

P. S
SHERIFF:

It is the duty of the local sheriff to convey the prisoner to the penitentiary when an appeal is dismissed in the Supreme Court for failure to prosecute same on behalf of the defendant.

June 29, 1934.

6-30



Hon. Geo. B. Padget
Prosecuting Attorney
Daviness County
Gallatin, Missouri

Dear Mr. Padget:

This is to acknowledge your letter of June 20th, as follows:

"I received a postal card from the Clerk of the Supreme Court, dated May 17, 1934, saying 'In case of State v. Milford Lirley. Respondent's motion to dismiss appeal sustained & appeal dismissed". He was on Dec. 7, 1928 by a jury convicted and punishment two years in penitentiary, various motions and delays were such that he was not formally sentenced until March 31st, 1932 at which time he was formally sentenced by our circuit court to two years in the penitentiary; at which time his appeal was granted to the supreme court, but later the appeal dismissed as above stated.

Now the question is, does the officer's from Supreme court come and take him to the penitentiary, or does our sheriff pick him up and take him?

Now another matter of similar kind; I just received a postal card, from clerk of Supreme Court, saying, 'In case of State vs. Herman Long, respondents motion to dismiss appeal sustained and appeal dismissed." Herman Long was tried in our circuit court in May 1927, and defendant was convicted and punishment fixed at two years in the Penitentiary.

He filed a motion for new trial, gave a day to day bond and while the case was pending on the motion he forfeited the bond by failing to appear, and afterward he was convicted and sentenced to penitentiary for stealing chickens in another county, and we did not get to sentence him until March 1932. He then appealed, but as above stated the appeal has been dismissed.

The same question in this case as the first one above asked. I don't believe either of them has been taken to penitentiary yet on these convictions, or sentences."

We find that on December 5th, 1933, this Department rendered an opinion which answers your question. In said opinion we held the following:

"We are therefore of the opinion that when a criminal case is dismissed, either at the option of the defendant or for failure to perfect the appeal, it is the duty of the local sheriff to convey the prisoner, in case of a felony, to the penitentiary or to carry out the judgment of the court."

We are of the same opinion at this time, and such applied to the facts in your case.

When an appeal is dismissed by the Supreme Court it has the same effect as though the case had never been before the Supreme Court, consequently the local circuit court has retained jurisdiction all of the while. The appeal being dismissed in the Supreme Court because of the failure of the defendant to perfect same, thus no jurisdiction ever lodged in the Supreme

Court so that that court could not direct the marshal to carry out its mandate affirmance, which would direct the marshall to arrest and convey the prisoner to the Penitentiary.

We are herewith attaching copy of the opinion referred to.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG
Enc.