

Opinion No. 55-6163

May 18, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Richard F. Rowley, District Attorney, Ninth Judicial District, Clovis, New Mexico

Recently you requested an opinion from this office concerning (1) whether or not a sentence which was suspended in Police Court is a valid sentence, and (2) whether or not the defendant may be required to serve the sentence at this time. You state that the sentence imposed was "Fine 10 days in jail. **Jail sentence suspended to leave town.**"

These two questions will be answered in the order asked.

1. Is the sentence given valid?

The State of New Mexico has provided a means of suspending a sentence in district courts and for crimes which are felonies or are crimes under which a person may be confined in the penitentiary. That section is 41-17-1, N.M.S.A., 1953, which reads as follows:

"Penitentiary sentence -- Length -- Release -- Suspension of sentence -- Breach of conditions. -- Every person who shall be convicted of a felony or other crime punishable by imprisonment in the penitentiary, if judgment be not suspended or a new trial granted, shall be sentenced to the penitentiary. The court in imposing such sentence shall fix the maximum and minimum duration of the same. The term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term fixed by the court. The release of such person shall be determined as hereinafter provided: Provided, that the court may, in its discretion, suspend any sentence imposed upon any person convicted of a felony involving a specific criminal intent, unless such person has previously been convicted of a felony involving a specific criminal intent, upon such terms and conditions as it shall deem proper, and such sentence shall go into effect upon order of the court upon a breach of any of such terms or conditions by the person convicted."

The Supreme Court of New Mexico held in the case of *Ex parte Lujan*, 18 N.M. 310, 137 P. 587, that the district courts had no power prior to this statute to suspend a sentence. See also *Ex parte Bustillos*, 26 N.M. 449, 194 P. 886. Thus, a court who is not encompassed in that statute does not have the authority to suspend a sentence and any suspension of a sentence by those courts is void.

2. May the defendant be required to serve the 10 days sentence at this time?

If the suspension of the sentence is void and the person after sentence is released, the sentence may then be imposed at any time the person is apprehended. *Jordan v.*

Swope, 36 N.M. 84, 8 P. 2d 788. The defendant falls into the category of an escaped convict at the time he is released after a void sentence suspension. State v. Vigil, 44 N.M. 200, 100 P. 2d 228; United States v. Greenhaus, 85 F.2d 116, 107 ALR 630.

There remains, however, the question of a sentence given and suspended upon the condition that the person leave town.

The vast majority of cases have held that a suspended sentence, whether valid or invalid as to the right of the court to suspend, is absolutely a void sentence when imposed with the condition that the defendant leave and remain away from the jurisdiction. See Annotation in 70 ALR 100.

Thus, the sentence was entirely void and does not constitute a sentence at all and the defendant should be treated as though she had not heretofore been sentenced under the conviction.

We sincerely hope that the above answers your inquiry.

By Fred M. Standley

Assistant Attorney General