

## Opinion No. 65-77

May 7, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** Honorable Alfonso G. Sanchez, District Attorney, First Judicial District, County Courthouse, Santa Fe, New Mexico

### QUESTION

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Can time for good behavior be applied to reduce the two year minimum sentence prescribed by Section 54-7-15 (A), N.M.S.A., 1953 Compilation, for violation of Sections 54-7-13 or 54-7-14, N.M.S.A., 1953 Compilation (Narcotic Drug Act)?

#### CONCLUSION

No.

### OPINION

#### {\*134} ANALYSIS

The question presented herein has arisen out of a fact situation similar to the following: An adult was convicted for violation of Section 54-7-13, N.M.S.A., 1953 Compilation, which is a provision of the Narcotic Drug Act. The sentence imposed by the sentencing court was for a term of not less than two (2) years and not more than ten (10) years, with all except two (2) years of the sentence suspended. The penitentiary officials charged with the custody of said inmate, by following a long established policy with regard to the application of good time, calculated the release date of said inmate to be some time prior to the expiration of the minimum two (2) years.

Section 54-7-15, N.M.S.A., 1953 Compilation is pertinent to the present inquiry, thus we quote applicable portions thereof as follows:

"54-7-15. Penalties. -- Any person violating the foregoing sections (54-7-13, 54-7-14) shall, upon conviction thereof, be punished as follows:

A. For the first offense, upon conviction, he **shall be** fined not more than two thousand dollars (\$ 2,000) and **imprisoned not less than two (2) years** nor more than ten (10) years.

\* \* \*

D. . . .

Upon conviction of any offense by an adult under the Uniform Narcotic Drug {*\*135*} Act, **the imposition or execution of a sentence shall not be suspended or probation or parole shall not be granted until the minimum imprisonment provided for the offense shall have been served. . .**" (Emphasis supplied)

The validity of the restrictive provision of Section 54-7-15, *supra*, (emphasized above) was the subject of inquiry in Attorney General Opinion No. 64-62, dated May 8, 1964. It was there concluded that Section 40A-29-15, N.M.S.A., 1953 Compilation, one of the provisions of our Criminal Code, which provides for deferment or suspension of sentences under certain circumstances, did not repeal by implication Section 54-7-15 (D), *supra*, and that therefore both criminal provisions could be given a coterminous operation. We hereby affirm our previous conclusion that the restrictive provision contained in Section 54-7-15 (D), *supra*, is valid and effective to prevent the suspension of the imposition or execution of a sentence upon an adult convicted of an offense under the Uniform Narcotic Drug Act, as well as the granting of probation or parole to such individual prior to the time when the minimum sentence prescribed for the offense is served.

This brings us to the real question for determination here. Does this same restrictive provision apply to a situation where the sentencing court suspends so much of the sentence imposed that an application of good time earned would reduce the actual term of imprisonment to less than the minimum prescribed by Section 54-7-15, *supra*? We will of course limit our opinion to this precise question.

The intent of the legislature with respect to Section 54-7-15 (D), *supra*, is evident, *viz.*, that adult narcotic offenders were to serve their entire minimum sentences inside the penitentiary. In many, if not most instances, when the sentence of one convicted is suspended he is placed on probation (or at least some conditions specified) either for some or all of the suspended portion of his sentence. Section 40A-29-17, N.M.S.A., 1953 Compilation provides that:

"40A-29-17. Placing defendant on probation. -- When a person has been convicted of a crime for which a sentence of imprisonment is authorized, and when the district court has deferred or suspended sentence, it shall order the defendant to be placed on probation for all or some portion of the period of deferment or suspension if the defendant is in need of supervision, guidance or direction that is feasible for the probation service to furnish; provided, however, the total period of probation shall not exceed five (5) years."

And, Section 40A-29-18, N.M.S.A., 1953 Compilation states in pertinent part as follows:

"40A-29-18. Conditions of order deferring or suspending sentence. -- The district court shall attach to its order deferring or suspending sentence such reasonable conditions as it may deem necessary to insure that the defendant will observe the laws of the United

States, the various states and the ordinances of any municipality. The defendant upon conviction may be required:

A. to pay the actual costs of his probation service not exceeding two hundred dollars (\$200) annually in one (1) or several installments;

\* \* \*

E. to be placed on probation under the supervision, guidance or direction of probation authorities for a term not to exceed that of the maximum sentence prescribed by law for the commission of the crime for which he was convicted; and . . ."

{\*136} Where the deduction of good time therefore reduces the actual term of imprisonment below that minimum prescribed by Section 54-7-15, supra, the effect could be to place the inmate on probation or other restricted release, prior to the time permitted by Section 54-7-15 (D), supra. Thus, what could not be done directly would be accomplished indirectly. The plainly expressed intent of the legislature, i.e., to require an adult convicted upon a violation of the Narcotic Drug Act to serve his minimum term in prison, would be circumvented.

While it must be conceded that the legislature did not make reference to the application of good time in Section 54-7-15, supra, it must be presumed that the legislature was aware of the New Mexico statutes providing for good time credits, viz., 42-1-54 and 42-1-55, N.M.S.A., 1953 Compilation, at the time of addition of the restrictive provision referred to above by Laws 1955, Chapter 41, § 1 and amendment thereof by Laws 1961, Chapter 146, § 1. We feel that the failure to expressly set forth that good time could not be applied to prevent the serving of the total minimum sentence prescribed by Section 54-7-15, supra, does not detract from the fact that the specific type of offenders with which we are here concerned were meant to be imprisoned for a definite period of time, to wit, the minimum term. This is not to say that one convicted for a violation of the Uniform Narcotic Drug Act is not entitled to be credited with good time, but only that none of that good time is to be applied to reduce his actual term of imprisonment to less than the minimum. any other conclusion would render of no effect the purpose sought to be accomplished by Section 54-7-15(D), supra, and would do violence to a well settled rule of statutory construction, cited by our court in **State ex rel. Lorenzino v. County Commissioners of McKinley County**, 20 N.M. 67, 145 P. 1083, as follows:

"1. When the words (of a statute) are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion." (Parenthesis supplied)