

PENITENTIARY - CONVICTS - WARDEN: When sentence concurrent  
or cumulative.

12-12

December 4, 1934.



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

Dear Sir:

Your letter of October 25, 1934, requesting an  
opinion is as follows:

"On January 23, 1934, J. E. Jones,  
our 44206, was tried and convicted  
of Larceny by the Circuit Court of  
Maries County, Mo., and was sentenced  
to '2 years in the penitentiary from  
January 23, 1934.'

"Later he was taken out on a writ  
of habeas corpus to Gasconade  
County, Mo., and was tried and con-  
victed in the Circuit Court of that  
County of Burglary and Larceny and  
was sentenced to '3 years in the  
penitentiary from September 11, 1934,'  
being returned to prison. Proceed-  
ings were had at different times and,  
of course, under different jurisdic-  
tions. No reference is made in  
either commitment to the proceedings  
or sentence in the other.

"There appearing to be a difference  
of opinion among interested attorneys,  
this office would like to know how  
much time Jones is required to do."

Section 648 R. S. Mo. 1929, provides the limita-  
tion in Missouri upon imprisonment of any person:

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

In *Meininger v. Breuer*, 304 Mo. 381, at 389 the Court discussed concurrent and cumulative sentences, and, although the facts of said case are not identical with the facts in the case presented, the propositions of law therein stated are applicable in all cases where a problem of cumulative or concurrent sentences is presented. The Court said at l. c. 391:

"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."

There are statutes in Missouri which direct the trial court to render cumulative sentences under certain circumstances, as for instance Section 4456 R. S. Mo. 1929, which reads 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."

Providing for cumulative punishment, there is also Section 12969, R. S. Mo. 1929, which provides:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and

sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held: Provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

Since the facts presented in your query are not applicable under the above sections (Section 4456 or Section 12969), and since we have been unable to find any other legislative act in Missouri directing cumulative sentences or punishment in Missouri, it remains for us to decide what sanction you are to place on the judgments and sentences of two different courts in two different circuits relating to two different crimes, when by the terms of said judgments and sentences, the same prisoner is committed to do time certain, but said time certain under the two commitments overlaps and is cumulative to the extent of said overlapping of specified time.

Let us look to the Constitution Statutes and see the jurisdiction of a circuit court and criminal courts to render judgment and pass sentence on one convicted of a felony, in felonies where cumulative sentence is not expressly provided for by Statute, that is, in felonies where the judgment and sentence of the court is not controlled by Sections 4456 and 12969, supra.

Article VI, Section 22 of the Missouri Constitution provided in part:

have

"The circuit court shall/jurisdiction over all criminal cases not otherwise provided for by law;\*\*\*."

Under the Missouri Constitution, above set out, we see that both the circuit courts of Maries County and of Gasconade County were given Constitutional jurisdiction over the two felony cases to which you refer.

Section 3715 R. S. Mo. 1929, provides the essentials of a formal judgment upon a conviction for a felony and is as follows:

"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."

Both judgments rendered, although coming from different Circuit Courts at different times, are in substantial conformity to the statutory requirements.

Section 3717 provides for making a certified copy of any judgment and sentence to the penitentiary, as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Section 8413 R. S. Mo. 1929 provides:

"Whenever any convict shall be delivered to said board, the officer having such convict in charge shall

deliver to the board the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the board a certificate of the delivery of such convict."

Here we have a person duly sentenced, delivered and now committed under two judgments against him. On one he is committed for "2 years in the penitentiary from January 23, 1934, and on another is committed for "3 years in the penitentiary from September 11, 1934." There exists two judgments outstanding against this prisoner which remains to be satisfied, and it is the Warden's duty to satisfy them. The prisoner must comply with the conditions of both judgments, and the Warden must take said judgments as he finds them, and restrain the prisoner only "by authority of law".

It cannot be said that the judgment of either Circuit Court is rendered beyond the jurisdiction of either court, nor is either sentence uncertain as to time or place of punishment, and as said before, both meet with statutory requirements as to form and style. Nor can it be said that the punishment in either instance does not conform to the statutory punishment provided for said felonies.

16 Corpus Juris, page 1372, Section 3238 states the law thus, although no Missouri cases are used as authority:

"The time imprisonment is to commence ordinarily is no part of the sentence; and where the judgment fixes the date that imprisonment shall begin, it should be construed to mean that the period of imprisonment shall begin from the date named unless the execution of the sentence is stayed for the time being in some of the ways provided by law, in which event it ought to be computed from the time the prisoner is actually incarcerated."

Although some states by legislative act have so provided, we have no statute in Missouri expressly providing in criminal cases that the judgment and sentence

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of the court shall set out specifically the date from which imprisonment shall be computed. In Missouri a judgment and sentence of a court of competent jurisdiction is legal when it is in good form and conforms to the statutory punishment, which was done by both Circuit Courts in the problem presented.

CONCLUSION.

It is the opinion of this office that the trial court's power in both Maries and Gasconade counties was limited, upon a conviction of the accused, to the imposition of a sentence authorized to be imposed. It is our opinion that it was within the discretion of the second trial court of Gasconade County to sentence this defendant, his term to start at the day of the sentence, and that such a sentence is no abuse of discretion on the part of the court. It follows as the opinion of this office that the Warden is to impose imprisonment as per the time shown in each of the judgments and sentences and that in so far as such two judgments overlap, they are to run concurrently with each other. Such a confinement is by "authority of law", allowable in such cases.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

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