

## **Opinion No. 65-216**

October 29, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Myles E. Flint, Assistant Attorney General

**TO:** Harold A. Cox, Warden, New Mexico State Penitentiary, P. O. Box 1059, Santa Fe, New Mexico

### **QUESTION**

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1. When does a sentence, entered pursuant to a conviction from which an appeal has been taken and dismissed, commence?
2. May two sentences which have different commencement dates be served concurrently when the crimes from which the convictions arose both occurred prior to the time of the first conviction?

#### **CONCLUSIONS**

1. See analysis.
2. Yes.

### **OPINION**

#### **{\*352} ANALYSIS**

The first question has been answered by this office previously in Opinion No. 57-139. The question was phrased somewhat differently there with the question concerning crediting a prisoner with the time served during pendency of an appeal. In answering the issue raised there, it was stated that no credit would be given for time served during pendency of an appeal for the reason that Rule 9 (5), Supreme Court Rules, provides that an appeal shall have the effect of a stay of execution of the sentence. The prisoner, therefore, cannot receive credit for time served until he commences to serve under the commitment issued under Judgment and Sentence of the Court.

The same ruling should apply here as well. The fact that the appeal did not proceed to a conclusion on the merits but was withdrawn does not change the situation. The entry of Notice of Appeal or Writ of Error affects the stay which is effective until the appeal is acted upon or withdrawn.

The New Mexico Supreme Court has adopted the position that in the absence of a statute, two or more sentences are to be served concurrently unless otherwise ordered by the Court. **Swope v. Cooksie**, 59 N.M. 429, 285 P.2d {\*353} 793 (1955). The statutory provisions have been enacted which change the common-law ruling to some extent. Section 40A-29-9, N.M.S.A., 1953 Compilation, provides:

"Whenever an inmate in a penal institution of this state or of any county shall be sentenced for committing any crime while an inmate, such sentence imposed shall be consecutive to the sentence being served unless the court specifies otherwise."

Section 40A-29-10, N.M.S.A., 1953 Compilation, provides:

"Any person who commits a crime while at large under suspended sentence, parole or probation and who is convicted and sentenced therefore, [sic] shall serve such sentence consecutive to the term under which he was released, unless otherwise ordered by the court in sentencing for the new crime."

Each of the above sections provides that the court may specify that sentences for crimes committed during the time that the prisoner is serving a sentence for another crime or while he is on parole or probation or a suspended sentence for another crime be served concurrently. It would be impossible for these sentences to be served concurrently from the date of initiation to conclusion. Therefore, it must have been intended that the court would have the power to have these sentences run concurrently during that period of time commencing with the commencement date of the second sentence and running until the conclusion of the first sentence. In this situation the initial portion of the first sentence being served and the final portion of the second sentence being served would not be served concurrently.

The statutory sections apply to situations where the second sentence arose from a crime committed subsequent to the date of the prisoner's conviction and initial sentence. It is logical and reasonable to assume that if the legislature would permit sentences to be served concurrently when the second sentence involved arose from a crime committed while serving the first sentence that it would also permit two sentences to be served concurrently when the crime out of which the sentences arose both occurred prior to the time of the initial conviction.

Similar constructions have been placed on sentences in other states. In one case, a sentence which commenced in 1908 ran concurrently with another sentence which commenced in 1915 for the duration of the initial sentence. **Ex parte MacDonald**, 178 Wis. 167, 189 N.W. 1029 (1922). For other discussions see also the annotations contained in 5 A.L.R. 380, 70 A.L.R. 1511 and 116 A.L.R. 860.

We trust that this fully answers the questions which you have asked.