

PERAL INSTITUTIONS: Imprisonment pursuant to the jury's verdict for robbery by means of a deadly weapon is not legally increased under the provisions of section 4428 R. S. Mo. 1929.

January 20, 1936.

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

Dear Warden:

We acknowledge your request for an opinion dated January 13, 1936, which is as follows:

"We have several prisoners serving in the penitentiary who have been convicted of robbery under the provisions of Section 4061, R. S. 1929, commonly known as the Henry Gun Law.

"In several of these cases the Court issued a mittimus committing the prisoners to the penitentiary for the time specified in the verdict of the jury, and have added thereto two years to the time specified in the verdict as provided by Section 4428, R. S. Mo., 1929. All such prisoners have been booked for incarceration to include the two years the Court has added to the time specified by the jury.

"Since the recent decision in State vs. Harris, 87 S. W. (2d) 1026, please advise me whether a prisoner charged and convicted under the Henry Gun Law is properly booked and incarcerated with two years added to the time assessed by the jury.

"And if such prisoners are not now properly booked, what course may we follow in correcting our records?"

The case of State v. Harris, 87 S. W. (2d), 1026, provides as follows:

"The information invokes the punishment prescribed by section 4061, R. S. 1929, Mo. St. Ann. Sec. 4061, p. 2863, which provides that: 'Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than ten years, and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment in the penitentiary for not less than five years.'

"The information, in clear and appropriate language, charges robbery in the first degree by means of a dangerous and deadly weapon. The verdict is responsive to that charge and assesses a punishment within the limits prescribed by said section 4061. The court had no authority to increase the punishment thus assessed unless it is conferred by section 4428, R. S. 1929, Mo. St. Ann. Sec. 4428, p. 3043, which reads: 'If any person shall be convicted of committing a felony, or attempting to commit a felony, while armed with a pistol or any deadly weapon the punishment elsewhere prescribed for said offense in the statutes and laws of the state of Missouri for the felony of which he is convicted shall be increased by the trial judge by imprisonment in the state penitentiary for two years. Upon a second conviction for a felony so committed such period of imprisonment shall be increased by ten years; and upon a third conviction for a felony so committed such period of imprisonment shall be increased by fifteen years. Upon a fourth or subsequent conviction for a felony so committed the person

so convicted shall be imprisoned for life. * * * *

"It appears to us that, as applied or attempted to be applied to robbery in the first degree, committed by means of a dangerous and deadly weapon, section 4428 and 4061 are inconsistent with and repugnant to each other. * * * *

"It is our conclusion that the specific provision of section 4061 as to the punishment for robbery in the first degree committed by means of a dangerous and deadly weapon must be regarded as an exception to, or qualification of, the general provisions of section 4428, and that where, as in this case, the information charges and the jury finds that the offense was so committed, the court or judge thereof is not authorized to increase the punishment assessed by the jury by assessing the additional imprisonment prescribed by section 4428. Defendant should have been sentenced to ten years' imprisonment in accordance with the verdict. * * * *"

Section 3717 R. S. Mo. 1929 provides:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Section 8411 R. S. Mo. 1929 provides:

"It shall be the duty of the board to keep a record book in the office of the penitentiary, in which shall be entered any and all violations of prison rules by convicts, as the same are reported by officer or officers in charge, the record to clearly state the offense, when committed, and what punishment, if any, was inflicted, and stating the name of the officer reporting the same. The board shall deduct from each prisoner's commutation such amount of time as they may deem proper and just, in view of the magnitude of the offense or offenses committed."

Section 8412 R. S. Mo. 1929 provides:

"The board shall at all times receive into the penitentiary on order of the governor, any person convicted of any crime punishable with death, whose sentence may be commuted to imprisonment either for life or for a term of years, in the penitentiary, and shall confine such persons according to the terms of such condition."

Section 8413 R. S. Mo. 1929 provides as follows:

"Whenever any convict shall be delivered to said board, the officer having such convict in charge shall deliver to the board the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the board a certificate of the delivery of such convict."

Article V. Section 8, Missouri Constitution provides in part as follows:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all

offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. * * * *"

CONCLUSION.

The warrant of mittimus in the hands of a warden authorizing him to incarcerate a prisoner is nothing more than a certified copy of the judgment and sentence of the Court. It is from this warrant of mittimus that the record clerk determines the duration of imprisonment. It is his duty to see that the records comply with the prison term of the mittimus in specifying the duration of incarceration. Where the prison term of the original mittimus is changed in some manner provided by law, then the record clerk is empowered to change the record accordingly.

Respectfully submitted

WM. ORR SAWYERS
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APPROVED:

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(Acting) Attorney General.

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