Continuing Jurisdiction to Modify Prior Sentence

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The Supreme Court of the United States has declared that "the New York Statutes emphasize a prevalent modern philosophy that the punishment should fit the offender and not merely the crime." This commendation would be far more deserved if the rules governing suspension of prison sentences had kept pace with the progressive New York philosophy of rehabilitation, rather than punishment, of the criminal.

One of the most effective means of rehabilitation is the suspended sentence and probation since "its aim is reformatory, and not punitive." Under the watchful eyes of trained probation officers and amidst the familiar surroundings of his own home and family, the transgressor is returned to the role of a law-abiding citizen free of the stigma and harmful environmental effects of a term served in prison. Should such progressive treatment of the criminal be confined to first offenders only? Consider, for example, the case of a defendant paroled after serving a portion of his sentence. While on parole, he is convicted of a crime committed during parole and is returned to prison to finish the remainder of his first sentence and to serve an additional sentence for the second offense. Before termination of his first sentence, the defendant has become a model prisoner. Can the judge who imposed both sentences suspend execution of the second sentence, or must this defendant, despite his reformation, remain in prison until eligible for parole on his second sentence? The New York law is not clear as to whether a judge does have the power to suspend the execution of a sentence imposed on a second or third offender.

New York Penal Law, Section 2188 vis-a-vis Section 1941

Section 2188 of the Penal Law would seem to permit the judge to suspend the execution of a prison sentence despite previous convictions. This statute authorizes a judge to suspend the imposition of sentence or the execution of the judgment except where the defendant was convicted as a fourth offender, or was convicted of a crime punishable by death or life imprisonment, or was convicted of a felony while armed, or was convicted twice previously for the sale of narcotics. Provided the second or third offense does not fall within any of these categories, it would seem the judge has the power to suspend.

3. The words "other than a crime punishable with imprisonment for an indeterminate term having a minimum of one day and a maximum of his natural life" were added by N. Y. Laws 1950, c. 525.
Section 1941 of the Penal Law, however, complicates the interpretation of section 2188 suggested above in that it provides that second or third felony offenders “must be sentenced to imprisonment.” This section was construed as mandatory in *Hogan v. Bohan.* There it was held that the Court of General Sessions was under a duty to require service of sentence by the defendant, a third felony offender. The court, while aware that section 2188 of the Penal Law does not exclude from its operation second or third felony offenders, held that section must be construed in connection with section 1941 and that,

“when so construed it will become manifest that the legislature intended to make a distinction between persons never before convicted of felony and those previously convicted thereof.”

A more recent case is *People v. Webster,* wherein the court ruled that it did have the power to suspend sentence in the case of second or third offenders despite the District Attorney’s contention that the ruling would contravene section 1941 and *Hogan v. Bohan.* The court stated:

“It is perfectly clear that the legislature rejected among others, the proposed limitation on the power of the courts to suspend sentence or execution of sentence on second or third felony offenders pursuant to section 1941 of the Penal Law and retained only the limitation against suspending sentence on fourth offenders under section 1942 Penal Law.”

“... I rule on the basis of the legislative history of section 2188 of the Penal Law, this court has the power to suspend sentence or impose sentence and suspend the execution thereof in the case of a second or third felony offender.”

**Origin and Legislative History of Section 1941**

Section 1941, enacted in 1926, was the product of the Baumes Crime Commission. The *Hogan* decision viewed the purpose of this section as being to “provide a ‘mechanistic rule’ to take the place of the discretionary power of the court in passing sentence on prior felony offenders.” That this in fact was not the intention of the legislature is indicated by the 1939 proposal of the Commission on the Administration of Justice in New York State, that suspension of sentence be prohibited in the case of second offenders. The Commission’s notes reveal that this proposal “effects a substantial change by prohibiting suspension in the case of a second offender under Penal Law section 1941.” The Commissioner’s report constitutes

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6. Id. at 18, 101 N.Y.S.2d at 869.
8. 201 Misc. at 243, 107 N.Y.S.2d at 768.
10. FINAL REPORT, COMMISSIONERS ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE, LEGIS. DOC. 76 (1939).
11. *Id.* at Title IX, § 415.
12. *Id.* at p. 107.
clear legislative recognition that, despite section 1941, the law permits suspending the sentence or execution thereof on second or third offenders and the placing of such offenders on probation.

Duration of the Power of the Sentencing Court to Suspend Sentence

The question of the duration of the sentencing court's power over the sentence was seemingly settled in People ex rel. Woodin v. Ottaway\(^1\) wherein the court stated:

"Jurisdiction to stay the execution did not expire with the term at which the prisoners were tried. Like the power to revoke the suspension, it was not confined to one term nor even to one judge, but was vested in the court."\(^4\)

The Woodin case was cited as controlling in People v. Thuna\(^5\) where the court was presented with the problem of whether it had jurisdiction to suspend the execution of the second of two consecutive sentences imposed for two counts in one indictment. The Attorney-General resisted the motion for suspension of the second sentence on the ground that the term of the court at which the sentence was pronounced had long since expired. The motion, however, was granted, the court saying, in effect, that the termination of the term of court at which a sentence is pronounced is unimportant and while the sentence remains unexecuted the power to modify continues.

Both these decisions rest in part on section 2188 of the Penal Law and section 470-a of the Code of Criminal Procedure. The last sentences of both these sections provide "that the imprisonment directed by the judgment shall not be suspended or interrupted after such imprisonment shall have commenced." The lower court opinion\(^6\) in the Woodin case contains the significant statement that "the power given to the sentencing court by section 2188, to suspend execution of sentence, is incidental to the court's control over its judgment until such judgments are put into execution."\(^7\)

The Federal View

The federal courts have taken a like view respecting a court's jurisdiction over its sentence. The Federal Probation Act\(^8\) confers power on the federal courts to suspend sentence or grant probation after conviction. The Supreme Court of the United States\(^9\) has construed this Act as meaning the power could be exercised before execution of the sentence begins, though,

\(^1\) 247 N. Y. 493, 161 N. E. 157 (1928).
\(^2\) Id. at 495, 161 N. E. at 158.
\(^3\) 178 Misc. 427, 34 N.Y.S.2d 1001 (County Ct. 1942), rev'd on other grounds, 266 App. Div. 223, 41 N.Y.S.2d 857 (2d Dep't 1943).
\(^4\) 129 Misc. 120, 220 N. Y. Supp. 671 (Sup. Ct. 1927).
\(^5\) 129 Misc. 120, 220 N. Y. Supp. 671 (Sup. Ct. 1927).