

JUDGMENT IN CRIMINAL CASES - Sentences for escaped convicts to be cumulative.

12-11
November 15th, 1933

FILED
J. J.

Mr. J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

We have your request of November 7th, 1933, for an opinion, which request is in the following language:

"At the September, 1925, Term of the Cass County Circuit Court the defendant, Larson, plead guilty to charges of Stealing Chickens in the Night Time and Carrying Concealed Weapons. He was sentenced to serve (consecutively) five (5) and two (2) years respectively, from October 29, 1925.

He was accordingly received at this institution December 8, 1925. On May 28, 1926 the prisoner escaped from the outside carpenter shop after assaulting a guard. He was returned five days later.

For this escape he was sentenced at the November, 1926, Term of the Cole County Circuit Court to serve three (3) years, "from expiration of present sentence."

The sentences, therefore, and the order in which they were pronounced are:

Cass County-	5 years-	Cause 20158-	Dec.4,1925
Cass County-	2 years-	Cause 20161-	Dec.4,1925
Cole County-	3 years-		Nov.15,1926

The prisoner's escape occurred during the first year of two sentences totaling seven (7) years. The customary penalty for escape

#2 - Hon. J. M. Sanders

being loss of merit time and benefit of the three-fourths law, should Larson serve both the five and the two years sentence in full, or only the first- 5 years- sentence?"

Sentence in Case 20158 and the judgment of the court thereon was as follows:

"It is therefore ordered, sentenced and adjudged by the court that the said defendants, Archie DeWitt and John Larson having plead guilty as aforesaid, be confined in the penitentiary of the State of Missouri for the period of five years from the 4th day of December, 1925 and that the sheriff of this county shall without delay, remove and safely convey the said defendants to the said penitentiary there to be kept, confined and treated in the manner directed by law until the judgment and sentence of the court herein be complied with or until the said defendants shall be otherwise discharged by due course of law."

It is, therefore, the opinion of this office that the above judgment and sentence of the circuit court was valid and binding and that the defendant must serve his five year sentence from December 4th, 1925 until he is discharged therefrom by operation of law.

In Case no. 20161, the defendant was sentenced on the same day as Case no. 20158, and the judgment and sentence in the latter case reads in part as follows:

"it is therefore sentenced ordered and adjudged by the court that the said defendant John Larson having plead guilty as aforesaid be confined in the Penitentiary of the State of Missouri for the period of two years to follow termination of sentence in case No. 20158, and that the sheriff of this county shall without delay remove and safely convey the said defendant to the said

#3 - Hon. J. M. Sanders

penitentiary there to be kept, confined and treated in the manner provided by law until the sentence and judgment of the court herein be complied with or until the said defendant shall be otherwise discharged by due course of law."

It therefore appears that the sentence in case No. 20161 cannot begin until the defendant has served his sentence under case No. 20158.

With reference to the conviction of the defendant for escaping from the penitentiary, which conviction occurred in the Cole County Circuit Court on November 18, 1926, and was for a term of three years, we may disregard that part of the sentence making it begin, "From the expiration of the present sentence", as surplusage. The above phrase "from expiration of present sentence" was unnecessary in this judgment, because under Section 3912, R. S. No. 1929, the Legislature specifically provided for the sentence in such a case as this, and the statute automatically becomes a part of every sentence, whether included therein by the judge or not. That section of the statute reads as follows:

"If any person confined in the penitentiary for any term less than life, or in lawful custody going to the penitentiary, shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding five years, to commence at the expiration of the original term of imprisonment.

It is, therefore, the opinion of this office that the above convict must serve the three sentences in the order in which he was sentenced, and that a prior sentence must be served and the defendant discharged therefrom before he can obtain credit for serving time upon any subsequent sentence.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General