PENITENTIARY: Minimum sentence two years in the penitentiary.

October 28, 1942 .

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Hon. Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of October 26, 1942, which reads as follows:

> "I would appreciate an opinion on the following question: Section 4310 Mo. R. S. 1939 reads that the punishment shall upon conviction be punished by imprisonment in a penitentiary for a term 'not exceeding' two years. Does this mean that the Court or jury can sentence one convicted to a period of only one year in a penitentiary?"

Section 4310 R. S. Missouri, 1939, referred to in your request, is one of the few penalty sections that has the peculiar wording, " * * * be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months." In most penalty sections the punishment provided is "not less than two years nor more than ___ years in the penitentiary." Where the penalty reads, "not exceeding two years in the penitentiary," it has been held to be reversible error where the court does not further say in its instructions, "not less than two years." It was so held in the case of State v. Bevins, 43 S. W. (2d) 432, pars. 6,7, where the court said:

"Since the defendant's right to have the punishment assessed by the jury is statutory, not constitutional, he takes it, of course, subject to the limitations and conditions imposed by other pertinent statutory provisions; in this instance by sections 3704,3705, and 3706. But he was entitled to have the jury correctly and fully informed as to the various punishments that might be assessed. By instructing the jury that they could assess the punishment at imprisonment in the penitentiary 'not exceeding two years' and failing further to instruct them that they could not assess such imprisonment for a less term than two years, the court misled the jury and probably induced the assessment of one year in the penitentiary, a punishment 'not authorized by law.'

"The language of instruction No. 1 regarding the punishment follows the language of the statute denouncing the offense and prescribing the punishment. But it is not always sufficient merely to use the language of a particular statute in an instruction. That may sometimes be misleading. That the instruction as given, without a further instruction to the effect that two years was the least penitentiary imprisonment that could be assessed, was misleading in this case there can be no doubt. Paraphrasing the language of this court in State v. Rose, 178 Mo. 25, 32, 76 S. W. 1003, it requires very ordinary intelligence to understand from the use

> of the words 'not exceeding two years' that any length of time of imprisonment may be fixed so that it does not exceed the time expressly designated."

Section 4850 R. S. Missouri, 1939, reads as follows:

> "Whenever any offender is declared by law punishable, upon conviction, by imprisonment in the penitentiary for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the offender may be sentenced to imprisonment during his natural life, or for any number of years not less than such as are prescribed; but no person shall in any case be sentenced to imprisonment in the penitentiary for any term less than two years."

Under this section no person shall in any case be sentenced to imprisonment in the penitentiary for any term not less than two years.

It has been held by the Supreme Court of this State, that where the jury finds a defendant guilty under proper instructions as to the penalty, and assesses the punishment at one year in the penitentiary, the court may assess the proper punishment which would be two years in the penitentiary. It was so held in the case of State v. Julin, 235 S. W. 818, par. 5, where the court said:

> " * * The next question earnestly urged here by appellant is the action of the court in raising the punishment

from one year to two years in the penitentiary. The jury returned a verdict finding appellant guilty and assessing his punishment at one year in the penitentiary. Section 4049, R. S. 1919, provides as follows:

"'If the jury assess a punishment, whether of imprisonment or fine, below the limit prescribed by law for the offense of which the defendant is convicted, the court shall pronounce sentence, and render judgment according to the lowest limit prescribed by law in such case.'

"The constitutional rights of appellant were no invaded or imposed upon by the action of the court in following the plain letter of the statute. Appellant had been regularly charged with crime by a grand jury, had been arraigned, was confronted by the witnesses against him, was afforded every opportunity to make his defense, and enjoyed in the trial of the case such protection and safeguards as were vouchsafed by the Constitution, both state and federal, and this statute is but a sequence of and supplementary to section 4048, R. S. 1919, Section 3698, R. S. 1919, is as follows:

"'Whenever any offender is declared by law punishable, upon conviction, by imprisonment in the penitentiary for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the offender may be sentenced to imprisonment during his natural life, or for

> any number of years not less than such as are prescribed; but no person shall in any case be sentenced to imprisonment in the penitentiary for any term less than two years.'
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> "From the foregoing it is apparent that it became the duty of the trial court to change the punishment fixed by the jury to that of the minimum punishment fixed by statute, and in doing so there was no violation of the constitutional rights of appellant. The punishment, upon conviction, of a number of offenses under our law, is fixed by the court, and not by the jury; e. g., section 3248, R. S. 1919. At the common law the verdict of the jury was guilty or not guilty, and the court fixed the punishment according to the laws in force, and the sections above quoted are not therefore in contravention of the constitutional rights of appellant and are constitutional. State v. Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846; State v. Mathews, 202 Mo. 143, 100 S. W. 420."

The above case was based upon what is now Section 4094 R. S. Missouri, 1939, which permitted the court to render judgment according to the lowest limit prescribed by law in such a case where the jury assessed a punishment either by fine or imprisonment below the limit prescribed by law for the offense.

CONCLUSION

It is, therefore the opinion of this department that a person convicted cannot be sentenced to one year in the penitentiary for the reason that the minimum term is two years.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW