Opinion No. 63-165

December 9, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

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

QUESTION

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1. Where a defendant has received two or more sentences upon conviction on two or more counts, and the sentencing judge specifies that "the sentence on count 1 is to be served first", is the penitentiary required to construe these sentences as one continuous sentence under Section 42-1-59, N.M.S.A., 1953 Compilation, or should the sentences be construed by the penitentiary as strictly consecutive?

2. If the sentences are to be construed as being strictly consecutive, does the Board of Parole have authority to grant "in custody" parole from one sentence to another?

3. If an "in custody" parole is granted to a consecutive count, thereby making both counts concurrent, is parole eligibility from the second count based on its minimum?

4. If the sentences are to be construed as one continuous sentence, thereby making the maximum sentence equal to the sum of the maximum of each separate sentence, and an "in custody" parole is granted from one count to the next, what is the maximum sentence to be then served?

CONCLUSION

1. See Analysis

2. Yes

3. Yes

4. In view of the answer to Question 1, no answer is necessary on Question 4.

OPINION

*{*385}* **ANALYSIS**

The factual situation under which this opinion operates is as follows: An inmate was convicted of two counts, and was sentenced to six months to three years on count 1,

and one month to five years on count 2. The Commitment specified that the sentence on Count 1 was to be served first.

The first question deals with whether such a specification by the sentencing court negates the effect of Section 42-1-60, N.M.S.A., 1953 Compilation. A rational conclusion to this question requires a construction of three separate statutory provisions. The first is Section 42-1-59, supra, the second is 41-17-24, N.M.S.A., 1953 Compilation (PS), dealing with parole authority and procedure, and the third is Section 41-17-24.1 (PS), N.M.S.A., 1953 Compilation, dealing with "in custody" parole. The difficulty in rationalizing these three statutes was pointed out in an Opinion by Oliver E. Payne to Warden Cox on July 12, 1961, Opinion No. 61-59. This opinion dealt with quite similar questions, and will be followed as a basis for *{*386}* the conclusions reached in the instant opinion.

For purposes of this opinion, and as generally defined in the case law, the terms "cumulative" and "consecutive" sentences mean substantially the same thing. As can be seen by reference to any standard dictionary as well as case law on the subject, it is generally felt that a consecutive or cumulative sentence is one which is added at the end of a prior sentence so as to increase the time of imprisonment by the amount of the cumulative sentence.

Absent statutory language to the contrary, the mere fact that a sentence is cumulative does not authorize the penitentiary authorities to "lump" or combine the maximums and minimums of the separate sentences into one continuous sentence. Generally, even though sentences are specified to be "consecutive", the identity of each separate sentence must be preserved. Ex parte Fitzpatrick, 75 Atlantic 2nd 636, 9 N.J. Super. 511, (1950); See P.L. 1950c, 292, R.S.30; 4-123-10, N.J.S.A. for later N.J. statute authorizing such combining; See also 24B CJS Criminal Law, Section 1996 (1).

New Mexico does, however, have a statute authorizing the combination of consecutive sentences. This is Section 42-1-59, supra, which provides:

"Whenever any convict shall have been committed under several convictions with separate sentences, they shall be construed as one continuous sentence for the full length of all sentences combined."

In Opinion No. 61-59 at Page 4 the position of this office was stated to be that "when a person is committed under separate sentences each of which has a minimum term and a maximum term, the minimum terms should be added together in establishing the parole hearing eligibility date."

This Opinion was dealing with consecutive sentences, but did not concern itself specifically with a case wherein the judge had specifically required that the sentence on one count was to be served first, thus indicating the intention of the court to require service of each sentence separately.

Although we feel that the statement above quoted in Opinion 61-59 is still the proper interpretation of the law under the facts of that case, we feel that where a judge specifically requires one sentence to be served prior to starting service on another, that the maximum and minimum of the specific sentence cannot be combined. Where the sentencing court specifies that one sentence is to "begin after the completion of a previous sentence", or which sentence is "to be served first" it has generally been held that each sentence must be served in order. See **Ex parte Love,** 231 SW 2nd 423. See also 24B CJS Criminal Law Section 1996(7). This Section 42-1-59, N.M.S.A., 1953 Compilation cannot be construed as being mandatory upon the penitentiary in every case is obvious from reading such statutory sections as that dealing with escape from prison wherein it is required that the escapee, upon conviction, be sentenced to not less than two years, which two years are not to run concurrently with any other sentence such person then be serving. See § 42-1-61, N.M.S.A., 1953 Compilation (P.S.). That the Love case, supra, did not limit to cases wherein separate sentences were imposed at different times can be seen by reference to the fact situation involved therein since the accused had been convicted of five separate crimes and his sentences were *{*387}* imposed some on the same day and some on different days.

It is obvious that the District Court at common law had authority to impose consecutive sentences as can readily be seen by reference to such works as 24B CJS, Sec. 1996(2) at Page 664. See also **Swope v. Cooksie,** 59 N.M. 429, 285 Pacific 793, 1955, which indicates that New Mexico follows the common law unless such has been changed by statute.

With reference to Opinion 61-59 it should be noted that § 41-17-24, supra, sets out certain specific cases wherein the minimum sentences to be served for parole eligibility are statutorily defined. Paragraph 4 dealing with life sentences, and Paragraph 3 dealing with sentences of 30 years or more were specifically dealt with in the opinion. Paragraph 1 states the general requirements for eligibility for parole for prisoners who are not dealt with under the other sections. Such prisoners become eligible for parole after they have completed one-third of the minimum sentence. This paragraph, however, does not shed light on the question involved since it leaves the definition of "minimum sentences" unanswered.

Section 41-17-24.1 deals with parole of prisoners to serve another sentence. It is obvious that in order for this statutory provision to be effective there must be cases wherein prisoners have more than one sentence to be served, one after completion of another. If it were mandatory upon the penitentiary to construe cumulative sentences as one continuous sentence, the provision of Section 41-17-24.1 would not be effective. Thus it becomes evident that in order to construe the above three statutory sections to be mutually effective and compatible, it is necessary for us to hold that the penitentiary must follow the requirements of § 41-17-59, supra, unless the sentence of the District Court specifies otherwise by showing its intention that the sentences are each to be served separately, one after the other. This is what can be termed strictly as consecutive sentences. Such sentencing is authorized under common law, and since it

has not been derogated by statute, it is binding on the penitentiary where applied by the sentencing court.

The answer to Question 2 is found in § 41-17-24.1, supra, which authorizes the Board of Parole to parole prisoners to "serve another sentence within the penitentiary." Thus, it is obvious that the Board of Parole has authority to grant "in custody" parole.

In view of the discussion of consecutive sentencing, where a prisoner is given strictly consecutive sentences, each sentence must be construed as a unit and so served. See **Ex Parte Love,** supra. Thus, the minimum for parole eligibility is the minimum of each sentence taken in order, and the maximum is the maximum of each separate sentence. Thus, the penitentiary must use the maximum of the sentence the prisoner is at that time serving in determining good time credits.

Since it is our conclusion that under the above circumstances the sentences are not to be construed as one continuous sentence, the answer to Question 4 is not necessary. It should be pointed out, however, that the maximum to be served is that maximum specified in each separate sentence that the prisoner is required to serve in order.

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