

as amended by Chapter 184, Laws of 1937, and apply to all cases where the State Board of Prison Commissioners have been given jurisdiction of a prisoner whose sentence has been suspended.

March 25th, 1939.

Mr. W. L. Fitzsimmons
Clerk of Consolidated Boards
State Capitol Building
Helena, Montana

My Dear Mr. Fitzsimmons:

On behalf of the State Board of Prison Commissioners you have submitted the following facts:

"A district judge sentenced one Nels Ogland in Richland County for a term of eight years in the penitentiary for the crime of forgery, and suspended the sentence on May 12, 1938, placing the prisoner under the jurisdiction of the State Board of Prison Commissioners as provided in Section 12082. On the second day of March, 1939, the judge caused the probationer to appear in his court, held a hearing as provided in Chapter 184, Session Laws of 1937, and after said hearing revoked his order of May 12, 1938, remanded the defendant to the custody of the sheriff and instructed said officer to deliver the defendant to the penitentiary to start serving his eight-year sentence."

You request my opinion on the question whether the Court was without jurisdiction in revoking the suspension of sentence and if so whether the Court's order is null and void.

The order suspending sentence made by the Court on May 12, 1938, reads as follows:

"It is therefore ordered that the said sentence imposed upon the said defendant is hereby suspended and the said defendant shall be placed on probation under the control and management of the State Board of Prison Commissioners and subject to the rules and regulations of the same as applied to persons paroled."

There is no language in the order suspending sentence by which the Court retained jurisdiction.

Opinion No. 36.

State Board of Prison Commissioners —Suspended Sentences—Jurisdiction to Revoke—Judgment—Want of Jurisdiction—Effect of Void Judgments.

HELD: Under the provisions of Sections 12078, R. C. M., 1935, as amended by Chapter 184, Laws of 1937, if the Court places a prisoner under the jurisdiction of the State Board of Prison Commissioners and does not retain jurisdiction it has thereafter no jurisdiction to revoke a suspended sentence.

An order of the District Court revoking a suspended sentence after placing jurisdiction of the prisoner with the State Board of Prison Commissioners and without retaining jurisdiction is without jurisdiction, void and a nullity.

Sections 12080 to 12086, R. C. M., 1935, are not repealed by Section 12078,

Our Supreme Court, in *ex Parte Sheehan*, 100 Mont. 244, 49 Pac. (2nd) 438, held that under Section 12078, R. C. M., 1921, authorizing suspension of sentence of one convicted of crime or misdemeanor where a Court suspended sentence it lost jurisdiction and only the State Board of Prison Commissioners may thereafter order his incarceration for a violation of the conditions imposed by the board of probation.

Chapter 184 of the Laws of 1937, amending this Section, after reciting the circumstances under which the Court may suspend sentence, reads:

"Any judge, who has suspended a sentence of imprisonment under this section, or his successor, is authorized thereafter, in his discretion, during the period of such suspended sentence, to revoke such suspension and order such person committed, or may, in his discretion, order the prisoner placed under the jurisdiction of the State Board of Prison Commissioners as provided by law, or retain such jurisdiction with his court as is authorized by him or his successor. Prior to such revocation of the order of such suspension the person affected shall be given a hearing before said judge." (Underscoring ours.)

It is obvious from the words underscored that the Legislature intended to permit the Court to retain jurisdiction of the prisoner or place him under the jurisdiction of the State Board of Prison Commissioners as provided by law. The language of the statute is plain. There is no ambiguity. There is nothing to construe as the statute is clear that the Court may retain jurisdiction or place the prisoner under the jurisdiction of the State Board. There are no words indicating an intent to have the Court and the Board retain concurrent jurisdiction.

Chapter 40 of the Laws of 1939 clearly shows that the Twenty-sixth Legislative Assembly so understood Section 12078 as amended. In Section 1, they said:

"When any Judge has suspended a sentence of imprisonment as provided in Section 12078 of the Revised Codes of Montana, 1935, as amended

by Chapter 184 of the Laws of 1937, and has not ordered the prisoner placed under the jurisdiction of the State Board of Prison Commissioners, but has retained jurisdiction with the Court, the Clerk of said Court shall nevertheless mail a full copy of the judgment of the Court and the order suspending the sentence and certify the same to the State Board of Prison Commissioners and Bureau of Identification at the State Prison, etc."

Except by disregarding the express and plain intent of the statute can we reach any other conclusion than that the Court, by its order of May 12th, 1938, placing the prisoner under the jurisdiction of the State Board of Prison Commissioners, lost jurisdiction and consequently was without power to revoke the suspended sentence.

A judgment is void when upon inspection of the judgment roll it is apparent that the Court did not have jurisdiction. In *Crawford v. Pierce*, et al., 56 Mont. 371, 185 Pac. 315, Chief Justice Brantley said, at page 375:

"It is elementary that when the judgment-roll upon its face shows that the court was without jurisdiction to render the particular judgment, its pronouncement is in fact no judgment. It cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose."

Likewise in *Scilley v. Red Lodge-Rosebud Irr. Dist.*, 83 Mont. 282, 290, 272 Pac. 543, the Court said:

"* * * but a judgment void on its face for want of jurisdiction, is a nullity and may be attacked in even a collateral proceeding."

See also *State ex. Rel. Thompson v.*

District Court, 57 Mont. 432, 436, 188 Pac. 902; *In re Fort Shaw Irrigation Dist.*, 81 Mont. 170, 261 Pac. 962; *Coburn v. Coburn*, 89 Mont. 386, 298 Pac. 349; 15 R. C. L. 841, Sections 316-318; 34 C. J. 528, Section 834; *Id.* 517, Section 821; *Id.* 511, Section 815, at page 514;

And *State v. Bates* (Utah), 61 Pac. 905, 906, quoting *Black on Judgments*, Section 170, reads:

“‘A void judgment,’ says Mr. Black, ‘is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever; it has no effect as a lien upon his property; it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title, nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But, whenever it is brought up against a party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action; direct or collateral.’ *Black, Judgm. Sec. 170.*”

The judgment roll discloses that the Court acted without jurisdiction. The judgment is, therefore, void and a nullity.

Section 12078, as amended, does not repeal Sections 12080 to 12086 of the Revised Codes of Montana, 1935. These sections are applicable to all cases where the Court has not retained jurisdiction and where jurisdiction is vested in the State Board of Prison Commissioners, which Section 12078, as amended, itself expressly recognizes.