ANALYSIS

SECTIONS 25:00 THROUGH 40:00

PROPOSED NEW PENAL LAW

The following recommendations are made with reference to the proposed new Penal Law (no comment is made on the sections that are acceptable):

§ 25:00 subdivision 1

This section prohibits a defendant convicted of two crimes from being sentenced to probation as to one and imprisonment as to another.

No justification exists for prohibiting sentencing courts from imposing probation with reference to one crime and imprisonment with reference to another crime. While a Trial Court will rarely so proceed, it is in the best interests of substantial justice that the sentencing court be given the greatest flexibility.

This section also compels a court to either imprison a defendant or completely suspend sentence if the defendant has any portion of an undischarged sentence pending. This requires that a defendant, who should properly be placed upon probation, must be sentenced to prison or given a suspended sentence even if he may owe one day on an unexpired sentence.

It is suggested that restrictions on probation contained in this section be deleted and the subject left to the proper exercise of a court's discretion.

§§ 25:05

This section creates a sentence called "conditional discharge". This may be used to provide for three years of supervision, under conditions set by the court, in the case of class C, D, and E felonies not covered by Article 225 (Health and Moral Offenses). Its language leaves several questions unanswered which should be clarified. Under the provisions of this section, a defendant convicted of a class C felony may be sentenced to conditional discharge which provides for supervision for a maximum of three years. In such case, should the defendant violate the terms of his conditional discharge after 2 years 11 months, may he then be confined for a maximum of 15 years punishment for a class C conviction, or is the court limited to a 3 year period? If the defendant can be given a 15 year sentence, does he get credit for the period of conditional discharge during which he adhered to the terms of his discharge?

It is suggested that this section be clarified to answer the above questions, although section 20:00, subdivision 4, seems to provide that after revocation a defendant can receive a full sentence without any credits.

§§ 25:15

This section provides that multiple sentences to "conditional discharge" or "probation" shall run concurrently even if pronounced at different times. It is recommended that the following words be added to subdivision 1, "from the date of the most recent sentence". This clarification can serve to eliminate the present volume of spurious writs in which defendants in these cases claim that when a latter sentence is made concurrent with an existing sentence, the maximum of the latter sentence is to be calculated from the date of the beginning of the earlier sentence. It should be abundantly clear that in these cases

the latter sentence begins to run from the day of judgment and is concurrent only with the remaining balance of the earlier sentence. Any other interpretation unduly limits the length of probation or conditional discharge in the case of a multiple offender.

§§ 25:15 subdivision 3

This section provides that if a defendant on probation or conditional discharge subsequently receives a reformatory or indefinite sentence on a new charge, he is deemed to have automatically satisfied his old sentence unless the earlier probation or conditional discharge is revoked before the second sentence is executed or before he is paroled or conditionally discharged upon the second sentence.

This section should provide that if a defendant on probation or conditional discharge is convicted upon a new charge, it shall serve as a discharge of the earlier sentence only if the District Attorney in the County from which the defendant was placed on probation or conditional discharge is given written notice of the subsequent conviction and takes no action for at least 30 days.

§§ 25:20

This section creates a new sentence called "absolute discharge" which may be used in all cases where a defendant could be conditionally discharged.

This section should be eliminated. It opens the door to excessive leniency. It is sufficiently lenient that a person convicted of a felony be given a suspended sentence, probation, or conditional discharge, without providing for absolute discharge. Once a defendant has been convicted of a felony, it appears ludicrous that not only should he receive no punishment, but the court should immediately forfeit its jurisdiction in the matter.

30:00

This section sets the sentence limits. Subdivision 3a provides that the maximum non-capital sentence must have a proscribed minimum of not less than 15 years nor more than 25 years. No justification exists for requiring a court, upon a straight life sentence, to fix a mandatory minimum that does not exceed 25 years. There are countless cases in which the alternative of capital punishment is by-passed only because the public can be secure that its elected justices can insure defendant's incarceration for the balance of his life. The maximum of a 25 year minimum deprives the public of this protection as does the equally ill-advised present provision for parole from a straight life sentence after approximately 27 years. The new provision is just a further step in a bad direction.

30:00 subdivision 3(b)

This section makes the pronouncement of mandatory minimum sentences in class B, C, D and E felony convictions optional. It prohibits minimums in excess of 1/3 of the maximum imposed.

The above restrictions, combined with the elimination of the present multiple offender sections, severely restricts the capacity of courts to be certain that sentences shall result in adequate incarceration. It represents a significant abdication of judicial jurisdiction to an appointive administrative agency (Parole Commission).

Minimum sentences should be mandatory. Courts should not be allowed to shirk their responsibility of insuring that the deterrent of adequate punishment does not disappear from the criminal justice. The permissible minimum should be up to 2/3 of the maximum possible sentence. This will reserve sufficient sentencing discretion to the courts.

§ 30:10

This section replaces the present provisions for multiple felony treatment. It's language is not mandatory, but seems to give the court the option of declaring a defendant a "persistent felonyoffender" after a third felony conviction.

The section is thoroughly inadequate as a practical device for granting proper protection to the public from multiple felony offenders. It makes multiple felony treatment discretionary, and even this discretion is restricted to a third felony conviction. The discretionary aspect of this provision , plus its requiring of a maximum of life imprisonment, when utilized from a practical viewpoint, will serve to virtually totally eliminate additional punishment for prior felony offenders. It limits additional punishment for repeated felony offenders to those cases where a court will take an affirmative step towards severity. The great tendency to reduce felonies to misdemeanors already has created a situation where the public is exposed to the same defendant repeatedly committing crimes against society without suffering the isolation which could protect the public. This provision will be a further step in that direction.

§ 30:15

The elimination by this section of penitentiary indefinite sentences under Article 7a of the Correction Law will deprive the courts of the capacity to provide for adequate incarceration in the countless cases in which felonies are reduced to misdemeanors. The effect of this section will be to prevent the disposition of the cases by pleas,

unless as a condition to such plea the prosecution and the court are prepared to tolerate an inadequate sentence. There may be theoretical justification for eliminating "rehabilitation sentences", but from a practical standpoint the courts will be deprived of a vital and effective weapon for disposing of indictments by pleas and still providing for adequate incarceration. It will also restrict the means for adequately dealing with persistent misdemeanants.

§ 30:15 subdivision 4

This subdivision specifically creates a maximum sentence of 15 days for a "Violation". The creation of this maximum may be in conflict with certain provisions of the Vehicle and Traffic Law as well as other laws.

I would suggest that to avoid unnecessary litigation, and for the sake of clarity, there be added to this section the words "except as otherwise specifically provided".

§ 30:30 subdivision 1(c)

This section creates an unnecessary maximum of 20 years in some situations, and 30 years in others, upon the term that a judge may impose where a defendant is convicted of a series of crimes all committed prior to his apprehension. This section creates a premium for the multiple law-breaker, and unduly restricts sentencing courts.

The practical impact of this section is that no matter how many class B, C, D, or E felonies a defendant commits before being apprehended, he can still only be imprisoned for a maximum of 30 years for a class B conviction and for a maximum of 20 years for any other lesser felony conviction. The capacity of the courts to protect the public

by protracted incarceration is thus denied in favor of assuring defendants that they can rely upon the fact that once they have committed one crime, there is hardly any extra punishment for subsequent crimes.

I suggest that this provision be eliminated.

§§ 30:30 subdivisions 2(b) and 2(d)

All of the reasons for opposing the maximums created by section 30:30, subdivision 1(c) are equally applicable to these sections. The sections proclude consecutive misdemeanor sentences that exceed 2 years. This unduly restricts the discretion of Trial Courts and gives a premium to the multiple misdemeanor offender. If a defendant has committed 10 independent misdemeanors, he is subject to the same maximum punishment as a defendant who has committed 2 misdemeanors. Persistent law-breakers should not be rewarded by an advantage based solely on his commission of violations in volume.

§§ 30:30 subdivision 3

This section modifies existing law by applying "jail time" against a minimum as well as a maximum sentence, and also by stating that where a defendant is serving sentences on more than one charge, all of the charges are reduced by any "jail time". Both of these provisions constitute unjustified reductions of the period of incarceration, and award a premium to the multiple offender. This section should be amended so that "jail time" remains credited to the maximum time, and is credited only to those charges that caused the detention.

§§§ 30:35

This section provides that a man on parole from a definite sentence, who commits another crime and receives an indeterminate sentence, is rewarded by being relieved of the burden of serving the balance of his determinate sentence. No justification exists for this section except to give the multiple offender uncalled for leniency. The public is entitled to know that when they are victimized by crimes, their perpetrators will pay the price demanded for each and every one of these crimes.

§§§ 30:40 subdivision 2

This section permits the Parole Board to release any defendant serving a definite sentence in excess of 60 days after he has completed 30 days incarceration. Under this provision a judge may sentence a defendant to as much as 2 years and have him released by the Parole Board in one month. This clearly allows for excessive leniency by a Parole Board.

§§§ 35:10a

This section provides that when a defendant, serving a reformatory sentence, subsequently commits another crime and receives a second REFORMATORY sentence, the second sentence should be deemed to have commenced at the time of the first sentence. This section unjustifiably restricts the use of reformatory sentences by Trial Courts, Whether a subsequent sentence should be concurrent with an existing sentence, or should commence on an earlier date, or should run from the date of the first sentence, should be left to the Trial Courts.

The argument that this is a reformatory sentence and a man should not receive a two-doses of "reformation" is philosophical hogwash. Basically, this sentence, like all others, is to facilitate incarceration, and possibly subsequent supervision. The unfettered use of this type of sentence must be reserved to the Courts if it is to be effectively used.

§ 35:10b

This section provides that a defendant subject to a definite sentence, who commits another crime and receives a reformatory sentence, shall be rewarded by being relieved of his definite sentence. Again, no basis exists for this mechanical minimization of punishment for crime.

§ 35:10 subdivision 2

(c)

(ii)

This section provides that a defendant, subject to a reformatory sentence, who subsequently commits another crime, and receives an indefinite sentence is automatically relieved of the balance of his reformatory sentence. Another unjustified reward to the multiple offender.

§ 40:00 § 40:05

These sections create a fine as punishment for a felony and a misdemeanor. No provision is made for the pronouncement of an alternative jail sentence if the fine sentence is not satisfied by payment of the fine. In the absence of such provision, the Court may pronounce a sentence of a fine, and should the defendant not pay, the only remedy of the state is a civil suit.

SUMMARY

The total impact of the revision of sentencing procedures and sentences in the proposed new law is the minimization of the discretion of the Trial Courts, and their capacity to insure adequate incarceration of law breakers. These revisions transfer a great deal of the power of elected judges to the Parole Commission. The public has the right to look to its elected officials to insure that crime is adequately punished, and not find that their power has been essentially transferred to an administrative agency. The increasing transfer of governmental authority to administrative agencies staffed by career civil servants, contributes to the destruction of responsive and responsible government. It should be avoided. No justification exists for revisions which appear to be based upon a complete lack of confidence in the capacity of the judiciary to deal with punishment for crime. The public should be secure from the specter of criticising a situation, and hearing that its elected district attorneys and judges have been made powerless to serve them by "reforms" in our penal law.

The philosophy, throughout the new sections, of rewarding the persistent criminal who has not benefited from parole or incarceration, by relieving him of time owed for earlier crimes once he commits subsequent crimes, is unjustified and should be eliminated. When these automatic reductions are combined with limitations upon maximum total sentences, and limited minimum sentences, the power of the Courts to deal adequately with offenders is being effectively removed, without justification.

The only cardinal accomplishment that can be attributed to the revised sentencing procedures is that

leniency is made a matter of statute. The drafters of the new law appear to have concluded that our present crime problem can best be dealt by lessening the capacity of the Courts to punish criminal offenders.

In the absence of drastic revision, it is recommended that the District Attorneys Association strenuously oppose the enactment of the new sentencing provisions. They do not represent an improvement.