CRIMINAL LAW: Magistrate has power to issue commitment after stay of execution extending throughout entire
MAGISTRATES: period of sentence. Power to issue commitment does not expire with expiration of time of original sentence when execution has been stayed.

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9/3/49

Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County Courthouse
Kansas City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department propounding the following question:

> "A defendant is given six months in the Jackson County Jail by a magistrate; the magistrate on his own motion grants a stay of execution to the defendant. Assuming that the six months stay of execution remains in full effect for the full period of six months, is the defendant then required to be committed or has his sentence been fully complied with."

Magistrate courts were created by Section 18 of Article V of the Constitution of Missouri, 1945. This provision reads in part as follows:

> "There shall be a magistrate court in each county. * * * * * "

Pending action to be taken by the General Assembly, the jurisdiction and procedure in such courts was controlled by Section 20, Article V of the Constitution of Missouri, 1945, reading in part as follows:

> "Until otherwise provided by law consistent with this Constitution, the practice, procedure, administration and jurisdiction of magistrate courts, and appeals therefrom, shall be as now provided by law for justices of the peace; * * * * "

Section 21, Article V of the Constitution of Missouri, 1945, provides as follows:

> "The general assembly shall provide for the administration of magistrate courts consistent with this Constitution."

We have examined the various statutory enactments of the intervening legislatures since the adoption of the Constitution of 1945 and with the exception of authorizing magistrate courts to grant stays of execution pending appeals, we do not find that specific authority has been granted such courts with respect to the question which you have proposed. It, therefore, becomes necessary to resort to unrepealed statutes relating to justice of the peace courts whose provisions will be controlling with respect to magistrate courts under the provisions of Section 20, Article V of the Constitution of Missouri, 1945, quoted supra.

In this regard, your attention is directed to Section 4129, R. S. Mo. 1939, which yet remains in full force and effect, and reads as follows:

> "In case of a conviction for any offense where the punishment has been fixed at a fine or imprisonment in the county jail, or workhouse, or by both such fine and imprisonment, the court in which any such conviction was had, or the judge thereof in vacation, or any justice of the peace before whom such conviction was had, may, for good cause shown, by order entered of record, or in writing signed by such judge or justice, grant a stay of execution on any such judgment of conviction and sentence thereon for a definite period of time to be fixed by the court, judge or justice granting the same, not to exceed six months, upon the defendant or some person for him entering a recognizance conditioned for his surrendering himself in execution at the time and placed fixed by the judgment of such conviction or sentence on a day to be named in such order."
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> (Underscoring ours.)

In the construction of this statute insofar as the computation of time to be credited to a defendant to whom a stay of execution has been granted, we find some lack of harmony in the appellate court decisions. In Ex parte Perse, 286 S.W. 733, decided by the Springfield Court of Appeals, August 31, 1926, the facts may be summarized as follows:

> On May 26, 1925, the defendant was sentenced to the county jail for a six-months' period. A void stay of execution was granted by the court for a period of 90 days. Subsequent to the expiration of the 90 days' stay, a commitment was issued. The defendant brought habeas corpus claiming among other things that he was entitled to credit upon his original sentence of six months for the period of intervening between the date of judgment and sentence and the issuance of the commitment. The court concurred in this position saying, l.c. 736:
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> > " * * * The commitment, however, should not be held void, because not issued immediately; but, in our judgment, it could be issued at any time within the six months, and would, when issued, authorize the arrest and confinement of defendant in jail for the remainder of the 6 months. At the end of that time the defendant should be released. * * * "

Previous to the decision quoted above, the same court had decided Ex parte Ben Bugg on April 1, 1912, reported 163 Mo. App. 44. Again briefly summarizing the facts, we find them to be as follows:

> Defendant was convicted upon two charges on January 18, 1909, in the Circuit Court of Howell County. In one case, a fine of $300.00 was assessed. For failure to pay this fine, defendant was committed and remained in jail until April 16, 1909. No order staying the execution of the judgment rendered in the companion case in which he had also been found guilty and sentenced to six months in jail was made. Subsequently, on April 16, 1909, it being thought that defendant was contracting tuberculosis, he was paroled and permitted to leave the state. On February 23, 1912, a capias execution was issued upon the judgment and sentence fixing defendant's punishment at six months in the county jail. Defendant brought habeas corpus claiming among other things that by reason of the failure of the court to order his immediate commitment after imposition of sentence to the county jail that in legal effect such sentence had been complied with owing to the lapse of time. The court, in disposing of this matter, said:

" * * * Viewing the case from this standpoint the first question which presents itself is whether in contemplation of law the sentence had been complied with. It has been held that when a jail sentence is imposed the date of imprisonment begins on the day the sentence is pronounced and that after the lapse of the time for which imprisonment was imposed the prisoner has in legal effect served the sentence whether he has been confined in prison during the time or not. (Re Webb, 89 Wis. 354.) We are not disposed to follow that case. In the absence of some other statutory provision, the judgment of a court imposing a jail sentence can only be satisfied by a compliance with its terms. * * * * * * The question then arises whether there should be any limit to the time within which a judgment may be enforced under such circumstances. If there is to be no limitation then a case might arise in which, years after the judgment had been pronounced, and possibly, after a man had reared a family and attained to a position of high standing in the community, he and his family might be humiliated and disgraced by the bringing to light of an old judgment long since forgotten and which, in all good conscience, ought never again to see the light of day. To say that under such circumstances a man should be cast into prison to satisfy an outraged law would be as absurd as to hold on the other hand that society could have no protection against the honest mistakes or willful neglect of the officers it commissions as the guardians of its welfare. * * * * * * * * * * * * * * The interests of both the defendant and society must be protected and while the defendant has guaranteed to him a speedy and fair trial, yet when he has been legally convicted and his punishment assessed, society cannot be deprived of the protection guaranteed to it by the speedy and certain punishment of offenders against its laws except for some valid reason. We do not think that mere delay in the infliction of the

> punishment assessed is a sufficient reason for relieving the convicted party from the consequences of a judgment against him unless the delay has been so great that society could derive no good from its enforcement, but when such delay has occurred without the fault of defendant, although with his consent, we should have no hesitancy in refusing to enforce the judgment. The criminal laws of this state are not based upon any idea of retaliation against the offender for the wrong he has done, but punishments are inflicted solely for the protection of society and when the execution has, without the fault of defendant, been so long delayed that society can no longer have any interest in its enforcement there would seem to be no good reason why its enforcement should be insisted upon. * * * * * * * "

After announcing these principles, the court ordered the petitioner discharged after making the following observation, l.c. 51:

> " * * * We do not mean to be understood as holding that the lapse of three years or any specific time should be sufficient or be required in all cases to bar the enforcement of a judgment similar to this one, but each case should rest upon its own peculiar facts and such course followed as will best promote the ends of justice. * * "

Subsequently the same court decided State vs. Smith on August 13, 1927, the opinion being reported 297 S.W. 711. The facts there presented were as follows:

> On March 23, 1926, defendant, upon a plea of guilty, had been sentenced to a term of six months imprisonment in the county jail. The Circuit Court of Pemiscot County, before whom the conviction was had, granted an indefinite stay of execution on the jail sentence. The order granting the stay was rescended on the 28th of December, 1926, and the defendant ordered committed. A writ of error was sued out and the cause decided upon the record. Here again the contention was made that the order of commitment

was void for the reason that more than six months had elapsed since the date of judgment. The court, in disposing of this contention, said, l.c. 712:

> "The order made September 28, 1926, setting aside the stay of execution, was made more than six months after the judgment and sentence. It might be urged that, since the punishment was fixed at six months, defendant has, in contemplation of the law, served his sentence, and therefore the order by which he was committed to jail is void. The only cases in this state, in so far as we have found, in which this identical question arose are Ex parte Bugg, 163 Mo. App. 44, 145 S.W. 831, decided by this court, and Ex parte Brown, 297 S.W. 445 (not officially reported), handed down at the present term of this court. In the Bugg Case, supra, in an able opinion by Judge Cox, it was held that the defendant 'was not technically in jail while he was, in fact, at liberty, and the lapse of the time after sentence for which he was adjudged to be confined in jail did not release him from liability to be retaken and required to serve the remainder of the time.' Loc. cit. 48 (145 S.W. 832). The same rule was followed in Ex parte Brown. While there is substantial authority from other states, contra, we perceive no sufficient reason for disturbing the previous rulings of this court. In the case at bar, where but six months and five days' time had elapsed, the question of long lapse of time between the original sentence and subsequent 'infliction of punishment' does not arise as in the Bugg and Brown Cases, supra."

Peculiarly enough, no reference is made in this case to Ex parte Perse, cited supra. From the language used, however, it seems that the rule as established by these various cases may be said to be that the mere expiration of the period of the original sentence as to which a stay of execution has been granted does not ipso facto amount to compliance with the terms of the sentence nor deprive the magistrate of power

to issue a commitment, but rather that it is only in the event that the peculiar circumstances attendant upon a particular case such as those which were found in the Bugg case, supra, will justify the appellate court in quashing such commitment and order the discharge of the convicted misdemeanant.

## CONCLUSION

In the premises, we are of the opinion that the expiration of the six-months' period mentioned in your inquiry during which a stay of execution has been in effect does not amount to a compliance with the original sentence, and the defendant should thereupon be committed.

We are further of the opinion that in the event a great period of time has elapsed subsequent to the termination of the period of the original sentence, but during which the convicted misdemeanant was not incarcerated by reason of a stay of execution having been granted, or by reason of peculiar circumstances surrounding the granting of the stay of execution, such as to make it inequitable or contrary to the public policy of the State of Missouri that such commitment be issued, that no commitment should in fact be issued. With respect to this paragraph of this opinion, it is our thought that each case must be considered upon its own facts.

Respectfully submitted,

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APPROVED:

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WFB:VLM