

Opinion No. 63-128

September 24, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Harold A. Cox, Warden Penitentiary of New Mexico Santa Fe, New Mexico

QUESTION

FACTS

An inmate of the Penitentiary of New Mexico was committed on January 24, 1957, to serve a term of 5 to 20 years for the crime of grand larceny. While serving this sentence, subject earned four months and two days meritorious good time. On April 9, 1959, the inmate obtained a Writ of Habeas Corpus, which was made final, and he was returned to San Juan County where he was resentenced by the District Court. A new commitment was issued but the sentence was specifically made to run from the time of his first commitment on January 24, 1957. Thus, the District Court Judge credited the inmate with the time he had served under his previous sentence. The new commitment indicates a sentence of one to ten years for grand larceny.

QUESTION

Can the meritorious good time earned under the prior invalid sentence be applied to the new sentence and credited to the inmate's term, although the Judge did not stipulate that such was to be the case?

CONCLUSION

Yes, within the discretion of the Penitentiary.

OPINION

{*286} ANALYSIS

The question posed is whether an inmate who has been incarcerated in the New Mexico Penitentiary under an invalid sentence, and who has earned meritorious good time while serving such invalid sentence, and who is later released by Writ of Habeas Corpus and resentenced, can be credited with the good time earned under the invalid sentence. This question is simplified by the fact that the Judge in the present case made the new sentence retroactive to the date of the original commitment, thus, indicating his intention of crediting the inmate with the time he had previously served. It is obvious that since the sentence was retroactive to the date of the original commitment, its effect is as if the inmate had actually begun serving a valid sentence as of the date of the original commitment, i.e., January 24, 1957. It follows that since the

meritorious good time was earned during the pendency of the original sentence, and since the new sentence began as of the date of the original commitment, any meritorious good time earned during the original commitment should be credited to the new sentence. This result would seem to be in the intention of the District Court in making the new sentence retroactive, and would further seem to carry out the ends of justice.

Although there are no cases on this point in New Mexico, other courts have passed on the point and have considered that the ends of justice required the inmate receive his good time earned under an invalid sentence. This has been held to be the case even where the new sentence was not made retroactive. See for example the cases of **Frye v. Delmore**, 288 P.2d. 850, 47 Wash. 2. 605 and **Application of Cannon**, 281 P. 2. 233, 203 Ore. 629. The State of California has solved this problem by passing a specific statute dealing with the crediting of time served under an invalid sentence, see California Penal Code, § 2900.1, and under such statutes its courts have indicated that good time should be also credited under a new sentence, **Ex Parte James**, 240 P.2d. 596, 38 Calif. 2. 302.

It has been held by this office in the past that the question of good time is within the administration of the Penitentiary, under the supervision of the Board of Commissioners of the Penitentiary of New Mexico. See Attorney General's Opinion No. 6378 of February 3, 1956. Thus, the question of crediting good time to the subject in the above case is a matter of policy to be decided upon by the Board of Commissioners of the Penitentiary of New Mexico. A decision in the affirmative would, in our opinion, be within the law.

By: James E. Snead

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