
**Constitutional Law - Indiana Habitual Criminal Statute Not
Punishment for Status - United States v. Dowd, 271 F.2d 292 (C.A.
7th, 1959)**

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tuted punishable crimes.¹⁸ Consequently, the principle established by this case, if accepted by other courts, will create an unmerited extension of the doctrine of double jeopardy and allow the guilty to go unpunished because of a technicality.

¹⁸ *United States v. Tynen*, 78 U.S. 88 (1870).

CONSTITUTIONAL LAW—INDIANA HABITUAL CRIMINAL STATUTE NOT PUNISHMENT FOR STATUS

Petitioner was found guilty of the offense of vehicle taking and sentenced to a term of from one to ten years. In compliance with the Indiana Habitual Criminal Act,¹ petitioner, having twice previously been convicted and imprisoned for felonies, was sentenced to life imprisonment. At a hearing on the petition for habeas corpus, completion of the one to ten year term was averred and petitioner contended that the life sentence was punishment for a status of criminality rather than for a crime. It was insisted that since all Indiana convicts were subject to hard labor,² continued imprisonment under the life term would constitute involuntary servitude in violation of the Thirteenth Amendment.³ The district court dismissed the petition for habeas corpus. The Court of Appeals, for the Seventh Circuit, affirmed the dismissal of the petition. *United States v. Dowd*, 271 F.2d 292 (C.A.7th, 1959).

Historically, the habitual criminal statutes in the various states have often been attacked on constitutional grounds,⁴ but have almost invariably been sustained by the courts.⁵ Among the more forceful assertions against constitutionality have been arguments that these statutes evoke cruel and unusual punishment, denial of due process and/or double jeopardy. In answering the cruel and unusual punishment argument, the courts have pointed out that this phrase as used in the Constitution refers to physical torture and not to duration of time that a convicted criminal is to spend imprisoned.⁶ In refuting the denial of due process argument, the Supreme Court has held that the imposition of a heavier penalty under these Acts is not per se violative of due process.⁷ In rebutting the double jeopardy argument, the Supreme Court has maintained that the heavier

¹ Ind. Rev. Stat. (1956) §§ 9-2207, 9-2208.

² Ind. Rev. Stat. (1956) § 13-238.

³ U.S. Const. Amend. XIII.

⁴ E.g., *State v. Mead*, 130 Conn. 106, 32 A.2d 273 (1943); *State v. Zywicki*, 175 Minn. 508, 221 N.W. 900 (1928); *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27 (1909).

⁵ But cf. *Goeller v. State*, 119 Md. 61, 85 Atl. 954 (1912).

⁶ E.g., *Gibson v. Commonwealth*, 204 Ky. 748, 265 S.W. 339 (1924).

⁷ *Graham v. West Virginia*, 224 U.S. 616 (1912).

punishment is not for prior offenses but is a more severe penalty for the last crime because the defendant is an habitual criminal.⁸ Related to the cruel and unusual punishment argument, and equally unsuccessful, is the contention that in these cases the penalty is disproportionate to the nature of the offense.⁹

Although the Habitual Criminal Acts have withstood many similar constitutional assaults, they are not at all uniform in content. They differ in scope of proscribed offenses, in adjudgment of habitual criminality and its effect on length of imprisonment and in statutory language generally.¹⁰ However, the cases involving these statutes have disclosed a common identity of purpose. The decisions have repeatedly stressed that the aim of the particular statute is to provide a more severe punishment for hardened offenders, thereby both removing them from society and affording a deterrent to others.¹¹

The Indiana Habitual Criminal Act under which petitioner was sentenced is as follows:

§ 9-2207. Every person who, after having been twice convicted, sentenced and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States of America, shall be convicted in any circuit or criminal court in this state for a felony hereafter committed, shall be deemed and taken to be an habitual criminal, and he or she shall be sentenced to imprisonment in the state prison for and during his or her life.

§ 9-2208. To authorize a sentence of imprisonment for life under this act, the indictment or affidavit shall allege that the defendant has been previously twice convicted, sentenced and imprisoned in some penal institution, for felonies, describing each separately. If the trial jury, in their verdict, find these facts to be true, and convict such defendant of the third felony, the trial court, *after passing sentence of imprisonment for a specific term*, as prescribed by the statute, shall proceed to sentence the defendant to imprisonment for his or her life.¹²

The twofold sentencing aspect outlined in the second paragraph (§9-2208) of the Indiana Act, is unique.¹³ It is this uniqueness which petitioner attempted to exploit in seeking to have his life sentence declared

⁸ Moore v. Missouri, 159 U.S. 673 (1895).

⁹ In re Rosencrantz, 205 Cal. 534, 271 Pac. 902 (1928).

¹⁰ Cal. Pen. Code (1959) § 644; Wisc. Stat. Ann. (1958) § 959.12; Ky. Rev. Stat. (1953) § 431.190; Conn. Gen. Stat. Rev. (1949) § 8820.

¹¹ E.g., Davis v. O'Grady, 137 Neb. 708, 291 N.W. 82 (1940).

¹² Ind. Stat., Burn's 1950 Repl., §§ 9-2207, 9-2208 (emphasis supplied).

¹³ The Habitual Criminal Statutes of states do not provide for separate sentences; the life sentence alone is imposed under these statutes, no distinct term for the last offense being described. That is, in their sentencing aspect, these statutes equate with the first paragraph (§ 9-2207) of the Indiana statute. Refer to the California and Kentucky statutes cited in note 10, supra.

unconstitutional. The attempt failed, but the case does represent the first reported decision resolving an alleged conflict between the Thirteenth Amendment and an Habitual Criminal Statute.¹⁴

Involuntary servitude "except as punishment for crime" is prohibited by the Thirteenth Amendment.¹⁵ The controversy here then was whether or not petitioner's life term was imposed as a penalty for crime. In settling this issue the majority held that the life sentence was imposed, not for the status of habitual criminality but as an "incident to a conviction of crime"¹⁶ and outside the ban of the Thirteenth Amendment. A concurring opinion advanced the theory that the life sentence was "punishment for crime" and therefore within the exception to the Thirteenth Amendment because it was imposed "for the *criminal conduct* of committing a third felony with a record of two prior criminal convictions."¹⁷ The dissenting opinion strongly urged the validity of petitioner's argument: "The life sentence is for being a 'Habitual Criminal.' It is not a sentence for the commission of the third felony of vehicle taking. Sentence [for vehicle taking] was *separately* imposed and has been served by the petitioner. The life sentence is imprisonment for a status. It is not 'punishment for crime' and violates the Thirteenth Amendment."¹⁸

The dissent is based upon a literal interpretation of the statute, but since such a statute is not self-executing, the key to its correct interpretation must be judicial determination of legislative intent. This same court in *Goodman v. Kunkle*¹⁹ held that habitual criminality is a status and not a crime, and the Indiana Supreme Court decided in *Kelley v. State*²⁰ that the additional punishment under the act is for the last offense only. Taken together, these two cornerstone cases necessarily lead to the conclusion that, although habitual criminality is a status, the defendant, in *Dowd*, was punished not for that status, but rather only for the latest crime of vehicle taking. In *Witte v. Dowd*,²¹ the defendant had been convicted of forgery and found to be an habitual criminal. The trial court then entered a sentence of life imprisonment without first and separately imposing a sentence for forgery. The Indiana Supreme Court held that the failure to impose the separate sentence for the specific crime was a mere irregularity and did not deprive the court of jurisdiction to enter the life sentence. The decision in *Witte* can have no meaning other than that the life sen-

¹⁴ See *Smith v. State*, 227 Ind. 672, 87 N.E.2d 881 (1949). But see *Witte v. Dowd*, 230 Ind. 485, 102 N.E.2d 630 (1951).

¹⁵ U.S. Const. Amend. XIII.

¹⁶ *United States v. Dowd*, 271 F.2d 292, 295 (C.A. 7th, 1959).

¹⁷ *Ibid.*, at 297.

¹⁸ *Ibid.*, at 298 (emphasis supplied).

²⁰ 204 Ind. 612, 185 N.E. 453 (1933).

¹⁹ 72 F.2d 334 (C.C.A. 7th, 1934).

²¹ 230 Ind. 485, 102 N.E.2d 630 (1951).

tence was imposed for the *last crime*. While forgery was the only crime charged there, the court failed to enter a specific term for it and the life sentence was allowed to stand. The logical inference from *Witte* is that the court recognized the double sentencing aspect of §9-2209 of the Act to be a procedural implementation of §9-2208 and not as determinative of substantive rights. The imposition of separate sentences does serve to emphasize the disparity between the punishment accorded habitual criminals in Indiana and that accorded first or second offenders. First or second offenders would, of course, receive only the specific term and not the life sentence.

Another constitutional attack on an habitual criminal statute is thus repulsed. It is felt here that these statutes are vincible only by repeal. And repeal is incomprehensible unless and until legislators begin to doubt the punitive and deterrent values of long-term imprisonment.

CONTRACTS—DEFENSE TO THIRD PARTY BENEFICIARY
RIGHTS NOT AVAILABLE UNDER COLLECTIVE
BARGAINING AGREEMENT IN ABSENCE
OF EXPRESS PROVISION

The United Mine Workers of America entered into a collective bargaining contract with nine coal operators, one of which was the Benedict Coal Corporation. The agreement provided that a union welfare fund was to be established and maintained from royalties on each ton of coal produced by the corporation for sale or use. The trustees of the fund brought suit as third party beneficiaries for a portion of the royalties which the corporation failed to pay under the collective bargaining agreement. The Benedict corporation cross-claimed for a larger amount as damages sustained from strikes and stoppages by the union in violation of the collective bargaining contract, and claimed that payment to the welfare fund was excused in proportion to the violation of the agreement by the union. The jury returned a verdict for the trustees, but also found in favor of the corporation on the cross-claim. The district court gave effect to Benedict's defense by refusing immediate execution and payment of interest on the trustees' judgment. Instead, it ordered that the judgment be satisfied only out of the proceeds collected by Benedict on its judgment against the union and paid into the registry of the court by the union.

Both the union and trustees prosecuted separate appeals to the Court of Appeals for the Sixth Circuit. The court of appeals affirmed the district court, except that it held the amount of the damages awarded to