Opinion No. 73-66

September 11, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Bill H. Carr Chairman, Parole Hearing Board P.O. Box 384 Fort Sumner, New Mexico 88119

QUESTIONS

FACTS

1. A person is held in official confinement on suspicion or charges of the commission of a crime. If convicted, the period spent in presentence confinement is credited against the sentence imposed for that offense. Section 40A-29-25, N.M.S.A., 1973 Comp.

2. A person is convicted of the commission of a crime. Prior to sentencing, diagnostic commitment is ordered. Following that commitment, a sentence to be served in the state penitentiary is imposed. Following confinement, the person appeals the conviction and is released upon an appeal bond during the pendency of the appeal. Upon affirmance of the conviction, or the imposition of a new and valid sentence for the commission of the crime, the person is returned to the penitentiary to serve the remainder of the sentence imposed.

3. Section 41-17-24, N.M.S.A., 1953 Comp., provides that prisoners may become eligible for parole after having completed one-third of their minimum sentences, or a certain length of time for certain minimum sentences. This section also requires that the prisoner maintain a "clear conduct record" for at least six months prior to appearing before the parole board.

QUESTIONS

1. Should the period spent in pretrial confinement be included in determining eligibility to appear before the parole board?

2. Should the period spent in post-conviction confinement prior to release on appeal bond be included in determining eligibility to appear before the parole board?

CONCLUSIONS

1. Yes.

2. Yes.

OPINION

*{*129}* **ANALYSIS**

All persons convicted of a felony or of a lesser included offense, as of March 31, 1967, are to be given credit against any sentence imposed for that offense for all time spent in presentence confinement. Section 40A-29-25, N.M.S.A., 1953 Comp. This statute is prospective only, and does not apply to those convicted before that date. **State v. Padilla,** 78 N.M. 702, 437 P.2d 163 (Ct. App. 1968); **State v. Sedillo,** 79 N.M. 255, 442 P.2d 213 (Ct. App. 1968); **State v. Luna,** 79 N.M. 307, 442 P.2d 797 (Ct. App. 1968); **State v. Thomas,** 79 N.M. 346, 443 P.2d 516 (Ct. App. 1968).

"[T]he time when the sentence commence(s) to run is important as **it affects the time when the prisoner is eligible for parole." Lott v. Cox,** 76 N.M. 76, 81, 412 P.2d 249 (1966). (Emphasis added) Thus the credit received will be included in determining when a sentence commences to run, and will be applied to both the minimum and the maximum incarceration periods. See, **Lott v. Cox, supra; Sneed v. Cox,** 74 N.M. 659, 397 P.2d 308 (1964); **White v. Gilligan,** 351 F. Supp. 1012 (S.D. Ohio E.D. 1972); **Mallory v. State,** 281 N.E.2d 860 (Ohio 1972); **Cooper v. Mailler,** 1 A.D.2d 279, 149 N.Y.S.2d 761 (1956); **People v. Denno,** 46 Misc.2d 436, 259 N.Y.S.2d 652 (1965).

To deny presentence confinement time in computing parole eligibility would permit a harsh result. Persons who are unable to make bail because of indigency would become eligible only after spending a greater length of time in confinement than would a person who was able to make bail prior to trial. (This of course, assumes that all other factors are equal.) There does not appear to be a reasonable or justifiable basis for such unequal treatment, and any policy which causes such treatment may amount to a denial of equal protection of the law.

Theoretically, there should not be any difficulty in determining whether the behavior in pretrial confinement constitutes "clear conduct." The sheriffs of the county jails are authorized to grant sentence deductions, with the approval of a district judge, for good behavior, industry and obedience by those persons sentenced to county jails. Section 42-2-7.1, N.M.S.A., 1953 Comp. If a sheriff can account for the conduct of a sentenced prisoner, he should also be able to account for the conduct of a person confined while awaiting trial.

For those inmates who may be eligible for parole upon their arrival at the state penitentiary, a period of at least thirty days must pass before their appearances before the board. This period is to allow the board to notify the sentencing judge of its contemplated action, and to allow *{*130}* the judge to express his views on the matter. Section 41-17-24, N.M.S.A., 1973 Comp.

We turn now to your second question. When an appeal is taken in criminal cases, the execution of the sentence of the district court is stayed until the appeal is decided. Section 41-15-2, N.M.S.A., 1953 Comp. If the person convicted of a felony is held in official confinement during the pendency of the appeal, credit for the period spent in

confinement will be given against the sentence finally imposed. Section 40A-29-24, N.M.S.A., 1953 Comp.

When a person is released from confinement during the pendency of the appeal, the statutes are silent as to awarding credit for the time spent on release. While there are no reported New Mexico cases in point, other jurisdictions have ruled that such release stays the running of this sentence. See generally, **Sica v. United States,** 454 F.2d 281 (9th Cir. 1971); **Marchese v. McEachen,** 451 F.2d 555 (9th Cir. 1971); **Wilson v. Henderson,** 468 F.2d 582 (5th Cir. 1972); **United States v. Carmel,** 215 F. Supp. 269 (D.C. E.D. N.Y. 1963); **United States v. U.S. Marshall for Dist. of Nev.,** 188 F. Supp. 905(D.C. Nev. 1960), **affirmed,** 292 F.2d 494 (9th Cir. 1961), **cert. denied,** 368 U.S. 919, 82 S. Ct. 240, 7 L. Ed. 2d 135 (1961).

In Attorney General Opinion No. 69-114, issued September 18, 1969, it was concluded that the time spent in confinement prior to release on appeal bond shall be credited towards the sentence. That conclusion is here reaffirmed.

Section 41-17-24, **supra,** directs that the parole board set policy, consistent with law, with respect to eligibility. This section does not, however, indicate whether the required six months "clear conduct record" must be continuous and uninterrupted. As pointed out above, the judiciary has emphasized that all confinement credit is to be applied in determining the minimum sentence which in turn affects parole eligibility.

Thus it is our opinion that when an inmate, released on appeal bond before completion of a six month clear conduct period, is returned to confinement, the six months should continue to run as though it were uninterrupted. Any policy to the contrary appears unjustified since it can not be clearly and specifically derived from Section 41-17-24, **supra,** and also because it would discriminate to an unfair degree against one who has elected to await appeal outside the penitentiary, while favoring one who remains confined during appeal.

By: Harvey B. Fruman

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