

Opinion No. 57-253

October 4, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Dr. Manuel N. Brown, Director of Parole, State Board of Parole, P. O. Box 1219, Santa Fe, New Mexico

QUESTION

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1. "The sentence and parole eligibility. In those cases where the sentence by the court is not in conformity with the indeterminate Sentence Act, must the Board of Parole nevertheless abide by that sentence in determining parole eligibility?"

2. "Notification of district judges. Section 13 of the Parole Act of 1955, Parole Authority and Procedure, states in part that "At least thirty days before ordering any parole, the Board shall notify the district judge of the judicial districts from which the inmate was committed to the correctional institution."

"QUESTION: Is it sufficient to notify the judge just once, at the time of the initial parole hearing of the inmate? That is, if the offender is denied parole at his first hearing, is it required that a notification be sent the judge each time his case is reviewed?"

CONCLUSIONS

1. Yes.

2. It is necessary to notify the judge thirty days before the prisoner is to be released on any parole.

OPINION

ANALYSIS

We turn to your first question. It would, of course, be fundamental that when a district court in New Mexico imposes a sentence to the penitentiary, which however is not in accordance with the indeterminate sentence law, that the district court so acting thereby commits an error of law. The basic question then is what is the effect of this judgment although such is admittedly erroneous.

First of all if the sentencing court had jurisdiction of the defendant, if it had jurisdiction of the subject matter (felonies) and if it has the power to decide the matter presented, then

the particular district court has the power to sentence a defendant to the penitentiary. These elements of jurisdiction are set out in *State vs. Patten*, 41 N.M. 395, 69 P. 2d 931. Since it is not the office of the Parole Board of New Mexico to inquire into the jurisdiction of any district court, you should assume in each instance that the court had jurisdiction, although you may honestly believe that it committed error of law in sentencing the particular prisoner. In addition, certain other principles of law have been announced by the courts in this state. They are binding upon you. In *State ex rel Sofeico vs. Heffernan*, 41 N.M. 219, 67 P. 2d 240, it was held that so long as a judgment (meaning sentence) remains unappealed from, it is in full force and effect, and it is no matter that it may be erroneous so as to be reversible on appeal or writ of error, since the judgment otherwise remains final. In other words irregularity in a trial court's judgment must be raised by appeal or writ of error. If such is not done the matter is at an end, for there can be no collateral attack. *Jencks et al. vs. Goforth*, 57 N.M. 627, 261 P. 2d 655.

It follows from the foregoing that the Board of Parole must abide by the sentence imposed by the district court in determining parole eligibility.

In regard to your second question, it is our opinion that the governing portion of Section 41-17-24, N.M.S.A., 1953 Compilation, 1957 Supplement, more specifically the third paragraph thereof which reads:

". . . At least thirty (30) days before ordering **any parole**, the board shall notify the district judge of the judicial district from which the inmate was committed to the correctional institution. Such judge may express his views on the inmate's prospective parole either in writing or personally, to the board, but the final decision on parole shall be of the board. . . ." (Emphasis ours.)

contains within its terminology the answer to your second question. We have found no decision by our Supreme Court which gives the answer to your second question. However, from the wording of the statute, particularly the language thereof reading ". . . any parole, . . .", it is our belief that the intention of the Legislature was to require notice to the district judge in each instance thirty days before granting any parole. However, we do not believe that the statute requires notice to the district judge thirty days before a parole hearing is granted, but only requires that such notice be given thirty days before ordering the actual parole itself. However, as a matter of policy, to be determined however by the Parole Board, it might be wise to give some notice to the district judge before the hearing or hearings.