PENAL INSTITUTIONS: Sentences when concurrent or cumulative.

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July 14, 1933

Honorable George D. Bryant
Pardon and Parole Commissioner
Jefferson City, Missouri

Dear Mr. Bryant:

LeRoy Sharon, Number 34016.

This Department acknowledges receipt of your letter dated June 30, 1933, as follows:

"Re:- LeRoy Sharon----#34016

I am enclosing herewith copies of Sentence and Judgment in the Case of the above named. You will note this subject entered a plea of guilty to two charges of Robbery, on the same day and was sentenced to 10 years on each charge; the copies submitted are worded alike.

Wish you would kindly advise this department whether this is to be treated as a 10 year or 20 year sentence, nowhere does it appear that one sentence is to begin at the expiration of the former, nor does it appear that they were to run concurrently.

Thanking you for an opinion on this subject, I remain".

Section 4456 Revised Statutes of Missouri 1929, provides as follows:

> "When any person shall be convicted of two or more offenses, before sentence 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".

As will appear from quotations hereafter set out the above section has been construed to apply to and cover cases only where a defendant has been convicted of two or more offenses before sentence had been pronounced upon the defendant in either case. When such a state of facts and record exists then by force of the above statute the punishment assessed shall be cumulative and successive and not concurrent, and the court has no authority to order the sentences to run concurrently in such a case.

The copy of the certified copy of judgment and sentence of the court in your case shows the defendant pleaded guilty in case number C-10080 and his punishment fixed in that case at ten years in the penitentiary. The copy of the certified copy of judgment and sentence of court attached to your letter shows the defendant to have pleaded guilty in case number C-10081 and thereupon was sentenced to ten years in the penitentiary, both sentences being imposed on the same day. The numbers of the record books nor pages of the records of the Clerk of the Circuit Court of Jackson County, Missouri, do not appear from the certificate of the clerk to the certified copies of the records, the cases are however numbered consecutively, and the record in case number C-10080 is a full disposition of the case. The judgment and sentence in case number C-10081 does not state whether the sentences and judgments in the two cases shall be cumulative or successive.

The letter attached from the Clerk of the Circuit Court of Jackson County, dated July 13, 1933, states that the defendant was sentenced to ten years on two charges, to run consecutively, but we do not find an affirmative direction to that effect in the copies of the records.

The real question is whether the failure of the Circuit Court of Jackson County to designate and direct that the sentences be served successively leaves the record in such condition that as a matter of law the sentences run concurrently.

In the case of Ex parte Turner, 45 Mo. 331, which involved an application for writ of habeas corpus, it was alleged that the petitioner had been sentenced to serve a two year term and also a three year term in the penitentiary, both judgments were rendered upon the same day and after the conviction in both cases. Under that state of facts, the court held the statute above quoted applied; that the sentences were cumulative and the prisoner was remanded.

In Ex parte Kayser, 47 Mo. 253, it appears that petitioner was sentenced in three separate cases on the same day to serve two years in the penitentiary in each case. The court at page 254 of the opinion said:

> "The evidence of the records from the St. Louis Criminal Court, where the proceedings were had, is that the prisoner was sentenced in each case at the same time".

The court further stated:

> "In law, a day is generally regarded as an indivisible point of time - punctum temporis- so that, in the words of Sir William Grant,'any act done in the compass of it is no more referable to any one than any other portion of it; but the act and the day are cotemporaneous, and therefore the act can not be said to be passed until the day is passed'. (Lester v. Garland, 15 Ves. Ch. 255.) It is nevertheless held - and that is the rule - that where justice demands it, the exact time when an act was done may be shown by parol evidence".

So that should it be determined that the failure of the trial court to direct that the sentences be cumulative, under the law renders the sentences concurrent, then it would appear that

inquiry may be made by you in cases like the present to determine the fact as to whether or not the sentence and judgment of court was pronounced in each case successively or in each case at the same time.

The case of Ex parte Kayser above referred to, was discussed in the case of State ex rel Meininger v. Breuer, 304 Missouri, 381, 418, where this court said:

> "Now, if the prisoner was convicted in all three cases before he was sentenced in either, that was the end of the case, because the statute (now Section 3697) applied and made the terms successive."

The case of State ex rel Meininger v. Breuer, supra, is the last expression of this court on the question under consideration; that case however arose strictly on the question of the right of the circuit court to try Meininger on a charge of embezzlement when he had theretofore been tried and convicted on a like charge, had been sentenced to the penitentiary and appealed. Prohibition was asked against the circuit judge. In holding that the circuit court had the right to try Meininger on the second charge after his conviction on the first, the court discussed concurrent and cumulative sentences on the theory that it tended to show that the court had the right to try defendant for one offense before his sentence had expired on a prior conviction. A large part of the discussion in the opinion centered around the case of Ex parte Meyers, 44 Mo. 279. We quote from the opinion not only as to the Meyers case, but such parts of the opinion as deal with concurrent and cumulative sentences. The court at page 389 said:

> "The doctrine which relator now urges this court to adopt is founded by him upon a construction he gives certain decisions of this court. Chief among these is Ex parte Meyers, 44 Mo. 279. In that case the record (still on file) and the opinion show that Meyers, at the March, 1866, term of the St. Louis Criminal Court, pleaded guilty to a charge of grand larceny and was thereupon sentenced to two years' imprisonment in the penitentiary. At the May, 1866, term of the same court Meyers was convicted by a jury on a like charge and sentenced to three years' imprisonment in the

penitentiary. The second sentence in no way refers to the first, and the trial court made no effort to make the terms cumulative or successive. Meyers was committed to the penitentiary and served more than three years in that institution. In July, 1869, he sued out a writ of habeas corpus, whereby he sought his discharge."

And again on page 390:

"In its opinion the court pointed out the error in the assumption that both convictions occurred at the same term, and stated the facts as the record shows them, i.e. that the sentence on the plea of guilty was passed at the March term, 1866, and the conviction on the second charge occurred at the May term, 1866, and concludes: "The prisoner was twice found guilty and sentenced on each finding at different terms." For that reason the court held that Chap. 207, sec.9, Revised Statutes 1865 (now Sec. 3697, R.S.1919) did not apply to the case because "this section applies only where a person is convicted of two or more offenses at the same term, and both convictions must take place before the sentence is pronounced in either case." When this point had been reached, the court had disposed of the statute. The proceeding before it was in habeas corpus, and the question was whether the record showing entitled the warden further to hold petitioner in his custody under the two sentences. Petitioner had served a time in excess of the longest of these. 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. The court discussed other matters but finally ruled as follows: "The prisoner has already served out more than the length of time prescribed by the longest sentence, and I think that he is entitled to his discharge. Prisoner discharged. The other judges concur." Since the trial court had not attempted to exercise the power to make the sentences cumulative, the court took the right course in disposing of the case on that theory, as it did in the sentence quoted in which its actual ruling appears."

And on page 403:

"It is clear that in 1869 the law was well settled, with no well considered or reasoned case to the contrary, that American and English courts were authorized to impose cumulative sentences and that no statutory authority therefor was required. Practically every authority to that effect is an authority for the rule that the courts had power to try and sentence one who had already been tried and found guilty of another offense. The facts involved made this true. It would be impossible to impose cumulative sentences without separate convictions, save in exceptional cases in which two offenses may be prosecuted simultaneously, as in burglary and larceny."

And on page 404:

"It has been suggested that, since Section 3697, Revised Statutes 1919, provides for successive terms of imprisonment when two or more convictions are secured before sentence is passed for either offense, this amounts to a prohibition against such sentences in any situation other than that covered by the Statute. This is a misconception of the meaning of the statute.

> The section first appeared in our law in 1835 (Sec.9,p.213,R.S.1835.) It seems to have been taken from the Revised Statutes of New York of 1829, in which (2 N.Y.R.S.1829, sec.11,p.700) appears a section identical in legal effect and almost identical in words and even punctuation. In this country it was then generally held that in order to impose cumulative sentences it was necessary for the subsequent sentence or sentences to contain a direction to that effect. (19 Encyc. Pl.& Pr.,p.484) A failure so to direct in such sentences was "fatal to any imprisonment which exceeds that of a single sentence". Courts sometimes inadvertently omitted the direction and at other times did not make it sufficiently certain to be effective. This statute was devised to put an end to miscarriages of the kind in so far as situations described in the statute are concerned. The purpose of the statute was merely to provide that in the cases it covered the sentences should run successively by force of the statute itself and not be dependent for their cumulative character upon any action of the trial court specially referable to that matter. The language of the statute itself evidences this. The decisions hold this is its effect. This is emphasized by the previous state of the law and the frequent abortive attempts of courts to impose cumulative sentences."

What is now section 4456 above quoted was adopted in this state in 1835 from the New York Revised Statutes. Referring to the latter statutes and the notes of the revisioners thereof, the court at page 405 of the Meininger opinion said:

> "This language means simply what it says. It is clear from it that the power to impose cumulative sentences already existed in the courts of New York and that the purpose of the statute was to make them cumulative (in the described cases) by force of the statute. The statute did not purport to give the courts any power to impose cumulative sentences.

> It took from them the power, in certain cases, to impose any sentence other than a cumulative one. It did this by writing itself into every sentence, in the kind of cases it described, as a part of such sentence. And so it has been held. (Ex parte Durbin, 102 Mo. l. c. 102; People v. Forbes, 22 Cal. l. c. 138.)".

In State ex rel v. Rudolph, 17 S. W. (2nd) 932, this court re-affirmed the holding that a defendant could be tried on a second charge and at a time when the sentence for a prior charge had not been served or satisfied.

> The cases of Ex parte Bryan, 76 Mo. 253,
> Ex parte Jackson, 96 Mo. 116,
> Ex parte Durbin, 102 Mo. 100,
> Ex parte Allen, 196 Mo. 226,
> Ex parte Lee, 287 Mo. 231, either come within

the provisions of the statute above quoted or the subsequent sentence or sentences were imposed on account of a crime committed by the defendant while he was serving a sentence, in which latter case the statute specifically provides that the sentence on the latter conviction must begin at the termination of the prior sentence or sentences.

In 16 C. J. page 1370, Section 3224, we find the following:

> "By common law cumulative fines and terms of imprisonment, if definite and certain, are valid where accused is convicted of separate and distinct crimes in different indictments or in different counts of the same indictment. And where a convict is serving a term of imprisonment under a prior sentence at the time of a second conviction, sentence may be pronounced to begin at the expiration of the term he is serving, even though the prior sentence was imposed by another and a different court in the state. Further, the fact that accused is undergoing life imprisonment will not preclude the imposition and execution of the death sentence, under a subsequent

> conviction. In some jurisdictions, however, it is held that cumulative sentences cannot be imposed except where they are expressly authorized by statute".

A great number of cases are cited in the footnotes, supposed to be in support of the foregoing declaration.

It seems to us to be impliedly recognized in all of the Missouri cases dealing with this subject, except the Meininger case which holds directly, that unless there is some order, direction or judgment making the sentences cumulative or unless the facts and record come within the statute above quoted, then where two sentences are imposed by a court on the same defendant at different times and where the defendant is incarcerated in the penitentiary under two committments, the sentences would be served concurrently and this would seem to be necessarily true because if the defendant is in the penitentiary serving under two committments it could not logically be said that he was serving under one committment as distinctive from service under the other committment without some authoritive direction to that effect.

Where a defendant is charged and is convicted of or pleads guilty to two offenses, the fact that the court does not withhold sentence in both cases and dispose of both after trial or plea would indicate that the court did not intend the statute to apply and by not directing the sentences to run consecutively would mean that he intended them to run concurrently.

Accepting the foregoing statements of this court in the Meininger case to be the law of this state, we are of the opinion that the record in the matter before us shows that LeRoy Sharon pleaded guilty to two separate and independent charges, and that the record shows he was sentenced on the charge in case number C-10080 first and in case number C-10081 secondly, and we are further of the opinion that since the court failed to directly designate that the sentences should be successive or cumulative then by force and operation of law the sentences run concurrently.

We are further of the opinion that the case presented by you is not controlled by Section 4456 Revised Statutes of Missouri 1929, because the record presented does not show that pleas of guilty were entered in each of the cases, prior to the sentence in either case. If the record did show

such pleas of guilty to have been entered before sentence was passed in either case, then the sentences would run consecutively by virtue of Section 4456 and the court would have no authority to direct otherwise.

I am returning you your copies of your files herewith, together with letter from the Clerk of the Circuit Court of Jackson County dated July 13, 1933.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

Inclosures