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Comment on: State v. Clifton Pearce

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NOTES AND COMMENTS

Comment On: *State v. Clifton Pearce*

Clifton Pearce was first tried in May, 1961 in the Superior Court of Durham County. He was indicted for rape; however, he was tried only for an assault with intent to commit rape, of which crime the jury found him guilty. He received a sentence of 12 to 15 years. There was no appeal. However, he petitioned for post-conviction review and a hearing was conducted by Judge William Johnson on May 10, 1965. Judge Johnson denied relief. Pearce then sought a writ of certiorari which was granted and a new trial was awarded because a confession had been admitted which did not meet the tests necessary for admissibility.

He was tried in June, 1966, upon a new bill of indictment returned by the Grand Jury at the March, 1966, session of the Superior Court for Durham County. This bill charged, and Judge McLaughlin sentenced him to 8 years. The prisoner had been in prison from May, 1961 until June, 1966, a period of 6 years and 6 months, 17 days, including gained time. This period added to the 8-year sentence imposed by Judge McLaughlin amounts to 2 years and 6 months more than the minimum sentence imposed by Judge William Johnson at the first trial.

From the verdict and sentence imposed at the June, 1966 session, the defendant appealed. Among other points raised on his appeal was the question of the sentence being in excess of that originally imposed (*State v. Pearce,* 268 N.C. 707 (1966).

Our Supreme Court found no error and specifically held that the sentence imposed was not in excess of that allowed by law and not unconstitutional. The Court cited and declined to follow *Patton v. North Carolina,* 256 F. Supp. 225 (1966).

Thereafter, Pearce sought a writ of habeas corpus in the Federal District Court. Judge Butler issued an order directed to the Superior Court of Durham County to the effect that Pearce should be resentenced within 60 days to a sentence not in excess of the original sentence of 12 years with credit for all time served or he (Judge Butler) would entertain a motion to release the prisoner forthwith.

The order of Judge Butler presented the Judge presiding over the Superior Court of Durham County with an unusual, if not impossible,

situation. It is well settled law in this state that once a case has been appealed from a final judgment the Superior Court has no jurisdiction. (*Clark v. Cagle,* 226 N.C. 230; *Bonaparte v. Funeral Home,* 206 N.C. 652.) The Superior Court cannot change or modify the judgment at a subsequent term. It would seem clear that the Superior Court of Durham County was without jurisdiction to change or modify the previous judgment of Judge McLaughlin.

In addition it would seem obvious that the Superior Court of North Carolina is bound by the decisions of the Supreme Court of North Carolina. (*Goodson v. Lebanon,* 225 N.C. 514; Strong's Index (original edition) Vol. 1, *Appeal and Error,* Section 58; *Hobbs v. Goodman,* 241 N.C. 665; Strong, *Appeal and Error,* Section 60.)

Without doubt the Federal District Court could directly order the North Carolina Department of Correction to release the prisoner. The question here presented is whether the Federal District Court can order a state court to act in direct contravention of a decision of the State Supreme Court. The writer feels that this power does not exist.

Obviously, the Federal District Court decision was based upon *Patton v. North Carolina.* It should be noted that there is a serious split among the various circuits on the Patton Doctrine. The seventh, tenth, and third circuits have, since the decision in Patton, affirmed harsher sentences following retrial. (*U.S. v. White,* 382 F.2d 445, 7th Circuit 1967); *Newman v. Rodriquez,* 375 F.2d 712 (10th Circuit 1967); *Starner v. Russell,* 378 F.2d 808 (3rd Circuit, certiorari denied, 19 L.Ed.2d 189.) It appears that the fourth circuit view in Patton is clearly not concurred in by at least 3 circuits and probably presents the minority position.

Among the questions yet to be resolved is whether, under the Patton Doctrine, the entire sentence is void where a retrial results in a harsher sentence or whether merely the excess sentence over the original is void. Surely, the latter view is more realistic. In these cases we are not dealing with guilt or innocence. There is no question but that the defendant ought to be imprisoned. We are simply considering the length of the sentence. Assuming a dangerous criminal—as is the case with Pearce—do the Federal Courts of the Fourth Circuit take the position that he should be forthwith released upon society, notwithstanding that he has not served the minimum sentence valid under the Patton Doctrine?

Should the Patton Doctrine finally prevail, in the opinion of the writer,

the likely result will be for state court judges to move in the direction of imposing maximum sentences in all cases where appeal is likely.

It is the personal opinion of the writer that in every case the defendant is entitled to credit for time served. On a second trial, it is permissible to impose a harsher sentence than imposed at the original trial provided the court, in imposing such a sentence, states for the record the reasons for the excess sentence and clearly indicates that the mere exercise of the right of appeal or of post-conviction relief was not the reason for the excess sentence.[1]

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A Survey of Loyalty Oath Tests

Introduction

One of the most significant developments in freedom of political expression in the period following World War Two has been the establishment of loyalty qualifications for employment. Major emphasis on loyalty requirements has been in government employment and defense plants, but programs have been established and proposed in a wide area of private employment as well.

One form of loyalty qualification has been the requirement of taking a loyalty oath or completing a loyalty affidavit as a condition of employment. By constitutional and statutory requirements, public officials and employees have customarily been required to take oaths to support the U.S. and state constitutions and laws. The issue arises as to oaths and affidavits which go beyond the traditional scope. The significance for freedom of political expression lies both in the restrictions imposed by the requirement of taking the oath and in the enforcement of the oath through perjury or similar proceedings. Another major form of loyalty qualification has been the requirement that persons meet certain standards of loyalty as a condition of obtaining or retaining employment. Justification for oaths and other loyalty requirements comes mainly from the needs of national security.

The initial and major emphasis on employee loyalty came from the Federal Government in the period following the establishment of the Com-

[1] Certiorari granted on January 13, 1969. Argument before the United States Supreme Court scheduled during last week in February, 1969.

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