Washington and Lee Law Review

Volume 21 | Issue 2 Article 18

Fall 9-1-1964

Unconstitutional Judicial Sentences

played in the crime which determines who is an accomplice. Thus, not being indicted for the same offense as the principal should not preclude the person from being found an accomplice.

The Supreme Court of Ohio in *State v. McCoy*[24] affirmed the trial court's determination that the abortee, a witness for the state, was an accomplice of the abortionist. Even though the abortee was not indictable under the identical offense as the abortionist, she was found to have participated in the unlawful act and therefore was found to be an accomplice. The court reached this result by invoking a broad and sweeping statute which stated, "[W]hoever aids, abets, or procures another to commit any offense, may be prosecuted and punished as if he was the principal offender."[25] It is often difficult to determine exactly which of the two tests a court is applying when a broad application of the identical offense test is supplemented by a sweeping accomplice statute,[26] as in the *McCoy* case. The identical offense test in this situation encompasses many of the characteristics associated with the criminal corruption test. Therefore, any realistic distinction between the identical offense test and the criminal corruption test cannot be made.[27]

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UNCONSTITUTIONAL JUDICIAL SENTENCES

Since the prohibition of the eighth amendment of the United States Constitution against cruel and unusual punishment has not been extended to the states,[1] the prevention of such punishments in state criminal prosecutions is left to the states, subject only to an undefined control based on the due process clause of the fourteenth amendment of the Federal Constitution.[2] State constitutions, though, do contain

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[24]Supra note 21.

[25]Ibid.

[26]"Whoever aids, abets, procures, commands or counsels any other person to commit a crime or offense against the state is an accomplice and is guilty of the same crime or offense as the principal." Del. Code Ann. tit. 11, § 102(c) (1953).

[27]People v. Kupperschmidt, 237 N.Y. 463, 143 N.E. 256 (1924); People v. Hayes 210 App. Div. 549, 206 N.Y. Supp. 556 (1924). The two tests have become almost indistinguishable in some instances.

[1]McElvaine v. Brush, 142 U.S. 155, 158 (1891); Siegal v. Ragen, 88 F. Supp. 996 (E.D. Ill. 1949), aff'd 180 F.2d 785 (7th Cir. 1950), cert. denied, 339 U.S. 990 (1950); Ex parte Barnard, 52 F. Supp. 102, 104 (E.D. Ill. 1943); In re Riddle, 22 Cal. Rptr. 472, 372 P.2d 304, 305 (1962).

[2]Robinson v. California, 370 U.S. 660 (1962).

provisions expressly prohibiting the imposition of cruel and unusual punishments.[3]

The North Carolina Constitution contains a clause prohibiting cruel and unusual punishments[4] which operates directly on the judiciary.[5] In the recent North Carolina case of *State v. Blackmon*,[6] the defendant was prosecuted for two crimes: (1) breaking and entering under section 14-54 of the Statutes which provides for a maximum sentence of ten years imprisonment[7] and (2) possession of tools incident to the accomplishment of the crime under section 14-55 of the Statutes which prescribes no maximum punishment, but which provides for punishment within the discretion of the court.[8] The Superior Court of Gaston County found the defendant guilty of both offenses. He was sentenced to from eight to ten years imprisonment for breaking and entering and to from twenty to thirty years imprisonment for the possession of tools incident to the crime. Thereafter, he appealed, claiming that the latter sentence constituted cruel and unusual treatment. The Supreme Court of North Carolina agreed in light of the fact that the maximum sentence which could be imposed under the statute for the crime of breaking and entering itself was ten years.

The emergence of this extraordinary situation was due to the previous adoption by the Supreme Court of North Carolina of an unsound interpretation of a particular criminal statute. Section 14-2

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[3]Kenimer v. State ex rel. Webb, 83 Ga. App. 264, 63 S.E.2d 280 (1951); State v. Duff, 144 Iowa 142, 122 N.W. 829 (1909); Jett v. Ferling, 209 Md. 633, 120 A.2d 580 (1956); State ex rel. Lay v. Dictrict Court, 122 Mont. 61, 198 P.2d 761 (1948).

[4]N.C. Const. art. I, § 14.

[5]State v. Cain, 209 N.C. 275, 183 S.E. 300 (1936).

[6]260 N.C. 352, 132 S.E.2d 880 (1963).

[7]"If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, bankinghouse, counting house or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years." N.C. Gen. Stat. § 14-54 (Supp. 1963).

[8]"If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of housebreaking; or shall be found in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court." N.C. Gen. Stat. § 14-55 (1953).

of the North Carolina Statutes places a limitation on other statutes, such as the aforementioned section 14-55, which defines crimes without fixing specific punishments.[9] The North Carolina Supreme Court had previously held that statutes providing that punishment should be in the discretion of the court did impose specific punishments and, therefore, were not within the scope of the limitations imposed by section 14-2 on nonspecific punishments.[10]

In the *Blackmon* case the Supreme Court of North Carolina was for the first time confronted with a factual situation which graphically illustrated the inherent defects of the former interpretation. It is submitted that the court was clearly correct in rejecting the old rule that a statutory provision for punishment by fine or imprisonment in the discretion of the court is specific and that, therefore, the limitations of section 14-2 are inapplicable.[11] Under the newly adopted doctrine of the *Blackmon* decision, statutes providing for punishment in the discretion of the court are not specific and are, therefore, limited by the proscriptions of section 14-2 of the North Carolina Statutes.

WELDON J. SMITH

[9]"Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned in the county jail or State prison not exceeding two years, or be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or State prison not less than four months nor more than ten years, or be fined." N.C. Gen. Stat. § 14-2 (1953).

[10]State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942); State v. Cain, 209 N.C. 275, 183 S.E. 300 (1936); State v. Swindell, 189 N.C. 151, 126 S.E. 417 (1925).

[11]132 S.E.2d at 884.