

## Opinion No. 69-114

September 18, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General James V. Noble, Assistant Attorney General

**TO:** J. E. Baker, Secretary, Department of Corrections, Post Office Box 1059, Santa Fe, N.M. 87501

### QUESTIONS

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1. Is a prisoner, after being awarded a new trial and having again been convicted of the crime originally charged, entitled to credit for time he spent in custody from the time of his first conviction?
2. Is a prisoner who has received a suspension of a portion of his sentence on re-trial entitled to credit for all time spent in custody from the date of his initial conviction of the crime?
3. Are convicted persons who have appealed their convictions and are presently free on bond entitled to credit for time spent in custody prior to their release on bond?

#### CONCLUSIONS

1. Yes, but see analysis.
2. See analysis.
3. Yes, but see analysis.

### OPINION

#### {\*181} ANALYSIS

Chapter 50, Laws of 1969, provides for the extending of credit to prisoners confined in the penitentiary for time spent in confinement pending outcome of an {\*182} appeal, writ of error or writ of certiorari from a court of competent jurisdiction. Sections 40A-29-24 and 40A-29-25, N.M.S.A., 1953 Compilation (P.S.), passed in 1967, provided for similar credit, but included **all** time spent in confinement while charges were pending. However, the Supreme Court held that Section 40A-29-24, *supra*, was not retroactive in effect. **State v. Sedillo**, 79 N.M. 9, 439 P.2d 226; **State v. Padilla**, (C.A.) 78 N.M. 702, 437 P.2d 163. Chapter 50, *supra*, makes the giving of such credit retroactive insofar as

prisoners in the penitentiary on or after the effective date of the act are concerned and insofar as post-conviction incarceration is concerned.

The United States Supreme Court handed down its decision in the case of **North Carolina v. Pearce**, 89 S. Ct. 2072, on June 23, 1969. It held, in that case, that one who had his conviction set aside, was re-tried and was again convicted and sentenced for the commission of a crime was constitutionally entitled to receive credit on his sentence for time spent in confinement as a result of the first (and invalid) sentence.

The answer to your first question is in the affirmative if the second conviction and sentence was for the commission of the same crime for which a previous invalid sentence had been imposed. Insofar as confinement in the penitentiary is concerned this can be handled administratively by you. Insofar as confinement in some other institution is concerned action of the sentencing court will be required. The prisoner should request action by the sentencing court.

Your second question is whether such credit is given to the entire sentence, a part of which is suspended, or only to the part to be served in the penitentiary. The legislative intent behind Chapter 50, Laws of 1969 and the holding in **North Carolina v. Pearce, supra**, clearly seem to require that such credit is to be applied to the time confined in the penal institution and not pro-rated to the entire sentence.

The same procedure should be followed as set forth in the answer to the first question above.

You finally ask whether a person presently free on bond pending a decision of an appellate court is entitled to this credit for time incarcerated prior to posting bond. The credit can, of course, only be given if the appeal results in affirmance of the conviction or if, after remand, a new and valid sentence for the commission of the same crime is imposed and he is again confined in the penitentiary. He would be entitled to the credit upon such re-confinement and it should be handled in the same manner as suggested by the answer to Question No. 1. Under any presently applicable state of facts Section 40A-29-24, *supra*, is here applicable.

It is noted that Chapter 50, *supra*, does not provide for the giving of credit for time incarcerated prior to an initial conviction whether or not post-conviction relief from a conviction is granted. Section 40A-29-25, *supra*, does give credit for time spent in incarceration while criminal charges are pending. Although **State v. Sedillo supra**, was not directly concerned with this section the reasoning therein contained would appear to apply so that it would have been held to be prospective in operation only. However, in view of the reasoning contained in **North Carolina v. Pearce, supra**, our Supreme Court might now reach a different result. Although **North Carolina v. Pearce, supra**, was not directly concerned with pre-conviction imprisonment the language and reasoning might well compel a holding that one charged with a crime is as much entitled to credit for time served in prison prior to conviction as one who is in prison pending

appellate or other post-conviction review. This question of retroactive application should properly be determined by { \*183 } our courts if a proper case is presented.