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Criminal Law - Limitations on Use of Habeas Corpus in Regard to Allowance of Credit for Time Served Under Prior Convictions

Paul T. Wright Jr.

instant case, such crediting is disallowed on the strict rule that *habeas corpus* may only issue to determine the validity of detention under present sentence. It would therefore appear that the lower court has in the instant case precluded the petitioner's successful use of *habeas corpus* by restricting the writ issued to the first sentence alleged to be void in the petition, and by failing to consider the remainder.

S. J. B.

CRIMINAL LAW–LIMITATIONS ON USE OF HABEAS CORPUS IN REGARD TO ALLOWANCE OF CREDIT FOR TIME SERVED UNDER PRIOR CONVICTIONS

The impact of the *Holland*[1] decision on the substantive rights of prisoners who have been sentenced under void convictions has been brought into sharper focus by *Smyth* v. *Midgett*.[2]

Once again the Hustings Court of the City of Richmond, Part II, had ruled in favor of a petitioner on a writ of *habeas corpus* with respect to a prior sentence, and once again the Supreme Court of Appeals overturned the judgment of the lower court on this point.

In the *Midgett* case petitioner had been convicted on six charges of grand larceny and two charges of housebreaking, receiving a two year sentence for each conviction. He had completely served three of the sentences for grand larceny and at the time he petitioned for *habeas corpus* was serving the fourth sentence. His remaining unserved sentences included the two remaining grand larceny convictions and the two housebreaking convictions, plus three subsequently incurred escape convictions of one year each.

Petitioner's writ of *habeas corpus* challenged the validity, on constitutional grounds, of the eight original convictions for grand larceny and housebreaking. The Hustings Court ruled in favor of petitioner, finding all eight convictions void and further or-

[1] See Smyth v. Holland, 199 Va. 92 (1957) and comment therein *supra*, p. 428.

[2] 199 Va. 727 (1958).

dered that he be credited with the time served under the void sentences on his three remaining escape convictions. By an allowance of this credit, the Hustings Court found that the three escape convictions were satisfied and the petitioner was ordered released.

On review, the Supreme Court of Appeals held that the lower court erred insofar as it gave petitioner credit for the three prior completed sentences, in that it did not have jurisdiction to determine the validity of sentences he had completely served prior to the filing of his petition.

The Court's decision was based on a strict application of the scope of the writ of *habeas corpus*. It held that *habeas corpus* could not be used to review sentences already served but could only inquire into the validity of the sentence under which the petitioner was presently being detained. Therefore the lower court could not give credit beyond the time served on the single sentence for grand larceny that Midgett was serving at the time of filing his petition.

The court relied on the *Holland* case in support of its decision and to some extent seemed to feel that the present case was little more than a re-hash of the *Holland* situation.[3] Yet a close reading of the *Holland* decision would indicate that the reason for a reversal of that case was based on the fact that the trial court issued the writ of *habeas corpus* on a prior completed sentence.

From this view of the Holland case it would appear that the possibility was still open for obtaining credit for a prior invalid sentence if there were a presently void sentence which would give life to a writ of *habeas corpus*.

Based on this rationale the *Midgett* case presented the court with a legal question which had never been passed upon in Virginia, and an opportunity to further its equitable policy of

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[3] While Holland alleged that his present sentence was invalid the trial court made no determination of this question, apparently on the theory that the issue was immaterial, since the credit it was allowing for the prior invalid sentence was adequate to grant Holland's immediate release.

granting credit for void convictions as established in the *Stonebreaker*[4] and *Fitzgerald*[5] cases.

In its reliance on the *Holland* case and its failure to point out the suggested distinction the court has either overlooked this possibility or regarded it as completely without merit and therefore unworthy of mention.

The effect of the Midgett decision is to greatly limit the scope of the policy granting credit to prisoners who have suffered invalid convictions.[6] The Court has allowed itself to reach this result by relying on the procedural limitations of the writ of *habeas corpus.*

These limitations have the support of eminent and weighty authority and such authority is not lightly disregarded.[7] But the writ of *habeas corpus* is basically founded upon principles of equity and justice. No other form of action inherited from the old English common law has such an impressive history in support of individual liberty.[8] Such a writ should not be profaned by allowing it to be used in reaching an unjust result.

The outcome of the *Midgett* holding, in its practical aspects, has had little effect on the petitioner's freedom since the allowance of credit from his present void sentence plus the time involved in processing his appeal through the courts will very nearly approximate the remaining time outstanding on the valid escape convictions.

However, the *Midgett* case is certain to become a precedent for future decisions. In placing a premium on strict adherence to procedural limitations, the decision is open to criticism. It cannot logically be argued that basic justice has been done when

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[4] Stonebreaker v. Smith, 187 Va. 205, 46 S.E.2d 406 (1948) discussed in preceding comment.

[5] Fitzgerald v. Smyth, 194 Va. 681, 74 S.E.2d 810 (1953), discussed in preceding comment.

[6] For a discussion of the general scope of this problem see Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws.* 35 Minn.L.Rev. 239 (1951). And see Note, 45 Mich.L.Rev. 912 (1947).

[7] 39 C.J.S., Habeas Corpus §26, 9 Michie's Juris., Habeas Corpus §14, 15, 25 Am. Jur., Habeas Corpus §55.

[8] Holdsworth, *History of English Law,* Vol. 9, pp. 108-125, Vol. 10, p. 658.

a technicality in a procedure, which supposedly protects the individual, actually defeats the possibility of obtaining years of freedom.[9]

The Court has not revealed its philosophy behind the holdings in the *Holland* and *Midgett* cases. The Commonwealth's argument submitted against allowing the lower courts to inquire into prior convictions and grant credit was stated in its brief in the *Holland* case:[10]

> If the court had jurisdiction to do this, it could adjudicate a traffic conviction, which previously detained the petitioner and long since completed to be invalid and apply the time served thereunder upon a murder conviction upon which a prisoner might be serving. Moreover, if the court had jurisdiction, it could apply time served under one sentence twenty years ago (if held invalid) and apply it to a current sentence. There is no limit to the potential situations if once the strict rules and principles of *habeas corpus* are abridged.

This type of reasoning is an affront to the intelligence of our trial courts and is not consistent with the wide discretion they already have in regard to the imposition of sentences.

Since the court rests its decision solely on the scope of *habeas corpus* in this case, it may yet be possible to obtain a future review fully considering the equities involved from the standpoint of natural justice.[11]

The application of the writ of *habeas corpus* has not been quite as strict as the *Midgett* opinion suggests. Credit has been allowed for a prior void sentence on a writ of *habeas corpus*

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[9] It is interesting to note that in the Holland case the petitioner had the misfortune of being credited with time off for good behavior on his first sentence. If he had served the full 25 years as originally pronounced against him, then at the time he brought his petition for *habeas corpus* he would still have been serving this first sentence and the writ would have been effective to grant his release.

[10] Brief on Behalf of the Commonwealth, Smyth v. Holland, Record No. 4657, p. 4, 5.

[11] For an interesting case in which the court feels compelled to circumvent procedural formalities to insure a just result, see Lang v. State, 92 So.2d 670 (1957).

where the prisoner was serving a valid sentence at the time of the petition.[12] In an Iowa case, although the trial court erred on its basis for sustaining the writ, the appellate court noted that the petitioner had served time equivalent to the only valid sentence against him and concluded that he was entitled to discharge by some proceeding to that end, and granted immediate release.[13] The Federal Rules have been held sufficiently flexible to allow credit for a prior void sentence.[14]

While these cases are only a sparse minority, it is submitted that their reasoning has merit in regard to assuring substantial justice to a prisoner who has served long years of confinement under an invalid conviction.

This is not to discount the desirability of maintaining a stable form of procedure in the face of "hard" cases.[15] But it is the continual function of our system of law to develop the procedures by which the rights of the individual are kept in balance with the judicial process. In this respect the *Midgett* decision should cause reflection and debate over the proper ends to these means.

P. T. W.

PROPERTY—DAMAGES FOR TIMBER TRESPASS

A 1957 case[1] decided in the Supreme Court of Appeals of Virginia evidences that Virginia is in accord with the majority of states and the Restatement views regarding the assessment of damages for timber trespass.

The facts of the case show that the defendant, without permission of the plaintiff, and in the face of repeated warnings that he was trespassing on the plaintiff's land, cut and removed virgin timber from the plaintiff's land, and manufactured it into lumber. The defendant asserted that the cutting and removal was done under an oral contract of sale. The contract referred to was

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[12] Ex Parte Bell, 256 S.W.2d 413, Tex.Cr.App. (1953).

[13] Bennett v. Hallowell, 203 Iowa 352, 212 N.W. 701 (1927).

[14] Ekberg v. U. S., 167 Fed.2d 380 (1948).

[15] See dissent to Lang v State, *supra*, Note 11.

[1] Barnes v. Moore, 199 Va. 227, 98 S.E.2d 683 (1957).