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Burns v. District Court: Sentencing Enters a New Era

by Philip A. Cherner

On August 15, 1982, Clarence Burns shot his wife five times at close range. Originally charged with first-degree murder, Burns pled guilty to second-degree murder, and the People agreed not to seek a sentence in excess often years. After a lengthy hearing, the sentencing court found probation was inappropriate. Burns was sentenced to four years with the Department of Corrections, plus one year of parole, which is the lowest possible extraordinarily mitigated sentence.(fn1)

On June 22, 1983, the district judge suspended the four-year sentence and sentenced Burns instead to two years in the county jail on a work release program. The public outcry over this short sentence was unprecedented. Seven days later, the judge revoked suspension of the four-year sentence. However, he did not increase the original sentence because he believed that the double jeopardy clauses of the U.S. and Colorado Constitutions prohibited an alteration of the four-year sentence.

Both the defendant and the People commenced original proceedings before the Colorado Supreme Court. (fn2) The People argued that the four-year sentence was so short as to be a gross abuse of discretion and requested that the sentence be increased. On the other hand, the defendant argued that there was no appellate remedy of which the People could avail themselves and that the sentence was supported by the record. The defendant further claimed that double jeopardy prevented an increase in the sentence. This article is a critique by a public defender of the Supreme Court holding on the sentencing issues in Burns, which was announced on December 5, 1983.

The Supreme Court Holding

The Supreme Court first held that it had jurisdiction pursuant to C.A.R. 21 to entertain the People's petition. The court noted that the issue was of sufficient public importance to warrant consideration and, further, that a writ of prohibition would lie to correct an illegal sentence. The court then held that the original sentence was illegal because the trial court had no authority to impose a suspended sentence if the defendant was not eligible for probation. Finally, the court ruled that neither state nor federal double jeopardy principles prevented an increased sentence if the original sentence was illegal. The Rule was made absolute and the case was remanded for resentencing.

An Analysis of the Decision

The key to the Burns decision is the Supreme Court's holding that the sentence imposed by the trial court at the first sentencing hearing was illegal for two reasons. First, the court ruled it would only have jurisdiction to hear the People's petition if the sentence was illegal. There is no statutory authority for the People to appeal a sentence which they feel is inappropriate, for whatever reason. Thus, only an extraordinary proceeding will allow appellate review. Second, the illegality of the sentence had been used to circumvent any double jeopardy bar, which is discussed further below.

The Suspended Sentence:

The Colorado Supreme Court previously held that, for a defendant twice convicted of a felony, the statutory bar to a grant of probation may not be circumvented by suspending the sentence and placing the defendant on what amounts to probationary status.(fn3) During Burns' sentencing, the trial court indicated that "probation was inappropriate." The Supreme Court used this remark to find that the defendant was thus ineligible for probation. Having made such a finding, it followed that Burns could not receive a suspended sentence.

There is a conceptual difference between a defendant who is not statutorily eligible for probation and one who is not deserving of probation because of the circumstances of his present offense. The former involves a ministerial act on the part of the trial judge; the latter is the essence of a sentencing decision. If the discretionary decision to deny probation is equated with the statutory proscription, then all suspended sentences are illegal because they imply the denial of outright probation. After Burns, sentencing judges will be required not to comment on the propriety of probation if a suspended sentence is still a possibility.

The *Burns* decision may also be interpreted in such a way that there is no longer a possibility for a suspended sentence. In the course of reaching its decision, the Supreme Court overruled *People v. Ray*(fn4) and *People v. Henderson*.(fn5) *Henderson* held that despite a lack of statutory authority, the trial court had authority to suspend a sentence. In the five years since that decision, the General Assembly never overruled *Henderson* by

banning suspended sentences, nor did it feel it necessary to provide a statute authorizing suspended sentences. However, *Burns* states:

> Defining crimes and prescribing punishments are legislative prerogatives. A court may not impose a sentence that is inconsistent with the terms specified by statutes. (Citations omitted.) Section 16-11-101, C.R.S. 1973 (1978 Repl. Vol 8) (1982 Cum. Supp.) authorizes the trial court to grant probation, unless the defendant is ineligible for probation, or to impose a sentence of imprisonment for a definite period of time.(fn6)

This language could be unfortunate for many offenders and misdemeanants in particular. Class one and two misdemeanors carry minimum sentences which are routinely suspended in part or in whole at many sentencing hearings.(fn7) Unless the legislature gives the court statutory authority to suspend sentences, misdemeanants may spend longer periods of time in custody than they would have prior to Burns.

The "Illegal" Sentence:

To delve further into the meaning of "illegal" sentence, the breadth of the definition must be questioned. What other factors might make a sentence illegal? Is a grossly lenient sentence so inappropriate as to be illegal? (fn8) If the defendant's prior criminal history is misrepresented to the sentencing judge, is the sentence rendered as a result of that misinterpretation considered to be illegal?

As noted above, the Supreme Court opinion relies upon the legality of the sentence in analyzing the double jeopardy question. Burns claimed that principles of double jeopardy prevented his sentence from being increased. The court held that if the sentence was illegal, it was void and a new sentence could be imposed in excess of the original. However, the court's citations of authority on this point leave room for disagreement. Four federal circuit decisions were cited, but each of these dealt with a trial judge who forgot to impose a sentence or a condition of a sentence that was mandated by statute.(fn9)

Two U.S. Supreme Court decisions were also relied upon by the court in reaching its decision. *Bozza v. United States*(fn10) held that the failure to impose a mandatory sentence could be later corrected. The remaining case, *United States v. DiFrancesco*,(fn11) involved a discretionary sentence by the trial judge which was appealable(fn12) by the government, thus putting the defendant on notice that the trial judge's decision was by no means final.

No cases were cited by the Supreme Court in which the prosecution, in the absence of any statutory authority, could appeal a sentence and then rely upon the trial judge's discretionary "error" to obtain jurisdiction and overturn the sentence. The *Burns* holding is a blank check for prosecutors to seek appellate review of any sentence they feel is too lenient. Perhaps therein lies the most long-lasting effect of *Burns*.

Conclusion

The holding in Burns is an invitation for prosecutors to seek appellate review of sentences which are arguably too lenient. Future decisions no doubt will clarify the definition of an "illegal" sentence. Now that prosecutors have their foot in the sentence-appeal door, it will be interesting to find out how wide it will open.

NOTES

Footnotes:

1. CRS § 18-1-105.

2. *Burns v. District Court,* 13 Colo.Law. 337 (S.Ct. Nos. 83SA284 and 83SA266, *annc'd* Dec. 5, 1983).

3. CRS § 16-11-201(2); *Herrmann v. District Court,* 186 Colo. 350, 527 P.2d 1168 (1974).

4. 192 Colo. 391, 560 P.2d 74 (1977).

5. 196 Colo. 441, 586 P.2d 229 (1978).

6. Slip op., pp. 10-11.

7. CRS § 18-1-106.

8. The author is of the opinion that this was the underlying motivation in *Burns*.

9. *United States v. Romero,* 642 F.2d 392 (10th Cir. 1981); *Stuckey v. Stynchcombe,* 614 F.2d 75 (5th Cir. 1980); *Garcia v. United States,* 492 F.2d 395 (10th Cir. 1974); *United States ex rel. Ferrari v. Henderson,* 474 F.2d 510 (2d Cir.), *cert. denied,* 414 U.S. 843 (1973).

10. 330 U.S. 160 (1947).

11. 449 U.S. 117 (1980).

12. 18 U.S.C. § 3576.