

13/69

Supreme Court of the United States

October Term, 1968

In the Matter of:

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STATE OF NORTH CAROLINA,
R. L. TURNER, WARDEN,

Petitioners;

vs.

CLIFTON A. PEARCE,

Respondent.

-----X

Docket No. 413

Office of the Supreme Court, U.S.
FILED

MAR 1 1969

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C O N T E N T S

ORAL ARGUMENT OF:

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on behalf of Petitioners 3

Larry B. Sitton, Esq.

on behalf of Respondent 22

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R. L. TURNER, Warden, :
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Petitioners; :
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vs. : No. 413
:
CLIFTON A. PEARCE, :
:
Respondent. :
:
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Washington, D. C.
February 24, 1969

The above-entitled matter came on for argument at
12:45 p.m.

BEFORE :

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 413, North Carolina,
3 et al., petitioners, versus Clifton A. Pearce.

4 Mr. Vanore.

5 ARGUMENT OF ANDREW A. VANORE, JR., ESQ.

6 ON BEHALF OF PETITIONERS

7 MR. VANORE: Mr. Chief Justice, may it please the
8 Court.

9 I am Andrew A. Vanore, Jr. I am a member of the
10 staff of the Attorney General in North Carolina and I
11 represent the petitioners, the State of North Carolina and
12 Warden R. L. Turner in this particular case.

13 The single issue involved in this particular case
14 is upon retrial for the same offense which has been set aside
15 on appeal for first conviction proceeding due to a Constitutional
16 defect in the first trial. The second trial court imposed
17 a harsher punishment upon the defendant.

18 The facts, briefly stated, are: Clifton A. Pearce,
19 the respondent in this particular case was initially tried
20 at the May 1961 term of the Superior Court of Durham County,
21 North Carolina on the capital charge of rape.

22 Upon arraignment the prosecuting attorney, or the
23 solicitor, announced that he would not seek a verdict in excess
24 of assault with intent to commit rape. The jury found the
25 defendant guilty of assault with intent to commit rape and the

1 judge imposed a sentence of 12 to 15 years upon the defendant.

2 The defendant started serving this sentence on May 25,
3 1961.

4 In 1965 the defendant filed a petition under the
5 First Conviction Relief Act questioning the admissibility of
6 the confession introduced against him in the first trial.

7 Relief was denied by the Superior Court of Durham
8 County on May 10, 1965 and Certiorari was accepted by the
9 Supreme Court of North Carolina which reversed the case and
10 awarded the defendant a new trial.

11 The defendant was released from custody upon the
12 first sentence imposed upon him on February 2, 1966. At that
13 particular time he had served four years, eight months and
14 six days flat time and six years, seven months and 14 days flat
15 and gained time, the gained time being computed upon 150
16 days granted to the defendant for each year of service on the
17 sentence.

18 The defendant was tried the second time at the
19 June 6, 1966 term of the Superior Court of Durham County, upon
20 an indictment charging assault with intent to commit rape.

21 The jury found him guilty of assault with intent to
22 commit rape and the presiding judge who specifically stated
23 in his judgment that he was taking into consideration the
24 fact that the defendant had served six years, seven months and
25 16 days flat and gained time, was going to impose a sentence

1 of eight years upon the defendant.

2 The judge stated in his judgment that it was his
3 intention to impose the maximum sentence allowed by statute
4 for the offense, which is 15 years. However, because of the
5 gained time, and so forth, he reduced it to eight years.

6 Q That factor in this case that bothers me. The
7 sentence the first time around on the first conviction was
8 12 to 15 years.

9 A Yes, sir.

10 Q And the second time around it was eight years.

11 A Yes, Your Honor.

12 Q Now, do I understand that it is the rule in
13 North Carolina that you do give prisoners on their second
14 conviction credit for time served?

15 A That is correct.

16 Q That is a rule of law?

17 A That is a rule ---

18 Q Does that include gained time?

19 A That includes gained time, yes, sir. All
20 credits ---

21 Q So when this fellow was given eight years
22 sentence at the second trial if he had served the whole eight
23 years without any reference to additional gained time, he would
24 have had to serve another one year and five months.

25 A That is correct. The trial judge, in taking

1 into consideration the gained and flat time that the defendant
2 had served, reduced it or deducted it from the maximum sentence
3 allowed under statute, 15 years.

4 He did not reduce it from the minimum sentence that
5 was imposed on the defendant at the first trial.

6 Q You mean the sentence here was not eight years,
7 but 15 years?

8 A The sentence was eight years. However, the
9 judge said, "It is my intention to give you a sentence of 15
10 years. However, since you have served this particular flat
11 and gained time upon the first sentence which was less than
12 seven years; since you have served that time I am going to
13 deduct that time from the maximum of 15 years and impose an
14 eight-year sentence upon you."

15 Q So he got eight years.

16 A He did in fact ---

17 Q Now, if he had been given credit for the time
18 served under the first sentence, including the plus gain time,
19 he would have had only, as I said before, he would have had
20 only another, what was it, year and five months to serve?

21 A That is correct. Assuming that the second
22 trial judge would be prohibited from increasing his sentence
23 upon the second trial.

24 Q Well, he would be, wouldn't he? No, no, I don't
25 mean that. I don't mean that. I don't mean that he would be.

1 No, I don't mean that he would be. I mean to say that he had
2 already passed sentence and the sentence was eight years; is
3 that right?

4 A That is correct.

5 Q Not 15 years, but eight years.

6 A That is correct.

7 Q Now, does the North Carolina law rule that
8 you just recited with respect to giving him credit for time
9 served, plus gained time, apply to that eight-year sentence?

10 A It applies to the eight-year sentence, yes.
11 But perhaps I am not making myself clear.

12 Q Well, I have struggled with this on the basis
13 of the briefs and I am still bewildered because if just looking
14 at this thing literally this fellow is due to be sprung about
15 now.

16 A Well, I don't think there is any question about
17 it but because of the eight-year sentence, he is going to have
18 to serve some additional time other than he would have been
19 required to serve under the first time.

20 The reasoning of the trial judge is that he could
21 have in fact imposed a 15-year sentence and if you give him
22 all credit for time served under the 15-year sentence which
23 he is required to do by the decision of our Supreme Court, then
24 he still, in fact, has left to serve seven years.

25 Q I know, but my problem here is, is this in truth

1 and in fact a case -- does this case really present a situation
2 in which the second sentence was greater than the first sentence.

3 A It does if you compute the time that he would
4 have to serve in an indeterminate sentence, 12 to 15 years; if
5 you compute it from the lesser of these two sentences imposed,
6 from the 12-year sentence.

7 Q Twelve year sentence -- now when would he be
8 entitled to get out, including maximum gain time which this
9 fellow steadily has earned?

10 A He would have been entitled to get out after
11 having served eight years, five months and 22 days of actual
12 time on the first sentence.

13 Q All right. Now that is bound to be less than
14 the time he has got to serve under his second sentence.

15 A That is correct. If we were to assume that he
16 would be given credit under both of these sentences, the
17 defendant would have to serve an additional sentence of one
18 year, 10 months and 10 days because of the new trial.

19 Q Not because of. This is much too elaborate. I
20 computed this yesterday on the basis of the brief and I have
21 a very serious question in my mind as to whether we are, in
22 truth and in fact, faced here with a situation in which the
23 man would serve longer under the second conviction than under
24 the second conviction.

25 A Of course, the District thought so ---

1 Q Apparently the District Court had an idea that
2 what had happened here was a 15-year sentence. But it wasn't,
3 it was an eight-year sentence under the second conviction.

4 A The District Court was of the opinion based on
5 the Fourth Circuit Court's opinion that the flat and gained
6 time served under the original sentence would have to be deducted
7 from the minimum of an indeterminate sentence. Since it was
8 not deducted from the 12 years, but rather from the 15 years,
9 that would be informative that the District Court found in
10 this particular sentence.

11 Q Mr. Vanore, has this man been out on bail at
12 all?

13 A Yes, he is out on bail now, Your Honor.

14 Q When did he get out on bail?

15 A Approximately six months ago.

16 Q Then except for that six months he has been
17 out on bail, but for this new trial he would be out for good.

18 A No, I believe that he would still have to
19 serve approximately a year and a half of the second sentence.

20 Q He would have to serve a year from today?

21 A Well, not computing the time that he has been
22 out on bail, yes.

23 Q So he would just about be out now; is that right?

24 A That is correct.

25 Q And solely because he made the mistake of going

1 to the Court and solely because the mistake the Court gave in
2 giving him a new trial, he has got to serve more time? Isn't
3 that it?

4 A Well, no, I don't quite agree with you, Mr.
5 Justice. I think that here we have two points that we must
6 consider.

7 Q Speaking for the man, I imagine he has very great
8 difficulty in seeing anything other than he has got to serve
9 more time solely because he was given a new trial.

10 A Well, I am sure he feels that way, yes.

11 Q Doesn't he have a little reason to feel that way?

12 A I do not think so based on the principle of law
13 that I think the case brings up before this Court whether or
14 not the Patton rule which prohibits an increased sentence or
15 which prohibits the State from giving the man a sentence over
16 and above the sentence that was given at the first trial. I
17 think that questions the very basis of our system of jurispru-
18 dence in that it assumes that the trial judge, the second
19 trial judge, is going to punish this man for exercising a
20 Constitutional right of appeal.

21 Q Mr. Vanore, let me ask you this question. Let
22 me take two situations. Now, suppose the judge in this case,
23 in the second trial had said, "I give you the same sentence
24 that you were given in the first trial, subject, of course, to
25 the law of this State that you are entitled to credit for the

1 time you served plus the good credits that you received." Now
2 that is one situation.

3 The other situation is what we apparently have here,
4 where the judge says, "I am going to figure out for myself what
5 credit you are entitled to under your first sentence and on the
6 time that you served, and I am therefore going to give you a
7 sentence of eight years at this time."

8 Now, under which of those two situations will the
9 man have to serve the most time.

10 A He would have to serve the same amount of time
11 under both situations.

12 Q Oh, I can't ---

13 A Maybe I misunderstood your question, then.

14 Oh, he would have to serve more time under the second
15 situation. I beg your pardon.

16 Q Isn't the question that we are interested in
17 here, can a judge give a man more time on his re-sentence
18 than he got on the first one, where his case had been reversed.

19 A So long as it comes under the statutory maximum
20 allowed for by the statute, yes. I think that is the question,
21 whether or not a judge can give more time on the second trial.

22 Q Well, that is what I wanted to get oriented on.

23 A Yes.

24 Q How does, characteristically, the North Carolina
25 Court effectuate the statute which requires credit?

1 A The second-sentencing judge takes into
2 consideration ---

3 Q He just doesn't say, I am going to give you
4 15 years without regard to the credit, then leave it up to the
5 prison authorities to ---

6 A It is done both ways.

7 Q Is it done both ways?

8 A Yes; he can say that ---

9 Q I am going to give you 15 years and the prison
10 authorities will credit you with the time already served.

11 A Yes, or he can compute it himself.

12 Q And here he did it the other way?

13 A Yes.

14 Q Is it clear that he did it the other way?

15 A It is to me.

16 Q So that the prison authorities would not give
17 him credit for any more time on his eight year sentence?

18 A No, they gave him credit ---

19 Q Do you think the judge has already given him
20 all the credit he deserves?

21 A Yes. He specifically stated ---

22 Q So he will be in no position to claim any more
23 credit from the prison authorities on account of the sentence
24 that he had already served?

25 A That is correct, because at the time that the

1 second-sentencing judge imposed sentence he had before him ---

2 Q At least that seems to be the basis on which
3 this case comes here?

4 A Yes. He had before him the prison records which
5 showed exactly how much gained and flat time this defendant
6 had served on the first sentence.

7 Q Because if he was still entitled to credit on
8 the eight-year sentence for all the time that he had served
9 before, there wouldn't be much time left, would there?

10 A That is correct.

11 If we compute it from the maximum that would be
12 allowable under the statute, he still has approximately six
13 years to serve even by way of the Patton Court's reasoning.
14 He has additional time to serve, and I believe that Judge Butler
15 points that out in his order, ordering the State to re-sentence
16 him or to release him and of course the State when he came on
17 for hearing before the State judge the judge refused to order
18 this man re-sentenced.

19 Judge Butler, thereupon, entered an order requiring
20 his immediate release and that is why we appeal to the Fourth
21 Circuit Court of Appeals which in a Memorandum Decision based
22 upon Patton versus North Carolina affirmed the District Court's
23 holding.

24 Q Mr. Vanore, this second trial was held before
25 the same judge as had presided at the first trial, or not?

1 A I don't believe so, no.

2 Q You can't make any difference?

3 A Well, I think that the argument might be

4 greater if it were held before the same trial judge as was
5 done in the Sanders case from California that the second trial
6 judge might have more reason, perhaps, if we want to assume
7 that the trial judge is going to be vindictive, that the second
8 judge might have more reason for imposing a harsher sentence.

9 Q In both cases, both the first trial and the
10 second trial in this case is what I mean, the sentence was
11 imposed by the judge, not by the jury?

12 A It is imposed by the judge in North Carolina by
13 statute.

14 Q And the jury's function is only to find guilt
15 or innocence?

16 A That is correct.

17 Q And the jury in your State has no function with
18 respect to fixing the severity of a sentence; is that right?

19 A Except in capital cases the jury can return a
20 verdict of guilty without leniency and thereupon the defendant
21 is sentenced to death. However, they can impose leniency and
22 the statute provides automatically for life imprisonment.

23 Q In this kind of a case it is a matter for the
24 judge.

25 A In this kind of a case the judge has the complete

1 discretion to impose any sentence which he deems necessary
2 under the facts.

3 The only prohibition that is put upon the second-
4 sentencing judge is that the time served under the first sentence
5 which was ---

6 Q Has to be credited.

7 A --- has to be credited and the time served under
8 the first sentence and the time imposed under the second
9 sentence ---

10 Q Cannot exceed the maximum.

11 A --- cannot exceed the maximum allowed by statute.

12 Q Now, you have already alluded to your position
13 which perhaps you will amplify a little further because it is
14 emphasized in your brief that it is improper to assume that
15 a judge -- whether it be the same judge or another judge --
16 in the same court after a second trial would be vindictive and
17 would be motivated to penalize the person for having appealed
18 his first conviction.

19 I understand that position. What would you say if
20 there were proof that the second-sentencing judge had been,
21 in fact, vindictive? What if he had been frank enough to say,
22 "Well, you appealed your first conviction and I don't think that
23 was proper. You have put the State through a great deal of
24 expense and trouble and now a jury has found you guilty all
25 over again and since you did appeal your first conviction I am,

1 hereby, going to sentence you to twice as long a sentence within
2 the statutory maximum."

3 A That would be a flagrant violation of the man's
4 Constitutional right to appeal.

5 Q Of what Constitutional right?

6 A The Constitutional right to appeal without any
7 fear of reprisal and our Supreme Court so held in a case
8 called State versus Patton where the sentencing judge first
9 imposed a fine on the individual and then the individual gave
10 notice of appeal and the sentencing judge thereupon struck
11 his first sentence of a fine and he imposed active time.

12 Our Supreme Court said that this was a flagrant
13 violation of the man's Constitutional right to appeal without
14 fear of any reprisal.

15 Q Well, now, how often do you think that you could
16 adduce evidence that the motivation of the second-sentencing
17 judge was a vindictive motivation of that type?

18 A I think it would be extremely difficult to
19 adduce that type of evidence. I think that we have to presume,
20 though, since as I see it our whole system is based upon the
21 good faith of judges. We have to assume that the sentencing
22 judge is not going to be vindictive, and if he was vindictive
23 he could easily circumvent the rule that was applied in Patton
24 by imposing the maximum sentence the first time around.

25 Then there would never be any question about it.

1 Q Did your Court hold that that sentence would
2 be void, unconstitutional under the State constitution or
3 under the Federal Constitution?

4 A Under the State and Federal Constitution.

5 Q That is the Patton case?

6 A Yes.

7 Q Yes.

8 A That is not Eddie Patton that was decided
9 by ---

10 Q It is a different Patton case.

11 A It is a different Patton case.

12 Q As far as we are concerned it would be void
13 under the State constitution and we wouldn't reach the Federal
14 question.

15 A Of course, our Supreme Court has already upheld
16 in a similar situation as is now before the Court, as a matter
17 of fact, in the Pearce case itself, that the second-sentencing
18 judge properly within the discretion imposed the eight-year
19 sentence.

20 They found no violation of the man's Constitutional
21 right.

22 Q Is there any indication at all in this record
23 as to why the second-sentencing judge imposed a greater sentence?

24 A I think the only indication is that the second-
25 sentencing judge intended to impose the maximum, the 15-years.

1 Q We know what he did, what he intended to do,
2 and what effect it had. My question was is there any indication
3 as to why?

4 A No, there is not.

5 Q Do you think that in the absence of any indication
6 that this presumption of judicial good will and good faith
7 can prevail when there is no indication at all of any reason
8 whatsoever to impose a harsher sentence after the second trial?

9 A I think it should. I think the burden should
10 be upon the defendant to show.

11 Q How could he possibly show?

12 A Well, it depends upon the disparity between the
13 two sentences that were imposed. We were talking about a very
14 short period of time. If the defendant ---

15 Q Would you concede that a greater punishment was
16 imposed after the second trial? That is not in issue here.

17 A That is correct.

18 My argument would be that rather than adopt the flat
19 prohibition set forth in Patton, if the Court will not have
20 the opinion that the burden was on the defendant to show abuse,
21 the position should be if any additional evidence is shown
22 at the second trial then the trial judge should have complete
23 discretion in imposing a harsher sentence upon the defendant
24 that was imposed at the first trial.

25 Q Mr. Vanore, is it not true that in North

1 Carolina that once a sentence is given in a final judgment the
2 judge can never increase that, can he?

3 A That is correct.

4 Q But if there is an appeal that comes back to him,
5 he can increase; is that correct?

6 A If a new trial is ordered, that is correct.

7 Q What happens to all of this judicial faith in
8 the judge? Wouldn't he be obliged to show why on the second
9 go-around he gave more?

10 A Well, I ---

11 Q That is the only way he can give more.

12 A We must assume that the trial judge had some good
13 reason in imposing a harsher sentence.

14 Q Wouldn't it be better if he gave his reasons?

15 A I think definitely he should give his reasons.

16 Q But I thought you said that the defendant should
17 be given the burden of showing it.

18 A Well, I ---

19 Q You were on this burden business.

20 A The Supreme Court of ---

21 Q You agree with me that the judge has got a
22 little burden.

23 A The Supreme Court of North Carolina in a very
24 recent decision, State versus Stafford, which is cited in the
25 State's brief, stated that the burden should be upon the

1 defendant to show abuse.

2 However, it would be more orderly if there was
3 evidence or if the judge stated his reasons into the record
4 as to why an increased sentence was given.

5 The main contention that we have here is that the
6 flat prohibition laid down in the Patton case that you can
7 never, no matter what the evidence is at the second trial, you
8 can never exceed the sentence imposed at the first trial.

9 We think that that is a flagrant violation of the
10 discretion of the trial judge to impose a proper sentence, and
11 the discretion of the State Legislature to fix a punishment
12 for a particular crime.

13 Q What I am saying is, if a man committed a crime
14 and he is sentenced to five to 15 years and after that time
15 the judge finds out through reputable sources that this is
16 about as horrible a character as ever came down the line, one,
17 if I had that information when he was before me I would have
18 given him 15 years. There is nothing he can do about it unless
19 there is a new trial.

20 A That is correct.

21 Q And if there is a new trial then he gets 15
22 years.

23 A Of course the defendant is the one that has to
24 request the new trial. The State can't go in on its own
25 initiative ---

1 Q Well then the only way this man can get his
2 15 years is for him to do something?

3 A Yes, I ---

4 Q The only way ---

5 A I believe that I have tried to make my position
6 clear in this particular case that the second-sentencing
7 judge deducted the gained and flat time from the maximum that
8 he could have imposed under the offense, 15 years, and not
9 under the minimum. That was the violation which the District
10 Court and the Circuit Court found in this particular case.

11 Q Does the record show whether the evidence was
12 precisely the same in both cases?

13 A It would seem that the record does show that, Mr.
14 Justice. As a matter of fact, in the second appeal to the Supreme
15 Court of North Carolina, the Supreme Court so stated that in
16 their facts situation, that the evidence was essentially the
17 same.

18 Q Does the record show whether it was the same
19 judge, or a different judge?

20 A I believe he was a different judge. I think
21 the record would show that.

22 Q I don't know ---

23 A As I recall, I am fairly sure that ---

24 Q But I would think that if there were two
25 different judges there would be an indication that one judge

1 just thought he ought to get more punishment than the other.

2 A Does this Court have any further questions?

3 MR. CHIEF JUSTICE WARREN: Very well.

4 Mr. Sitton.

5 ARGUMENT OF LARRY B. SITTON, ESQ.

6 ON BEHALF OF RESPONDENT

7 MR. SITTON: Mr. Chief Justice, may it please the
8 Court.

9 My name is Larry Sitton. I am from Greensboro, North
10 Carolina. I represent the respondent in this case, Clifton
11 A. Pearce.

12 At the outset I might say that I think Mr. Vanore
13 has made clear that in this particular case at the second
14 trial the judge gave Mr. Pearce credit for the time he had
15 served under his first sentence, and deducted that amount to
16 fix the eight-year sentence and that this credit would not have
17 been made on the second sentence. He still had eight years
18 to serve and in my brief that is the reason I said it out as
19 I did.

20 In North Carolina the computation of good conduct time,
21 Governor's time and gang time become very complex. But if you
22 measured the person's sentence as if he had served it straight
23 through. In other words, his minimum sentence on his first
24 conviction was 12 years and this was in 1961.

25 If he had served it straight through he would have

1 been released in 1973. The second sentence was for eight years
2 and this was in 1966. If he served it straight through he would
3 have been released in 1974. That is the basis of our argument
4 that it was harsher.

5 Q There is no issue between you and your brother
6 at the Bar as to that the second sentence was harsher. We
7 are a little bit confused here on the Bench. But as I under-
8 stand it you don't disagree about that at all. He got a more
9 severe sentence the second time.

10 A Yes, sir.

11 Q If I may, the Appendix on Page 3 sets forth
12 the District Court's statement when it sentenced the man and
13 regardless I think it should have been stated a little more
14 precisely but it appears from that what he really did was to
15 serve the man to time served plus gained time plus eight years;
16 is that right?

17 A Stated that way I don't think ---

18 Q But that is what it amounted to as you see it
19 and as your adversary sees it; is that correct?

20 A That is correct.

21 Q If you turn it around both of you seem to agree
22 that this is just as if the second judge had said, "I sentence
23 you to 15 years, but since under State law you are entitled
24 to time served your sentence will be eight." Isn't that it?

25 A (No reply)

1 Q That is right, but the difficulty is that he
2 didn't say that. But that is the way the two of you interpret
3 it.

4 (No reply)

5 Q But this conceptual problem is only conceptual;
6 isn't it?

7 A There is also the fact that it is harsher in
8 terms of parole. In North Carolina they construed the
9 decision as meaning unless the judge gives actual reference
10 to credit for parole purposes the person has to serve the
11 minimum period again. So that at the time Pearce was tried
12 again, he was eligible for parole. After the second sentence
13 he was not eligible for another two years.

14 Q Mr. Sitton, this isn't just a conceptual problem,
15 semantic problem, is it? If he had said that I am going to
16 give you the same sentence you got last time, 15 years, less
17 the time you have served plus the time you have earned, then
18 he would have been all right, wouldn't he?

19 A No, sir, Your Honor, because his first sentence
20 was 12 to 15 years. He would have had to do that on a 12-year
21 basis.

22 Q We will make it 12 to 15 years. If he had given
23 him the same sentence that he gave him last time.

24 A That is right. There would be no problem,
25 except for parole problems.

1 Q But because he did the thing the way he did,
2 this man must serve more time.

3 A But he passed his in terms of a straight 15-year
4 sentence.

5 Q I don't care how he passed it. What he did
6 do caused the man to serve more time than he would have served
7 if he had had just the 15-year term originally.

8 A That is correct.

9 Q So all we are talking about is whether a judge
10 can give a greater sentence on the second one than the first
11 one.

12 A That is correct.

13 Q And you both agree that under this sentence
14 that he did get on the second proceeding he must serve more
15 time than he would have on the first.

16 A That is right.

17 Q That is the basic question, isn't it, whether
18 he can do that?

19 A That is right.

20 In this case the decision of the District Court was
21 affirmed by the Fourth Circuit Court of Appeals on the basis
22 of Patton versus North Carolina. That case thoroughly explored
23 the Constitutional issues involved in whether you can have
24 an increased sentence.

25 It said that an increased sentence on retrial violated

1 three portions of the Constitution: The Due Process and Equal
2 Protection clauses of the 14th Amendment and the Double Jeopardy
3 clause of the 5th Amendment.

4 Now, in due process the State should not be allowed
5 or requir the defendants to waive a benefit conferred by the
6 State in order to assert his Constitutional right.

7 Now, the benefit is immunity from increased sentence --
8 has already been pointed out that after the term of Court has
9 expired and the sentence has begun to be served, it cannot be
10 increased in North Carolina.

11 Yes, the only way that this is possible is for a
12 person to assert his right to a fair trial through some method
13 of the first-conviction review. If he does this, if he asserts
14 his right to a fair trial, saying that there is a Constitutional
15 defect in his first trial, then he runs the risk of getting an
16 increased sentence.

17 If he had not sought a fair trial, he would have
18 been assured that the time he had served would be credited
19 and that he would become eligible for parole in due course.
20 But he didn't do this in this case. He said that there was a
21 Constitutional defect in his first trial and this was borne
22 out by the State Supreme Court.

23 Q The State says that could be rectified by giving
24 the maximum every time.

25 A That would be one way to get around this problem,

1 Your Honor.

2 Q That is what I understood him to say. He wasn't
3 recommending it but he said that would be a way to ---

4 A I think so, and in North Carolina because they
5 have this credit rule it would be a way to get around it but
6 this again goes into the function of the sentencing judge.

7 Q What if instead of the judge having discretion
8 as to the sentence to be imposed within statutory limits, what
9 if this were a matter for the jury to determine as is, in fact,
10 true in many States, as you know? Would the jury under your
11 submission on the second trial have to be told that while
12 ordinarily the statute gives the juries in our State power to
13 impose sentence upon conviction for this type of offense any-
14 where from probation up to 20 years in the penitentiary while
15 normally that is the power given to a jury.

16 Yet in this case this man has been tried before and
17 he was sentenced by a previous jury to 12 years and, therefore,
18 you cannot in this case, if you convict this man, sentence him
19 to more than 12 years. That would be the result, I suppose, of
20 your submission.

21 Now, wouldn't that pretty well prejudice this hypo-
22 thetical defendant before a jury to have the jury told that he
23 has been convicted before and sentenced to 12 years in peniten-
24 tiary for this same offense?

25 A I think that if it was a problem of prejudice in

1 bringing out the first conviction, I think the rule should be
2 in such a situation that the jury would be allowed to set the
3 sentence and then it would be reduced to bring it in line with
4 this rule, if that was the problem.

5 I think ---

6 Q The other answer, I suppose, would be that in
7 the instructions the judge could say that you are limited to
8 sentencing him upon conviction from probation to 12 years with-
9 out giving the explanation as to why.

10 A Whether the jury sentences him or the judge
11 sentences him the risk is still the same for the defendant
12 for asserting his Constitutional right.

13 Q Well, the risk is the same for the defendant
14 for asserting his Constitutional right but if he prevails on
15 appeal then the conventional theory is that the original trial
16 is wiped out and he goes to trial again and he has a very good
17 opportunity of being acquitted.

18 A That is true, Your Honor.

19 Q And your submission would result in a heads, I
20 win, tails, you lose proposition for the State, wouldn't it?

21 A Well, if he was reconvicted though, if he was
22 not acquitted then he would still, even under this rule, he
23 would still go back to prison or could conceivably go back to
24 prison to serve out what he would have had under the original
25 sentence. He does not walk out because of this rule.

1 Q What if on the second trial all sorts of
2 evidence comes in that shows that the crime was much more
3 flagrant than the evidence had shown in the original trial, or
4 what if the pre-sentence investigation shows in the second trial
5 shows an entirely different kind of character than the
6 defendant had been assumed to have been on the first trial,
7 much worse in the second trial?

8 A I don't think the rule should be any different,
9 Your Honor, for the simple reason that if it is possible under
10 any circumstances to increase the sentence because of additional
11 evidence or because of information in the pre-sentence report,
12 then the danger still remains that the person could be penalized
13 for asserting his Constitutional right.

14 Q He is not being penalized. He got a new trial.
15 That is not a penalty.

16 A It is a penalty, though, if he gets ---

17 Q What you say is that the State should get the
18 penalty by freezing the amount of punishment he can get on what
19 the first judge or jury decided to give him.

20 A But if you have a different rule, Your Honor,
21 then you restrict his right of appeal.

22 Q Well, he takes the risk. I have always heard
23 that is what they did when they did it. I have seen many
24 cases here where the Court would tell him, "Now, you have a
25 chance of getting so much if you reverse this."

1 A We submit, Your Honor, that it shouldn't be
2 that way.

3 Q Well, maybe it shouldn't, but are we the ones
4 that should say so?

5 A Yes, I think you should, because I think this
6 is a violation of the right to due process.

7 Q That is under the fair trial concept.

8 A I think so, Your Honor.

9 Q One has to accept that concept of the ---

10 A And the State has established a right to
11 appeal or a method of first conviction review then once they
12 have established it, it should not be restricted. It should
13 be open to everyone.

14 Q Leaves it up to us to decide whether it is fair?

15 A That is correct, Your Honor.

16 On the equal protection argument, we come back to
17 the same point again that the person's sentence can't be
18 increased after he begins serving so that the only class of
19 persons exposed to the risk of increased sentence are those
20 who exercise their right of appeal.

21 We submit that this is an arbitrary classification,
22 that there is no reason to believe that only the class of
23 persons who have won a new trial should receive any harsher
24 sentence.

25 Q Mr. Sitton, how far does your argument go --

1 perhaps I shouldn't ask you this. You are from North
2 Carolina. You are representing a North Carolina petitioner
3 and the rule is in North Carolina as a matter of State law
4 that a person sentenced after second conviction has to be given
5 credit for the time served on his first conviction, as a
6 matter of State law.

7 And that the total of that prior time plus the new
8 sentence cannot exceed the statutory maximum, as I understand.
9 But now there are States where there is no such rule or State
10 law.

11 Would your argument be that -- take this case -- a
12 man is convicted by a jury and sentenced by the judge to five
13 years in the penitentiary. He serves two years of it, then
14 he gets his conviction set aside and goes back for a new trial.
15 He is convicted again by the jury.

16 Now, how much time in the penitentiary can the judge
17 sentence him to, five years?

18 A No, sir.

19 Q Why not? That would be the same sentence he
20 got the first time.

21 A Yet he has already spent two years of his
22 life in prison.

23 Q So you say the State rule in North Carolina is
24 also a rule required by the Federal Constitution?

25 A Yes, sir, Your Honor.

1 Q North Carolina didn't say that, did it?

2 A No, sir.

3 Q It created this rule.

4 A The rule of credit.

5 Q The rule of credit.

6 A Now this rule is of recent origin and I
7 think they did not make it on the basis of the Federal
8 Constitution.

9 Q This is what we are going to require in North
10 Carolina?

11 A This is fair.

12 Q This is fair in North Carolina. This is what
13 we are going to require. My question is if the State doesn't
14 have that rule; a man is sentenced to five years in the
15 penitentiary on the first conviction; he gets a reversal after
16 serving two years time; he tries again; is convicted by a jury;
17 the judge sentences him to five years in the penitentiary.

18 You say that is not permissible either; is that right?

19 A That is right, Your Honor. I think even if the
20 State did not have the rule as North Carolina does it would
21 still be unconstitutional.

22 Q What would you say about giving credit for the
23 time he is out on bail? Do you have to give credit for that?

24 A I don't think I would go that far. It is not
25 in this case, of course.

1 Q No, I know it isn't.

2 A I don't think the restraint placed on a person
3 while he is on bail is the restraint placed on him while he
4 is in custody. I don't think the rule would go that far.

5 Q Suppose he is not out on bail. He is in jail.
6 He waits two years to get a term. Does the Constitution
7 require him to get credit for that?

8 A I think by natural extension, it could, Your
9 Honor.

10 Q In answer to Justice Black, you said this was
11 one of the requirements of a fair trial. I thought this was
12 a double jeopardy case; isn't it?

13 A We do raise this issue too, Your Honor, that
14 it violates double jeopardy because it is, in effect, a multiple
15 punishment.

16 Q Have we ever held that the double jeopardy clause
17 of the 5th Amendment is applicable to the States by reason of
18 the 14th?

19 A No, sir, you have not. I state in my brief
20 that the way I understand it, you have this issue before you
21 in the case of Benton versus Maryland. It has been argued
22 once and it is set for re-argument.

23 In Patton, faced with this rule, the Fourth Circuit
24 stated that it was applicable to the States.

25 Q My question to you, Mr. Sitton, is going to be

1 that even assuming, even assuming, let us assume that the
2 double jeopardy clause of the Bill of Rights is fully applicable
3 to the States. Is there any Federal case that says that the
4 sentencing of a person on a second trial after he has won a
5 new trial to a greater sentence violates the double jeopardy
6 clause?

7 A No, sir.

8 Q There are some cases that say it isn't?

9 A That is right, Your Honor.

10 Q In this Court.

11 A I think that those cases that you make reference
12 to Stroud and to Murphy versus Massachusetts -- that was a
13 factual reality that there was an increased sentence in both
14 cases, but I don't think the Court faced that issue.

15 I think in both of those cases that the argument
16 was made that the second trial itself was barred.

17 Q We have held that the man in the first trial
18 gets life and after the second trial, after an appeal, gets
19 death, as double jeopardy.

20 A I think that was the fact in Stroud.

21 Q That was the Green case, wasn't it?

22 A I think in Green he was convicted acquitted of
23 first degree murder, convicted of second degree murder and at
24 a subsequent trial was convicted of first degree murder and
25 this Court said that the conviction of second degree murder at

1 the first trial was an implied acquittal of first degree murder.

2 Q Those are the semantics the judges sometimes
3 use, but ---

4 A I think it was observed that there can be
5 no distinction between the Stroud case and the Green case.

6 Q In Stroud you say only the old law that touched
7 the Court, that the second trial after a successful appeal is
8 not in and of itself a violation of double jeopardy?

9 A That is right, Your Honor. I think that was
10 the sole issue that we brought forward. The Constitutional
11 arguments that were made in this case were not made in Stroud.
12 They were made in Green to some extent and in Green it was
13 held that the person acquitted.

14 Q Well, if your argument had been made in Stroud
15 do you suppose that Stroud would have been any more successful
16 than he was?

17 A Maybe not at that time.

18 Q At that time there was no suggestion that
19 double jeopardy applied to the States?

20 A That is correct.

21 Q Wasn't that Kansas?

22 A Stroud?

23 Q I think so.

24 A Does the Court have any further questions?

25 Thank you.

1 MR. CHIEF JUSTICE WARREN: Gentlemen, just before we
2 adjourn, I would like to say to you, Mr. Sitton, that inasmuch
3 as you have accepted assignment of this case for a defendant,
4 the Court appreciates your willingness to undertake the service
5 which we consider to be a real public service in the interest
6 of justice. So, we thank you for what you have done.

7 And, Mr. Vanore, I want to say that we, likewise
8 appreciate your frank and candid manner in representing the
9 people of your State.

10 (Whereupon, at 1:35 p.m. the argument in the above-
11 entitled matter was concluded.)
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