PENAL INSTITUTIONS: Sentences are to run concurrently from the date rendered unless the sentencing court directs sentence to commence at a future time.

August 28, 1937.

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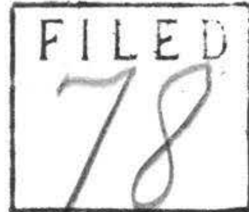

Honorable J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated August 20, 1937, which reads as follows:

> "Walter Wall #46638, is serving here four years from Cape Girardeau County, Missouri, from June 24, 1935, for Burglary and Larceny, having plead guilty there to the charges at the April, 1935 term, and was received here on June 26, 1935, as shown by his commitment now in file in this office.
>
> "Prior to this, on May 31, 1935, at the same term of the Circuit Court in said county, he was tried and convicted by a jury of similar offence as stated above, and his sentence was fixed at four years from June 8, 1935, as will be shown by the certified copy of the sentence and judgment of court herewith submitted. He appealed this conviction to the Supreme Court of Missouri, but was transported to prison and began service on the first sentence named above at the time stated, which sentence he is now serving.
>
> "On June 30, 1936, the Supreme Court affirmed his conviction on the appealed sentence, setting forth in its mandate that sentence was to

> be for 'A period of two years for burglary and two years for larceny, the same being the sentence passed by the said Circuit Court of Cape Girardeau County aforesaid.' This said mandate was received here August 19, 1937.
>
> "This office would appreciate an opinion from you as to when service in the appealed sentence should begin."

The record of facts of this case, as stated in your request for an opinion, does not bring the above prisoner within the provisions of Section 4456 or 12969 R. S. Mo. 1929, which are mandatory statutes directing cumulative sentences under certain circumstances where one is convicted of more than one crime.

The power of the Trial Court to render judgment and sentence, after conviction of the crime, is provided in Section 3715 R. S. Mo. 1929, which 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."

By the above section we see that the Trial Court has the power to, and is not prohibited from, rendering a cumulative sentence upon one, convicted of a crime, while restrained under a judgment and sentence of conviction for a prior crime.

Section 3742 R. S. Mo. 1929, provides when an appeal to the Supreme Court operates as a stay of execution on the trial court's judgment and sentence and reads:

> "No such appeal or writ shall stay or delay the execution of such judgment or sentence, except in capital cases, unless the supreme court, or a judge thereof, or the court in which the judgment was rendered, or the judge of such court, on inspection of the record, shall be of opinion that there is probable cause for such an appeal or writ of error, or so much doubt as to render it expedient to take the judgment of the supreme court thereon, and shall make an order expressly directing that such appeal or writ of error shall operate as a stay of proceedings on the judgment; but in capital cases the order granting the appeal shall operate as such stay absolutely."

When an appeal be granted the defendant may be committed without a stay of execution as was done in the above case, or he may be recognized (admitted to bail while on appeal), for Section 3754 R. S. Mo. 1929 provides:

> "If an appeal be granted, the court below shall order the defendant to be committed or recognized, and the recognizance shall be to the same effect as the recognizance required when the defendant himself is appellant; and the party, if committed, shall be held in custody until the judgment of the supreme court shall have been passed on the case, to abide such judgment."

The mandate of the Supreme Court, in this case, follows the provisions of Section 3763 R. S. Mo. 1929, which reads:

> "When the appeal is taken, or the writ of error is sued out by the party indicted, if the supreme

court affirm the judgment of the court below it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly; if the judgment be reversed, the supreme court shall direct a new trial, or that defendant be absolutely discharged, according to the circumstances of the case."

The Supreme Court in its mandate could have changed the time of imprisonment pursuant to Section 3765 R. S. Mo. 1929, which reads:

"No judgment shall be reversed or set aside by the appellate court, for the reason that the judgment by virtue of which such person is confined, or from which he has prosecuted an appeal or writ of error, 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, and to cause the officer or other person having such prisoner in charge to convey him forthwith to such designated place of imprisonment."

Section 648 R. S. Mo. 1929 states the limitations upon the warden for imprisoning one convicted of crime, and reads:

"No person's body shall be imprisoned or restrained unless by authority of law."

In Meininger v. Breuer, 304 Mo. 381, l. c. 391, 264 S. W. 1, the Supreme Court said:

> "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."

CUNCLUSION.

This department is of the opinion that the mandate of the Supreme Court in the hands of the warden, by its very terms, affirms the judgment of the trial court and thereby gives force to the judgment of the trial court which had been rendered before appeal.

The form and substance of said judgment shows it to be in conformity with statutory requirements, even though the trial court did not render cumulative sentences for the second conviction. A cumulative sentence was not mandatory for the second conviction under the Missouri code.

The trial court, in plain language, fixed the sentence at four years incarceration to run from June 8, 1935, which sentence was legal, because it is intended to run from the same date that judgment and sentence was passed, and the Supreme Court, on appeal, did not change that judgment and sentence as to time, as was its power, in the mandate dismissing the appeal.

Since the judgment and sentence of the trial court was rendered within the trial court's jurisdiction; since it is certain as to time and place of imprisonment; since the punishment conforms to the statutory punishment for the particular crimes, and since the Supreme Court has unconditionally sanctioned the judg-

ment and sentence in its mandate, now the duty falls on the warden to imprison according to the original judgment and sentence, as ordered in the mandate. Imprisonment in the appealed case should be computed from June 8, 1935, the date that the original judgment was rendered and sentence was passed.

When the appeal was granted to the Supreme Court the defendant was not admitted to liberty on appeal bond, nor does the record show a stay of execution on the judgment and sentence, pending appeal, or an escape. In such cases the present opinion would not apply. At all times, since the original judgment and sentence on the second charge, the record shows that the prisoner was being incarcerated in the penitentiary without recognizance on either charge.

It is our further opinion that insofar as the two judgments and sentences overlap, as to time of incarceration, they should run concurrently with each other on the prisoner's records. Such a confinement is by "authority of law".

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

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