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ANDERSON v. ANDERSON: CREDIT SENTENCING OR FORFEITED TIME?

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A harsh, but relatively unpublicized problem has long existed within the American judicial system concerning credit for prison time served under consecutive sentences. Specifically, does a prisoner have the right to credit time served under the first of consecutive terms against remaining terms imposed at the same time, when the first sentence is voided or overruled by an appellate court? The courts have failed to deal with this problem with any degree of consistency.[1] As a consequence prisoners faced with the predicament of years of lost time under an invalid judgment and sentence often are forced to face tribunals that will decide their future in unpredictable and often irrational ways.

Recently the Oklahoma Court of Criminal Appeals further contributed to this state of confusion with its decision in *Anderson v. Anderson*.[2] In *Anderson*, petitioner had been convicted under four separate judgments and sentenced to three consecutive sentences, the first for fifteen years. Petitioner served six years of this first sentence before it was reversed by the Court of Criminal Appeals.[3] Petitioner sought credit for this time served to be applied to the remaining consecutive sentences for the different crimes. The court denied petitioner's plea holding instead that he was liable for the entire term of the remaining sentences, despite the six years previously served.

In disposing of this problem the court relied upon two of the three most common reasons for denying such credit. Citing Oklahoma authority the court reasoned that time served by the petitioner under the void sentence would not be credited upon another sentence im-

1. *See generally*, Agata, *Time Served Under A Reversed Sentence or Conviction—A Proposal and A Basis for Decision*, 25 MONT. L. REV. 3 (1963); Wagner, *Sentence Credit for "Dead Time,"* 8 CRIM. L. BULL. 393 (1972).
2. 513 P.2d 345 (Okla. Crim. App. 1973).
3. Anderson v. State, 510 P.2d 998 (Okla. Crim. App. 1973).

posed upon petitioner for an entirely different offense.[4] The point continually stressed by the Oklahoma court and other supporting jurisdictions was that the time served only applied to the void sentence, with the remaining sentences waiting to be served in full.[5] For the luckless prisoner, years previously served become literally lost time.

The lack of a constitutional prohibition against the denial of credit was also utilized by the court in reaching its decision.[6] This constitutional crutch does lend some strength to the argument against credit in certain limited situations. As stated by one court in *United States es rel. Watson v. Pennsylvania*,[7]

> While we are somewhat sympathetic to relator's situation, we cannot conceive of a constitutionally inundated system of accumulated prison credits . . . . Such a requirement of credit for time served under vacated sentences would enable recidivists to obtain release or to avoid incarceration altogether by the simple device of pleading a prior invalid imprisonment.

But as will be further noted this so-called constitutional silence is only partially applicable to the *Anderson* case, in that it only conerns that part of the invalid sentence that was served prior to the imposition of the second, valid sentence.

The third premise often employed by courts to avoid credit sentencing is the construction or interpretation of the "jail-time" statutes. These laws provide the inmate with credit against his sentence for the time served in confinement prior to actual reception at the penitentiary.[8] Under a strict construction of these statutes, it has been determined that they do not apply to time served under an invalid sentence.[9] Since these statutes do not specifically grant credit in such a situation they are subsequently employed as a convenient device with

4. Evans v. Page, 465 P.2d 771 (Okla. Crim. App. 1970); Dorrough v. Page, 450 P.2d 520 (Okla. Crim. App. 1969); *Ex parte* Farve, 64 Okl. Cr. 326, 79 P.2d 1034 (1938).

5. Taylor v. Wainwright, 178 So. 2d 105 (Fla. 1965); Montford v. Wainwright, 162 So. 2d 663 (Fla. 1964); *In re* Allen, 140 So. 2d 640 (Dist. Ct. App. Fla. 1962); State v. Rhoades, 77 N.M. 536, 425 P.2d 47 (1967).

6. United States *ex rel.* Olden v. Rundle, 279 F. Supp. 153 (E.D. Pa. 1968); United States *ex rel.* Watson v. Penn., 260 F. Supp. 474 (E. D. Pa. 1966). *See also* Evans v. Page, 465 P.2d 771 at 773 (Okla. Crim. App. 1970).

7. 260 F. Supp. 474, 475 (E.D. Pa. 1966).

8. N.Y. PENAL LAW § 70.30(3) (1967); OKLA. STAT. tit. 57 § 138 (1971); PA. STAT. ANN. tit. 19 § 894 (1964).

9. People v. Kowalsky, 2 N.Y.2d 949, 142 N.E.2d 421, 162 N.Y.S.2d 355 (1957); Nataluk v. Denno, 227 N.Y.S.2d 288 (Sup. Ct. 1962); Evans v. Page, 465 P.2d 771 (Okla. Crim. App. 1970); Dorrough v. Page, 450 P.2d 520 (Okla. Crim. App. 1969).

which to deny the prisoner credit for time of incarceration.

As explicitly emphasized by Judge Brett in his dissent, state courts electing to deny credit for time served under an invalid sentence against remaining consecutive sentences, have opted to overlook existing federal authority which at least partially supports the claim for credit. As determined by the Supreme Court in *Blitz v. United States*,[10] where the prisoner is serving consecutive sentences imposed under a multiple count indictment and the first sentence is invalidated, time served under that first sentence is to be applied to the remaining sentences. In *Blitz* it was determined that the term of the valid remaining sentence commenced on the date of imprisonment under the voided judgment and sentence. Other federal courts dealing with the issue presented in *Blitz* have followed the Supreme Court's reasoning and judgment closely.[11] Although these decisions concern themselves with credit for consecutive sentences only under multiple count indictments, it is readily apparent that they provide persuasive authority for petitioner's plea for credit in *Anderson*. It is a short, but desperately needed, step from the application of credit to consecutive sentences under multiple count indictments to the application of such credit for time served under a reversed judgment against remaining consecutive sentences imposed at the same time for unrelated offenses.

The appeal for credit to be applied against remaining sentences has not been limited to the small number of articles concerned with this topic. The American Bar Association, in its Project on Minimum Standards for Criminal Justice, has suggested as an alternative that such credit be given for all time served.

> If a defendant is serving multiple sentences and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum term and any minimum term of the remaining sentences should be given for all time served since the commission of the offenses on which the sentences were based.[12]

An application of this proposal by state courts could provide maximum

10. 153 U.S. 308 (1893).

11. Jenkins v. United States, 389 F.2d 765 (10th Cir. 1968); Hoffman v. United States, 244 F.2d 378 (9th Cir. 1957); Eckberg v. United States, 167 F.2d 380 (1st Cir. 1948); Youst v. United States, 151 F.2d 666 (5th Cir. 1945); Costner v. United States, 139 F.2d 429 (4th Cir. 1943); McNealy v. Johnston, 100 F.2d 280 (9th Cir. 1938).

12. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—APPROVED DRAFT—STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 3.6(c) (1968).

credit for time served under an invalid judgment or sentence. It would eliminate the tragedy of years of lost time in prison under such a judgment; years of lost freedom due to judicial mistake.

There is another theory on this issue that lends strength to the plea for credit for time served. The Massachusetts Supreme Court in its landmark decision in *Brown v. Commissioner*,[13] faced a situation in which petitioner had received consecutive sentences under one set of indictments and four months later was convicted under a second set of indictments with the subsequent sentence to commence after expiration of the first set of sentences. The first set of judgments and sentences were eventually overruled, and the Massachusetts Court utilized a judicial fairness approach in determining that the subsequent sentences, under the second indictments, would therefore run from the date of their imposition rather than from the date of reversal. Petitioner was to receive credit against the remaining sentences for all time served since the imposition of the second sentences. The court stressed the petitioner's rights, "for otherwise a defendant will have served time for which he receives no credit."[14] This rationale of the *Brown* approach has had its effect among other concurring state jurisdictions.[15] The import of this decision on the right to credit time of confinement against later sentences cannot be denied. This far more humanitarian approach stresses concepts of fairness and equity, rather than strict adherence to the rigid principle that years of confinement designated under one judgment and sentence are only applicable to that judgment and sentence.

The *Brown* doctrine had the potential to have a substantial impact upon the petitioner's appeal for credit in *Anderson*, due to the fact that petitioner's valid conviction was imposed on the same day as the invalid one. Under this doctrine, petitioner would have been granted the requested six years credit. Unfortunately, the Oklahoma Court of Criminal Appeals has dealt with situations in which this doctrine could be employed in widely divergent ways. In *Lamb v. Page*,[16] the court was presented with a fact situation that paralleled the later *Anderson* case. In *Lamb*, petitioner, while serving a suspended sentence

13. 336 Mass. 718, 147 N.E.2d 782 (1958).
14. *Id.* at 784.
15. Helton v. Mayo, 153 Fla. 616, 15 So. 2d 416 (1943); Bennett v. Hollowell, 203 Iowa 352, 212 N.W. 701 (1927); Potter v. State, 263 N.C. 114, 139 S.E.2d 4 (1964); Commonwealth *ex rel.* Nagle v. Smith, 154 Pa. Super. 392, 36 A.2d 175 (Super. Ct. 1944); Green v. State, 245 A.2d 147 (Me. 1968).
16. 482 P.2d 615 (Okla. Crim. App. 1971).

from an earlier conviction, committed a second crime. The suspension was revoked and Lamb was imprisoned and subsequently convicted of the second crime. Nine years later petitioner sought to have the first conviction declared void. The validity of the first conviction was the only issue before the court; however, after voiding the first conviction, the court then concluded, almost as an afterthought, that time served under the void sentence would be applied to the subsequently imposed sentence which petitioner was then serving.

In the later case of *Martin v. Page*,[17] the same court interpreted the *Lamb* decision to be a matter of fairness in that particular situation. In *Martin* the court adamantly refused to extend the *Lamb* decision so as to permit the petitioner to credit time served under a void sentence *prior* to the imposition of a valid sentence to the term of the valid sentence. But yet both the state and the court agreed that the petitioner should receive full credit for all time served under the void sentence *after* the imposition of the valid judgment and sentence.[18] To all appearances the Oklahoma court had accepted the philosophies of the *Brown* decision.

If the court had adhered to the concepts that it had followed in *Lamb* and *Martin* in the later *Anderson* case, the petitioner would have received credit for the time served under the invalid conviction and sentence. But in *Anderson* the court determined that the *Lamb* decision was to be limited to the facts of that particular case and was not to be construed to change Oklahoma law. *Martin*, with its reliance on the *Brown* doctrine, went uncited. The fairness approach, prescribed by the *Brown* doctrine and utilized to explain the *Lamb* decision, went unmentioned in *Anderson*. Apparently, concepts of fairness were of little benefit to the petitioner in his futile attempt to gain credit for lost time. Oklahoma law, as interpreted by the court, was to remain steadfast in its refusal to grant credit.

The constitutional considerations concerning the application of the principles of *Brown* have been dealt with in the federal courts. On this level the trend has evolved to grant credit for prison time in situations comparable to the one found in *Brown*.[19] Credit was

17. 484 P.2d 1319 (Okla. Crim. App. 1971).

18. *Id.* at 1321.

19. Goodwin v. Page, 418 F.2d 867 (10th Cir. 1969) (in which the appellate court overruled the Oklahoma Court of Criminal Appeals and held that credit must be granted due to constitutional reasons). *See also*, United States *ex rel.* Olden v. Rundle, 279 F. Supp. 153 (E.D. Pa. 1968); United States *ex rel.* McKee v. Maroney, 264 F. Supp. 684 (M.D. Pa. 1967); Barrow v, N. Car., 251 F. Supp. 612 (E.D.N.C. 1965).

deemed essential to ease the judicial conscience and meet the standards of the due process clause of the fourteenth amendment.[20] In essence, these federal courts have concerned themselves with what is fair and just in determining how to cope with the tragic problem of the unwarranted service of time in prison. One can only hope that, in the future, Oklahoma, and other state courts that have refused to credit time served under an invalid judgment and sentence to remaining sentences, will themselves adhere to these interpretations of the requirements of the fourteenth amendment and the concurrent standards of fairness and conscience. It will only be through such a change of heart and attitude, that future decisions denying credit for lost time can be avoided.

Through the scope of this article, philosophies both for and against credit for time spent in prison under an invalid sentence have been analyzed. Clearly in the eyes of this author, those arguments favoring credit possess the greater legal and moral weight. At this point it must be emphasized that this article does not appeal for credit for dead time served under a void sentence when the prisoner has been released and has subsequently committed and been convicted of an entirely different offense. Credit in this situation would permit the prisoner to "bank" time and commit later offenses with the knowledge that there existed a period of free time to be applied to any sentence. This article presents the limited thesis that, as a matter of judicial fairness, a prisoner presently incarcerated under consecutive sentences for differing offenses should be permitted to credit time served under an invalid sentence toward the remaining valid sentences. It will only be when all jurisdictions accept these concepts of fairness that the tragedy of lost years in prison, as found in *Anderson*, can be permanently erased.

20. Goodwin v. Page, 418 F.2d 867 at 868 (10th Cir. 1969); United States *ex rel.* McKee v. Maroney, 264 F. Supp. 684 at 688 (M.D. Pa. 1967).