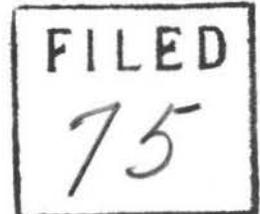


PENAL INSTITUTIONS:

Sentence to said School runs consecutively to sentence to county jail. Inmates of school may be produced for trial, in response to writ of habeas corpus ad prosequendum.

MISSOURI TRAINING SCHOOL:

July 10, 1942



Mr. George A. Riley
Superintendent
Missouri Training School for Boys
Boonville, Missouri

Dear Sir:

This is in reply to your request for our opinion by your recent letter, which is, in part, in the following terms:

"I would like to obtain an opinion from your office concerning the following case.

"Samuel Davis 8029-I, born December 24, 1922, was sentenced June 16, 1937 in the juvenile Court of St. Louis City to a term of three years for delinquency, being admitted June 25, 1937. The boy has escaped eleven times from this Institution. Granting him credit for time spent in jail after being apprehended from his last escape, he still has some time remaining on his original sentence. On January 2, 1942, Samuel Davis 8029-I escaped from this Institution and was apprehended under the Kemper Military School Football Stadium by officers of the school. He was returned to the Institution and released to the Cooper County authorities for prosecution. He was tried in the Circuit Court and give a six-months jail sentence, charged with trespassing. His jail sentence will ter-

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minate June 30, 1942.

"The County Officials will notify me when his term in jail has been completed, and we plan to bring him back to the Institution here to complete his sentence. I would like to have the following points clarified."

Your first, second and sixth questions may be answered together. They are:

"(1) Does the Institution here have any claims on this boy, whatsoever?"

"(2) If it is our duty or privilege to return him here, is it permissible to allow him credit on his sentence here for the number of days served in jail?"

"(6) Should the Institution here, in the case of an escaped boy who violates the law, is apprehended and taken into custody by county officials, tried in court, and given a sentence in some other institution resulting in the incarceration of such boy for a longer period of time than the remainder of his sentence here, discharge the boy from his sentence here?"

Your institution does, in a sense, have a claim on Davis, because his sentence to your institution has not been fully served. That sentence cannot run concurrently with the other sentence to imprisonment in the county jail. It is true, as ruled in State ex rel. Meininger v. Breuer, 264 S. W. 1, 1. c. 2, 306 Mo. 406, that:

"* * * 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. * * * * *

This rule of decision was pointed out in our opinion addressed to you, dated July 9, 1942. It applies, absent the application of a statutory provision to the contrary. The statutes constituting exceptions to this rule, mentioned in our said opinion, do not apply to this case for the reasons there stated.

Sentences by different courts of the same State to the same place of imprisonment generally run concurrently, subject to the exceptions already stated. 15 American Jurisprudence, p. 126, Sections 470, 471.

However, the above mentioned rule of concurrent sentences has been applied by the Supreme Court of Missouri, and other courts, only to sentences to imprisonment in the same institution. In our opinion it does not apply where the sentences are to imprisonment in different places. A large number of authorities are summarized to this effect in 15 American Jurisprudence, p. 123, section 465:

" In those states where cumulative sentences are permissible and the subject is not controlled by statute, if the accused is convicted of more than one offense under more than one count, sentences of imprisonment imposed under the different counts or for different offenses, if by the same court, will be construed as running concurrently, and the accused will be discharged at the expiration of the longest term, unless the sentences expressly state otherwise or unless for other reasons (as that the imprisonment is in different places) it clearly appears that the court intended that the sentences should run con-

secutively, and not concurrently.
* * * * * (Underscoring ours)

Imprisonment in the Cooper County jail could not satisfy the sentence to imprisonment in the Training Schools for Boys. In Ex parte Lamar, 24 A. L. R. 864, l. c. 880, 274 Fed. 160, the question was whether a sentence by one federal court to imprisonment in a federal penitentiary, ran concurrently with a sentence by a federal court to imprisonment in the Mercer County, New Jersey, jail. At l. c. 880 of 24 A.L.R. the court said:

"Servitude in the United States penitentiary at Atlanta did not answer the requirement to serve one year in Mercer County jail in New Jersey. The petitioner could not serve the term fixed for Mercer county jail until after he finished his term at Atlanta, Georgia. * * * * *

Similarly, in United States v. Remus, (CCA, 6th) 12 Fed. (2d) 239, l. c. 240, the court said:

"In this case the same judge imposed the two sentences. The second made no reference to the first. It is not to be supposed, however, from that circumstance, that he intended it to be served concurrently with the first, but rather, knowing that it could not be served in the penitentiary, that he intended that each should be served at the place designated and did not consider it necessary to say that the jail sentence should be served separately from the penitentiary sentence. * * * * *

* * * * * In this case the difference in the sentences necessitated separate service-one was for a felony, the other, a misdemeanor.

Neither was ordered to be served at the place designated in the judgment for the service of the other; the appellee could not have been sentenced to the penitentiary for the misdemeanor. From this hypothesis alone there is a clear intent of separate service."

Other decisions to the same general effect as those cited above are: *Ex parte Sichofsky* (Cal.), 257 Pac. 439, 53 A. L. R. 615; *Zerst v. McPike*, CCA, 97 Fed. (2d) 253; *Ex parte Aubert*, D. C., 51 Fed. (2d) 136.

Inasmuch as these two sentences could not be served at the same time, the Superintendent of the Training School has no legal authority to allow Davis credit on the sentence to that institution for time served in the Cooper county jail.

Your sixth question is answered by the foregoing. The fact that an inmate of the Training School escapes, is convicted of an offense and imprisoned in some other institution, is no ground for discharging him from his sentence to the Training School. That sentence is still in effect.

Your third and fourth questions are:

"(3) Does the Institution here hold the authority to release this boy from his sentence here? If so, what steps should be taken in granting this release?

"(4) Does the Institution here have an option of returning the boy for the completion of his sentence or of releasing him outright?"

The Superintendent of the Training School has no authority to release Davis, and has no option with reference to requiring him to serve his sentence. Said Superintendent has the duty to maintain custody over inmates for the lawful duration of their sentences, and has no power to issue paroles.

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Such power is vested in the Board of Probation and Parole, as stated in our opinion to you, dated July 9, 1942. Of course, the Governor has constitutional authority to issue pardons and paroles. Constitution of Missouri, Article V, Section 6; 46 C. J. p. 1182, section 3; State v. Asher (Mo. Sup.), 246 S. W. 911, 913.

Your fifth question is:

"In such cases as the one sighted above, is it proper for the Institution to turn over to county authorities, boys who have committed an offense while on escape and who have been returned to our Institution? If so, what type of order or writ, if any, is required?"

Where inmates of the Training School are sought by public authorities for prosecution, it is proper to surrender custody only for the purpose of trial, but this should be done only in response to a writ of habeas corpus ad prosequendum, issued by either a circuit court, a court of common pleas, one of the Courts of Appeal, or by the Supreme Court of Missouri. In State ex rel. Billings v. Rudolph (Mo. Sup.), 17 S. W. (2d) 932, l. c. 933, 934, the court said of an analogous situation:

"On that question those cases were, in effect, overruled in State ex rel. Meinger v. Breuer, 304 Mo. 381, 264 S. W. 1. In that case we held that a circuit court had jurisdiction to try a defendant for felony after he had been sentenced to the penitentiary. Such is the universal rule. * * * * *

"The writ at common law includes several forms. Among the number: (a) Habeas Corpus ad subjiciendum (you have the body to submit), (b) habeas corpus ad prosequendum (you have the body to prosecute). 21 Cyc.

353; Burrell, L. Dict.; 3 Blackstone,
Comm. 129, 130.

"It follows the warden of the peniten-
tiary is ordered to deliver Henry Stocks
to the sheriff of Dunklin County, to
be taken there for trial on said indict-
ments. It is further ordered that said
sheriff return Henry Stocks to the peni-
tentiary on the termination of said trials."

CONCLUSION

In view of the above authorities, it is our opinion
that a sentence to imprisonment in the Missouri Training
School for Boys runs consecutively to, and not concurrent-
ly with, a sentence to imprisonment in the county jail.
Inmates of said School may lawfully be produced for trial
only, in response to a writ of habeas corpus ad prose-
quendum.

Paroles from said Training School may be issued by
the Board of Probation and Parole, and not by the Superin-
tendent of the School.

Respectfully submitted,

APPROVED:

ERNEST HUBBELL
Assistant Attorney-General

VANE C. THURLO
(Acting) Attorney-General

EH/rv