Opinion No. 63-170

December 20, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

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

QUESTION

FACTS

The practice has become prevalent among District Judges at the time of imposing sentences to the State Penitentiary to suspend all but a short term of the maximum sentence. Consequently, the inmates so sentenced serve only thirty (30), sixty (60), ninety (90) days, six (6) months, etc., in actual custody. In some of the cases the judgment and sentence stipulate that upon completion of the term in custody, the inmate will be taken back to the county by the sheriff or probation officer of the courts to have these persons serve some, and in most cases the greater portion, of their sentence in a suspended status.

QUESTION

Should the allowances provided, under Section 41-17-8, N.M.S.A., 1953 Compilation, for any prisoner "released upon parole" or "discharged from the Penitentiary by expiration of his maximum sentence," be paid to prisoners who serve the greater portion of their sentence on probation or in a suspended status?

CONCLUSION

No.

OPINION

*{*394}* **ANALYSIS**

Section 41-17-8, supra, reads as follows:

"Upon the release of any prisoner, upon parole from the penitentiary, the superintendent shall provide him with suitable clothing, with twenty-five dollars ($ 25.00) in money, and shall procure transportation for him to his place of employment, if within this state, and if not within this state then to any place within the boundaries of the state. The superintendent shall make the same provision for any prisoner **discharged from the Penitentiary by expiration of his maximum sentence,** save that he shall procure transportation for said prisoner to his home, if within the state; if not, to the place of his conviction, or to any place within the boundaries of the state." (Emphasis added).

There have been two previous Attorney General opinions construing this section. However, they dealt with different fact situations. The first of these, No. 5621 rendered December 17, 1952, held essentially that a prisoner released for retrial or on a writ of habeas corpus was not entitled to the allowances above mentioned. The reasons given for this conclusion were that the statute was mandatory and that it specifically provided for those instances when the allowances were to be paid, namely, upon parole or discharge by expiration of the maximum term. The second opinion No. 6122 rendered March 3, 1955, held that such allowances were to be given to prisoners released on parole or by expiration of sentence, when such prisoners are turned over to the custody of other authorities for further prosecution or for confinement *{*395}* in another institution and to those discharged after having been returned for parole violation. Again, the reasons stated for such conclusion were the mandatory language and the plain terms of the statute.

The problem with which we are now concerned is limited to the simple inquiry of whether or not those prisoners described in the facts above have either been released upon parole or discharged by expiration of maximum sentence. If they cannot, by any reasonable construction, fit into one or the other of these categories they are automatically excluded from the operation of the statute.

Section 41-17-14, N.M.S.A., 1953 Compilation, (P.S.) provides a definition of the word "parole" as follows:

"41-17-14. Definitions. -- As used in the Probation and Parole Act (41-17-12 to 41-17-34):

* * * *

B. "Parole" means the release to the community of an inmate of an institution by decision of the board prior to the expiration of his term, subject to conditions imposed by the board and to its supervision; . . ."

The above definition is binding upon us, and, it is clear that such definition does not include those prisoners who are not released "by decision of the board." It follows then that the prisoners now under consideration are not to be included, as parolees.

Our Court has not had occasion to provide a definition of the term "maximum sentence" which would resolve our inquiry. However, there are at least two decisions which strongly suggest that it is the full and complete sentence imposed by the court, including any part which might be suspended. The first of these decisions was **Ex Parte Lucero,** 23 N.M. 433, 168 P. 713, which involved a hearing on a Writ of Habeas Corpus. The facts indicated that a sentence had been imposed upon the petitioner and suspended during his good behavior. Subsequently, an indictment was returned against the petitioner and others. This indictment was filed in the original cause after the time for which the sentence was originally imposed had expired. The court found that the petitioner had violated the conditions upon which the sentence, theretofore pronounced

against him, was suspended, and ordered that said original sentence be enforced. This decision was upheld in the hearing on Writ of Habeas Corpus, the court holding in effect that a suspended sentence can be enforced after the time for which the sentence was originally imposed has expired. In **State v. Vigil,** 44 N.M. 200, 100 P. 2d 228, it was held that the district court had jurisdiction to revoke its order suspending a convict's sentence for breach of condition by the subsequent commission of a felony, though the maximum term had expired before such revocation. Thus, it appears that the court, by its language, in these cases meant to include within the term "maximum sentence" the time served in a suspended status.

It is our opinion, based upon the foregoing that the prisoners described in the facts above are not entitled to the allowances provided under Section 41-17-8 supra, inasmuch as they have neither been "released upon parole" or "discharged by expiration of their maximum sentence."

By: Frank Bachicha, Jr.

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