Opinion No. 65-200

October 14, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr. Assistant Attorney General

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

QUESTION

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Where part of a penitentiary inmate's sentence has been suspended, what is the "basic maximum sentence" from which good time is to be deducted for determination of his final release date?

CONCLUSION

The total maximum sentence imposed, including any suspended portion thereof.

OPINION

*{*324}* ANALYSIS

The promissory statutory provisions of the New Mexico law pertinent to this inquiry are Sections 42-1-54 and 42-1-55, N.M.S.A., 1953 Compilation, i.e., the so-called good time provisions. They read as follows:

"42-1-54. DEDUCTION FROM SENTENCE FOR GOOD BEHAVIOR. -- Every convict imprisoned in the penitentiary who performs faithfully the duties assigned to him, is of good behavior, and complies with the rules and regulations of the penitentiary during his imprisonment, shall be entitled to a deduction **from the time of his sentence** for the respective years thereof, and proportionately for any part of a year as follows: for the first year, one month; for the second year, two months; for the third year, three months; for the fourth year, four months; for the fifth year, five months; for the sixth year and any succeeding year, six months. **The deductions shall be computed on the basic maximum sentence** as follows:

Sentence Time to be served
1 year 11 months
2 years 1 year, 9 months
3 years 2 years, 6 months
4 years 3 years, 2 months
5 year 3 years, 9 months

6 years 4 years, 3 months
7 years 4 years, 9 months
8 years 5 years, 3 months
9 years 5 years, 9 months
10 years 6 years, 3 months

Longer maximum sentences will be computed on the same basis as this schedule." (Emphasis supplied.)

"42-1-55. MERITORIOUS DEDUCTIONS. -- A. Any convict confined in the penitentiary may be awarded an additional deduction of ten *{*325}* days' meritorious good time per month based on exemplary conduct, outstanding work, and continuing effort toward self-improvement and rehabilitation, upon recommendation of the classification committee and approval of the warden. Any convict assigned to the penitentiary honor farm will be awarded a deduction of twelve days' meritorious good time per month.

B. A prisoner whose record of conduct shows that he has performed exceptionally meritorious service or performed duties of exceptional importance in connection with institutional operations, evincing a desire toward self-improvement and rehabilitation, and whose record of conduct shows that he has otherwise faithfully observed the rules of the institution, may be eligible for a lump-sum good time award, not to exceed one year, **which may be deducted from the length of maximum sentence then remaining unserved.** The classification committee and the warden shall determine the number of days to be awarded in each case based upon the particular merits. Allowance for exceptionally meritorious service shall be in addition to commutation of time for good behavior, and in the event two or more consecutive sentences are being served, the aggregate of the several sentences shall be computed.

C. Meritorious deductions may be terminated upon recommendation of the classification committee and approval of the warden if the convict does not properly maintain the standard on which the award was based." (Emphasis supplied.)

It is our understanding that the present penitentiary policy, which has not heretofore been questioned, is to deduct good time earned from the maximum sentence imposed. Example: Sentence of not less than two (2) nor more than ten (10) years, good time applies to reduce the ten (10) years to determine final release date. This is a rather simple operation and is in line with statutory requirements. However, where a portion of the sentence imposed has been suspended the good time has heretofore been deducted from the actual time to be served inside the penitentiary. Example: Sentence of not less than two (2) years nor more than ten (10) years with all suspended except the first three (3) years thereof, good time is now deducted from the three (3) years to determine the final release date. This latter method is the one in question here.

On August 23, 1965, our Supreme Court rendered an opinion in the case of **Martinez v. Cox,** Supreme Court No. 7919. This case involved a writ of habeas corpus issued on May 26, 1965, upon an allegation of the Petitioner, Martinez, that he had fully completed

service of his sentence of imprisonment "for a term of not less than two nor more than ten years . . . all of said sentence except the first eighteen months is hereby suspended." The parties stipulated that if the good time already earned by Petitioner was credited against the eighteen months' sentence not suspended, he would have completed his full sentence, within the penitentiary, on April 15, 1965, or prior to the date of issuance of the writ. The Court denied relief.

Concededly the Petitioner, Martinez, was convicted for a violation of Section 54-7-13, N.M.S.A., 1953 Compilation, of the Uniform Narcotic Drug Act which contains a restriction in Section 54-7-15 (D), N.M.S.A., 1953 Compilation to the effect that neither the imposition nor execution of a sentence shall be suspended nor probation or parole granted until the minimum provided for the offense (narcotics) is served. In our opinion, this fact does not render the opinion in that case inapplicable to the present situation, *{*326}* since the court had occasion to consider the correct application of good time credits. In certain unmistakable language, it said, citing **Owens v. Swope,** 60 N.M. 71, 287 P.2d 605 (1955):

"It is our settled judgment that a consideration of all of the controlling statutes requires a construction that **'good time' allowances,** for the purpose of final discharge from imprisonment, **are only deductible from the maximum sentence provided by law.** Owens v. Swope, supra, requires that construction." (Emphasis supplied.)

In reply to the Petitioner's allegation of violation of due process the court further stated:

"Petitioner's argument that failure to order his immediate release constitutes a deprivation of due process, cannot be sustained. Statutory ineligibility for probation or parole does no violence to due process of law concepts, (citing cases), and we perceive of no material difference between that and statutory ineligibility resulting from a **requirement that good time allowance should be computed only on the maximum term required to be imposed under the indeterminate sentence law."** (Emphasis supplied.)

It is clear that the "maximum term required to be imposed under indeterminate sentence law" does not take into account any suspension of such sentence, pursuant to the authority granted to judges by Section 40A-29-15, N.M.S.A., 1953 Compilation. We must assume, too, that all judges will sentence in accord with the requirements of the law.

Even though the above mentioned decision had the effect of refusing relief on habeas corpus to the Petitioner who was convicted of violation of the Narcotic Drug Act, it is our opinion that such decision is as well applicable to all instances involving suspended sentences.

It has been suggested that were the Warden to apply good time earned to the maximum term of sentence, including any suspended portion thereof, it would give him the power to disregard and thereby revoke the suspended portion of the sentence. We do not so

conclude. The inmate would be released, if not by parole, upon the expiration of the term of imprisonment directed by the court to be served within the penitentiary. He would still have the benefit of the suspended portion of the sentence imposed. Another suggestion has been made that the actual sentence imposed is the unsuspended portion of the sentence. The debt to be paid to society by one convicted of a violation of the law is prescribed by statute in providing for the sentence to be imposed. As we see it, this debt is not partially eliminated by the discretionary power of the sentencing judge to allow the defendant to pay such debt outside the penitentiary walls on a suspended status. Only the type of restriction is different. Inside the penitentiary or on parole, the inmate is in the custody of the warden. When he is out on a suspended sentence he is in the custody of the court which authorized such suspension. But, he is still serving the sentence imposed, which is presumably the legal and valid sentence. See **Commonwealth ex rel. Lycett v. Ashe,** 20 A.2d 881, 883, 145 Pa. Super. 26, cited by our court in support of the decision rendered in **Owens v. Swope,** supra.

Owens v. Swope, supra, relied upon by the court in **Martinez v. Cox,** supra, involved the question whether good time could be deducted from the minimum sentence to determine final release date or merely to determine when an inmate would be eligible for release on parole. This court decided that it was only for the latter and that in order to determine when an inmate would be eligible for final discharge, such good time *{*327}* would have to be deducted from the maximum sentence. There is considerable language in that opinion which bears upon the issue involved herein. This Court in **Owens** cited with approval the case of **Orme v. Rogers,** 260 P. 202, 32 Ariz. 502, where it was said, in part:

". . . we are fully convinced that when the rule for good conduct time was first laid down it was given to the prisoner as a matter of absolute right, to be applied only **in cancellation of the definite debt he was held to owe the state,** and that such rule has never been changed . . . ."

"Such being the case, it seems to us that it would be absurd to hold that a credit given as a matter of right for the purpose of lessening the debt owed the state was meant to apply to a period fixed, not as the time when the offender might say, 'my debt is paid, **full release** is mine as of right,' but as the date when he might petition for permission to serve his sentence under easier conditions or be discharged, if the authorities, as a matter of grace consented thereto. We hold, therefore, that the good conduct time granted by the statute applies . . . **to the maximum period, which is the only one at which the prisoner may claim as such right to be fully discharged from the consequences of his offense."** (Emphasis supplied.)

In attorney General Opinion No. 63-170 dated December 20, 1963, this office had occasion to provide a construction of the term "maximum sentence". To reach a decision we relied upon two previous New Mexico cases as reflected in the following quote from that opinion:

". . . . 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 thus our opinion, based upon the foregoing analysis and authorities, that good time allowances of penitentiary inmates must be deducted from the entire sentence required to be imposed (and presumably the sentence actually imposed) including any suspended portion thereof. This is, we conclude, the basic maximum sentence" referred to in Section 42-1-54, supra.

We are not unaware of the fact that many former penitentiary inmates have been released prematurely by the erroneous application of the good time statutes, supra; and, that many present inmates *{*328}* will be affected by this change in the application of the law. This same problem existed following the **Owens** decision. Thus, we recommend as did that court when it stated at page 87:

". . . Any change in policy as to those committed under the former law will be damaging; and one of the basic purposes of imprisonment, reformation, will be impaired. We recommend that the record of all prisoners, including the petitioner, committed prior to the enactment of the 1955 Law, be reexamined by the parole board with a view of recommending executive clemency by way of a pardon or conditional pardon where warranted, so as to achieve as nearly as possible the former policy of deducting good time off the minimum sentence. Otherwise, those previously released, not having served out their sentences, must be branded as escapees."