Opinion No. 59-122

August 27, 1959

BY: HILTON A. DICKSON, JR, Attorney General

TO: Honorable Harold A. Cox Warden, New Mexico State Penitentiary P. O. Box 1059 Santa Fe, New Mexico

*{*188}* In a recent letter you asked the following question:

In view of the thirty-day limitation in which a sentencing judge has jurisdiction, can he, after sentence has been imposed, amend, modify, or allow prisoners credit for time served in jail, if any of these stipulations were not part of the original commitment, by issuing an amended commitment, after the thirty-day limitation?

My answer to your question is no.

Although you did not so indicate in your letter, I take it that you probably refer to Section 21-9-1, N.M.S.A., 1953 Compilation, the pertinent portion of which reads as follows:

". . . Final judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty (30) days after the entry thereof, . . ."

Our Supreme Court has cited or construed the afore-mentioned section of our statutes times almost without number, as a matter of fact, in at least thirty of its decisions. Said decisions, however, without exception have to do with civil cases.

On the basis of the reasoning contained in former opinions of this office with their supporting authorities, hereinafter in this opinion set forth, I have concluded *{*189}* that said aforementioned statute is not controlling herein.

An opinion of this office No. 144, dated May 4, 1931, covering the power of a district court to change, alter and amend its judgments after commitment of a prisoner to the Penitentiary is cited under said Section 21-9-1, N.M.S.A., 1953 Compilation. This would indicate that the compiler felt that said opinion interpreted the provisions of said section of our statutory law.

As a matter of fact, although our said Opinion No. 144, supra, mentioned the statute in question, the reasoning therein as well as the conclusions reached were not based upon an interpretation of said Section 21-9-1. Said opinion held that when a prisoner was committed and commenced serving his sentence in the New Mexico State Penitentiary, the Court sentencing him lost all jurisdiction in the matter and the Court's order vacating the sentence was void. Said opinion further stated that said prisoner stood regularly committed, was an inmate of the Penitentiary and must have so

remained until sentence was completely served or until paroled or pardoned by the power so to do vested in the Governor of New Mexico. In his concluding paragraph of said opinion, the then Attorney General stated:

"If the power of the courts over sentences were not limited, they would encroach upon the power of another branch of our government, the Executive Branch, in which solely is vested the power or pardon or reprieve. Courts have no such power in this State, as we view it."

The latter order, dated September 9, 1939 (you will note that the period of time was considerably **less** than thirty (30) days), held that a sentence may not be suspended by a district judge after commitment. In said opinion, reference was made to Section 130-163, 1929 Comiplation, the successor to which section is Section 41-17-1, (P.S.) N.M.S.A., 1953 Compilation, the pertinent portion of which section reads as follows:

"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 sentence the person for the term as prescribed by law for the particular crime of which he was convicted. The term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term fixed by law. The release of such person shall be as provided by law: . . ."

Some change in the wording of said Section 130-163, 1929 Compilation has been made, however, no such change in my opinion would affect the answer to the instant problem.

In our Opinion No. 4072, dated April 21, 1942, we replied to the following question propounded by one of your predecessors:

"What are the time limits of a sentencing judge in regard to modifying a sentence of imprisonment after said sentence has been imposed?"

The answer of this office was:

"This office has heretofore ruled that the sentencing judge may not modify a sentence of imprisonment in the State Penitentiary after commitment has issued."

We find no Supreme Court decision even slightly bearing on the point involved herein other than **Ex parte Bates,** 20 N.M. 542. This was a lengthy opinion regarding the power of a court to suspend the execution of its judgments in criminal cases and holding that upon violation of such orders, the court had the power to revoke the same and commit the accused. The Supreme Court held that a court did have the power to suspend and upon violation of the terms of the suspension to commit the accused.

*{*190}* On page 545 of the **Bates** case, it is stated:

"The Attorney General takes the position that the act authorizing the suspension of a sentence is in conflict with the provision of the Constitution vesting in the executive the power to grant reprieves and pardons after conviction for all offenses. This provision of our state Constitution is as follows:

'Subject to such regulations as may be prescribed by law, the Governor shall have power to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment.' Section 6, art. 5.

Assuming this to be true, the Attorney General argues that the action of the district court in suspending the sentence imposed upon the petitioner was a nullity, and that the commitment upon the judgment and sentence imposed on October 21, 1914, could therefore issue at any time, upon the theory that the judgment imposed is not satisfied until the sentence has been served. The right of the district court to withhold its judgment, or to temporarily delay the pronouncement of sentence, is not brought into question. **As we understand the contention of the Attorney General, it would appear that he has assumed that the Legislature has no right to authorize any court to suspend a sentence already imposed, and in this we might agree that the Attorney General is correct;** but such is not the state of facts presented for our consideration at this time." (Emphasis supplied)

Vol. 15, Am. Jur., 1959 (P.S.), page 27, reads as follows:

"It has been generally held that the power which a trial court may exercise over its judgments during term, or during a fixed statutory time following their entry, does not extend to authorize revision or modification of a valid sentence in criminal cases after the commitment of the defendant thereunder; its power of revision of the sentence exists only so long as it remains unexecuted. **And the great weight of authority supports the rule that when a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of the court at which the sentence was pronounced;** any attempt to do so is of no effect and the original sentence remains in force." (Emphasis supplied)

Under Federal law, a court retains the power to reduce its sentences in criminal cases within sixty days after the sentence is imposed. Title 18, USCA, Rule 35, Federal Rules Criminal Procedure.

Under the respective constitutions and laws of some of our sister states, a court retains the power to make changes in sentences.

It is more than passing strange that the Supreme Court of this State has not been called upon to decide the exact question presented to us by your letter. It is even more surprising that our legislature has not seen fit to clarify the law as it pertains to the rights of the many prisoners who enter the gates of the institution which you head.

In the absence of an adjudication by our Supreme Court to the contrary, it is my opinion that a district judge is without authority to change, alter or amend a judgment after issuance of commitment to the penitentiary.

By Carl P. Dunifon

Assistant Attorney General