Opinion No. 60-31

February 24, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Senator Fabian Chavez, Jr. Chairman, State Judicial Study Committee P. O. Box 1651 Santa Fe, New Mexico

QUESTION

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1. In the case of a defendant in a felony case who is convicted or pleads guilty, may a district judge enter an order stating that the judgment and sentence of the court is "deferred indefinitely?"

2. What is the effect of a sentence which has been deferred indefinitely in the above situation?

CONCLUSIONS

1. No.

2. See analysis.

OPINION

*{*381}* **ANALYSIS**

The right to defer sentence upon a person convicted of a crime in the State of New Mexico is found in Section 40-1-11, N.M.S.A., 1953 Compilation (P.S.), and reads in part as follows:

"Upon entry of a judgment of conviction of any offense not punishable by death or life imprisonment, any of the several district courts of the state having jurisdiction to try offenses against the state when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, **may suspend in whole or in part the imposition or execution of** sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best, . . .

The period of probation, together with any extension thereof, shall not exceed five (5) years.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation." (Emphasis supplied.)

This section of the New Mexico statutes was obviously taken from the Federal Probation Act of March 4, 1925, which, together with later changes is now found in Title 18, U.S.C.A., Sections 3651 and 3653. Our state adopted only the first part of the probation act and eliminated those provisions which provide the times and methods of rescinding the probation orders entered under the first part of the act. Since under most of the federal cases interpreting the probation act the entire act is read together, these cases are of little help in construing our own statute.

Under the present statute our district courts are given power to suspend the imposition of sentence (deferred sentence) as well as to suspend the execution of sentence (suspended sentence.) It is not necessary to attempt to distinguish the two, in fact, they must now be treated as being subject to the same construction as if no difference existed.

This statute was passed in 1957 and we find no New Mexico cases construing or interpreting it.

The question of indefinite suspension is discussed in the case of **Horton v. United States,** 151 F. (2d) 406, and the case held:

"The court is without authority to indefinitely suspend a valid sentence of imprisonment *{*382}* indefinitely upon condition that a fine be paid. It may, however, suspend the execution of any valid sentence of imprisonment and place the defendant on probation for a definite period of time. . . ."

An excellent discussion of this power is to be found in Ex Parte United States, 242 U.S. 27, 61 L. Ed. 129, 37 S. Ct. 72. The Supreme Court, quoting with approval from other cases, presented a rationale which seems to best describe the constitutional limitation on the exercise of this power. Quoting in pertinent part:

". . . in **People v. Morrisette,** 20 How. Pr. 118, . . . The Court said: 'I am of the opinion the court does not possess the power to suspend sentence indefinitely in any case. * * * An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner be discharged from imprisonment. No court in the state has any pardoning power. That power is vested exclusively in the governor.'"

"In **People v. Brown,** 54 Mich. 15, 19 N.W. 571, in deciding that no power to permanently suspend a sentence existed, speaking through Mr. Justice Cooley the court said:

"'Now it is no doubt competent for a criminal court, after conviction to stay for a time its sentence; and many good reasons may be suggested for doing so; * * * to enable the

judge to better satisfy his own mind what the punishment ought to be; but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; it was not a delay for any purpose of better advising the judicial mind what ought to be done; but it was an entire and absolute remission of all penalty and the excusing of all guilt. **In other words, what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty, indirectly, but to complete effect, grant to the respondent a pardon for his crime.'"**

(Emphasis supplied.)

It is to be noted that the above case was decided prior to the passage of the Federal Probation Act in 1925. The power to "indefinitely suspend" was denied the federal courts. It seems even more clear therefore, that under our act limiting the period of probation to five years, the power to indefinitely suspend or defer is denied by statute.

What is the effect of a sentence which has been deferred indefinitely? First, it should be pointed out that the trial court retains jurisdiction over the case and the person in such circumstances even though the order purporting to indefinitely defer sentence would be void. As was said in **Miller v. Aderhold,** 288 U.S. 206, 53 S. Ct. 325:

"If the suspension be for a fixed time, the case undoubtedly remains on the docket of the court until disposed of by final judgment. There is no good reason, in our opinion, why a different rule should obtain where the order of suspension, though expressly made permanent, is void. Such an order is a mere nullity without force or effect, as though no order at all had been made; **and the case necessarily remains pending until lawfully disposed of by sentence." (Emphasis** supplied.)

The New Mexico case of **In Re Lujan,** 18 N.M. 310, 137 P. 587, involved a situation where the trial court suspended sentence after conviction but before the suspended sentence law became effective *{*383}* in 1909. The court held that the power to suspend sentence was not vested in the court at the time the attempt to suspend sentence was exercised. Nevertheless the Supreme Court held that the attempt, while a nullity, would not operate to discharge a prisoner under Habeas Corpus and that the invalid order should be replaced by a valid order irrespective of the time which had elapsed.

State v. Sorrows, 63 N.M. 277, 317 P. 2d 324, held that lapse of time did not deprive the court of jurisdiction to impose sentence even though seven years had elapsed since sentence had been deferred.

Section 40-1-11, N.M.S.A., 1953 Compilation (P.S.), was enacted March 9, 1957, and became effective ninety (90) days thereafter on June 7, 1957. There can, therefore, be two categories of cases which carry orders indefinitely deferring sentence: Those which were entered prior to June 7, 1957, and those entered subsequent to that date. Those orders entered subsequent to June 7, 1957, may legally be corrected nunc pro tunc. **Campbell v. Aderhold,** 36 F. (2d) 366, states in part:

"The record, moreover, could have corrected nunc pro tunc by making it recite fully what was actually done at the time of the sentence. **If there is a general probation granted and an omission to fix at the time, verbally or in the judgment, the terms and conditions of probation, these can be added or altered at any time to save the probation from failure."** Archer v. Snook, (DC) 10 F. (2d) 567. (Emphasis supplied.)

As to those orders which were entered prior to the effective date of our probation statute, June 7, 1957, the court may now enter its order and grant to the convicted person the benefits of Section 40-1-11, supra. This act is a remedial act and in the case of **Nix v. James,** 7 F. (2d) 590, it was held that a person convicted two years before the passage of the Federal Probation Act was nevertheless entitled to its benefits if the court were moved to apply it. The court stated:

"In other words, defendants sentenced at terms which expired prior to March 4, 1925, and who have not yet been imprisoned, may come within the mischiefs which Congress intended to remedy, and we should not by construction exclude them from the operation of the statute."

The Federal Probation Act, which is the source of our own act, was held in the above case to apply to a person convicted two years before its passage and the Circuit Court of Appeals entered its order requiring the District Court to hear the petitioner's application for probation filed after the act became effective.

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