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Appellate Review of Sentencing

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"(4) The exercise of caution on the part of the courts to avoid going beyond the intent of the standards and to guard against imposing upon the news media restraints not contemplated by the standards and not demanded by the requirements of courtroom decorum, and

"(5) Voluntary action by law enforcement agencies to acquaint their personnel with the limitations of the standards, and also to avoid withholding from the news media information about crime which the standards intend should be released promptly."⁵⁶

Only recently have the bar and press considered the problem together and, in Louisiana, an agreement of principles has been reached. It should be the duty of the bar associations to continue discussion with the news media, constantly seeking compatibility between first and sixth amendment rights of fair trial and free press. It is a responsibility shared by all which requires continued attention if the fundamental constitutional rights of fair trial-free press are to be equally protected.⁵⁷

Elliott W. Atkinson, Jr.

APPELLATE REVIEW OF SENTENCING

"Early in 1960 a 32 year old man was committed to a Federal prison upon his conviction of forging a \$58.40 check. He was unemployed at the time of his offense, his wife had just suffered a miscarriage, and they needed money for food and rent. He was a veteran who had been honorably discharged from the Army in 1952. . . .

"At about the same time there was also committed to prison a 36 year old man who had been convicted of forging a check for \$35.20. He was also unemployed, and his wife had left him. . . . A year prior to his forgery charge he had been committed to jail for 30 days for drunk driving, and shortly thereafter sentenced to 6 months in the county jail for failing to provide for the child that had been born to his marriage.

56. *Reardon Report*, *supra* note 6, at 32-33.

57. Ainsworth, *Fair Trial and Free Press*, 15 *LA. B.J.* 13 (June 1967).

"Our records disclose that the histories and offenses of these two men are practically identical. Yet the *first man received 15 years* in the penitentiary, and the *second man received 30 days*. Why? Simply because they appeared before two different judges."¹ (Emphasis added.)

In the vast majority of criminal cases in this country, the issue of guilt is not disputed.² "What is disputed and, in many more than guilty plea cases alone, . . . the only real issue at stake, is the question of [administering] the appropriate punishment."³ The imposition of sentence in a criminal case is of great importance.⁴ The trial judge is burdened with the duty of attempting to strike a delicate balance between the rights of society to be protected from future offenses, and the rights of the defendant to receive the appropriate punishment.⁵ Yet, in most jurisdictions in the United States, including Louisiana, this decision is not subject to appellate review.⁶ No other country in the free world permits a trial judge such unbridled discretion.⁷ In an attempt to remedy this problem, the American Bar Association recently adopted certain minimum standards relating to appellate review of sentencing and suggested that they be used as a guideline for state courts and legislatures in providing needed reform in this area.⁸ Responding to this suggestion, many

1. 110 CONG. REC. 20367 (1965) (remarks of James V. Bennett, former Director, United States Bureau of Prisons).

2. *Introduction to ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES* at 1 (app. draft 1968) [hereinafter cited as ABA STANDARDS, APPELLATE REVIEW OF SENTENCES]. The vast majority of criminal defendants plead guilty. *Id.* See also, Kadish, *Legal Norm & Discretion in the Police & Sentencing Process*, 75 HARV. L. REV. 904, 905 (1962). The author states in part: "Of all persons touched by the criminal process only the relatively small percentage who are brought to trial and acquitted or convicted are directly affected by the safeguards of trial." Hence, the sentence is the most important aspect of the system to these people.

3. Kadish, *Legal Norm & Discretion in the Police & Sentencing Process*, 75 HARV. L. REV. 904, 905 (1962).

4. See McGuire & Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U.L. REV. 423, 426 (1940).

5. Burr, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?*, 33 U. PITT. L. REV. 1 (1971).

6. See McGuire & Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U.L. REV. 423 (1940). Louisiana has no provisions allowing appellate review of sentences imposed within statutory limits. See *State v. Polk*, 258 La. 738, 247 So.2d 853 (1971) (as long as the sentence falls within the limits authorized by statute, the Supreme Court of Louisiana has no authority to review it).

7. ABA STANDARDS, APPELLATE REVIEW OF SENTENCES 2.

8. *Introduction to ABA STANDARDS, APPELLATE REVIEW OF SENTENCES*, at 3; Erickson, *The Standards of Criminal Justice in a Nutshell*, 32 LA. L. REV.

states have provided specific statutory authority for appellate courts to review sentences.⁹ The purpose of this Comment is to examine some of the major factors surrounding the question of appellate review of sentences in order to illustrate the need for continued legislative reform, and, more specifically, to suggest a feasible mechanism for use in Louisiana until the legislature provides a statutory remedy.

Elimination of Disparity

A universal criticism of sentencing procedures which do not provide for appellate review is the resulting disparity of sentences in cases which do not appear to be substantially different from one another.¹⁰ In the mind of the public, unequal sentences imposed upon defendants convicted of the same offense, without some visible justification, amount to judicial caprice and could cause loss of respect for the judicial system. Unjustified sentence disparity also tends to inhibit prisoner rehabilitation. Prisoners who receive much harsher sentences than their fellow inmates convicted of similar crimes become bitter, whereas those who receive relatively lighter sentences generally feel that they have beaten the system. Such adverse effects of sentence disparity tend to frustrate the deterrent and rehabilitative purposes of the sentence.¹¹

Data was compiled and given to the Congress of the United States as early as 1965 which revealed that sentence disparity

369, 374 (1972). See also J. HOGARTH, *SENTENCING AS A HUMAN PROCESS* (1971) (generally recognizing a need for reform in the current sentencing procedures) [hereinafter cited as HOGARTH].

9. "Statutory authority to review sentences has been specifically granted in one form or another, in thirteen states and in the military courts." ABA STANDARDS, *APPELLATE REVIEW OF SENTENCES* § 1.1(a) and comment at 14-15. ARIZ. REV. STAT. ANN. § 13-1717 (1956); CONN. GEN. STAT. ANN. § 194 (1966); FLA. STAT. ANN. § 932.52(13) (1966); HAWAII REV. STAT. § 212-14 (1965); ILL. ANN. STAT. ch. 38, § 121-29 (Smith-Hurd 1964); IOWA CODE ANN. § 793.18 (1950); ME. REV. STAT. ANN. tit. 15, § 2141-44 (1966); MD. ANN. CODE art. 26, § 132-38 (1966); MASS. GEN. LAWS ANN. ch. 278, § 28A-28D (1969); NEB. REV. STAT. § 29-2308 (1964); N.Y. CODE CRIM. PRO. § 543, 764; ORE. REV. STAT. § 138.050, 168.090 (1963); TENN. CODE ANN. § 40-2711 (1955).

10. *Introduction* to ABA STANDARDS, *APPELLATE REVIEW OF SENTENCES* at 1-6; HOGARTH 6.

11. 110 CONG. REC. 20367-38 (1965): "Considering the many adverse effects of such disparities in law enforcement it is hardly strange that although our prison sentences are on the whole the most severe in the world, we also continue to have one of the highest crime rates. The deterrent and rehabilitative purposes of the law are largely frustrated and nullified by sentences of an inconsistent and unjust nature."

was a nationwide problem.¹² For example, in 1959 the federal courts of western Arkansas and western Oklahoma punished defendants convicted of forgery with an average sentence of 58 and 63 months respectively, while Maine and southern New York imposed an average sentence of 9 months for defendants convicted of the same crime. Convictions for auto theft, a crime normally involving similar factors, brought sentences ranging from an average of 46 months in southern Iowa to only 11 months in the Western District of New York. Appellate review would be an important element in eliminating such unjustified disparity.¹³

Trial Judge Discretion in Sentencing

Despite the inequities produced by inconsistent sentencing, advocates of appellate review have been quick to point out that complete uniformity in sentencing is not only unrealizable, but also undesirable.¹⁴ The purpose of appellate review is not to insure that every defendant will get the same sentence if convicted of the same crime, but rather, to insure that those convicted of similar crimes under similar conditions and with relatively similar backgrounds will receive "equality of consideration"¹⁵ by the judge who imposes the sentence.¹⁶ Thus proponents of appellate review are aware of the fact that each offense may have many different combinations of circumstances and facts relating to the offender which necessarily require a certain amount of judicial discretion in selecting a particular

12. 110 CONG. REC. 20367 (1965). See note 1 *supra*.

13. Data also revealed that sentence disparity exists in state courts. However, the goal of appellate review of sentencing, in this author's opinion, is not to achieve uniformity in the sense that every state must provide similar sentences. Rather, appellate review would help provide for uniformity within each state and within the federal system. As between the individual states, sentences would vary depending upon the statutory limits the various state legislatures prescribe for particular crimes. 110 CONG. REC. 20367 (1965). J. HALL & G. MUELLER, *CASES & READINGS ON CRIMINAL LAW & PROCEDURE*, 33 (2d ed. 1965). Although statistics are not yet available in Louisiana to compare sentences imposed on defendants convicted of similar crimes, an interview with MacAllyn J. Achee, a former assistant prosecutor for the state Attorney General revealed that sentence disparity is not uncommon among the various state courts.

14. HOGARTH 7; Comment, 23 U. FLA. L. REV. 736 (1971).

15. HOGARTH 7; Burr, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?*, 33 U. PITT. L. REV. 1, 2 (1971).

16. *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 273 (1962).

penalty. Possible factors to be considered would include the offender's past record, his economic station in life, public opinion concerning a particular crime, and the various local resources available to the correctional branch of the judicial system to deal with offenders.

The argument most often made by opponents of appellate review, that sentencing is a matter which *requires* the exercise of the trial judge's *absolute discretion*, is subject to criticism. While it is generally recognized that the sentencing process does require exercise of discretionary power by the judge, critics of the current system ask why is sentencing not subject to review since review is provided in virtually every other area of the law where the trial court exercises discretion?¹⁷ Considering the adverse affects which result from an abuse of discretion, it would appear that the power of sentencing is too delicate and consequential to be placed entirely unsupervised in the hands of one man.¹⁸ It has been said that "in no other role can a judge so freely impose a pattern of his personal reactions, philosophy and animosity, as when he sentences a man, who has no right [to] appeal [the sentence]."¹⁹ Advocates of appellate review are not seeking elimination of the trial judges' discretion, as opponents fear, but simply a more uniform application of that discretion.²⁰ Appellate review could certainly aid the judicial system in achieving that goal.

Reduction of Excessive Sentences

Another apparent advantage of appellate review of sentencing would be the review and possible reduction of *clearly excessive* sentences. An excessive sentence may be defined as one which is neither necessary to protect the public nor useful in terms of rehabilitating the defendant.²¹ In *Peterson v. United*

17. Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 684 (1962).

18. *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 268 (1962).

19. *Id.*

20. ABA STANDARDS, APPELLATE REVIEW OF SENTENCES § 1.2 and comment (e), at 27-29; S. WARNER & H. CABOT, JUDGES & LAW REFORM 159-60 (1936). Over a period of time Judges develop certain criteria used to formulate the sentence; hence, if uniform criteria were developed, standard application of judicial discretion would result.

21. ABA STANDARDS, APPELLATE REVIEW OF SENTENCES § 1.2 and comment at 21.

States,²² the defendant was convicted of the theft of a forty-cent stamp. The maximum penalty of three years was imposed by the trial judge. In levying this punishment the judge observed that although the offense for which the defendant was found guilty was "rather trifling," he believed that the defendant was also guilty of subordination of perjury—"the main reason for the severe sentence imposed."²³ Another bizarre example of excessive sentencing occurred in *Duke v. United States*.²⁴ In that case an eleven-year sentence was imposed on an attorney having no prior record, because the sentencing judge thought that the defendant was arrogant and rude.²⁵ Still another extremely harsh sentence, seemingly unjustified, was reported by the Attorney General of the United States at a seminar being conducted on sentence disparity. A twenty-year-old man was blinded in an industrial accident, after which his wife divorced him and took custody of their two children. After regaining his sight he robbed a bank of \$5,000 at gunpoint in order to obtain money with which to get his family back. Shortly thereafter he became remorseful and turned himself over to the authorities. At his trial he pleaded guilty and was sentenced to forty years in prison at a time when the average sentence for bank robbery during that year was less than thirteen years. The trial judge completely disregarded the circumstances surrounding the crime and the fact that this was the defendant's first offense.²⁷

Many federal and state statutes permit judges to issue consecutive sentences which are not necessary to protect the public nor useful in terms of rehabilitating the defendant.²⁸ One such example is found in the case of *United States v. Smaldone*,²⁹ where a defendant received consecutive sentences totaling 170 years.³⁰ Such a sentence does not facilitate nor exemplify justice. Notwithstanding, it is firmly established in the federal criminal

22. 246 F. 118 (4th Cir. 1917).

23. *Id.* at 119.

24. 255 F.2d 721 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958).

25. See also Kennedy, *Justice Is Found in the Hearts & Minds of Free Men*, 25 FED. PROBATION 3, 4 (1961).

26. 30 F.R.D. 402, 424-25 (1961).

27. *Id.* See also Kennedy, *Justice Is Found in the Hearts & Minds of Free Men*, 25 FED. PROBATION 3, 4 (1961).

28. See note 21 *supra*.

29. 216 F.2d 891 (10th Cir. 1954), *rev'd per curiam*, 348 U.S. 961 (1955).

30. It should be noted that 110 of the 170 years were suspended.

practice that the appellate court has no control over a sentence which is within the limits allowed by statute.³¹ The Louisiana supreme court has likewise held that the determination of the sentence to be imposed is entirely discretionary with the trial judge, and as long as the sentence imposed falls within the statutory limits, it is not subject to review.³² Such holdings are based on the theory that the trial court has the unrestricted power to impose the maximum penalty authorized by the legislature, and, therefore, it is irrelevant whether the trial court was influenced by circumstances which should not have entered into its consideration.³³ Such a theory does not exemplify the goals of our criminal justice system, one of which is to render equal justice to all.

The Record on Appeal

A major objection to appellate review of sentencing has been the feeling that an appellate court could not determine, from a "cold" record, whether a proper sentence was given.³⁴ The ABA Standards suggest that the reviewing court should have before it all the information that was used by the sentencing judge.³⁵ Opponents have advanced the argument that even with a complete record before the court, appellate review ignores the unique opportunity of the trial judge to observe the defendant and thus base his disposition on a personal familiarity with the defendant's character.³⁶ However, there is no reason to suspect that the appellate court will not give due consideration to this factor.³⁷ Certainly it does not follow that because a trial judge observes the defendant first hand, an excessive or unfair sentence should go uncorrected. The three elements which are essential to the record sent to the appellate court are the

31. *United States v. Rosenberg*, 195 F.2d 583, 604 (2d Cir. 1952); *Gurera v. United States*, 40 F.2d 338, 340-41 (8th Cir. 1930).

32. *State v. Polk*, 258 La. 738, 247 So.2d 853 (1971).

33. *United States v. Satcher*, 182 F.2d 416, 421 (2d Cir. 1950); *Bailey v. United States*, 284 F. 126, 127 (7th Cir. 1922); Comment, 33 U. PITT. L. REV. 1, 7 (1971).

34. *Introduction to ABA STANDARDS, APPELLATE REVIEW OF SENTENCES* at 5.

35. *ABA STANDARDS, APPELLATE REVIEW OF SENTENCES* § 2.3 and comment (b), at 42-43.

36. Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79, 85-89 (1965); Comment, U. FLA. L. REV. 736, 744 (1971).

37. In many cases the defendant exercises his fifth amendment rights and, therefore, all the trial judge can do is look at the defendant.

pre-sentence report,³⁸ a verbatim record of the sentencing proceeding,³⁹ and any statements in aggravation or mitigation made by the district attorney or the defense.⁴⁰ It is submitted that these elements would give the appellate court valuable information that was available to the trial court when the sentence was formulated. The second and third elements would be especially important to the appellate court in determining whether the sentence was based on emotional grounds or because of aggravating remarks made during the course of the trial.

Frivolous Appeals

Another major objection of appellate review of sentences stems from the fear that the courts would be flooded with frivolous appeals.⁴¹ Although it is not meant to suggest that practical hardships on the appellate court should be overlooked when considering the validity of sentence review, objection on this basis alone completely evades the issue of whether such review is needed to insure the quality of justice that should characterize our courts.⁴² The ABA Standards, as formulated,

38. Whether pre-sentence investigation reports should be revealed to the parties has been a matter of frequent debate. *See, e.g.*, ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES & PROCEDURES (approved draft 1968). However, it is not the intention of this paper to resolve this debate. In Louisiana the court may advise the defendant or his counsel of the factual contents and conclusions contained in the pre-sentence investigation report; however, the source of such confidential information cannot be disclosed. LA. CODE CRIM. P. art. 877.

39. The ABA Standards propose the following be included in the record: "(i) a verbatim record of the entire sentencing proceeding, including a record of any statements in aggravation or mitigation made by the defendant, the defense attorney and the prosecuting attorney, together with any testimony received of witnesses on matters relevant to the sentence, any instructions or comments by the court to the jury in cases where the jury participated in the sentencing decision, and any statements by the court explaining the sentence; (ii) a verbatim record of such parts of the trial on the issue of guilt, or the proceedings leading to the acceptance of a plea, as are relevant to the sentencing decision; (iii) copies of the pre-sentence report of a diagnostic facility, or any other reports or documents available to the sentencing court as an aid in passing sentence." The part of the record containing such reports or documents should be subject to examination by the parties only to the extent that such examination was permitted prior to the imposition of sentence. ABA STANDARDS, APPELLATE REVIEW OF SENTENCES § 2.3 (a) (i)-(iii) and comments at 42-47.

40. *Id.*

41. *Introduction to ABA STANDARDS, APPELLATE REVIEW OF SENTENCES* at 5.

42. *See Appellate Review of Sentences, A Symposium at the Judicial Conference for the Second Circuit*, 32 F.R.D. 249, 309 (1962). Congressman Cellar stated that fear of frivolous appeals would not be a basis for objection inasmuch as it evades the issue of whether or not review of sentences is needed to insure that justice is done.

illustrate that it is quite possible to devise methods of coping with the practical burdens of sentence review.⁴³ One method of avoiding frivolous appeals is to place a reasonable limit on the length and kind of sentence that would be subject to review.⁴⁴ Notwithstanding the practical difficulties involved, increased workloads should not be a valid reason for denying substantial justice.

A Feasible Alternative for Louisiana?

There is an alternative for Louisiana short of legislative reform. The majority of cases exhibiting excessive sentences and sentence disparity occur as the result of a lack of guidelines for the trial judge to follow when imposing the sentence.⁴⁵ Hence, the crucial problem appears to be one of establishing agreed criteria for sentencing whereby every offender, although not receiving the same penalty from committing the same offense, will at least receive "equality of consideration."⁴⁶ It is the opinion of this author that with established guidelines for judges, the problem of sentence disparity and excessive sentences could be greatly reduced. Such uniform criteria could be established for Louisiana judges by the judicial administrator pursuant to his authority to promulgate rules for the courts.⁴⁷ Studies could be made of past sentences and sentencing procedures, taking into consideration what the judges feel to be the most prominent factors in the sentencing process. From such studies guidelines could be established and disseminated for judges for future use. However, while the above procedure would be an important step toward sentence consistency, it would still be impossible for an aggrieved offender to seek redress in the event that an occasional judge abused or exceeded the sentencing guidelines.⁴⁸

43. ABA STANDARDS, APPELLATE REVIEW OF SENTENCES § 1.1 (b).

44. *Id.*

45. *Introduction to ABA STANDARDS, APPELLATE REVIEW OF SENTENCES* at 2; BENNETT, *THE SENTENCE—ITS RELATION TO CRIME & REHABILITATION*, S. DOC. NO. 70, 88th Cong., 2d Sess. 307, 311 (1964); HOGARTH, *supra* note 8, at 7.

46. See note 15 *supra* and accompanying text.

47. LA. CONST. art. VII, § 12.1 provides: "The office of *Judicial Administrator* is hereby created as a constitutional office, and the Supreme Court shall have the power, . . . to promulgate all necessary rules and regulations in connection [with his duties]." (Emphasis added.)

48. Although guidelines for sentencing are necessary, appellate review of sentencing is also necessary if the system is to insure that the established guidelines will not be abused. Another possible method to attack the current

Conclusion

The major problem of the current system is the lack of established guidelines or standards for judges to use when determining the sentence. In addition to needed guidelines, review of sentencing procedures is also necessary to insure that established guidelines are followed. Due to the Louisiana supreme court's stated inability to review sentences without express statutory power,⁴⁹ needed reform must necessarily proceed from an informed legislature that is ready to extend judicial review to this important aspect of the criminal process. Until such legislative reform, internal court action in the form of seminars for judges wherein a free exchange of ideas regarding sentencing could be extremely helpful in alleviating some problems. Also, the judicial administrator could compile and distribute sentencing data to members of the judiciary, to be used in formulating sentencing guidelines. Even with such information appellate review of sentences is still essential if the defendant is to have a forum in which to seek redress when the judicial guidelines are disregarded. Without review, the objectives set forth by the ABA in drafting the standards relating to appellate review of sentences would in large measure, be defeated.

Julian Glenn Dupree

IMPLEMENTATION OF THE SPEEDY TRIAL GUARANTEE IN LOUISIANA

The right to a speedy trial, recognized from the time of the Magna Charta¹ is secured by the Constitutions of the United States² and Louisiana,³ and by the Louisiana Code of Criminal

sentencing problem is for the legislature to revise some of the current penalties which are provided for the various crimes. See, e.g., Ruben, *Disparity & Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 56 (1966); Wechsler, *Sentencing, Correction, & the Model Penal Code*, 109 U. PA. L. REV. 465, 472-75 (1961).

49. *State v. Polk*, 258 La. 738, 247 So.2d 853 (1971).

1. "To none will we sell, to none deny or delay right of justice." 4 W. BLACKSTONE, COMMENTARIES *422.

2. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

3. LA. CONST. art. I, § 9: "In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury . . ."