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Criminal Law: Consecutive Sentences for Burglary and Larceny Committed in a Single Criminal Transaction (Morgieau v. State, 24 St. Rptr. 79, 1967)

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A balance may be achieved between these interests if the criteria for the establishment of the public right are such that only valuable recreational waters are appropriated. To accomplish this such intangibles as reputation and access will be as important as the number of fish.[36]

Game fishing is America's leading form of outdoor recreation.[37] Each year more than a quarter of a million fishermen, spending 36 million dollars, fish Montana waters.[38] A majority of them prefer stream fishing.[39] Montana is one of the leading trout fishing states in the nation,[40] yet this asset is one which can be quickly lost. In the Black Hills of South Dakota 1,200 miles of trout streams have dwindled to 160.[41] The proper application of the instant decision could prevent such an occurrence in Montana.

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CRIMINAL LAW: CONSECUTIVE SENTENCES ALLOWED FOR BURGLARY AND LARCENY COMMITTED IN A SINGLE CRIMINAL TRANSACTION.—Petitioner and companions, intent on stealing beer, broke a window in a beer parlor. They returned to a cafe, drank coffee, and then drove around to ascertain the location of the city policeman so they would know it was safe to proceed. Seeing him park his car, they returned to the saloon, climbed in the broken window and removed 19 cases of beer from the premises. *Held,* petitioner committed the separate and distinct offenses of burglary and larceny and may be given consecutive sentences for each. *Morigeau v. State,* 423 P.2d 60 (Mont. 1967).

Whenever a defendant is charged with more than one offense arising out of a single criminal transaction, the question arises whether he is being punished twice for a single crime. He may be charged with an included offense—a crime that must necessarily be committed in the commission of another. For example, assault is included in assault and battery,[1] and there can be no crime of robbery[2] without the included

Since the appropriator is entitled to a certain quality of water also, this will create conflicts due to the purity of water needed by fish. See *Atchinson v. Peterson, supra* note 19 and also note 16.

[36]The primary consideration is the public use of the water rather than the preservation of the fish *per se.* Thus the type of fish as well as the number is an important consideration.

[37]BIENNIAL REPORT OF THE MONTANA FISH AND GAME COMMISSION, May 1, 1958-April 30, 1960, at 23.

[38]*Ibid.*

[39]*Id.* at 32.

[40]*Id.* at 23.

[41]COMMISSION REPORT, *supra* note 15, at 21.

[1]See REVISED CODES OF MONTANA, 1947, §§ 94-601 to 94-605, "Assaults." (REVISED CODES OF MONTANA are hereinafter cited R.C.M.)

[2]R.C.M. 1947, § 94-4301 (robbery defined).

crimes of assault and larceny. It is said that a man may not be punished twice for included crimes.[3] However, a more difficult question is posed when the defendant commits separate crimes in a single transaction—crimes that need not necessarily be committed in the commission of the other. Burglary[4] is breaking with intent to commit a felony and larceny[5] is unlawful taking. There may be a felonious breaking without a taking, and a taking without a breaking. Each constitutes a separate offense which violates a separate section of the code. Separate punishment is provided for each.[6]

When a man commits a burglary on one occasion and a larceny on another, there is little question that he has committed two crimes and may be punished accordingly. On the other hand, when the breaking took place at the same time as, and for the sole purpose of facilitating the taking, there is some feeling that the defendant should not be subjected to two punishments. Bishop states the problem in this often quoted excerpt:

> . . .a first count may set out a breaking and entering with intent to steal, and a second may allege the larceny as a separate thing and thereon the defendant may be convicted and sentenced for both. . . .Still, to make a burglary thus double, and punish it twice, first as burglary and secondly as larceny, hardly accords with the humane policy of our law, and we have cases which refuse this double punishment.[7]

Although many courts do take Bishop's viewpoint, the cases are far from being in agreement.

The federal cases are an example of the disagreement. The lower federal courts disagreed whether a person who broke into a post office with intent to steal, and committed larceny therein could be punished for both the burglary and the larceny.[8] In *Morgan v. Devine*,[9] the Supreme Court finally decided that he could be punished for the entry with intent to steal as well as the stealing. The Court said it thought the intention of Congress was to define separate and distinct offenses in the statute.[10] The Supreme Court reached a different result, however, in interpreting the federal bank robbery statute which made it an offense both to enter a bank with intent to commit larceny and to rob the bank.[11] In holding that a person could not be sentenced for violating both sec-

[3]See People v. Savarese, 1 Misc. 2d 305, 114 N.Y.S.2d 816, 834 (1952).

[4]R.C.M. 1947, § 94-901. (burglary).

[5]R.C.M. 1947, § 94-2701. (larceny defined).

[6]R.C.M. 1947, § 94-2706. (punishment for grand larceny). R.C.M. 1947, § 94-903. (punishment for burglary).

[7]1 BISHOP, NEW CRIMINAL LAW § 1062 (1892).

[8]Anderson v. Moyer, 193 F. 499 (N.D. Ga. 1912) held he could be punished for both. Halligan v. Wayne, 179 F. 112 (9th Cir. 1910) held he could be punished for either but not both.

[9]237 U.S. 632 (1915).

[10]*Id.* at 638.

[11]18 U.S.C. § 2113 (1964).

tions, the Court looked at the legislative history and decided the unlawful entry section was added to cover situations where the criminal might otherwise go unpunished.[12]

In some states a defendant may be sentenced for both burglary and larceny, even though they took place in the same transaction.[13] In fact, one court upheld a conviction for (1) breaking and entering with intent to steal (2) larceny of a safe (3) forcing entry into the safe, and (4) having possession of burglary tools.[14] On the other hand, some states have held that a defendant may not be sentenced for both burglary and larceny occurring in the same transaction.[15] Some courts have said in dicta that a court can not sentence for two facets of one transaction.[16] There are cases holding that concurrent sentences can be imposed[17] and one case said that the "more approved practice" was to sentence on the highest count.[18] Other states have settled the matter by statute. For example, in Missouri there is a statute providing:

> If any person in committing burglary shall also commit a larceny . . .on conviction of such burglary and larceny, (he) shall be punished by imprisonment in the penitentiary, in addition to the punishment herein prescribed for the burglary, not less than two nor exceeding five years.[19]

Maryland has a separate statutory crime of breaking and stealing[20] addition to that of breaking and entering with intent to steal.[21] If convicted of the former, the defendant can not be convicted of larceny also,[22] but if the latter is charged, he may be convicted and punished for both.[23]

The question then arises as to the effect of the Montana statute, 94-4701:

> An act or omission which is made punishable in different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. . . .

[12]Morgan v. Devine, 352 U.S. 322, 325-29 (1957).

[13]State v. Byra, 128 N.J.L. 429, 26 A.2d 702 (1942), *aff'd*, 129 N.J.L. 384, 30 A.2d 49 (1943); State v. Quatro, 44 N.J. 120, 129 A.2d 741 (1957); Wyatt v. Alvis, 73 Ohio L. Abs. 21, 136 N.E.2d 726 (1955); State v. Trunzo, 75 Ohio L. Abs. 187, 137 N.E.2d 511 (1956); Copeland v. Manning, 234 S.C. 510, 109 S.E.2d 361 (1959); Comm. *ex rel.* Comer v. Claudy, 174 Pa. Super. 494, 102 A.2d 227 (1954).

[14]*State v. Trunzo, supra* note 13.

[15]Clark v. Commonwealth, 135 Va. 490, 115 S.E. 704 (1923).

[16]Wells v. State, 168 So.2d 787 (Dis. Ct. App. 1964).

[17]People v. Griffin, 402 Ill. 247, 83 N.E.2d 746 (1949).

[18]State v. Lewis, 129 La. 800, 56 So. 893, 896 (1911).

[19]Mo. Ann. Stat. § 60.110 (1949).

[20]Md. Ann. Code, art. 2, § 32 (1957).

[21]Md. Ann. Code, art. 27, § 33 (1957).

[22]Crowe v. State, 240 Md. 144, 213 A.2d 558 (1965).

[23]Johnson v. State, 223 Md. 479, 164 A.2d 917 (1960).

Arizona,[24] California,[25] New York,[26] Utah[27] and Alabama[28] have construed the same provision and have reached inconsistent results.

Arizona has taken the position that the statute does not prevent the imposition of consecutive sentences for burglary and grand theft committed in the same transaction.[29] The Arizona court said that the statute has no effect unless the alleged crimes have identical components. Since the elements constituting burglary and theft are entirely different, rasoned the court, the statute does not apply.[30] However, the court did not entirely reject the contrary result, because it decided that the imposition of maximum consecutive sentences for burglary and larceny of a saddle was too severe and said that it was "in the interest of justice that the sentences should run concurrently."[31]

Utah also has held that the statute does not prevent a person from being sentenced to consecutive sentences for burglary and larceny. In *State v. Jones*,[32] the court noted that each offense required different acts. It distinguished a case where the accused was charged with adultery, incest, fornication, rape and carnal knowledge arising out of one act of intercourse with a female where it was held there could be but one conviction.[33] In that case, a single act constituted a violation of more than one provision of the criminal code. Thus, Utah and Arizona apparently feel that "an act or omission" refers to a single act, as opposed to a course of conduct.

Alabama rejected the view of Utah and Arizona.[34] The Alabama court found persuasive decisions in California and New York that the statute modified the common law, and prevented a defendant from being punished for both burglary and larceny.[35] However, the court was careful to limit its decision to those cases where "the uncontradicted evidence of the completed act of larceny stands alone to support the allegation of the prisoner's intent when he entered the premises into which he had broken."[36] In other words, if the defendant broke in with the intent to commit rape, and finding no one home, committed larceny, he could be sentenced for both burglary and larceny.

[24] ARIZ. REV. STAT. ANN., § 13-1641 (1956).
[25] CAL. PEN. CODE, § 654.
[26] N. Y. PEN. LAW, § 1938.
[27] UTAH CODE ANN., § 76-1-23 (1953).
[28] ALA. CODE tit. 15, § 287 (1958).
[29] State v. Hutton. 87 Ariz. 176, 349 P.2d 187 (1960).
[30] *Id.* at 188.
[31] *Id.* at 189.
[32] 13 Utah 2d 35, 368 P.2d 262 (1962).
[33] *Id.* at 263.
[34] Wildman v. State, 42 Ala. App. 357, 165 So. 2d 396 (1963).
[35] *Id.* at 402.
[36] *Id.* at 403.

Until the enactment of a recent statute,[37] the state of the law in New York was uncertain. In *People v. Savarese,*[38] after a careful analysis of the case law, the court concluded that the statute would not permit a defendant to be punished for both kidnapping and robbery when "no act was committed which was not necessary or incidental to the robbery and all such acts were motivated with an intent to commit that crime."[39] On the other hand, another court upheld the conviction and consecutive sentence for forging a check and grand larceny of the amount specified in the check, stating that it did not agree with the decision reached in the Savarese case.[40] In the case of *People v. Jackson,*[41] however, the defendant was given concurrent sentences for assault with intent to kill and attempted robbery arising out of the same transaction. The high court held that this did not violate the provision against double punishment, since the sentences were to be served concurrently. Thus, although not laying down the rule that a defendant may not be punished for two separate offenses arising out of a single transaction, the decision is at least entirely consistent with that position.

In California, it is settled that a defendant may not be punished for two offenses committed incident to a single criminal transaction.[42] In *Neal v. State,*[43] the defendant threw gasoline into a couple's bedroom and ignited it, severely burning them. It was held that the defendant could not be punished for both arson and attempted murder. The court said that the prohibition against double punishment applies not only where there is one "act" in the ordinary sense, but also where there is a "course of conduct" which violates more than one statute and comprises an indivisible transaction. The court said that whether the defendant can be punished for more than one offense depends on the "intent and objective" of the defendant and if they were all incident to one objective, he may be punished for only one of them.[44] This decision was followed in *People v. McFarland,*[45] where defendant broke into a hospital and stole an air compressor, thereby subjecting himself to a prosecution for burglary and larceny. The rule has also been applied to burglary with intent to

[37]N. Y. REV. PEN. LAW, § 70.25 (1967):
> 2. When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences must run concurrently. . . .

[38]*Supra* note 3.

[39]*Supra* note 3, at 836.

[40]People v. Zipkin, 202 Misc. 552, 118 N.Y.S.2d 697 (1952).

[41]2 N.Y.2d 259, 159 N.Y.S.2d 203, 140 N.E.2d 282 (1957).

[42]People v. Kennedy, 101 Cal. App. 2d 709, 226 P.2d 359 (1951); People v. Logan, 41 Cal.2d 279, 260 P.2d 20 (1953); People v. Brown, 49 Cal.2d 577, 320 P.2d 5 (1958); Neal v. State, 55 Cal.2d 11, 9 Cal. Rptr. 607, 357 P.2d 839 (1960); People v. McFarland, 58 Cal.2d 748, 26 Cal. Rptr. 473, 376 P.2d 449 (1962); People v. Brown, 200 Cal. App. 2d 111, 19 Cal. Rptr. 36 (1962); People v. Gay, 230 Cal. App. 2d 102, 40 Cal. Rptr. 778 (1964).

[43]*Supra* note 42.

[44]*Neal v. State, supra* note 42, at 843.

[45]*Supra* note 42.

rob,[46] and burglary with intent to rape.[47] There are limitations to the rule, however. In *Ex parte Chapman*,[48] after defendant had robbed the victim, the victim tried to run, and defendant tackled him and struck him with a weapon. The defendant was held punishable for both robbery and assault, since the assault was a separate act after the objective of robbery was accomplished and was not necessary to it. In *Seiterle v. Superior Court*,[49] the defendant tied his victims to a bed while he ransacked their house. Later he stabbed them to death. He was sentenced for murder and kidnapping with bodily harm. The court upheld the conviction and sentence on the ground that there was evidence to support the theory that the killings were not part of a pre-conceived plan but followed as an after-thought.

In the instant case, the defendant was sentenced to consecutive sentences for burglarizing a beer parlor and stealing 19 cases of beer. On its face, it would appear that the court rejected the California position and adopted that of Utah and Arizona. However, the facts of the case were peculiar. The defendant first made an unlawful entry by breaking a window. After a period of time he came back and removed the beer. The Court seemed to rest its decision on these facts. It said:

> The manner in which the petitioner and his companions committed the burglary and larceny divide the crimes neatly. There is a distinct time interval between each crime. Either crime can be proven without the slightest reference to the other crime. There are two distinct acts by which two distinct crimes were committed.
>
> The vital element of petitioner's argument, that is, the single act contention, is not supported by the facts. Therefore, we are not required to interpret the meaning of section 94-4701.[50]

The decision seemed to be based on these peculiar facts and not on a construction of 94-4701. The court treated each offense as though it were a separate transaction. This distinction is questionable since petitioner committed the entire sequence of acts with one objective in mind —stealing the beer. The mere fact they took the precaution after the initial entry to check on the policeman does not make it any less a single course of conduct. However, the court was obviously influenced by the great leniency that had already been shown the defendant.

It is submitted that the Supreme Court has not decided whether, under 94-4701, a person may be punished for both larceny and burglary committed in a single transaction. Although other courts are divided on the matter, the California cases would be persuasive that he may not be punished for both. In deciding which is the more desirable rule, a review of sentencing policy must be made, since it is the total time the offender must serve that is the ultimate consideration. This will be

[46] *People v. Brown, supra* note 42.
[47] *People v. Gay, supra* note 42.
[48] 43 Cal.2d 385, 273 P.2d 817 (1954).
[49] 57 Cal.2d 397, 20 Cal. Rptr. 1, 369 P.2d 697 (1962).
[50] Instant case at 79.

influenced by the nature of the crimes, available prison facilities, rehabilitation opportunities, parole practices, and other related factors. In a state that has indeterminate sentencing and rehabilitation programs, the length of time the criminal actually spends in prison can vary according to his rehabilitation. In Montana, however, the emphasis is placed on punishment rather than rehabilitation, and a person convicted of burglary and larceny could receive a definite sentence of up to 29 years.[51] This is nearly twice the sentence he could receive if he committed only one of the crimes, and must be considered in view of the fact that his object was the commission of only a single wrong. Since each crime by itself carries the possibility of a stiff sentence, a rule allowing the offender to be sentenced for only one of them would give the judge enough latitude to impose an adequate sentence according to the facts of the case, and would still be in accord with the "humane policy of our law."

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MONTANA'S "LONG ARM" STATUTE CONSTRUED: PRODUCT LIABILITY.—Plaintiff sued an Ohio corporation whose principal place of business was Chicago. She alleged injury to her respiratory system caused by perfume manufactured by the defendant in Chicago. Defendant's only contact with Montana was the shipment of products to Montana wholesale and retail outlets, constituting less than one-half of one per cent of its total business. *Held,* the defendant had sufficient "minimum contacts" with Montana so that personal service of process upon it did not offend the due process clause of the Fourteenth Amendment.[1] Sales and a general intention to sell products in Montana subjects a foreign corporation to the jurisdiction of Montana courts. *Bullard v. Rhodes Pharmacal Co., Inc.,* 263 F.Supp. 79 (D.Mont. 1967).

In 1877, Justice Field, in *Pennoyer v. Neff,*[2] defined the extent of a state court's jurisdiction:

> The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.[3]

[51] R.C.M. 1947, § 94-2706 provides a punishment of not less than one nor more than fourteen years for grand larceny. R.C.M. 1947, § 94-903 provides a punishment of not less than one nor more than fifteen years for first degree burglary, and not more than five years for second degree burglary.

[1] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const. amend. XIV, § 1.

[2] 95 U.S. 714 (1877).

[3] *Id.* at 722.