

MARSHALL OF SUPREME COURT: Not duty of Marshall, when criminal case is dismissed to carry out judgment; it is the duty of the local sheriff to convey the prisoner to the penitentiary or carry out the judgment of the court.

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12-11 Acc 3749 RS mo 1929  
December 5, 1933.



Hon. Herbert M. Braden,  
Prosecuting Attorney,  
Livingston County,  
Chillicothe, Missouri.

Dear Mr. Braden:

This department acknowledges receipt of your letter of November 28 relative to Case #3611, which was recently dismissed in the Supreme Court. Your letter is as follows:

"Please advise me by return mail whether or not the Marshall of the Supreme Court will attend to the apprehension and commitment of E.B. Hane, whose appeal to the Supreme Court, Case No. 3611 M D, was dismissed by the Supreme Court on the 28th day of October, 1933, for failure to perfect the appeal within a year.

I can find nothing in the Statutes touching this point, and it just occurred to me that it might be the duty of the Sheriff to attend to this, and if so, should like to know about it at once, so he can be taken to the Missouri Penitentiary, or his bond forfeited if he does not surrender himself, as he has left this county."

You are correct in stating that there is no statute to guide you in a situation such as you present. Section 3749, R.S. Mo. 1929 is as follows:

"In all cases where the appeal or writ of error shall be prosecuted by the party indicted in the supreme court, and where the punishment assessed shall be imprisonment in the penitentiary, and where the judgment wherein the appeal or writ of error is prosecuted shall be affirmed, such court shall direct the sentence pronounced to be executed, and for this purpose the supreme court shall order the marshal of such court to arrest the convict, and deliver him to the proper officer of the penitentiary."

This section is very plain as to the duty of the marshall when a case is affirmed, and as the office of marshall is purely a creature of the statute and his duties are defined therein, he cannot act beyond his duties as prescribed by the statute.

The appeal having been dismissed, a mandate will be mailed to your Circuit Clerk showing that said appeal has been dismissed, and as a result, the Circuit Court of Livingston County again acquires jurisdiction, and the defendant is in the same position as if no appeal had been taken. Therefore, it devolves upon the local court of your county to carry out the judgment. As was said in the case of State ex rel. v. Broadus, 234 Mo.358, l.c. 367:

"The cause was before the court of appeals on a writ of error and when it affirmed the judgment and transmitted its mandate to the trial court, the cause was no longer before it, and any further action in the enforcement of the judgment must necessarily have been exercised by the latter court."

There are several cases holding that in a misdemeanor case, when the same is affirmed, the sheriff and not the marshall executes the judgment of the trial court.

#### CONCLUSION

We are therefore of the opinion that when a criminal case is dismissed, either at the option of the defendant or for failure to perfect the appeal, it is the duty of the local sheriff to convey the prisoner, in case of a felony, to the penitentiary or to carry out the judgment of the court.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General

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