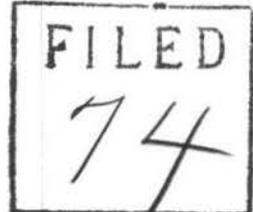


PENAL INSTITUTIONS: Time in jail on stay of execution
is not serving penitentiary sen-
tence.

September 10, 1942

9-25



Hon. Paul V. Renz
Farms Commissioner
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion,
under date of September 9, 1942, which reads as follows:

"I should like to have a ruling from
you covering the situation which I
outline below:

"In this case the inmate of this insti-
tution was sentenced by the Circuit
Court of the city of St. Louis to Life Im-
prisonment on the 24th day of June, 1936;
on the 14th of July, 1936, the same Cir-
cuit Court entered up an order holding
this man in the city jail in St. Louis
'until further order of the court'.
About this time the judgment and sentence
was appealed to the Supreme Court of
Missouri pending which appeal the inmate
continued to serve on the original judg-
ment and sentence in the city jail; on
the 17th of August the Supreme Court af-
firmed the judgment of the Circuit Court
and the defendant was on the same day
lodged in the Penitentiary and entry
was made in our Serial Record Book that
the sentence commenced on August 17,
1938, the date of the Supreme Court Man-
date.

"I should like to know whether in your opinion this sentence legally starts on June 24, 1936 and whether it should be so entered in our journal, or Serial Record Book, which is kept in accordance with the act of the Legislature."

Section 4106 R. S. Missouri, 1939, reads 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."

Under this section it is mandatory that upon the conviction and sentence, the sheriff, without delay, should transport and deliver a convict to the State Penitentiary. In view of Section 4106, supra, the legislature, in order to protect defendants who have been convicted, in their appeal, enacted Sections 4130 and 4131 R. S. Missouri, 1939, which grant the defendant time for appeal. It also enacted Section 4132 R. S. Missouri, 1939, which reads as follows:

"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."

Under this section the Supreme Court, a judge thereof, or the judge of the court in which the judgment was rendered may grant a stay of execution. It goes without saying, that upon a stay of execution the convict is not serving the term of his conviction set out in the judgment. The Legislature also, in order to retain the custody of the defendant during a stay of execution, enacted Section 4135 R. S. Missouri, 1939, which reads as follows:

"If the defendant in the judgment so ordered to be stayed shall be in custody, it shall be the duty of the sheriff, if the order were made by the court rendering the judgment, or upon being served with the clerk's certificate and a copy of the order, to keep the defendant in custody without executing the sentence which may have been passed, to abide such judgment as may be rendered upon the appeal or the writ of error."

Under this section the sheriff is ordered to keep the defendant in custody without executing the sentence, that is delivery to the penitentiary.

In reading over your request, we notice you state that the Circuit Court of St. Louis made an order holding the defendant in the city jail in St. Louis until further order of the court. It is not for us to say whether this is a stay of execution, and it is a matter of fact as to whether the order was made as a stay of execution or whether it was an order unlawfully made. If it was not a stay of execution, he should be allowed his jail time spent in the St. Louis County jail. It was so held in *Ex parte Perse*, 286 S. W. 733, Par. 11, where the court said:

"Docket entries also show that a stay of execution for 90 days was granted defendant. No commitment was issued until the expiration of 90 days, and it is contended that the justice had no authority to grant a stay of execution, and that it was his duty to have issued a commitment immediately, and, since he did not, he could not issue it 90 days thereafter. At the time of this judgment, May 26, 1925, the justice did not possess the power to grant a stay of execution, and that order of the justice was void. We do not think, however, that the delay of 90 days in issuing the commitment, in and of itself, rendered the commitment void. The time of the jail sentence was 6 months, and had the commitment been issued on the same day that the judgment was entered, the sentence would not have expired at the end of 90 days. We are of the opinion that, since it was the duty of the justice to issue the commitment immediately,

the time of defendant's sentence to jail would begin immediately, and that he would be entitled to the benefit of the time from the date of the judgment, and upon the expiration of 6 months from that date he would be entitled to his release, no matter when the commitment was issued.
* * * * *

The purpose of the enactment of Sections 4132 and 4135, supra, was to aid defendant in his appeal. The Legislature further enacted Section 4136 R. S. Missouri, 1939, which reads as follows:

"In all cases where an appeal or writ of error is prosecuted from a judgment in a criminal cause, except where the defendant is under sentence of death or imprisonment in the penitentiary for life, any court or officer authorized to order a stay of proceedings under the preceding provisions may allow a writ of habeas corpus, to bring up the defendant, and may thereupon let him to bail upon a recognizance, with sufficient sureties, to be approved by such court or judge."

Under this section, after a stay of execution had been granted the prisoner could make bond, subject to the final decision of the Appellate Court. Of course, under a valid stay of execution the time spent at liberty under his bond is not recognized as part of the time under his sentence.

It was so held in the case of Ex Parte Perse, 286 S. W. 733, Par. 12, where the court said:

"After this proceeding was begun, and the writ of habeas corpus issued, the petitioner gave bond, and has been at liberty since that time. The time he has been at liberty under this bond should not be credited on the 6 months provided in the sentence."

There is no question but that under Section 4132, supra, the court may grant a stay of execution where there is probable cause for an appeal, or writ of error. It was so held in the case of Ex Parte Thornberry, 254 S. W. 1087, l. c. 1090, where the court said:

" * * * That a court has power, in the exercise of its discretion, to suspend a sentence a reasonable time for a proper purpose there is no question. That purpose has usually been construed under our practice, in the absence of any statute on the subject, to granting time to file a motion for a new trial or in arrest of judgment, to secure bail, or to perfect or pending an appeal."

Section 4153 R. S. Missouri, 1939, reads as follows:

"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 pro-

nounced 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."

Under the above section, the Supreme Court may affirm the judgment of the court and direct that the sentence pronounced be executed.

Since the defendant in the case continued to take advantage of the stay of execution by remaining in the city jail of St. Louis, and did not obtain his release, on bond, as provided in Section 4136, supra, he was not serving the sentence under the judgment of the court and his sentence, under the judgment of the court, did not begin until he entered the penitentiary.

Section 9061 R. S. Missouri, 1939, reads as follows:

"The commission shall keep a journal, in which it shall enter regularly the reception, discharge, death, pardon or escape of every convict, and all other occurrences of note that concern the state of the penitentiary."

Under this Section the Commission enters into the Serial Record Book the date of the commencement of the sentence, which, under the facts in your request, would be August 17, 1938.

Of course, in case of a parole or pardon by the Board of Probation and Parole, the board may take into consideration the fact that the defendant spent over a year in the city jail in the City of St. Louis. That authority is granted to it under Section 9160 R. S. Missouri, 1939.

Hon. Paul V. Renz

(8)

September 10, 1942

CONCLUSION

Therefore, it is the opinion of this department, that if the order made by the judge of the Circuit Court of St. Louis was a stay of execution, then the sentence legally starts on August 17, 1938, which was the date of the Supreme Court mandate and mittimus, and reception in the penitentiary, and not June 24, 1936, which was the date of the sentence in the lower court and should be so entered in the Serial Record Book.

It is further the opinion of this department that if the order made by the Circuit Court of St. Louis was not a stay of execution, the date of the commencement of the sentence would still be August 17, 1938, but the defendant, if the sentence was for a certain number of years, instead of life, would be entitled to have the time spent in the city jail deducted from his term. This could only be determined by way of habeas corpus proceeding.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW