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Criminal Law: The Effect of a Felony Committed by a Prisoner Who is on Parole: A Comparison of the New York and California Rules

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The Restatement of Property states:[31]

> Apportionment may be made on the basis of the intention manifested in the making of a promise respecting the use of land.

It was obviously the intent of the parties that apportionment to the then owners be made on the basis of value. There seems to be no reason that such intent not be carried to apportionment in every instance. The appellate court stated:[32]

> Such method of division [on the basis of value] is consistent with the terms of the agreement as well as being in harmony with section 1467 of the Civil Code.

This method of apportionment is also consistent with the apportionment that would be made in the absence of such agreement if these payments were royalty or rent.

It appears that the appellate court in its decision to apportion on the basis of value rather than area, correctly applied Section 1467 of the Civil Code. Once this is decided, there is no doubt as to the method of distribution prescribed by statute. The statute itself seems to be a restatement of the common law applicable to apportionment of rent and the method prescribed therein does not violate the interest of the parties nor disturb any legal principles. The application of the statute gives effect to the intention of the parties which is what is to be desired in any judicial determination by the courts.

Robert L. LaVine

CRIMINAL LAW: The Effect of a Felony Committed by a Prisoner Who is on Parole: A Comparison of the New York and California Rules

The question as to the effect of a felony which is committed while a prisoner is on parole was raised and decided by the New York Court of Appeals in the case of *People ex rel. Watkins v. Murphy*.[1] Watkins had committed a felony in New York for which he was tried and given a sentence of five to ten years. In 1945, after serving approximately three and one-half years, he was paroled, and with permission from the Parole Board he moved to Texas. On November 2, 1949 the New York Board filed a parole violation warrant with the Texas officials and Watkins was declared delinquent as of the date of the above mentioned warrant. For no apparent reason, Watkins was still at large in December of 1949, and in this month he committed and was convicted by a Texas court of robbery by assault, which crime was a felony both under the laws of Texas and New York. Watkins was sentenced by the Texas court to the state penitentiary, and after five years he was paroled therefrom. Upon his release, he was turned over to New York officials who incarcerated him in a New York prison. The New York Parole Board and the Department of Correction decreed that he would be required to serve the maximum term of the sentence originally imposed for the New York felony, and further that the time he was on parole would not be credited to that sentence. Watkins petitioned for a writ of habeas corpus and the ruling of the Parole Board was affirmed by the Court of Appeals, five justices dissenting.

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[31] § 536, comment *d* (1944).

[32] 145 Cal. App. 2d at 267, 302 P.2d at 330.

[1] 3 N.Y.2d 163, 143 N.E.2d 910 (1957).

There is a division of authority in the United States as to the effect of a parole on the prisoner's sentence.[2] Many jurisdictions[3] hold to the rule that the parole is a mere *suspension* of the prisoner's sentence. This view stems from the concept that once on parole, the convict is no longer a prisoner, and is in fact a free man subject to the terms of his parole. Since his time outside prison has no relation to the period of his confinement, this time could not possibly reduce his original term. The other view, and the one followed in California[4] and New York,[5] is that a convict on parole is in effect merely serving his sentence outside the confines of prison, and thus for the purposes of determining whether he has served his sentence, the time outside is credited to the original term of imprisonment.

The question raised by the principal case is: should the rule allowing the prisoner credit for the time served outside the prison be applied in his favor if he has violated his parole by the commission of a felony? In New York there is a statute[6] which answers the above query in the negative. The statute in substance provides that if any prisoner while on parole from a state prison should be convicted of a felony, he shall be returned to said prison to serve the maximum term of the original felony from the date he was released on parole. The majority of the court held that petitioner *was on parole* when he committed and was convicted of the Texas felony and hence he should be bound by the provisions of the statute.

The dissenters took exception to the decision on the point that Watkins was not in fact on parole when he committed the subsequent felony. It was their opinion that the decree of the New York Parole Board declaring Watkins a delinquent terminated the parole as of November 2, 1949. He was therefore no longer on parole and thus failed to meet this declared requisite of the statute. To substantiate this conclusion they cited a number of cases[7] which hold that after a parolee is declared delinquent he is no longer on parole, and is in the eyes of the law an escapee from prison. The most decisive holding to this effect was stated in *People ex rel. Dote v. Martin*.[8] Although this case was also cited by the majority of the court for the proposition that a parole violator is still within the custody of the Parole Board, it more properly stands for and directly holds that the violator of a parole is no longer under the custody of the Board and is an escapee. The court here said:[9]

> a violator is not entitled to credit for the time which elapsed between the date of delinquency as fixed by the Board and the date when returned to prison. During this time his absence from prison was *unlawful* and he was no longer in the custody of the Parole Board. (Emphasis added.)

The majority cited *People ex rel. Rainone v. Murphy*[10] in which a prisoner had committed a felony while on parole, and the court held that although the run-

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[2] 39 AM. JUR., *Pardon* § 93 (1942).

[3] Zerbest v. Kidwell, 304 U.S. 359 (1938); *Ex parte* Patterson, 94 Kan. 439, 146 Pac. 1009 (1915).

[4] *Ex parte* Casey, 160 Cal. 357, 116 Pac. 1104 (1911); *Ex parte* Forbes, 108 Cal. App. 683, 292 Pac. 142 (1930).

[5] People *ex rel.* Dote v. Martin, 294 N.Y. 330, 62 N.E.2d 217 (1945).

[6] N.Y. CORRECTION CODE § 219.

[7] Matter of Spitale, 302 N.Y. 616, 92 N.E.2d 900 (1951); People *ex rel.* Patterson v. Borckel, 270 N.Y. 767, 200 N.E. 586 (1936).

[8] 294 N.Y. 330, 62 N.E.2d 217 (1945).

[9] *Ibid.*

[10] 1 N.Y.2d 367, 135 N.E.2d 567 (1956).

ning of the state sentence stopped at the time of the prisoner's commission of the felony, such sentence begins to run again when the prisoner is turned over to the state parole board. This case was offered to show that although the parole is no longer effective to reduce the time of the original sentence (the one from which the prisoner was paroled), it does not terminate it so as to put the petitioner outside the control of the parole board. In other words, prisoner is still on parole, but the time between the commission of the felony and the time he was turned over to the New York authorities would not accrue to the unserved portion of his original sentence. But it should be noted that there was no delinquency prior to the commission of the second felony, and thus the case may be distinguished on this ground from the *Watkins* case.

People ex rel. Wilson v. Jackson[11] supports the thesis of the majority that the statute requiring the prisoner to serve the maximum term of his original confinement and also denying him credit for the time on parole, is applicable where there has been a decree of delinquency prior to the commission of the second felony. But the case held that this statute was pertinent only:[12]

> . . . where commission of the felony is made possible by the release on parole and before the state *has been able* to physically retake the prisoner. (Emphasis added.)

The dissenting judges made much of the fact that there was nothing which prevented the Parole Board from physically retaking the prisoner prior to his commission of the felony in Texas. In other words, even though Watkins was not residing in New York, it is most probable that had the New York Board acted seasonably, it could have physically retaken him in a considerably shorter period of time than the month between the issuance of the decree of delinquency and the commission of the felony. Thus they argued that to apply the statute in regard to Watkins would only be to sanction dilatory administrative procedure.

It would appear from an examination of the cases above cited that the question of Watkins being on parole at the time he committed the robbery in Texas could easily have been decided the other way. And there is adequate support for the dissenters' view that once a delinquency is decreed by the Parole Board, the prisoner is no longer on parole and thus is not within the statute which the majority applied. But upon consideration of the practical result which would ensue if such view had been adopted, there can be no doubt that the majority reached the correct conclusion. If the minority opinion had been adopted, the court would have been forced to credit Watkins with the time served on parole prior to the delinquency. By doing this it would have placed a premium on wrong-doing; for as a consequence of such a holding, one who is decreed delinquent and then commits a felony prior to being returned to custody would only have to serve the remainder of his sentence from the date of his delinquency whereas the parolee who has no prior violation, is not decreed delinquent and who commits a felony would be required not only to serve the maximum term of his original sentence, but also would lose the credit for the time on parole prior to the commission of the felony.

Having stated and to some extent examined the rule in New York, we will now look to the California law so as to determine if the same result would be reached should the California Supreme Court be faced with a case similar to *People ex rel.*

[11] 151 N.Y.S.2d 810 (Sup. Ct. 1956).
[12] *Ibid.*

Watkins v. Murphy. At the outset, let it be stated that there is no provision in the California Penal Code which requires that one who commits a felony while on parole must serve the maximum sentence from the date he was paroled.

There are, however, statutory provisions relating to parolees, and therefore we will turn our attention to a brief discussion of those which are most pertinent to the problems presented in the principal case. The Parole Board is authorized to impose any condition on a parolee that it may deem proper,[13] and if the prisoner shall violate such condition as is imposed, his parole shall be revoked.[14] It is further provided that he shall be considered an escapee during that period in which he is still at large after the parole has been revoked.[15] Lastly, a prisoner *on parole* shall remain under the custody of the Parole Board and shall be subject at any time to be returned to the enclosure of the prison.[16]

If one were to consider only the statutory law above summarized, then the problem which faced the New York court as to the control of the Parole Board once the prisoner has violated his parole, could face a California court. The prisoner could argue that once he violated the parole, by a felony or other breach of condition, then he is not a parolee but an escapee. He might further argue that the Parole Board has authority only while he is on parole. Thus, since he is an escapee after violation of the parole, he is no longer on parole and thus not subject to the control of the Parole Board. Although his argument might appear to be valid, the decision of the California Supreme Court in *Ex parte Casey*[17] would preclude any occasion for its use. In this case the prisoner had been paroled from a conviction of a felony and had committed a subsequent felony while on parole. The court held that:[18]

> the time which the petitioner was at liberty on parole must be credited to him as time served on the original judgment.

Thus the difficulty of determining whether or not the time on parole prior to the commission of the second felony shall accrue to the term of the original sentence does not face the California courts. The rule as set forth in the case clearly denies any right of the Parole Board or the courts to refuse to credit the time served outside prison and prior to delinquency to parolee's original sentence.

The most notable aspect of the California law on this subject is that our legislature has wisely refrained from burdening the courts and parole authorities with restrictive statutes. The whole tenor of our statutory law is to give broad grants of power to the parole authority and allow it, along with the guiding hands of the courts, to determine what will be just or unjust restrictions or conditions to be placed on a parole.

John F. Van De Poel

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[13] CAL. PEN. CODE § 3053.
[14] CAL. PEN. CODE § 3064.
[15] *Ibid.*
[16] CAL. PEN. CODE § 3056.
[17] 160 Cal. 357, 116 Pac. 1104 (1911).
[18] *Ibid.*