

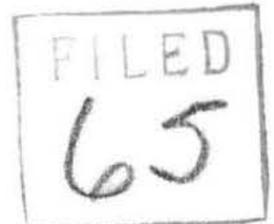
CRIMINAL LAW:
CRIMINAL PROCEDURE:
CONSECUTIVE SENTENCE:
CONCURRENT SENTENCE:
SENTENCING:
DEPARTMENT OF CORRECTIONS:

1) That portion of Section 222.020, RSMo 1959, which provides that sentences must be cumulative in certain instances, does not apply when the defendant already under sentence to the custody of the Department of Corrections, is convicted of another crime committed prior to imposition of the sentence which he is serving.
2) Where no statutory requirement to the contrary applies, it is within the discretion of a court imposing sentence to the custody of the Department of Corrections to determine whether or not it shall be served consecutive to or concurrent with prior sentences to the same department.

March 23, 1964

OPINION NO. 65

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Burrell:

This is in response to your request for an opinion concerning application of a portion of Section 222.020, RSMo 1959.

The inquiry concerns an individual who committed a crime in Barry County, was convicted therefor and sentenced to a term in custody of the Department of Corrections which he is now serving. A charge is pending against him for a crime committed in Greene County at about the same time as the one in Barry County but before he was sentenced thereon. The crime charged in Greene County is one punishable only by commitment to the custody of the Department of Corrections.

You present two questions in anticipation of conviction for the crime in Greene County:

1. Must the judge order the new sentence to run consecutive to the one being served in view of Section 222.020, RSMo 1959?
2. May the new sentence be served concurrently with the present one?

Unless there is some statutory provision to the contrary (such as the one discussed here), it is generally within the discretion of a court imposing sentences to the custody of the Department of

Corrections to determine whether or not they shall be served consecutive to or concurrent with prior sentences to the same department. State v. Shell, 299 SW2d 465, 467[3]; Williford v. Stewart, 198 SW2d 12, 14[2].

As pertains to your inquiry, Section 222.020, provides:

"* * * and if any convict commits any crime in an institution of the department of corrections, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in the county shall have jurisdiction of the offense, and the convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of the convict shall not commence to run until the expiration of the sentence under which he is held.* * *"
(Emphasis added.)

The statute directs that service of a second sentence to the custody of the Department of Corrections cannot commence until expiration of a prior sentence thereto if the second crime is committed at a time when the accused was already under sentence for the first crime. However, as you point out in your opinion request, there is some inconsistency in the language of State v. Campbell in construing this law. At 307 SW2d 486, 490[3], the Supreme Court appears to be saying that the two sentences must be served consecutively where the accused is convicted of a second offense while already under another sentence.

The language of the court in Campbell at l.c. 490 is:

"* * * Section 222.020 provides that if a convict 'while under sentence' shall be convicted of another criminal offense, the sentence of the later conviction 'shall not commence to run until the expiration of the sentence under which he may be held.'"
(Emphasis added.)

Nevertheless, the court goes on to express what is at issue and is decided in the case as follows:

"The fact that the defendant was on parole and not confined to the penitentiary at the time of the commission

of the second offense did not prevent the application of section 222.020 because, as held in *Herring v. Scott*, Mo., 142 N.W.2d 670, 671[2]: "The fact that he was out on parole when the second offense was committed, did not make him any the less "under sentence" for the first offense.'" (Emphasis added.)

Thus, the court recognizes that it is the commission of the second offense with relation to the time of sentencing for the first offense which is controlling. If the second offense is committed after the accused has been sentenced for the first offense, then the statute dictates that the term of imprisonment for the second offense shall not commence to run until the expiration of the term of imprisonment for the first offense.

Herring v. Scott, 142 SW2d 670 (En Banc), interprets the legislative intent in formulating this provision as follows, l.c. 672:

"They were contemplating a situation where a convict under sentence for one felony commits another perhaps of a different kind and at a remotely later time. They saw fit to require that in event of conviction of the latter, the sentence therefor should not commence to run until the convict had fully paid his debt to the State for the first. Having so declared in a solemn legislative act, we are not at liberty to amend it by construction." (Emphasis added).

Under the facts presented Section 222.020, RSMo 1959, requiring cumulative punishment in certain circumstances, does not apply. The court, in the event of conviction, may in its discretion, impose either a consecutive or a concurrent term of punishment in the custody of the Department of Corrections.

CONCLUSION

I.

That portion of Section 222.020, RSMo 1959, which provides that sentences must be cumulative in certain instances, does not

apply when the defendant already under sentence to the custody of the Department of Corrections, is convicted of another crime which was committed prior to imposition of the sentence which he is serving.

II.

Where no statutory requirement to the contrary applies, it is within the discretion of a court imposing a sentence to the custody of the Department of Corrections to determine whether or not it shall be served consecutive to or concurrent with prior sentences to the same department.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Howard L. McFadden.

Very truly yours,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General