PENAL INSTITUTIONS-CONVICTIONS-JUDGMENTS: An ante-dated mittimus in the hands of the Warden is interpreted that sentence is to commence from date of judgment, unless sentence is stayed to a future date in someway provided by law. Allowing jail time by ante-dating sentence is illegal.

November 20, 1935. 11-20

FILED
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Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We acknowledge your request for an opinion dated November 1, 1935, which is as follows:

> "Harry 'Dutch' McCoy was convicted and sentenced to two years in the State Pen, on June 13th, 1935, and was committed to the State Penitentiary. On another charge pending in June, 1935, Harry McCoy was returned to the same Court by a writ of habeas corpus ad prosequendum and he pleaded guilty and was sentenced to another two years on the 1st day of November 1935. The Court in its sentence and judgment dated the second sentence of Nov. 1st, 1935 to begin as of June 13th, 1935, and ordered the sentences to run concurrently. This new sentence and judgment of the court on Nov. 1st, 1935, was at a new and different term of the circuit court.
>
> "Now will the two convictions, under the sentences run concurrently from the 13th day of June 1935, or will the second conviction of Nov. 1st, 1935, start to run, after the culmination of the first two year sentence of June 13th, 1935?
>
> "The defendant Harry 'Dutch' McCoy was recommitted to the State Penitentiary under the sentence and judgment of November 1st, 1935."

Section 3715 R. S. Mo. 1929 is the Circuit Court's authority to make an entry of judgment of record after conviction in a criminal cause, and reads:

> "Whenever a judgment upon a conviction shall be rendered in any court, the clerk of such court shall enter such judgment fully on the minutes, stating briefly the offense for which such conviction shall have been had, and the court shall inspect such entries and conform them to the facts; but the omission of this duty, either by the clerk or judge, shall in nowise affect or impair the validity of the judgment."

According to the provisions of Section 3717 and 8413 R. S. Mo. 1929, the Warden's Warrant of Mittimus authorizing him to incarcerate a prisoner is nothing more than a certified copy of the judgment and sentence of the Court rendered under the provisions of Section 3715, supra. Thus, under the provisions of Section 3715, supra, we see that the Legislature did not provide specifically that the time when imprisonment is to commence is to be a necessary part of the Warden's Warrant of Mittimus appearing of record, in the Trial Court, while in capital cases the Legislature expressly saw fit to make the day on which punishment is to be inflicted a necessary part of the sheriff's Warrant of Execution, and Section 3719 R. S. Mo. 1929 provides:

> "Whenever any convict shall be sentenced to the punishment of death, the court shall cause to be made out, sealed and delivered to the sheriff of the county, a warrant stating such conviction and sentence, and appointing a day on which such sentence shall be executed, which shall be not less than four nor more than eight weeks from the time of the sentence."

In the case of Ex parte Turner, 45 Mo. 331, our Supreme Court said at l. c. 332:

> "The prisoner, Turner, now claims that inasmuch as the judgments under which

> he is and has been confined do not specify the time when the imprisonment should commence, each term should be held to begin at the same time, and consequently that he has served his full period. But the statute does not require it, and it is not the practice for each sentence to specify the day of the commencement of the imprisonment. He is sentenced, and the time of imprisonment is designated according to the assessment by the jury, and the law decides when the term shall commence; and when he is convicted and sentenced for two offenses, the law also expressly decides when the second term shall begin, and it is wholly unnecessary for the court to decide it. The court can not do so with any certainty, for the prisoner may be discharged by pardon or otherwise from his confinement under the first conviction, and in that case the second term should at once begin."

The Supreme Court said in State v. Hedrick, 296 S. W. 152, at l. c. 154:

> "It is said that the verdict of the jury is illegal, because it fixed the date of the punishment. The verdict is as follows:
>
> > 'We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment at ninety days in the county jail beginning April 25, 1925.'
>
> "This is a general verdict, notwithstanding the fixing of the date of punishment. Pursuant to the trial, the jury returned the verdict, and, after allocution, the court pronounced judgment, and sentenced defendant to

> serve three months in the county jail from this date, all of which occurred on April 25, 1925. Section 4111, Revised Statutes 1919, provides, in substance, that no judgment shall be reversed or set aside by an appellate court because it was erroneous as to time or place of imprisonment; but in such case it shall be the duty of the court or officer hearing the case to sentence such person to the proper place of confinement and for the correct length of time from and after the date of the original sentence. We treat the words in the verdict beginning 'April 25, 1925,' as surplusage; thus rendering the verdict in effect regular, and without error.
>
> "Finding no error in the record, we affirm the judgment."

In the case of Perkins v. State, 63 Southern 692, the Supreme Court of Alabama, where the criminal procedure is similar to criminal procedure in Missouri, said:

> "At the end of an appropriate sentence there was added the provision that 'said sentence begins January 22, 1913, and expires December 10, 1913.' This clause was surplusage, and, the defendant by his appeal having procured a suspension of the sentence, the judgment appealed from is corrected here by striking from it the words quoted, and, as thus corrected, the judgment is affirmed."

CONCLUSION.

This department is of the opinion that, where one is sentenced to the State Penitentiary, imprisonment is to commence to run from the date of sentence, unless execution is stayed for the time being in some way provided by law, such as where execution is stayed by pardon, by parole, or by order of a superior court, by taking an appeal, or

where the facts of the case fall within the provisions of Section 4456 or 12969 R. S. Mo. 1929. Where execution of sentence is legally stayed, then the Warden of the Penitentiary is to compute imprisonment from the time the prisoner is actually incarcerated.

This department is of the opinion that any part of a judgment of record which shows that sentence is to start at a day prior to the date of sentence is but surplusage, being no legal part of the formal judgment and sentence proper rendered by the Court. Since our Courts have held that such is surplusage in the jury's verdict in State v. Hedrick, supra, they will also hold same to be surplusage when appearing as a part of judgment of record. We believe the Missouri Appellate Courts will follow the Alabama case, supra, should the question ever be presented to them.

This surplusage usually appears in a judgment as an overture to allow time spent in a jail awaiting trial. If time spent in jail awaiting trial is to be considered in measuring punishment for crime, the Trial Court can use the direct method of diminishing the term of punishment from and after the date of judgment. For instance, a prisoner who would ordinarily be sentenced to three years incarceration for his crime should be sentenced to two years, explaining to the prisoner that one year having been spent in jail, the time of incarceration is reduced by that one year. There is no good reason for a Court to ever indicate in a judgment that incarceration is to be computed from a date prior to sentence, and there is much reason why the Court should not have such power. A felon loses his civil rights when incarcerated for a felony, and by ante-dating the judgment to a fictitious incarceration date, we can conceive of cases where a felon may be defeated from some civil right, or may avoid otherwise binding contracts, were it not for the fictitious date in the judgment entry. We can conceive of cases where rights of innocent third parties have been defeated by such fiction, as where a public officer convicted of a felony has had official dealings with the general public up to the date of his judgment and sentence, while, if by fiction his conviction can be legally ante-dated, the right of third parties have been jeopardized. As was said in the Turner case, supra, it is not proper practice for a judgment to specify the date of commencement of imprisonment, the law itself deciding

when the term shall commence. It is for the Warden to follow the law when imposing sentences on those committed to his custody.

If in those cases where the mittimus in the hands of the Warden shows a judgment specifying a date from which sentence is to be computed, on one committed to the penitentiary, is to be given any legal significance, it would be possible for the Trial Court to completely defeat punishment for crime while rendering judgment in a criminal cause by merely stipulating the date sentence is to start at a time in the past so that no term of punishment remains to be served. If the Legislature intended such procedure while providing incarceration in the penitentiary for crime, they would have said so in Section 3715, supra, for they did specifically provide that in capital cases the judgment day is a necessary part of the sheriff's Warrant of Execution. (See Section 3719, supra.)

The practice of ante-dating, in a judgment, the time that incarceration be computed is confusing both to society and to the culprit. The general public is lead to believe that the criminal code is being enforced with long sentences, while the culprit is lead to believe that he has a legal claim for time, by the arbitrary date of incarceration appearing in the judgment and the date that judgment was actually rendered.

From the facts of your letter it is our opinion that prisoner 'Dutch' McCoy, by the judgments rendered in his cases, is to serve his sentence in the penitentiary from the date of judgment in both cases, and insofar as the terms overlap the incarceration is to be concurrent and not consecutive.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN Jr.
(Acting) Attorney General.

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