Commitment Sentence, Term of Under Parole. Pardon. Judicial Parole.

Under a judgment of conviction, sentence was pronounced upon the convict for a term of seven years with a proviso that three years be spent in the Montana state prison and the remainder of the term of four years be by parole under the authority of the state board of prison commissioners. Held, to be a sentence for seven years, and that part which attempted to parole the prisoner after service of three years of the sentence was surplussage, or at most a recommendation for executive clemency.

January 5th, 1914.

Hon. Frank Conley,
Warden Montana State Prison,
Deer Lodge Montana.

Dear Sir:

On the 19th ultimo you wrote to this office, enclosing a commitment received by you from the Thirteenth Judicial District of Montana, committing to your institution one Earl Chatwood, a copy of which commitment was sent with your letter with the request that this office render an opinion as to whether the same was one for the imprisonment of the convict for three years or for seven years.

I have examined the commitment and also the order of the court upon which the same is based. Such parts of the order as are essential follow:

> "It is therefore ordered, adjudged and decreed that the said Earl Chatwood be punished by imprisonment at hard labor in the state prison of the State of Montana, at Deer Lodge, Montana, for the term of seven years, and that he pay the costs of this prosecution, subject to the following condition:
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> "It appearing to the satisfaction of this court that the said defendant, Earl Chatwood, has never before been imprisoned for a crime either in this state or elsewhere, and it further appearing to the satisfaction of the court that after this defendant, Earl Chatwood, has served three years of the sentence imposed upon him, that the circumstances of the case are such that he would not likely again engage in an offensive course of conduct, and it further appearing that after the said defendant, Earl Chatwood, has served three years of the sentence imposed upon him, that the public safety would not then demand nor require that the said defendant, Earl Chatwood, suffer the remaining portion of the penalty imposed by law.
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> "It is therefore ordered, adjudged and decreed that after the said defendant, Earl Chatwood, has served three years of this sentence imposed upon him, that the execution of the remainder of the sentence requiring the said defendant, Earl Chatwood, to be imprisoned at hard labor in the state's prison at Deer Lodge, Montana, for the balance of his term of four years, is hereby suspended and the said defendant, Earl Chatwood, be then placed on probation, and the said defendant, Earl Chatwood, be then placed under the control and management of the state board of prison commissioners of the State of Montana, and he shall then be subject to all the rules and regulations that said board may apply."

It will be observed that the sentence imposed is for the definite period of seven years, with a proviso, which is added, to the effect that when three years of the sentence imposed upon the defendant has been served, the execution of the remainder, or four years thereof, is suspended, the convict then to be placed upon parole or probation.

This sentence was evidently imposed pursuant to the provisions of Chapter 21 of the Session Laws of the Thirteenth Legislative Assembly, which provides for the suspension of sentences in certain instances. This law, however, makes no provision for the partial suspension of any sentence, but relates to the suspension as a whole without the execution of any part thereof in the first instance. When its provisions are invoked its purport is in effect that the convict shall escape punishment by imprisonment entirely.

Two questions of serious import arise in the consideration of this matter: (1) Is the sentence definite and certain in its terms; (2) Is the imposition of such a sentence an encroachment on the pardoning power of the chief executive?

As to the first of these propositions, Sec. 9737, Revised Codes of Montana, 1907, provides for the commutation of sentence for good behavior. On a three-year term the actual time to be served would be two years and six months, and upon a seven-year term the actual time of service would be four years and nine months. This sentence apparently contemplates that the convict shall remain three years in the state prison and four years on parole, under the supervision of the state board of prison commissioners. The sentence ought to be definite and certain so that the prisoner and the officers charged with his detention may know its length.

12 Cyc. 779.

It should be pronounced according to law without omission or modification.

Hamilton v. State, 78 Ohio St. 76.

84 N. E. 601.

Here a modification is attempted so that it is manifestly impossible to gather from the order of commitment whether the prisoner is to remain in confinement for three full years or for a lesser period, dependent on his good behavior. The right to earn a commutation of sentence by good behavior appears to be a right of which the prisoner may not be deprived.

People v. Deyo, 181 New York, 485.

However, the convict alone may raise this question (Idem.), and if he does not see fit to complain, I fail to see wherein it may be urged that any substantial right of his is or may be usurped or violated hence, in the absence of a proper protest or contest upon his part, that portion of the sentence which seeks to parole the prisoner should be regarded as a recommendation merely, and the sentence regarded as one for seven years subject to commutation for good behavior.

Upon the second question, a reference to the commitment itself, discloses that the defendant was sentenced to

> "Be imprisoned at hard labor in the state prison of the State of Montana at Deer Lodge, Montana, for the term of seven years."

That portion of the commitment which follows has to do with the manner in which the sentence is to be executed—namely, three years

in confinement and four years under parole. I am of the opinion that this latter part of the commitment may be considered in seriousness simply as a surplusage, for the reason that the law itself determines how a prisoner shall serve his time, and especially so where he has already entered into the execution of the sentence and the jurisdiction of the court which imposed it has been lost. Of course it cannot be doubted that courts have an inherent power to suspend the execution of sentences imposed by them. but this power is only available to enable the court to pass upon the justness of its judgment as by motion for a new trial, etc., but the power apparently ends there, for if the court were authorized to suspend indefinitely the execution of a sentence legally imposed, the effect would be to give to courts the pardoning power lodged elsewhere by the constitution.

Fuller v. State, 57 S. Rep. 806 (Miss.).

See also People v. Monroe Co., etc., 23 L. R. A. 856 and note (N. Y.).

A careful search of the authorities fails to disclose a case treating the precise question here involved. However, as to the legislative authority and the powers of courts generally see:

Singleton v. State, 34 L. R. A. 251 and note (Florida).

People v. Cummings, 14 L. R. A. 285 and note (Mich.).

Ex parte Parker, 16 Missouri, 501.

State v. Peters, 43 Ohio State, 629.

It will be seen from the above that the courts are by no means uniform, but that there is a considerable diversity and contrariety of opinion upon the question of the powers of courts over sentences imposed by them, so much so, in fact, that I hesitate to say that the judgment here under consideration is at all lawful in so far as it seeks to parole the prisoner after a part of his sentence has been executed.

As to the constitutionality of the act of 1913, supra, I have nothing to say except that its validity is not necessarily involved here, for the reason that it does not appear that the procedure therein outlined was followed in the present case, nor that the court presumed to exercise any power thereunder. If it did, and the defendant has any rights by reason thereof, he is not without a remedy, for he may still appeal, or if that part of the judgment which seeks to parole is illegal, and beyond the power of the court to impose, and the sentence be one in fact for three years, the prisoner may, under the authority of State v. District Court, 35 Montana, 321, in due season invoke the remedy of habeas corpus. On the other hand, if that part of the judgment which seeks to parole be bad, it may be rejected as surplusage, for it does not vitiate the judgment.

Ex parte Tani, 91 Pac. 137 (Nev.).

13 L. R. A., N. S. 518.

Raglan v. State, 55 Florida, 157.

12 Cyc. 782.

In conclusion, I am of the opinion that this commitment should be regarded as one for seven years, subject to the commutations

allowed by law for good behavior, and that if the prisoner feels aggrieved thereby, he may invoke the power of the courts for relief, or, failing in that, if the portion of the judgment which seeks to parole is in fact surplusage, it nevertheless may be considered as a recommendation, and the prisoner has the right to so consider it upon appeal for executive clemency.

Very truly yours,

D. M. KELLY,
Attorney General.