

**Criminal Law—Courts — Jurisdiction — Sentence — Imprisonment.**

Where a defendant is convicted of selling and disposing of narcotics there is no authority justifying a sentence to serve a term in the state prison, to pay a fine, and in default in the payment of the fine to serve one day for each two dollars thereof in the state prison.

There is no authority in law by which the prisoner can be required to serve one day for each two dollars of the fine in that institution.

Because of the valid portion of the sentence the prisoner could not be recommitted to the trial court for pronouncement of another sentence.

Hon. Joseph M. Dixon,  
Governor,  
Helena, Montana.

My dear Governor Dixon:

You have submitted to me a copy of commitment in the case of The State of Montana vs. S. D. Tanaskoff, together with correspondence from attorneys representing this man, and request of me an opinion as to the legal status of this prisoner.

From the commitment it appears that the prisoner pleaded guilty on the 26th day of April, 1923, in the District Court of Silver Bow county, to a charge of felony, and was sentenced to a term of imprisonment in the state prison of not less than one year nor more than two years, and to pay a fine of \$500.00, and in default of payment of said fine that he be imprisoned one day for each two dollars thereof. There is nothing in the commitment to show what the specific charge was. From the correspondence submitted, however, it appears that he was charged with selling and disposing of narcotics, and, in determining the legal status of the prisoner, I am assuming that this is a proper statement of the charge upon which he was convicted.

Section 3189, R. C. M. 1921, makes it unlawful for any person to sell, barter, exchange, distribute, give away, or in any manner dispose of, at retail, or to a consumer, opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, within this state, except upon the original written prescription of a duly licensed physician, and except that a dentist or veterinary surgeon may obtain said drugs or narcotics on federal permits for use in his practice.

Section 3202, R. C. M. 1921, provides that any person violating or failing to comply with the requirements of the act shall on conviction be punished by a fine of not more than one thousand dollars, or by punishment for not more than three years, or by both such fine and imprisonment.

It will be observed that no mention is made as to where the imprisonment shall be, that is, in the county jail or the state prison. The Supreme Court of Montana in the case of State vs. Toy, 65 Mont. 230, held that the offense is a misdemeanor, and that the imprisonment should be in the county jail.

The Eighteenth Legislative Assembly attempted to amend said Section 3202 by enacting Chapter 36 of the Laws of 1923, providing that any person unlawfully possessing the above mentioned drugs shall upon conviction be punished by a fine of not less than \$500.00 and imprisonment in the state penitentiary for one year, nor more than \$3,000.00 and five years' imprisonment in the state penitentiary, and any person who sells, barter, exchanges, distributes, gives away or in any manner disposes of any of said drugs contrary to the provisions of the act shall, upon conviction, be punished by a fine of

not less than \$1,000.00 and by five years' imprisonment in the state penitentiary, nor more than \$3,000.00 fine and ten years' imprisonment in the state penitentiary.

This attempted amendment was by the Supreme Court held unconstitutional in the case of *State vs. Mark*, 220 Pac. 94, upon the ground that the title to the act was insufficient to meet the requirements of the Constitution upon the subject, and therefore, said Section 3202 is still in force, which makes the offense a misdemeanor and punishable by a fine of not more than one thousand dollars, or by imprisonment for not more than three years in the county jail, or by both such fine and imprisonment.

Upon his plea of guilty to this offense, a sentence should have been imposed upon the defendant in accordance with said Section 3202. The term of imprisonment should have been a definite term in the county jail of Silver Bow county instead of an indeterminate sentence in the state prison.

The validity of a judgment of imprisonment in the state prison, where the offense is punishable only as a misdemeanor, has been determined by the Supreme Court of Montana in the case of *State ex rel. Chapin v. District Court et al.*, 35 Mont. 321, wherein the Court said:

"Since the District Court of Silver Bow county had no power or authority to impose a sentence of imprisonment in the penitentiary upon Fairgrieve for the misdemeanor, its judgment was simply void, and Fairgrieve was entitled to be discharged from the custody of the prison contractors upon habeas corpus; for the defect was one of jurisdiction \* \* \*."

That part of the sentence is, therefore, a nullity which imposes upon Tanaskoff a term of imprisonment in the state prison for an offense which is only a misdemeanor under the law.

That part of the judgment which requires the defendant to be imprisoned in the state prison one day for each \$2.00 of the fine, in default of payment thereof, is not a part of the punishment imposed, but merely a means of enforcing the payment of the fine. (*State ex rel. Poindexter v. District Court*, 51 Mont. 186.) This portion of the sentence is likewise a nullity for the reason that there is no authority of law to require the prisoner to serve out a fine in the state prison for an offense which is a misdemeanor. (*In re Sullivan (Cal.)*, 84 Pac. 781.)

The imposition of the fine, however, is within the limits prescribed by Section 3202 providing penalties for the offense. This part of the sentence is severable from the other parts imposing imprisonment as a punishment and as a means of collecting the fine. (*Ex parte Johnson (Cal.)*, 93 Pac. 199; *In re Sullivan, supra.*)

"According to the weight of authority, where the court imposes a sentence in excess of that authorized by law the whole sentence is not illegal and void, but is valid to the extent that the court had power to impose, and void merely as to such excess, provided such excess is separable and may be dealt with without disturbing the valid portion of the sentence."

16 C. J. Criminal Law, page 1312, and cases there cited.

The imposition of the fine being valid, it constitutes a lien upon any real property which the prisoner might have (Sec. 12073) and execution may issue upon the judgment for fine as on a judgment in a civil action. (Sec. 12088.) A sentence merely to pay a fine does not authorize the imprisonment of the defendant in default of the payment of the fine, unless the sentence so declares, and in this case that part of the sentence, which so declares, is, as stated above, void.

It, therefore, appears that the prisoner, upon a writ of habeas corpus, would be entitled to a discharge from imprisonment in the state prison. If the entire sentence were void, the Court would no doubt send him back to the trial court to have a proper sentence pronounced, as the Montana Supreme Court has repeatedly held that upon habeas corpus, where the conviction is valid, but the sentence is void, the prisoner would not be absolutely discharged, but would be recommitted to the trial court for the pronouncement of a proper sentence.

In re Lewis, 51 Mont. 539;

In re Hughes, 54 Mont. 153.

However, the sentence is valid to the extent of the fine, and this fine, after disregarding the void provisions of the sentence, constitutes the entire sentence. Another sentence could not be pronounced upon the same conviction. The rule seems to be,

"If the sentence is valid in part and void in part, and the two are not severable, or if it is wholly void because not such as the court was authorized to impose, the prisoner will be remanded for the imposition of a lawful sentence."

State ex rel. Petcoff v. Reed (Minn.), 163 N. W. 984.

The case at bar does not come within the rule, because the sentence is severable and the fine is valid.

It is, therefore, my opinion that all of the sentence, with the exception of the imposition of a fine, is void; that as to the fine of \$500.00 it is valid; that the valid is severable from the void portions of the sentence; that the prisoner upon habeas corpus would be discharged from his confinement in the state prison for the reason that there is no authority at law for the imposition of a sentence to imprisonment in that institution for selling and disposing of narcotics,

and there is no authority of law by which the prisoner could be required to serve one day for each two dollars of the fine in that institution, and that because of the valid portion of the sentence he could not be re-committed to the trial court for the pronouncement of another sentence.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.