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Criminal Law: Habitual Criminal Statute--Effect of Concurrently Served Terms

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> "It is difficult to find any real distinction between cases in which (1) the trial court is considering the propriety of setting aside a conviction pursuant to a motion for coram nobis when the defendant has fully served his sentence and (2) cases in which an appellate court dismisses an appeal from a conviction because the defendant has fully served his sentence, especially when questions of constitutional right are involved in the appeal."[29]

However, it is not difficult to distinguish those situations from the one involved in this case, where the sentence remained unsatisfied.

Insofar as the court suggests that persons irregularly released from imprisonment do not raise a question of substantial right in a proceeding in the nature of coram nobis, it is submitted that the case is doubtful authority.

However, in its more important aspect of laying accurate survey lines about an important procedural remedy in the criminal law at this particular stage of evolution in contemporary practice, *State v. Huffman* has undoubtedly made a valuable and commendable contribution to the criminal common law.

Raymond L. Mushrush

CRIMINAL LAW: HABITUAL CRIMINAL STATUTE—EFFECT OF CONCURRENTLY SERVED TERMS

Bill Sukovitzen has had a hard time staying out of trouble. In 1938 he was convicted for violation of the Dyer Act[1] in Nevada. In 1940 he was convicted of forgery in San Francisco, for which he was imprisoned but later paroled. While on parole he was convicted in March, 1943 of robbery in Nevada County. His parole under the forgery conviction was revoked, and his sentence for the Nevada County robbery was made to run concurrently with the unexpired portion of the forgery term. In May, 1943, he was convicted of two robberies in San Francisco (presumably committed while he was on parole from the forgery conviction). The sentences for these two robberies were made to run consecutively to the forgery term but concurrently with each other and with that portion of the Nevada County robbery term which would overlap. In 1944 Sukovitzen was convicted of a robbery in Sacramento (also presumably committed while on parole from the forgery conviction) for which he was sentenced to a term to run consecutively to all the terms to which he was then under sentence. Therefore, in 1945 after the forgery term had expired, Sukovitzen was serving three terms simultaneously: the term for the Nevada County robbery and those for the two San Francisco robberies. He had to wait until all of these terms ended before he started on the term for the Sacramento robbery. He was serving these three terms when he escaped from Folsom Prison in 1954 and committed the robbery for which he was convicted in the present action, *People v. Sukovitzen*.[2] After reviewing the defendant's record the trial court adjudged him a habitual criminal under California Penal Code section 644 (a), and sentenced him to life imprisonment.

On appeal, however, it was held that Sukovitzen could not be adjudged a habitual criminal under Penal Code section 644 (a). That section provides:

> Every person convicted in this State of the crime of robbery . . . who shall have been previously twice convicted upon charges separately brought and tried, and who shall

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[29] State v. Huffman, 207 Ore. at ....., 297 P.2d at 851.

[1] 41 STAT. 324 (1919), 18 U.S.C. §§ 10, 2311–2313 (1948) (transportation, sale or receipt of stolen vehicles in interstate commerce).

[2] 138 Cal. App. 2d 159, 291 P.2d 107 (1955).

> have *served separate terms* therefor in any State prison . . . of the crime of robbery, burglary, burglary with explosives, rape with force or violence, arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subordination of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon, extortion, kidnapping, mayhem, escape from a state prison, rape or fornication or sodomy or carnal abuse of a child under age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, shall be adjudged a habitual criminal and shall be punished by imprisonment in the State prison for life. (Emphasis added.)

The court held that to come within the statute as a "prior conviction," the conviction must have been for one of the crimes designated and must have been followed by a *separate* previously served term therefor. Since forgery and violation of the Dyer Act are not among the crimes designated, those convictions do not count. Neither does the Sacramento robbery conviction, because the term for that conviction had not yet started and so was not a *previous* conviction within the meaning of the statute. Furthermore, and the point being emphasized here, the court held that the convictions for the two San Francisco robberies could not be counted either, since no part of the terms for these convictions was separately served, because from their commencement in 1945 they were served concurrently with the Nevada County robbery term. This interpretation left only part of one term separately served, that portion of the Nevada County robbery term from 1943, when it commenced, until 1945, when the two San Francisco robbery terms started running concurrently with it. Service of part of a term satisfies the requirement of the statute,[3] and therefore the court held that the defendant had served one prior conviction within the meaning of the statute.

A holding that concurrently served terms do not satisfy the separate service required by California's Habitual Criminal Statute, California Penal Code section 644, is not new.[4] But this writer questions the advisability of applying this rule to the facts of the *Sukovitzen* case. Should a defendant with a past record of convictions for violation of the Dyer Act in 1938, forgery in 1940, robbery in March of 1943, two robberies in May of 1943, and a robbery in 1944 who is subsequently convicted of robbery after escaping from prison in 1954 avoid the rigors of the Habitual Criminal Statute because the trial court in sentencing for the two May 1943 robberies made the sentences run concurrently with the term of the March 1943 robbery? To answer this question we must first answer another: Why exclude convictions followed by concurrently served terms from the operation of the Habitual Criminal Statute?

The basis for California decisions holding that convictions followed by concurrently served terms are not to count for the purpose of imposing a greater penalty under the Habitual Criminal Statute lies in the 1935 amendment[5] to that statute. Before this amendment, the statute required that for a prior conviction to be counted, it was merely necessary for the defendant to have "served a term therefor,"[6] and the courts had held this requirement satisfied when there had been service on concurrently served terms.[7] The 1935 amendment made the provision that for prior convictions to be counted the defendant must have "served *separate*

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[3] People v. Mangan, 87 Cal. App. 2d 765, 197 P.2d 781, *cert. denied*, 336 U.S. 920 (1948).

[4] Spivey v. McGilvray, 29 Cal. App. 2d 357, 84 P.2d 256 (1938); People v. Gump, 17 Cal. App. 2d 221, 61 P.2d 970 (1936).

[5] CALIF. STATS. 1935, p. 1699.

[6] CALIF. STATS. 1931, p. 1052.

[7] Spivey v. McGilvray, 29 Cal. App. 2d 357, 84 P.2d 256 (1938).

terms therefor."[8] (Emphasis added.) The first appellate case dealing with this additional "separate" requirement understood it to mean that the legislature wished to halt findings of habitual criminality based on convictions followed by service of concurrent terms.[9] And thus it has remained.

In many cases such an interpretation is wise and supported by sound reason. This is apparent when one considers the effect of imposing concurrent sentences and the implications arising from such imposition.

At common law when a defendant was convicted of more than one crime, it was within the court's discretionary power to impose either cumulative or concurrent sentences.[10] Sentences which are served concurrently are served during the same period of time, for their full duration or for only part. Sentences which are served cumulatively are served consecutively and on termination of a prior sentence, the subsequent sentence commences immediately.

The common law rule is largely embodied in California Penal Code section 669, which provides that when a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or different judges, the later judgment must direct whether the terms of imprisonment are to run consecutively or concurrently. The section leaves a great amount of discretionary power in the trial court, however, as to when concurrent and consecutive sentences are to be imposed.[11]

It will be seen on a moment's reflection that by allowing sentences to run concurrently, a trial judge may grant leniency to an offender whom he feels is deserving. In such a case, two or more terms may be served simultaneously, and the effect of the subsequent sentence is thereby either partially or totally alleviated. On the other hand, should the trial judge so decide, he might provide a more severe punishment for the offender by having his sentences run consecutively, thereby giving each term its maximum effect.[12] The trial judge may take into consideration the circumstances of the case and the character of the defendant,[13] and render judgment accordingly.[14]

There would appear, then, to be a very good reason for excluding convictions followed by concurrently served terms from the operation of our Habitual Criminal Statute. It has been repeatedly stated that the Habitual Criminal Statute is aimed at the so-called recivitist, the habitual offender who indicates such a tendency toward the repetition of criminal acts that he may never be reformed.[15] Its function, therefore, is to act as a deterrent to repeated criminal acts[16] and as a protection for society from those who have become habitual criminals.[17] One charged with being a habitual criminal should have had the opportunity to reform by giving him the chance to consider the errors of his ways during each *separate*

[8] CALIF. STATS. 1935, p. 1699.

[9] Spivey v. McGilvray, 29 Cal. App. 2d 357, 84 P.2d 256 (1938).

[10] 14 CAL. JUR. 2d *Criminal Law* § 275 (1954).

[11] People v. Tipton, 124 Cal. App. 2d 213, 268 P.2d 196 (1954); People v. Palacio, 86 Cal. App. 2d 778, 195 P.2d 439 (1948).

[12] People v. White, 100 Cal. App. 2d 836, 224 P.2d 868 (1950).

[13] People v. VanValkenburg, 111 Cal. App. 2d 337, 244 P.2d 750 (1952).

[14] People v. Withers, 73 Cal. App. 2d 58, 165 P.2d 945 (1946).

[15] People v. Richardson, 74 Cal. App. 2d 528, 169 P.2d 44 (1946).

[16] 24 CAL. JUR. 2d *Habitual Criminals* § 2 (1955).

[17] People v. Coleman, 145 Cal. 609, 79 Pac. 283 (1904); People v. Stone, 69 Cal. App. 2d 533, 159 P.2d 701 (1945).

term for each conviction relied on to place him in that status.[18] It is his failure to reform that causes him to be labelled an incorrigible,[19] and by relying on convictions followed by sentences served simultaneously with sentences for other offenses we are denying the defendant that opportunity to reform.

The California courts recognize an exception to the rule excluding concurrently served terms from the operation of the statute. This exception arises in situations where a portion of two or more sentences is served concurrently and is illustrated in the case of *People v. Mangan*.[20] In that case the appellant, while on parole from a former conviction, committed a second offense for which he was convicted and sentenced to a term to be served concurrently with the unserved remainder of the former sentence. He was discharged from the first sentence 12 days after the second sentence began. The court held that since service of a term within the meaning of California Penal Code section 644 includes part of a term as well as a full term,[21] the mere fact that a portion of the two sentences was served concurrently did not prevent them from being separate within the meaning of the statute. This was the basis for the court's holding in the *Sukovitzen* case that the defendant's service of the Nevada County term from 1943 to 1945 could be regarded as a separately served term.

There is a sound basis, however, for liberalizing the rule which excludes convictions followed by concurrently served terms beyond the specific exception recognized by the courts and which is mentioned above. The principal case is particularly in point. Here the defendant, during a 16 year period, has suffered seven convictions, five of which are for crimes specifically covered by the Habitual Criminal Statute. He has demonstrated his inability to reform and his peril to society, the very evils with which the statute attempts to deal. However, the defendant is able to evade that statute, curiously enough, because of the leniency afforded him when three of his sentences were made to run concurrently, but which leniency he has spurned. The motivation of mercy which causes a trial judge to impose the more lenient punishment is admirable. But it should not be defeated by the very thing it is intended to prevent, namely, a return to crime. The comment of Shakespeare's Senator that "Nothing emboldens sin so much as mercy"[22] may at first blush appear cynical, but it suggests the unrepentant criminal who cannot learn his lesson without suffering physical punishment for each crime. It is suggested that the unrepentant criminal, the criminal who has spurned leniency, comes particularly within the class of offenders with which the Habitual Criminal Statute deals. Yet through the application of the rule excluding convictions followed by concurrently served terms the courts allow this undeserving criminal to escape the punishment particularly applicable to him.

The answer to this problem does not lie in abolishing the rule excluding these convictions. While it might be said that any criminal who commits a crime after having served concurrent terms for past crimes is to some extent "spurning" leniency, the matter is one of degree. The need is for a more flexible rule.

Therefore, it is suggested that the problem could be met by allowing the trial court discretion to determine whether concurrently served terms will count under the Habitual Criminal Statute in a particular case. Such discretion would be based

[18] See State v. Miles, 24 Wash. 2d 55, 207 P.2d 1209 (1949).
[19] UNDERHILL, CRIMINAL EVIDENCE 1080 (3d ed. 1923).
[20] 87 Cal. App. 2d 765, 197 P.2d 781, *cert. denied*, 336 U.S. 920 (1948).
[21] People v. Martin, 78 Cal. App. 2d 340, 177 P.2d 813 (1947).
[22] SHAKESPEARE, TIMON OF ATHENS, Act III, Sc. 5.

upon its opinion whether or not a defendant has in any way profited from the past leniency afforded him by the imposition of the concurrent sentences. This is the same type of discretion exercised by the court in imposing concurrent or cumulative sentences. Lacking judicial precedent, however, such a provision would have to be embodied in the statute.

Whether a particular criminal was in fact deserving of a former court's leniency through its imposition of concurrent sentences could be determined in retrospect by considering such clear cut matters as: (1) The number of subsequent convictions (including those not specifically within Penal Code section 644); (2) The nature of the crimes for which the defendant was convicted; (3) The similarity in nature between these crimes (specifically, such similarities as assault bears to robbery or which fraud bears to forgery, which tend to manifest a continued propensity toward a particular type of crime); and (4) The period of time during which the commission of these crimes took place (if the crimes took place over a longer period of time it would tend to indicate a more persistent tendency to commit crimes, whereas commissions during a shorter span would tend to indicate a more shortlived criminal spree.) It should be emphasized that this would not be an attempt to review the prior trial court's judgment in imposing the concurrent service, but to determine whether in fact the defendant has profited from the leniency shown him or whether his subsequent conduct merely manifests contempt for this leniency or total disregard of it.

There may be another factor for the court to consider. It is possible that the trial court which imposed the concurrent sentences had no other choice than to impose them as it did. For example, in the present case at the time the concurrent sentences were imposed, the defendant was already under sentence for the Nevada County robbery, and any sentence imposed during the term of this earlier sentence would, of needs, have to run at least in part concurrently with it. The only other alternative would have been to have the terms for these robberies run consecutively with the Nevada County robbery term.[23] But even then these convictions could not be counted in the present case. For when the defendant escaped from the penitentiary in 1954, he was still serving for the Nevada County robbery, and, since it had not yet terminated, sentences running consecutively to it could not have commenced. Since the term for the convictions would not yet have started, they could not be counted as *previous* convictions within the meaning of the statute. This is the same argument preventing the Sacramento robbery conviction from coming within the operation of the statute.

If a defendant has manifested an incorrigible criminal disposition, he should not be allowed to evade the Habitual Criminal Statute because a former trial court was unable to impose a sentence giving the maximum effect to its judgment. Such a factor would strongly suggest that such concurrent sentences should not operate in the defendant's favor, but should be counted.

The rule providing for exercise of the trial court's discretion in determining when concurrently served terms are to count under the Habitual Criminal Statute based on the factors suggested above would be easily administered. The necessary facts required for its determination are available from the report required of the prosecution when invocation of the statute is requested.[24]

It is felt that by including certain convictions followed by concurrently served

[23] *In re* Whitton, 120 Cal. App. 2d 608, 261 P.2d 775 (1953).

[24] CALIF. PEN. CODE § 969.