8 N.Y.2d 391, 171 N.E.2d 310, 208 N.Y.S.2d 963 (1960); People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955).

[17] See People *ex rel.* Boenert v. Barrett, 202 Ill. 287, 67 N.E. 23 (1903).

[18] Miller v. Aderhold, 288 U.S. 206, 210 (1933).

Such was the position of the United States Supreme Court in the *Miller* case. However, the Court of Appeals rejected this view notwithstanding the provision of Section 472 of the Code of Criminal Procedure that any delay in pronouncing judgment may be waived by the defendant. The Court stated that "retention or loss of jurisdiction should not depend on activity or nonactivity of [the] defendant." [19]

Much has been said in support of this view. In the *Mintie* case the Court of Appeals for the Eighth Circuit stated that "if [the problem involved] is jurisdictional, and if jurisdiction shall be lost when *sentence is omitted or postponed indefinitely* . . . then no question of consent can be of aid in the case. . . ." [20] In *People* ex rel. *Boenert v. Barrett*,[21] wherein there occurred an interval of over two years between the relator's release on his own recognizance and the final disposition of his motion for a new trial, it was observed:

> [I]t cannot . . . be contended that the doctrine of estoppel has any application here; nor can it be held that the relator could waive any requirement respecting the jurisdiction of the court to enter judgment and pronounce the sentence. If the court had no *power* thus indirectly to suspend sentence . . . such power could not be conferred by his consent nor by his express request.[22]

Since the *Hogan* case established the principle in New York that courts lack the *power* to indefinitely defer the imposition of sentence, it appears that the statement from *Barrett* would apply with equal effect to the present situation.

As noted above, the delay in sentencing did not result from any request of, or consideration for, the defendant. Hence the question of whether a loss of jurisdiction would result where a delay was initiated by the defendant was not decided. Cases from other jurisdictions seem to indicate that a delay caused by a defendant does not cause a court to lose power to impose sentence.[23] In *McLaughlin v. State*,[24] where a sixteen-month delay was caused by the defendant's motion to set aside and vacate a judgment, the court stated that while an unjustifiable delay in rendering judgment would result in a loss of jurisdiction, "if . . .

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[19] People *ex rel.* Harty v. Fay, 10 N.Y.2d 374, 377, 179 N.E.2d 483, 484, 223 N.Y.S.2d 468, 470 (1961).

[20] Mintie v. Biddle, 15 F.2d 931, 932 (8th Cir. 1926).

[21] 202 Ill. 287, 67 N.E. 23 (1903).

[22] *Id.* at 299, 67 N.E. at 28 (emphasis added).

[23] See, *e.g.*, Stephens v. State, 227 Ind. 417, 86 N.E.2d 84 (1949); Varish v. State, 200 Ind. 358, 163 N.E. 513 (1928); State v. Heaston, 109 Mont. 303, 97 P.2d 330 (1939); Zwillman v. State, 9 N.J. Misc. 66, 152 Atl. 775 (1931) (per curiam).

[24] 207 Ind. 484, 192 N.E. 753 (1934).

the party complaining has invited the delay, he has nothing upon which to base any right to avoid the judgment." [25] In New York it would appear that a delay caused by the defendant would not come within the purview of the rule set forth in the present case by the Court of Appeals, and therefore would not result in a loss of jurisdiction.

In finding loss of jurisdiction the Court used a hindsight approach. There is no indication as to the point in time at which the trial court lost jurisdiction. The Court merely stated that under the circumstances a delay of six years was unreasonable. Apparently, that which constitutes an "extremely long delay" remains to be decided in future cases on an *ad hoc* basis.

Whether a provision in Section 472 of the Code of Criminal Procedure for a mandatory time within which judgment must be pronounced, rather than the present indefinite wording "as remote a time as can reasonably be allowed," would be of any value is questionable. Other states having such statutory provisions [26] seem to indicate that failure to pronounce judgment within the time ordered does not cause a loss of jurisdiction.[27] For example, the Utah Code provides that the time appointed for pronouncing judgment must not be more than ten days after the verdict.[28] However, it has been held that "the time fixed by the statute is not jurisdictional, and since it is regarded as merely directory the further provision that the judgment should be rendered within a *reasonable* time has been judicially read into the statute." [29]

The *Harty* decision aligns New York with numerous other jurisdictions [30] which hold that an extremely long delay in imposing sentence is not only illegal but also results in a loss of jurisdiction. In spite of uncertainties which are inherent in this case, the Court of Appeals has afforded a measure of protection to those individuals who, through the state's inaction, have never been sentenced. In so doing it has imposed upon the courts the duty to pronounce judgment within a reasonable time or run the risk of losing jurisdiction, and as a consequence, putting a convicted defendant beyond the court's power to subsequently impose sentence.

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[25] *Id.* at 487, 192 N.E. at 754.

[26] See, *e.g.*, CAL. PEN. CODE § 1191 (Supp. 1961); UTAH CODE ANN. § 77-35-1 (1953).

[27] See, *e.g.*, People v. Mitman, 122 Cal. App. 2d 490, 265 P.2d 105, *cert. denied*, 347 U.S. 991 (1954); People v. Williams, 24 Cal. App. 2d 848, 151 P.2d 244 (1944); State v. Anderson, 12 N.J. 461, 97 A.2d 404 (1953); State v. Fedder, 1 Utah 2d 117, 262 P.2d 753 (1953).

[28] UTAH CODE ANN. § 77-35-1 (1953).

[29] State v. Fedder, *supra* note 27, at 120, 262 P.2d at 754-55.

[30] See, *e.g.*, Grundel v. People, 33 Colo. 191, 79 Pac. 1022 (1905) (per curiam); People v. Penn, 302 Ill. 488, 135 N.E. 92 (1922); Commonwealth v. Maloney, 145 Mass. 205, 13 N.E. 489 (1887).