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# Criminal Law—Resentencing—Credit Not Allowed for Time Served Under Void Conviction

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CRIMINAL LAW—RESENTENCING—CREDIT NOT ALLOWED FOR TIME SERVED UNDER VOID CONVICTION*—If a criminal defendant imprisoned pursuant to an *invalid sentence* is subsequently resentenced on the same charge, the courts usually permit the time served under the *invalid sentence* to be deducted from the legal sentence imposed.[1] However, most courts do not grant credit for time served under a *void conviction* when the defendant is reconvicted and resentenced on the original charge.[2] A few states have statutory provisions requiring the allowance of credit regardless of whether the time was served pursuant to an invalid sentence or a void conviction.[3] The rationale of courts making the distinction between an invalid sentence and a void conviction is that an invalid sentence is merely a product of judicial error and can be easily corrected,[4] while a void conviction is considered a nullity in law and of no legal effect.[5] This common interpretation of the effect of a void conviction arose from the common law rule that a defendant who had once served any portion of this sentence could not be retried on the same charge.[6] The courts overcame the defense of double jeopardy as a bar to a second trial by declaring the original conviction void and of no legal consequence.[7] Should New Mexico continue its untenable adherence to the majority rule, which makes specious distinctions between void convictions and invalid sentences, to deprive the defendant of credit for time already served in prison?

The case of *Morgan v. Cox*[8] was a habeas corpus proceeding wherein Morgan petitioned the supreme court to compel the warden of the state penitentiary to credit time served under a void conviction to the sentence imposed when he was reconvicted on the identical

* Morgan v. Cox, 406 P.2d 347 (N.M. 1965).

1. 5 Wharton, Criminal Law and Procedure § 2216, at 433 (12th ed. 1957).

2. *Id.* at 432. *But see,* Short v. United States, 344 F.2d 550 (D.C. Cir. 1965) (defendant's new sentence could not be such that his total time served in prison might exceed the statutory maximum for that offense); Vellucci v. Cochran, 138 So. 2d 510 (Fla. 1962) (credit awarded as a matter of course); Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948) (defendant to receive proper credit for sixteen years in prison, after conviction declared void).

3. *E.g.*, Cal. Pen. Code § 2900.1; N.Y. Pen. Law § 2193(4); Wash. Rev. Code Ann. § 9.95.063 (1961).

4. *E.g.*, Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922, 35 A.L.R.2d 1277 (1952).

5. 5 Wharton, *op. cit. supra* note 1, at 433, and cases cited therein.

6. For a concise discussion of the origin and development of the void conviction doctrine, see Whalen, *Resentence Without Credit For Time Served: Unequal Protection Of The Laws,* 35 Minn. L. Rev. 239, 240 (1951).

7. *Id.* at 242-43.

8. 406 P.2d 347 (N.M. 1965).

charge. The background of *Morgan* was that the petitioner had pleaded guilty to four felony counts and had been sentenced on February 11, 1963, to a term of one-to-three years on the first two counts and a term of one-to-ten years on the second two counts. All but three years on the second two counts were suspended, and all sentences were to run concurrently. After serving seventeen months in the state penitentiary, Morgan's conviction was declared void because he had been denied the benefit of counsel at trial.[9] Upon remand to the trial court, the petitioner pleaded guilty to the first count of the original information,[10] and was sentenced to a term of one-to-three years in the penitentiary. The trial court suspended this sentence "during good behavior." Subsequently, the suspended sentence was revoked, and Morgan was returned to prison. On Morgan's petition for credit for time served pursuant to the void conviction the New Mexico Supreme Court, *held*, Quashed,[11] stating that credit would not be allowed where the original proceeding was void.[12]

Nine months prior to *Morgan*, the New Mexico Supreme Court decided *Sneed v. Cox*.[13] In *Sneed*, the court permitted the petitioner to receive credit for time served under an invalid sentence after he was legally resentenced on the same charge. In deciding *Sneed*, the court relied upon its statement in *State v. Garcia*:[14]

> 'There exists in every court, however, an inherent power to see that a man's fundamental rights are protected in every case. . . . [*T*]*his court has the power in its discretion, to relieve him and to see that injustice is not done.*'[15]

Significantly, the supreme court in *Sneed* was concerned that unless credit were allowed, the petitioner would remain in prison for eighteen months after the date of release fixed by the invalid sen-

9. Morgan v. Cox, No. 35180, 1st Dist., Santa Fe County, N.M., July 17, 1964.

10. There is no record of the disposition of the remaining three counts to which petitioner had originally pleaded guilty on February 11, 1963.

11. 406 P.2d at 348.

12. *Ibid.*

The supreme court observed that because the petitioner had not had the benefit of counsel at his original trial, the trial court lacked jurisdiction over the petitioner. Thus, the original conviction and sentence were void. 406 P.2d at 347, 348.

13. 74 N.M. 659, 397 P.2d 308 (1964).

14. 19 N.M. 414, 143 Pac. 1012 (1914).

15. 74 N.M. at 663, 397 P.2d at 310. (Emphasis added.)

tence.[16] The court said: "That such a result is inherently unfair and unjust is not subject to dispute."[17]

In *Morgan,* however, the court did not concern itself with the "unjust result." The court felt secure in adopting the general rule and chose not to discuss the archaic legal reasoning that compelled it to ignore the period of time served under the petitioner's void conviction. This acceptance of the majority rule by the New Mexico Supreme Court implies an acceptance of the reasoning supporting this rule: a void conviction restores the state and the defendant to the same position they enjoyed prior to the arraignment of the defendant.[18] Thus, a very real period in the defendant's life is merely a fiction to the court.[19]

The practice of not giving effect to action taken pursuant to a void judgment is peculiar to the criminal courts. In a civil case the court attempts to place the parties in the position they enjoyed prior to the void judgment, and in so doing the court takes into consideration any action taken pursuant to the void judgment.[20] It follows that one who has paid moneys to satisfy a civil judgment would be entitled to recover the sum if the judgment is subsequently declared void because it is without legal effect.

It would seem that the position of the criminal defendant who has served time pursuant to a void conviction, is analogous to that of the civil litigant who has made payment in satisfaction of a void judgment. If the courts can compel the return of moneys paid in satisfaction of a void civil judgment they certainly should grant credit to the criminal defendant who has "paid" with time in prison to satisfy a void conviction. In criminal law the void proceeding should be viewed as it is in civil law wherein only the judgment itself

16. The maximum terms of the valid and the invalid sentences in *Sneed* were identical. The minimum term of the invalid sentence was in conflict with the applicable statute. Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964).

17. *Id.* at 663, 397 P.2d at 310.

18. The New Mexico Supreme Court in *Morgan* cited with approval *Ex parte* Wilkerson, 76 Okla. Crim. 204, 135 P.2d 507 (1943), which stated this reasoning.

19. A similar result has not escaped comment in the federal courts:

> 'The Government's brief suggests . . . that because the first sentence was void appellant has served no sentence but has merely spent time in the penitentiary; that since he should not have been imprisoned as he was, he was not imprisoned at all. . . . [I]t might be suggested that he is liable in quasi-contract for the value of his board and lodging, and criminally liable for obtaining them by false pretenses. We cannot take this optimistic view.'

Short v. United States, 344 F.2d 550, 552 (D.C. Cir. 1965), quoting King v. United States, 98 F.2d 291, 293-94 (D.C. Cir. 1938).

20. *E.g.,* Pennoyer v. Neff, 95 U.S. 714 (1877). Title to property does not pass by sale under an execution issued upon a void judgment.

is without legal effect, thus permitting the courts to retry the criminal defendant without placing him in double jeopardy.

The inequity of the New Mexico Supreme Court's application of the void conviction doctrine is aptly revealed by comparing *Sneed* and *Morgan*. In both cases the petitioner was resentenced for his original crime as a result of circumstances beyond his control. Sneed's only request was that he be sentenced in accordance with the applicable statute, whereas Morgan sought his constitutional right to a fair trial. Yet Sneed alone received credit for time in prison because he was the fortuitous recipient of an invalid sentence rather than a "victim" of a void conviction. Although Morgan was a victim without fault, he may now serve up to fifty-four months for a crime for which he was twice sentenced to a maximum term of three years.[21] There cannot be any doubt that this consequence of Morgan's effort to obtain a fair trial is "inherently unfair and unjust."[22]

More important, however, are the far-reaching effects of cases like *Morgan*. Encouraged by the recent United States Supreme Court decisions affirming the constitutional rights of criminal defendants to a fair trial,[23] many convicted felons are contesting their convictions in New Mexico.[24] To these prisoners the lesson of *Morgan* is clear. If a prisoner obtains a reversal of his first conviction because he was denied his constitutional right to a fair trial, he will probably be retried on the same charge.[25] If, upon retrial, the defendant is reconvicted, he can only look forward to a "new" sentence with little hope that the court will give him credit for the time he has already served.[26] Faced with the prospect of having to wager

21. See note 8 *supra* and accompanying text.

22. Sneed v. Cox, 74 N.M. 659, 663, 397 P.2d 308, 310 (1964).

23. The landmark decision is, of course, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel at trial). See also Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel at pre-arraignment interrogation); Jackson v. Denno, 378 U.S. 368 (1964) (declaring unconstitutional the procedure of jury determination of voluntariness of confessions); Massiah v. United States, 377 U.S. 201 (1964) (right to counsel during post-arraignment interrogation).

24. Interview With Mr. Gary O. O'Dowd, Assistant Attorney General of New Mexico, Nov. 22, 1965. In the ten month period of January 1, 1965, to October 31, 1965, 452 writs of habeas corpus were heard by New Mexico courts. On October 31, 1965, 151 writs of habeas corpus were pending in New Mexico. During the entire year of 1964, 329 habeas corpus cases were disposed of by New Mexico courts.

25. It is suggested that in a few cases the evidence required for reconviction will be stale or non-existent and the petitioner will be released because the charges will be dropped.

26. In New Mexico the fact that the petitioner has served time prior to application for writ of habeas corpus is a proper matter to urge in mitigation when he is resentenced. Jordon v. Swope, 36 N.M. 84, 8 P.2d 788 (1932). Apparently the trial court in *Morgan* considered the fact of prior imprisonment when it suspended his second sen-

time served against the possibility of being found innocent upon retrial, it is submitted that few "felons" will seek the remedy afforded them by *Gideon v. Wainwright*,[27] and subsequent related Supreme Court decisions.[28]

These defendants, denied their constitutional right to a fair trial, may properly seek their release from confinement by writ of habeas corpus.[29] The writ of habeas corpus is given explicit recognition in the federal constitution,[30] and in the New Mexico constitution.[31] In the recent case of *Fay v. Noia*,[32] the United States Supreme Court reviewed at length the historical development of the writ of habeas corpus and said:

> We do well to bear in mind the extraordinary prestige of the Great Writ . . . in Anglo-American jurisprudence: 'the most celebrated writ in the English law.' . . . It is 'a writ antecedent to statute.' . . . [The writ of habeas corpus] was early confirmed by Chief Justice John Marshall to be a 'great constitutional privilege.' . . . Only two Terms ago this Court had occasion to reaffirm the high place of the writ in our jurisprudence: 'We repeat what has been so truly said of the federal writ: "there is no higher duty than to maintain it unimpaired" . . . and unsuspended . . . .'[33]

The effect of the void conviction doctrine, however, is to discourage the use of the writ of habeas corpus. By threatening a prison inmate with the possibility of a second sentence being imposed without credit for time already served the state deters him for resorting to the writ of habeas corpus, his only available remedy to redress a deprivation of his constitutional rights. It is submitted, therefore, that enforcement of the void conviction doctrine is unconstitutional because it discourages and thereby "impairs" utilization of the writ of habeas corpus.

This constitutional argument has never been discussed by a court. However, the United States Supreme Court has acted in other areas of the law to declare unconstitutional a procedure that infringed

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tence. However, the courts are not bound to give credit and there is no guarantee that prior imprisonment will be given due consideration in each case.

27. 372 U.S. 335 (1963).

28. Escobedo v. Illinois, 378 U.S. 478 (1964); Jackson v. Denno, 378 U.S. 368 (1964); Massiah v. United States, 377 U.S. 201 (1964).

29. Stack v. Boyle, 342 U.S. 1 (1951).

30. U.S. Const. art. 1, § 9(2).

31. N.M. Const. art. 2, § 7.

32. 372 U.S. 391 (1963).

33. *Id.* at 399-400.

upon the enjoyment of a "great constitutional privilege." In *Aptheker v. Secretary of State*,[34] the Supreme Court was required to determine the constitutionality of a federal statute that denied members of a political organization the right to apply for or to use a passport. In support of its holding that the statute was unconstitutional because it infringed upon the fundamental right of freedom of travel, the court quoted from its language in *Shelton v. Tucker*:[35]

> '[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'[36]

The stated purpose of the void conviction doctrine is to avoid the bar of double jeopardy so that the defendant may be retried.[37] But the doctrine is so broadly applied that not only is the conviction void but the time served pursuant to the void conviction is lost. This broad application of the void conviction doctrine "stifles fundamental personal liberties" because it discourages a prison inmate from utilizing the writ of habeas corpus to secure his constitutional rights. The purpose of the void conviction doctrine could be narrowly achieved by a determination that only the void conviction itself was without legal effect. If credit were given for time served under the void conviction, prison inmates would not fear the consequences of seeking review of their convictions by the writ of habeas corpus—"a great constitutional privilege."

It appears that constitutional grounds exist for overturning the void conviction doctrine.[38] It should also be remembered that the New Mexico Supreme Court has stated that it has the "inherent power to see that a man's fundamental rights are protected in every case."[39] This power should be exercised to overturn the void conviction doctrine in New Mexico. The modern goals of criminal confinement are the reformation and the rehabilitation of the convicted criminal.[40] Enforcement of the void conviction doctrine does

34. 378 U.S. 500 (1964).
35. 364 U.S. 479 (1960).
36. Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964).
37. See notes 6 & 7 *supra* and accompanying text.
38. For an argument that the void conviction doctrine is unconstitutional because the defendant might receive a harsher sentence when he is resentenced than that imposed pursuant to the void conviction, see Van Alstyne, *In Gideon's Wake: Harsher Penalties And The "Successful" Criminal Appellant*, 74 Yale L. J. 606 (1965).
39. See note 15 *supra* and accompanying text.
40. Williams v. New York, 337 U.S. 241 (1949).

not contribute to the realization of either goal. A rule of law that does not permit a period of imprisonment served under a void conviction to be credited to a sentence imposed on the defendant in a subsequent retrial and conviction on the same charge[41] is unnecessary and unjustifiably harsh.

RANNE B. MILLER

41. See note 21 *supra* and accompanying text on the result in *Morgan*.