

Opinion No. 24-3775

July 28, 1924

BY: JOHN W. ARMSTRONG, Assistant Attorney General

TO: Requested by: Hon. John B. McManus, Supt. Penitentiary, Santa Fe, New Mexico.

A Sentence for "Not Less, Nor More Than One Year, Six Months and One Day" is a Legal Sentence.

OPINION

{*156} The question you propound arises on certain correspondence between your office and the Honorable Harry P. Owen, Judge of the Seventh Judicial District. In view of the public importance of the matter involved, we take the liberty of quoting rather freely from such correspondence:

{*157} **Your Letter to Judge Owen:**

We note that the commitments in the cases of Lyle Green, Lynn Treigle and James DeLuche sentenced by you on May 26th, 1924 show that "flat" sentences were imposed and it occurs to us that possibly the commitments are in error. Was it not your intention to impose a maximum and minimum term?

Judge Owen's Letter to You:

Regarding your inquiry about the commitments, while I have not seen them, they are probably not "flat" as you say, but convey the meaning of "not less than" and "not more than," a minimum and maximum sentence, which form seems to have been held legal in the rather notorious case of State v. Davisson, reported in 117 Pac., p. 240. Some other states, it is true, decide to the contrary. The statute calling for a maximum and minimum sentence, seems, under our peculiar treatment of criminals and courts (**idem sonans**) to have been generally ignored by the pardoning and paroling authorities, as in a large majority of cases action is taken by them long before the minimum sentence is served (though probably not before the minimum limit of the statute offended against). Hence, of what efficacy is the interval to be fixed by a court? I should think the prison board could accept as a finality the fact that the very best has been done for the culprit in the district court, which views the case from all the circumstances and from every angle, when a minimum is fixed, but, as I say, it is not so taken. Am I correct in this? And only for good reasons, growing out of changing conditions affecting the culprit, should the minimum be disturbed, is my opinion.

But even if the sentence were irregular, I seriously doubt if any advantage could be taken of it.

Your Inquiry:

Our question was directed to Judge Owen after he had sentenced and we had received on commitment certain prisoners whose terms we considered irregular. * * * The commitment for whom reads, "Not less, nor more than one year, six months, and one day."

Our New Mexico statutes require that prisoners shall be given a minimum and a maximum term and if the sentence quoted above is to be construed to be in accordance with this statute, the prisoner can receive no benefits from the parole law, to which he is entitled, and the law itself is of no avail.

We recognize the force of your contentions and the probable salutary effect such a construction of the statutes might have on prisoners. Your position is in line with many boards governing other like institutions of advanced standing. However, in order to meet the object you intend, our statutes will necessarily have to be amended.

In construing the law you mention, our Supreme Court, in the recent case of *State v. Davisson*, 28 N.M. 663-664, holds:

{*158} The statute * * * implies * * * that the discretion of the court controls the period of imprisonment, it being required only that such period be within the minimum and maximum term.

That the sentence of the trial court is thought to be inconsonant with the spirit and purpose of the statute applied, is not sufficient reason for holding such sentence improper, if conformable to the obvious meaning of the statute; the purpose and spirit of the law is presumed conclusively to have been expressed by the Legislature in the language employed. The sentence here considered satisfies the words of the statute. It is not less than the minimum term, one year, nor greater than the maximum term, three years. How great the period of time intervening between the two should be rests primarily in the discretion of the trial court. To say that, as the minimum term approaches the maximum, a point may be reached which deprives the sentence of validity seems to be a pronouncement upon the occult. The sentence was proper.

The portion administered by Judge Owen appears to be within the law and the board will necessarily have to be governed by the terms of the commitment.