

Opinion No. 53-5710

March 23, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Morris A. Abram Warden New Mexico State Penitentiary Santa Fe, New Mexico

{*103} This is in reply to your letter of March 3, 1953, requesting an opinion as to the status of W. M. Foster, an inmate of the New Mexico State Penitentiary. We will recite the facts concerning Foster as you have related them to this office, before stating the specific information you desire.

1. Foster was convicted in Lea County on September 20, 1950 for the crime of Breaking and Entering in the Night Time and was sentenced to the State Penitentiary for a term of from 5-7 years.
2. Foster was well behaved as a prisoner for some 20 months and was sent to the Prison Farm at Los Lunas, New Mexico, on May 26, 1952, from which he escaped on October 5, 1952.
3. During the two days the inmate was at large, he assaulted and robbed an employee of the Santa Fe Railroad, for which crime he was subsequently returned to Valencia County, was tried and convicted, receiving a sentence of from 3 years to 3 years, commencing November 26, 1952.
4. Subsequently, Foster filed a petition for Writ of Habeas Corpus in the District Court of Santa Fe County attacking the validity of the sentence of 5-7 years imposed in September 1950. The Court found and ordered on January 8, 1953, that the sentence received in 1950 was void in so far as it exceeded the 3-year maximum sentence for the crime of Breaking and {*104} Entering provided by Section 41-906, N.M.S.A. Pursuant to the Court's Order, a sentence of from 3 years to 3 years was entered on Foster's record pertaining to the conviction for Breaking and Entering.
5. You state in your letter that "in calculating subject's (the inmate's) date for Discharge, we find that the subject should have been discharged on July 14, 1952, if we figure his time on the 3-year sentence beginning September 20, 1950, crediting him with all good time."

On the basis of these facts, you ask what should be considered the expiration date of Foster's sentence imposed in Lea County in September 1950, and whether his escape in October 1952 should be considered in determining such expiration date. You also ask our opinion as to which sentence the inmate is, or should be, now serving, the sentence of September 20, 1950 or the subsequent sentence imposed November 26, 1952.

As you realize, the effect of the Order of the District Court of Santa Fe County, on January 8, 1953, was to change the sentence imposed in September 1950 for the crime of Breaking and Entering to provide imprisonment for a term of 3 years. You state that the inmate was well behaved until his escape in October 1952 and you admit that if he had been serving a valid sentence of 3 years in July 1952, instead of an excessive sentence of from 5-7 years, he would have been released on July 14, 1952 in consideration of the 'good time' he had earned.

Under these circumstances, it is the opinion of this office that the escape of the inmate in October 1952 should not be considered in determining the expiration date of the valid 3-year term, even though strictly speaking, the inmate was not legally incarcerated in October 1952. The amount of credit a man receives for 'good time' served as an inmate is an administrative determination of your institution, and it is not the function or the desire of this office to state how long it should take for a well-behaved inmate to serve a valid 3-year sentence. However, inasmuch as you have indicated that under the rules of the Penitentiary, Foster should have been released on July 14, 1952, if a valid 3-year sentence had been originally imposed, it would seem unjust to consider an escape in October 1952 as altering the expiration date of such sentence. It is therefore the opinion of this office that the sentence imposed on September 20, 1950, taking into account the inmate's "good time" which you admit, should be considered as having expired on July 14, 1952.

The fact that under normal procedure, Foster would have been released from the Penitentiary in July 1952 does not, however, lessen the criminality of the assault he committed as an escapee in October 1952 or alter the sentence imposed for this crime on November 26, 1952. Therefore, in the opinion of this office, your records should reflect that Foster commenced serving his 3-year term for assault and robbery on November 26, 1952.

We sincerely hope that this opinion has answered all your questions on this subject.

By: W. F. Kitts

Assist. Attorney General