

PENAL INSTITUTIONS: Mandamus imposing sentence in criminal cause. Sentence to run concurrently since the Supreme Court did not direct otherwise.

February 2, 1935.



Honorable George W. Bryant  
Chairman Pardon and Parole Board  
Department of Penal Institutions  
Jefferson City, Missouri

Dear Mr. Bryant:

We acknowledge your request for an opinion dated January 15th, which request is as follows:

"We have two mandates from the Supreme Court relative to the above named inmate.

"It seems this man was tried in St. Louis County for kidnapping, and given five years. He was tried in St. Louis City for carrying concealed weapons and given two years. The mandates from the Supreme Court confirm these sentences. The mandate for the five year term was signed by J. D. Allen, February 18, 1932. The mandate for the two year term was signed by J. D. Allen, March 6, 1933. There is nothing in these mandates to show whether the sentences run concurrently or consecutively.

"Will you kindly send me an opinion as to whether these sentences should run concurrently or consecutively?"

The mandates out of the Supreme Court to which you refer in your letter contains the following finding: "Doth consider and adjudge the judgment aforesaid, in form aforesaid, by the said trial court rendered, be in all things affirmed, and stand in full force and effect." Again the mandates direct the

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warden as follows: "There to be imprisoned for the period of \_\_\_\_\_ years, the same being the sentence passed by the said trial court aforesaid."

Thus we see that the mandates by their very terms affirm the judgments of the two different trial courts in all things and direct imprisonment as per the sentences passed by the two trial courts. The mandates simply give force to the judgments previously rendered and hence we must consider the form and substance of said judgments before we can intelligently answer your query.

By the trial court records on file in the Supreme Court I find that John Pepe was sentenced on June 21, 1930, by the Circuit Court of St. Louis County to the "State penitentiary at Jefferson City, Missouri, for a term of five years on the charge of kidnapping." In said records I further find that John Pepe was sentenced on January 15, 1932, by the Circuit Court of St. Louis City "for his offense of carrying concealed weapon and in pursuance of the verdict heretofore rendered against him, be imprisoned in the penitentiary of the State for a term of two years." Nothing in either trial courts' records indicate when sentence is to commence by the judgments and sentences rendered.

Section 1063 R. S. Mo. 1929, provides in part as follows:

"The Supreme court, St. Louis court of appeals and Kansas City court of appeals, in appeals or writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law; \* \* \* \* \*"

The mandate of the Supreme Court follows statutory authorization, and by its very terms the warden must execute the mandate as per the terms of

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two sentences of two different trial courts in two different circuits relating to two different crimes. By the terms of said judgments and sentences the prisoner is committed to the penitentiary to do time certain. You ask whether these sentences should run concurrently or consecutively.

Section 648 R. S. Mo. 1929, provides the limitations in Missouri upon imprisonment of any person:

"No person's body shall be imprisoned or restrained unless by authority of law."

In *Meininger v. Breuer*, 304 Mo. 381, at 389 the Court discussed concurrent and cumulative sentences, and, although the facts of said case are not identical with the facts in the case presented, the propositions of law therein stated are applicable in all cases where a problem of cumulative or concurrent sentences is presented. The Court said at l. c. 391:

"The law then, as now, was settled beyond dispute, that in the absence of a statute to the contrary, sentences were not cumulative, even where they might be made so, unless the sentencing court expressly made them so by directing that the subsequent one should commence at a future time determined or determinable with certainty. In the *Meyers* sentences no sort of effort was made by the trial court to render the sentences cumulative."

There are statutes in Missouri which direct the trial court to render cumulative sentences under certain circumstances, as for instance Section 4456 R. S. Mo. 1929, which reads as follows:

"When any person shall be convicted of two or more offenses, before sen-

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tence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction."

Providing for cumulative punishment, there is also Section 12969, R. S. Mo. 1929, which provides:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held: Provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

Section 3715 R. S. Mo. 1929, provides the essentials of a formal judgment upon a conviction for a felony and is as follows:

"Whenever a judgment upon a conviction shall be rendered in any court, the clerk of such court shall enter such

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judgment fully on the minutes stating briefly the offense for which such conviction shall have been had, and the court shall inspect such entries and conform them to the facts; but the omission of this duty, either by the clerk or judge, shall in nowise affect or impair the validity of the judgment."

Both judgments rendered, although coming from different Circuit Courts at different times, are in substantial conformity to the statutory requirements. It cannot be said that the judgment of either Circuit Court, is rendered beyond the jurisdiction of either court, nor is either sentence uncertain as to time or place of punishment, and as said before, both meet with statutory requirements as to form and style. Nor can it be said that the punishment in either instance does not conform to the statutory punishment provided for said felonies. In affirming said judgments the Supreme Court has already passed favorably on the form and substance of the judgments and sentences of the trial courts.

In 16 Corpus Juris, page 1372, Section 3228 the law is stated thus, and Missouri cases are used as authority:

"When not otherwise directed by statute, or by the sentence of the court, as a general rule the term of imprisonment for which defendant is sentenced begins with the first day of actual incarceration in the prison, unless actual imprisonment is prevented by some cause other than the fault or wrong of defendant.  
\* \* \* \*"

Although some states by legislative act have so provided, we have no statute in Missouri expressly providing in criminal cases that the judgment and sentence of the court shall set out specifically the date from which imprisonment shall be computed. In Missouri

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a judgment and sentence of a court of competent jurisdiction is legal when it is in good form and conforms to the statutory punishment, which was done by both Circuit Courts in the problem presented.

CONCLUSION.

It is our opinion that the mandates of the Supreme Court must be executed by the warden as per the judgments and sentences of the Trial Court, and that the prisoner under said mandate must comply with the conditions set out in same. In affirming the judgments and sentences rendered by the Trial Courts the Supreme Court held same sufficient in form and substance in their opinions in said cases.

Since neither of said judgments or sentences fixes the date when imprisonment shall begin, and since the start of said sentences was stayed by reason of appeals to the Supreme Court, this stay of execution continued until the date that the Supreme Court passed on said appeals. It is our opinion that sentence in the kidnapping case started on the first day of incarceration in the penitentiary under Supreme Court mandate for said offense, and that since he was already confined in the penitentiary at the time that the appeal for carrying a weapon was disposed of by mandate of Supreme Court, it is our opinion that sentence in that case starts from January 15, 1932, the date that the Court issued the mandate to the warden in said cause. It is our further opinion that in so far as such two judgments and sentences overlap as to time of incarceration, they are to run concurrently with each other. Such a confinement is by "authority of law."

Respectfully submitted

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Assistant Attorney General.

APPROVED:

ROY MCKITTRICK  
Attorney General.

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