Denver Law Review

Volume 48 | Issue 4 Article 7

January 1972

Criminal Law - Concurrent Sentencing - Multiple Convictions - Colo. Rev. Stat. Ann. 40-1-508 and DeBose v. People

Scott Anderson Jr.

Criminal Law - Concurrent Sentencing - Multiple Convictions - Colo. Rev. Stat. Ann. 40-1-508 and DeBose v. People

COMMENT

CRIMINAL LAW — CONCURRENT SENTENCING — Multiple Convictions

COLO. REV. STAT. ANN. § 40-1-508 and *DeBose v. People,* 488 P.2d 69 (Colo. 1971)

INTRODUCTION

IN the recent case of *DeBose v. People*[1] the Colorado Supreme Court held that: (1) since robbery[2] and conspiracy to commit robbery[3] constitute separate and distinct offenses, multiple convictions may be obtained for their commission; and (2) the separate offenses of robbery and conspiracy to commit robbery may be punished, in the discretion of the trial court, by consecutive sentences. In so holding the court adopted the common law rule which prevails in the United States.[4] The new Colorado Criminal Code,[5] enacted a few months prior to the court opinion in *DeBose,* deals with both consecutive sentences and multiple convictions and became effective on July 1, 1972. This comment examines the impact of the new Colorado Criminal Code upon the rule recently established by the Colorado Supreme Court in *DeBose.*

I. MULTIPLE CONVICTIONS

The first part of the *DeBose* holding established that a defendant may be convicted for both robbery and conspiracy to commit robbery. Section 40-1-508(1) of the recently enacted Colorado Criminal Code, however, bars multiple convictions for several types of multiple charges,[6] but it does not bar multiple convictions for conspiracy and the related substantive offense.

---

[1] 488 P.2d 69 (Colo. 1971).

[2] COLO. REV. STAT. ANN. § 40-5-1 (Supp. 1967).

[3] COLO. REV. STAT. ANN. § 40-7-35 (1963).

[4] *See, e.g.,* Callanan v. United States, 364 U.S. 587 (1961); Pereira v. United States, 347 U.S. 1 (1954); Pinkerton v. United States, 328 U.S. 640 (1946); Goldman v. United States, 245 U.S. 474 (1918); United States v. Rabinowich, 238 U.S. 78 (1915); Toliver v. United States, 224 F.2d 742 (9th Cir. 1955).

[5] COLO. REV. STAT. ANN. Ch. 40 (Supp. 1971).

[6] *Id.* § 40-1-508(1).

Prosecution of multiple counts for same act. (1) When any conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not be convicted of more than one offense if:

(a) One offense is included in the other, as defined in subsection (5) of this section; or

(b) One offense consists only of an attempt to commit the other; or

Although section 40-1-508(1) was supposedly adopted from section 1.07 of the Model Penal Code,[7] the Colorado Criminal Code omits the portion of the Model Act which provides:

> When the same conduct of a defendant may establish the commission of more than one offense, the defendant . . . may not . . . be convicted of more than one offense if . . . (b) one offense consists only of a conspiracy or other form of preparation to commit the other . . . .[8]

Instead, the Colorado legislature substituted in its place language barring multiple convictions for attempt and the substantive offense. By virtue of this substitution it appears that the legislature agrees with the *DeBose* rule that multiple convictions may be obtained for the separate and distinct offenses of robbery and conspiracy to commit robbery.

II. CONCURRENT OR CONSECUTIVE SENTENCES?

DeBose also established that related multiple offenses *may* be punished, *in the discretion of the trial court,* by consecutive sentences. The new Colorado statute, however, provides that *concurrent* sentencing will be required in situations in which multiple prosecutions are prohibited. That prohibition, which is a significant innovation in itself, is briefly examined prior to the discussion of concurrent sentencing.

A. *Multiple Prosecutions*

The potential of prosecutorial abuse in multiple prosecutions has recently received much attention.[9] Procedural rules which allow the prosecutor to hold separate trials for separate offenses arising from the same transaction permit the prosecutor to engage in "jury shopping" a technique by which prosecutions may continue until a verdict satisfactory to the prosecutor is rendered.[10] Justice Brennan, in his concurrence in

---

(c) Inconsistent findings of fact are required to establish the commission of the offenses; or

(d) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods or instances of such conduct constitute separate offenses.

[7] *Id.* The Comment states erroneously: "Subsection (1) of this section is *adopted without change* from Model Penal Code Section 1.07." (emphasis added).

[8] MODEL PENAL CODE § 1.07 (Proposed Final Draft, 1962).

[9] Ashe v. Swenson, 397 U.S. 436, 452 n.3 (1969).

[10] Ciucci v. Illinois, 356 U.S. 571 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958).

Ashe v. Swenson,[11] argued that the constitutional guarantee against double jeopardy ought to be construed to include protection from "jury shopping." The Colorado legislature appears to have adopted Justice Brennan's formulation in section 40-1-508(2) of the Criminal Code:

> If the several offenses are known to the district attorney at the time of commencing the prosecution and were committed within his judicial district, all such offenses upon which the district attorney elects to proceed must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode. Any such offense not thus joined by separate count cannot thereafter be the basis of a subsequent prosecution.[12]

Although the section contains the limitations that the prosecutor must be aware of the offense and that the offense must have been committed within his judicial district, these limitations do not dilute the effective prohibition on "jury shopping." It is important to remember that this subsection does not bar multiple convictions; it merely requires the state to seek such convictions in a single trial whenever the offenses charged occurred within the same criminal episode.

B. *Concurrent Sentencing*

Section 40-1-508(3) requires that under certain circumstances any sentences imposed upon multiple convictions run concurrently:

> When two or more offenses are charged as required by subsection (2) of this section and they are supported by identical evidence, the court upon application of the defendant may require the state, at the conclusion of all the evidence, to elect the count upon which the issues shall be tried. If more than one guilty verdict is returned as to any defendant in a prosecution where multiple counts are tried as required by subsection (2) of this section, the sentences imposed must run concurrently.[13]

The term "identical evidence" is employed to identify a situation where only one "crime" has been committed, apparently codifying the *Blockburger* additional fact test[14] for determining when the traditional double jeopardy protection applies. According to this test, robbery and conspiracy to commit robbery are separate and distinct offenses, since each requires the proof of a fact not

---

[11] 397 U.S. 436, 488 (1969) (concurring opinion).

[12] COLO. REV. STAT. ANN. § 40-1-508(2) (Supp. 1971).

[13] *Id.* § 40-1-508(3).

[14] Blockburger v. United States, 284 U.S. 299, 304 (1932). "[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

necessary to the proof of the other. This distinction was considered to be of major importance by the majority of the court in *DeBose*.[15] The second sentence of subsection (3), however, requires that any jail terms imposed upon multiple convictions run concurrently.[16] This sentence, taken alone, appears to overrule the second holding in *DeBose*.

It might be argued, however, that subsection (3) taken as a whole, is applicable only in "identical evidence" situations and, thus, provides different protections at different stages of the same prosecution. This argument would contend that the second sentence of the subsection is applicable only when the court does not require the state to make an election as provided in the first sentence. But this is not a proper interpretation.[17] The two sentences of subsection (3) should be read separately because they apply to mutually exclusive fact situations. In the first, an identical evidence situation, there is only one "crime," and therefore, as a matter of law, only one conviction can occur, and the bar against consecutive sentences is inapplicable. This merely codifies the *Blockburger* test.[18] In the second fact situation, multiple convictions are anticipated: a defendant need *only* show that his case is subject to the requirements of subsection (2) to receive protection from consecutive sentences. Since the two sentences of subsection (3) refer to different fact situations, it is clear that they are independent.

The question remaining, then, is whether the crimes of robbery and conspiracy to commit robbery must be prosecuted as separate counts in a single prosecution under subsection (2). The critical language of that provision is the phrase "same act or series of acts arising from the same criminal episode." The Drafting Committee Comment indicates that this phrase is

---

[15] DeBose v. People, 488 P.2d 69, 70 (Colo. 1971).

[16] COLO. REV. STAT. ANN. § 40-1-508(3) (Supp. 1971). The provision employs the terms "guilty verdict" and "tried." If a defendant pleads guilty to the charges (as the defendant did in *DeBose*), he would be unable to qualify for the protection from consecutive sentences. It is, however, doubtful that a court would be inclined to construe these terms strictly, because to do so would be to provide protection to only those defendants who exercise their constitutional right to a trial by jury.

[17] Interview with former Colorado Supreme Court Justice Otto Moore and Harvey Cochran (members of the Drafting Committee of the Colorado Criminal Code), Legislative Drafting Office, Denver, Colorado, Nov. 3, 1971. The drafters intended that these sentences be taken separately. It would be bizarre, indeed, to give a defendant protection from more than one conviction, and to allow him the lesser protection of barring consecutive sentences if he failed to exercise his right to the former protection.

[18] Test quoted note 14 *supra*.

synonymous with "same conduct or criminal transaction."[19] A "criminal transaction" is not limited to each individual violation of a separate statutory provision; it includes all of the violations which a defendant commits while pursuing a single objective.[20] All of the acts of the conspiracy and the commission of the substantive offense were directed at accomplishing the same purpose: the successful completion of the robbery. Thus, these crimes fall within the phrase "series of acts arising from the same criminal episode."[21] Even the majority of the court in *DeBose* characterized the defendant's actions as a single course of conduct in the same criminal transaction.[22] Therefore, robbery and conspiracy to commit robbery are offenses which must be prosecuted as separate counts in a single prosecution as required by subsection (2), and if multiple convictions are obtained, consecutive sentences may not be imposed.

CONCLUSION

As a result of the enactment of the Colorado Criminal Code, the *DeBose* rule allowing consecutive sentences for multiple offenses arising out of a single criminal episode has been short-lived.[23] Although it is not clear whether the Colorado legislature *intended* to leave the remainder of the *DeBose* rule intact — the rule allowing multiple convictions for conspiracy and the substantive offense — it is clear that they have done so.

The legislature has, thereby, adopted an interesting middle ground: in a *DeBose* factual situation, the judge may no longer impose consecutive sentences, but a parole board may (must?) take into account the fact that the defendant is serving a sentence for more than one offense. Unless the legislature intends

---

[19] COLO. REV. STAT. ANN. § 40-1-508(2), Comment (Supp. 1971).

[20] *In re* Ward, 64 Cal. 2d 672, 414 P.2d 400, 51 Cal. Rptr. 272 (1966); Neal v. State, 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960); MODEL PENAL CODE § 1.08, Comment (Tent. Draft No. 5, 1956).

[21] Moore and Cochran Interview, *supra* note 17. The drafters used this language with the specific intent to include conspiracy and the substantive offense which was the object of the conspiracy, as well as other fact situations.

[22] DeBose v. People, 488 P.2d 69, 70 (Colo. 1971). The court here applies the *Blockburger* test (quoted note 14 *supra*) — "[t]he test as to whether the same act or transaction constitutes two distinct crimes or offenses . . . ." This test is applicable only when the charges are either assumed or characterized to have arisen from the same act or transaction.

[23] COLO. REV. STAT. ANN. § 40-1-501(1)(f) (Supp. 1971). This provision indicates that if a significant change in the law has been applied to the applicant's conviction or sentence which, in the interests of justice, requires retroactive application of the changed legal standard, the defendant is entitled to post-conviction review even if his conviction was affirmed on appeal. From this it would appear that DeBose might be able to have his consecutive sentences changed to run concurrently, especially since they were affirmed after passage of the new Code.

to direct the parole authorities to differentiate on this basis, there is little reason to exclude conspiracy and the substantive offense from those multiple charges for which multiple convictions are barred. If the legislature did not so intend, a verbatim adoption of section 1.07(b) of the Model Penal Code would avoid an unnecessary ambiguity.[24]

Scott Anderson, Jr.

[24] *See* p. 592 & note 8 *supra*.