IN RE: COMMITMENTS AT INTERMEDIATE REFORMATORY TO COMMENCE WHEN?

4-4

June 30, 1933.

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Mr. John Thornberry
Superintendent
Algoa Farms
Jefferson City, Missouri

Dear Mr. Thornberry:

Your letter requesting an opinion from this office is in words and figures as follows:

> "We have a certified copy of a commitment which reads as follows: '... ... the said defendant, Arnett Perkins, having entered his plea of guilty as aforesaid, be confined in the Intermediate Reformatory of the State of Missouri, for a period of two years from the 16th. day of September 1932,.....'
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> "The record then shows that he was given a bench parole, 'upon his good behavior'. The record further shows that on the 12th. day of May, 1933,' ....the parole heretofore granted be and the same is hereby terminated .... that the Sheriff deliver said Arnett Perkins to the Superintendent of the Intermediate Reformatory at Algoa, Missouri, to serve the sentence heretofore received'.
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> "Please advise me whether this boy's sentence time of two (2) years runs from September 16th. 1932 or whether it runs from the date he was received at this institution which was on the 19th. day of May, 1933."

The sentence to which you refer was imposed under the provisions of Section 8474, R. S. Mo. 1929,

which reads as follows:

> "If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons. (Laws 1927, p. 365, Section 9.)"

In the case of State v. Hedrick, 296 S. W. 1. c. 154, the Supreme Court said:

> "It is said that the verdict of the jury is illegal, because it fixed the date of the punishment. The verdict is as follows:
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> > '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.'
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> "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.

In the case of Ex Parte Mounce, 269 S. W. 387, the Supreme Court said:

> "A parole is a matter of grace or favor to a convicted defendant, and, when he accepts such parole, he does it subject to all the provisions fixed by the statute, and subject to all other conditions which may be imposed upon him by the authority granting such parole, which are not illegal, immoral or impossible of performance. Such, by all the authorities, is the rule where a parole or conditional pardon has been granted by the executive or other constitutional pardoning power, and the rule applies as fully and as reasonably to paroles by trial courts under our statute.
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> "Petitioner's contention also seems to be that, where the parole has been terminated within the term during which the paroled person would have been in the penitentiary had he not been paroled, the time during which he was at large under his parole must be regarded as part of his sentence, and, as a logical consequence, that, if the term of imprisonment to which he was sentenced had entirely elapsed but for such parole, he cannot be required to serve any part of such term of imprisonment, if such parole is thereafter terminated. Such contention is directly in the face of section 4158, and is utterly without merit.

In the case of State v. Hockett, 139 Mo. App.

l.c. 644, the Appellate Court said:

> "We feel fortified in the position that the power, as exercised in this case, does not exist in this State, from the consideration that we have a statute regulating parole, which is in effect a suspension of punishment. (Art. 14, chap. 16, R. S. 1899.) But it cannot be exercised by the court or judge until there has been a judgment or sentence of punishment."

Thus we see in the instant case that the imposition of the sentence on the 16th day of September, 1932, was a condition precedent to the parole which was subsequently granted. The order granting the parole would have been untimely without the record showing the sentence of the court. Such is the holding in the Hockett case. The records showing a sentence "for a period of two years"and then adding "from the 16th day of September, 1932" is definite enough in setting out the term of imprisonment to which the prisoner was sentenced. The words "from the 16th day of September, 1932" do not affect the duration of the two years sentence but are mere surplusage to the sentence proper, which was for two years confinement in the Intermediate Reformatory. In the Hedrick case, where the verdict of the jury contained words of similar import, the Supreme Court treated them as surplusage;and,with the same logic, we treat the words in the record in the instant case as surplusage. And, when the court, on the record, revoked the parole on the 12th day of May, 1933, and passed judgment "to serve the sentence heretofore received" there was no force added to that portion of the sentence which was surplusage in its origin. Hypothetically, should the Superintendent of the Intermediate Reformatory date a commitment back to a fictitious beginning merely because some court record so indicated, such procedure might result in a given case where the term of imprisonment to which a convict be sentenced to imprisonment was entirely lapsed before there was occasion to revoke the parole and hence the convict not required to serve

any part of a sentence for imprisonment which the law required the judge to make before the parole was granted.

It is the conclusion of this office that the prisoner's commitment in the instant case should be dated from the date that the prisoner was received at the Reformatory.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General.

ROY McKITTRICK
Attorney General.

WOS/AJ