

Opinion No. 57-139

June 17, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Paul L. Billhymer, Assistant Attorney General

TO: H. R. Swenson, Warden, Penitentiary of New Mexico, P. O. Box 1059, Santa Fe, New Mexico

QUESTIONS

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Is the time served by a prisoner, after conviction but during pendency of appeal, to be credited on the sentence of such prisoner where the result of the appeal is the affirmation of the conviction?

CONCLUSION

No.

OPINION

ANALYSIS

We have combined the three questions which you asked into this single question for we believe the answer to this question makes it unnecessary to answer, specifically the three questions which you asked.

We do not believe that the prisoner is entitled to this time for the simple reason that actually he is not serving the sentence under a commitment even though he may be incarcerated.

Rule 9 (5), Supreme Court Rules, reading as follows:

"All appeals and writs of error in criminal cases shall have the effect **of a stay of execution of the sentence** of the court until the decision of the Supreme Court upon the said appeal or writ of error. Whenever the sentence of the district court shall be that of death or imprisonment for life the party convicted shall remain in close confinement until the decision of the Supreme Court shall be pronounced; in all other cases the party taking the appeal or suing out the writ of error shall be entitled to be released on bail by filing a bond in the sum and with conditions to be fixed by the district court upon the allowance of such appeal or upon receipt of such writ of error, where bond shall be sufficient to secure the due execution of the sentence of the court in case the judgment of the court be affirmed by the Supreme Court." (Emphasis ours).

indicates that the sentence upon appeal is stayed. Therefore, the time served could not be time served under such sentence. In all cases except a death sentence the party is entitled to bail upon the filing of a proper bond. If bail had been secured there could be no question that this intervening time should not count as service of time upon the sentence. We feel that the actual imprisonment is in lieu of bail and, therefore, cannot be counted as time served on the sentence. *Demarois v. Hudspeth*, 99 F.2d 274; *Mosheik v. Bates*, 87 F.2d 221; *Sasser v. State*, 98 S.W. 2d 211, 131 Tex. Cr. 347. These cases affirm the rule that absent statute the time served pending appeal is not to be credited as time served upon the sentence. We know of no New Mexico statute which authorizes the crediting of such time, and in view of the above quoted rule, we believe that there are no grounds for granting such time.