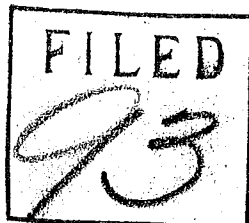


CRIMINAL LAW: Priority of service of terms of punishment.

March 11, 1954



Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Request is herewith presented for opinion directing us as to proper procedure in the following cause.

"One John Doe was charged in this jurisdiction with 3 separate felonies.

"In the first case tried he was charged Burglary 1st Degree, found guilty and convicted for a term of 10 years. In due course motion for new trial was overruled and defendants application for Appeal to Supreme Court filed. Same now pending in process.

"While his motion for new trial was pending in the matter above mentioned he was tried on a further charge and found guilty and punishment assessed at 1 year in County jail.

"The 3d charge is pending awaiting trial.

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"Our question is, shall we retain custody of defendant in our County to jail to serve first, the sentence of 1 year in the County jail, and upon completion thereof commit him to the State Penitentiary on the first mentioned sentence; or, commit him at this time to the State Penitentiary in accordance with the 10 year sentence and place our "Hold" upon completion thereof to be returned to serve the 1 year County jail sentence.

"As it now stands our Sheriff is holding 2 commitments; one for the 1 year county jail sentence and the other for commitment of the defendant to the State Penitentiary on the 10 year sentence.

"Will you kindly advise promptly, and oblige."

In the above-quoted request we have taken the liberty of inserting the name "John Doe" for that of the person which appears therein. Further, in preparation of the opinion we have assumed that the acts constituting the second felony were not committed subsequent to the first trial and that the record in both cases is silent as to whether the sentences are to be served concurrently or consecutively.

It will be observed at the outset that the only conviction which has become final is the one under which sentence of one year in the county jail has been imposed. It therefore seems appropriate that the Sheriff of St. Louis County incarcerate the defendant under such commitment in order that compliance may be had with the punishment imposed thereunder.

It is true that ordinarily sentences imposed by the same court upon the same defendant, in the absence of a direction of the trial court to the contrary, are to be served concurrently. In this regard we direct your attention to *Williford v. Stewart*, 198 S.W. (2d) 12, in which the defendant had pleaded guilty on February 6, 1933, in the Jackson County Circuit Court to four felonies. Subsequently, on April 8th, 1933, in the same court, although in a different division thereof, the same defendant was convicted of a further crime. No direction appeared in the judgment in the latter case as to whether the sentence imposed therein should be served concurrently or consecutively with the sentences imposed

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in the four prior cases. The Supreme Court of Missouri held in these circumstances that all of the sentences imposed should run concurrently. The Court said, l.c. 15:

"The judgment of the trial court being controlling, we must reject the spurious recital in the commitment that the burglary and larceny four year aggregate sentence and the automobile theft 15 year sentence should run consecutively, and must hold they run concurrently--which means that the period of the petitioner's legal incarceration began on February 6, 1933 and ran for 2 months and 2 days under the burglary and larceny aggregate sentence until April 8, 1933, when the 15 year sentence in the automobile theft case was pronounced. From there on the sentences in the five cases ran concurrently as far as coincident, and until the end of the 15 year sentence, making a total period of 15 years, 2 months and 2 days. Under the three-fourths rule, allowed by Sec. 9086 for good behavior, this time would be reduced to 11 years, 4 months and 17 days."

We think that this rule would be controlling in the instant case were it not for the further fact that the defendant in the case about which you have inquired was sentenced to separate institutions. This circumstance invokes a further rule which has been declared by the Supreme Court in Anthony v. Kaiser, 169 S.W. (2d) 47, l.c. 49 to the following effect:

"Ordinarily sentences to different institutions are, in the very nature of things, cumulative and not concurrent. * * *"

The converse of this rule was again stated by this Court in McCracken v. Kaiser, 179 S.W. (2d) 470, where the following language appears:

"The general rule is that in the absence of an applicable statute making the terms successive, or a direction to that effect in the sentence or commitment, terms imposed by the same court to the same institution are to be regarded as concurrent. * * *"

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From the foregoing we take it to be the rule that sentences to separate institutions in the circumstances described in your letter of inquiry are to be served consecutively in the absence of a direction by the trial court to the contrary. We are further persuaded to this view with respect to the instant case by reason of the fact that the sentence in the first case has not as yet become final in the sense that it amounts to a "conviction" until affirmed on the pending appeal. It is of course true that the defendant may be committed pending the appeal absent the giving of a supersedeas bond (as to which your letter of inquiry is silent) but in the event of a reversal and possible discharge of the defendant the case would stand as though no "conviction" had ever been had.

CONCLUSION

In the premises we are of the opinion that in the circumstances outlined in your letter of inquiry the defendant should be committed to the county jail of St. Louis County, Missouri, to serve the sentence imposed upon him of one year in that institution, and there to be held until discharged according to law.

We are further of the opinion that upon compliance with such sentence the defendant should thereafter be committed to the Missouri State Penitentiary to serve the sentence of ten years in that institution in accordance with the sentence imposed upon him in such other case, provided of course, that such conviction be affirmed on the pending appeal to the Supreme Court of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:vlw