

STATE PENITENTIARY:
DEPARTMENT OF CORRECTIONS:
SHERIFFS:
CIRCUIT COURTS:

Discussion of Section 546.615, V.A.M.S., including a holding that the sheriff is required to endorse all allowable jail time on the commitment papers.



May 6, 1960

Honorable James D. Carter, Director
Department of Corrections
Capitol Building
Jefferson City, Missouri

Dear Col. Carter:

This is in response to your request of December 29, 1959, for an opinion, which request reads as follows:

"The following questions are requested answered in order for us to properly credit jail time, eliminate any friction between a sentencing court, sheriff's office and our record unit.

1. Is time spent in jail subsequent to the date of sentencing and prior to delivery to the state department of corrections to be calculated as a part of the sentence imposed, if such order is not endorsed on the commitment papers by the officer required to deliver the convicted person?
2. If subsequent jail time to the date of his sentence and prior to his delivery to the state department of corrections and the time spent by the subject in prison or jail prior to his conviction and the date on which sentence is pronounced is not made a part of the commitment document, is it deductable from the term of the sentence?
3. Is jail time deducted from the term of a sentence if the commitment papers do not have an endorsement by the delivering officer, or, the sentencing judge has not made such order a part of the document, and, the document is accompanied by an order from the court granting jail time, yet, separate from the commitment papers?
4. After the inmate is delivered to the state department of corrections a letter is received

Honorable James D. Carter

from the sentencing judge advising he failed to include in his records his intention to grant certain jail time and asks that a certain number of days of jail time be credited, this letter endorsed by the delivering officer. Is jail time credit in this manner received to be deductible from the imposed sentence?

5. The same question as number 4, however, the letter has not been endorsed by the delivering officer.

6. Is it compulsory that the delivering officer endorse any order pertaining to jail time, whether it be subsequent or prior to delivery?

7. Is a court order, separate from the commitment document, directed to either the Warden's office or the Records office, State Penitentiary ordering a grant of a specified number of days of jail time for a defendant sufficient evidence for allowance of jail time credit? This order not being endorsed by the delivering authority and sent to the institution several days after the commitment of the subject.

8. A defendant is held in county A for a lengthy period, succeeds in securing a change of venue and is transferred to county B where he is again held for an extended period. He eventually is taken to court, tried, convicted and sentenced. The sentencing judge incorporates in his commitment document an order for jail time, the sheriff in county B grants jail time and makes the necessary endorsement. The sentencing judge writes the sheriff in county A asking him to transmit a letter granting credit for the jail time which the defendant spent in county A prior to transfer. Is the jail time from county A creditable in this instance?

"These questions have arisen since the bill became effective and as it is our wish to comply with the law and also conform to orders properly issued from our courts it is felt that answers are necessary."

In a conversation with Warden E. V. Nash, Missouri State

Honorable James D. Carter

Penitentiary, subsequent to receiving the request, we were advised that the primary reason for requesting the opinion was that a number of sheriffs were taking the position that the allowance of credit for time spent in jail before and after conviction was within their discretion. Consequently, many of them are refusing to endorse on the commitment papers the time the convicted person has spent in jail subsequent to imposition of sentence and also the time spent in jail prior to imposition of sentence even though the court has, in its judgment, allowed credit for time spent in jail prior to imposition of sentence.

House Bill No. 262, 70th General Assembly, which became effective August 29, 1959, has been designated as Section 546.615, V.A.M.S., and reads as follows:

"When a person has been convicted of a criminal offense in this state

(1) The time spent by him in prison or jail subsequent to the date of his sentence and prior to his delivery to the state department of corrections shall be calculated as a part of the sentence imposed upon him; and

(2) The time spent by him in prison or jail prior to his conviction and the date on which sentence is pronounced may, in the discretion of the judge pronouncing sentence, be calculated as a part of the term of the sentence imposed upon him.

"2. When the time spent in prison or jail is calculated as a part of the term of the sentence under the provisions of subdivision 1 of this section, the time so spent in prison or jail shall, in addition to any reduction of time allowed under section 216.355, RSMo, be deducted from the term of the sentence.

"3. It is the duty of the officer required by law to deliver a convicted person to the state department of corrections to endorse upon the commitment papers the length of time spent by the person in a prison or jail subsequent to the date of his sentence and prior

Honorable James D. Carter

to his delivery to the state department of corrections, and if, by the terms of the sentence, the time spent in prison or jail prior to conviction and sentence is to be calculated as a part of the term, the officer shall also endorse upon the commitment papers the length of time spent in prison or jail prior to the person's conviction and sentence."

In questions 1 and 2 you inquire as to whether the time spent in jail subsequent to the date of sentence and delivery to the Department of Corrections and the time spent in jail prior to the date of sentence, if allowed by the court, is to be calculated as a part of the sentence if the time spent in jail has not been endorsed on the commitment papers by the delivering officer. In question number 6 you inquire as to whether it is compulsory that the delivering officer endorse the length of time spent in jail subsequent to the date of sentence and delivery to the Department of Corrections and the length of time spent in jail prior to sentence where the court has allowed credit for such time in its judgment.

The language used in subsection 1 under paragraph 1 of Section 546.615, supra, clearly provides that a person convicted of a criminal offense in the State of Missouri is entitled to have the time spent in jail subsequent to the date of sentence and prior to delivery to the Department of Corrections calculated as a part of the term of the sentence imposed upon him. Likewise, subsection 2 of paragraph 1 clearly provides that the court, in its discretion, may allow the time spent in jail prior to the date of imposition of sentence to be calculated as a part of the term of the sentence imposed by the court. The Department of Corrections and the sheriff are not invested with any discretion with regard to when time spent in jail shall be calculated as a part of the sentence.

As to whether it is compulsory for the delivering officer to endorse the time spent in jail upon the commitment papers depends upon the meaning given to the words "duty" and "shall" as they are used in paragraph 3 of Section 546.615, supra. This paragraph provides that it is the duty of the officer required by law to deliver a convicted person to the Department of Corrections to endorse the time spent in jail subsequent to the date of sentence imposed and where the court, in its judgment, allows credit for the time spent in jail prior to sentencing, the officer shall endorse upon the commitment papers the length of time spent in jail prior to sentencing and conviction.

Honorable James D. Carter

The meaning of words used in statutes are subject to the rule of construction enunciated in Section 1.090, RSMo Cum. Supp. 1957, which reads as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

As a technical term of the law, "duty" signifies an obligation to do a thing. Black's Law Dictionary, Fourth Edition. A ministerial duty is a simple and definite duty imposed by law arising under conditions admitted or proved to exist and regarding which nothing is left to discretion. 67 C.J.S. 398; State ex rel. Heller vs. Thornhill, et al., 160 SW 558, 559.

The word "shall" is ordinarily imperative, operating to impose a duty which may be enforced. 82 C.J.S. 877. Black's Law Dictionary, Fourth Edition, in defining the word "shall," reads:

"As used in statutes, contracts or the like, this word is generally imperative or mandatory."

It is generally held that a statute imposing a positive duty on a public officer will be construed as mandatory. 67 C.J.S. 399. It is our opinion that paragraph 3, Section 546.615, supra, imposes a positive duty upon the officer charged by law with the delivery of convicted persons to the Department of Corrections to endorse upon the commitment papers all of the time spent in jail, both before and after sentencing, which is to be calculated as a part of the sentence. If the convicted person has no jail time which he is entitled to have calculated as a part of the sentence, the delivering officer should so endorse this fact upon the commitment papers. The delivering officer is vested with no discretion as to if and when time spent in jail is to be calculated as a part of the sentence. He is merely required by law to endorse the length of time spent in jail subsequent to imposition of sentence as well as the length of time spent in jail prior to imposition of sentence where the court has allowed such time in the judgment. When a statute requires the performance of an official duty, the right to have that duty performed continues as long as the official fails and refuses to perform such duty. 66 C.J.S. 402. We believe that the duty imposed upon the officer by paragraph 3, Section 546.615, supra, is that of performing a ministerial act which the officer may be compelled to perform through appropriate legal action.

Honorable James D. Carter

The request does not inquire, and we are not expressing, an opinion with respect to what civil liability, if any, an officer may incur for failure to endorse the time spent in jail upon the commitment papers. However, it is interesting to note a statement in 67 C.J.S. 422 (Section 127B) which reads as follows:

" * * *Where, however, the law imposes on the officer the performance of ministerial duties in which a private individual has a special, direct and distinctive interest, the officer is liable to such individual for any injury which he may proximately sustain in consequence of the failure to perform the duty at all, or to perform it properly * * *"

In answer to questions 4 and 5, we would advise that a court can only speak by and through its records. In re Wakefield, 274 SW2d 345, affirmed 283 SW2d 467; State ex rel. Phelps v. McQueen, 296 SW2d 85; In re Oberman's Estate, 281 SW2d 549; Cunio v. Franklin Co., 285 SW 1007. An informal letter from the trial court advising that it intended to grant jail time has no legal effect. The fact that the allowable jail time has or has not been endorsed on such a letter is of no significance.

Questions 3 and 7 relate not only to the question of the officer's endorsing the allowable jail time upon the commitment papers but also to the power or right of the sentencing court to amend the original judgment to allow a convicted person credit for the time spent in jail prior to conviction and sentencing.

The cases indicate that at one time the trial court retained control over and had the power to modify, amend, revise or vacate its judgment during the term within which it was rendered except when execution of the judgment had begun. State v. Turpin, 61 SW2d 945, 948 (9); State ex rel. Orr v. Latshaw, 237 SW 770, 771 (1); Ex parte Simpon, 300 SW 491; 24 C.J.S. 118.

It would appear that now a judgment in a criminal cause is final when entered. State v. Morrow, 316 SW2d 527, 528; State v. Parker, 310 SW2d 923, 924. Therefore, the trial court no longer has authority to amend, modify or vacate its judgment after it is entered, except as is provided by Supreme Court Rule 27.22 or to make a nunc pro tunc entry to correct an error or omission in the original judgment.

Honorable James D. Carter

Supreme Court Rule 27.22 provides that the court may on its own initiative arrest or set aside a judgment before the transcript is filed in the appellate court if an appeal has been taken, and in any event, not later than thirty days after entry on the grounds (1) the facts stated in the information do not constitute an offense or (2) the court is without jurisdiction of the offense. Therefore, any attempt on the part of a court to amend, modify or vacate a judgment after it has been entered has no legal effect except where the judgment is vacated on one of the grounds specified in Supreme Court Rule 27.22 or the modification is in the form of a nunc pro tunc entry. If the court, at the time it enters its judgment, orders that the convicted person be allowed credit for time spent in jail prior to sentencing, and this order of the court is omitted from the judgment when it is written up, the court may correct this omission at any time by means of a nunc pro tunc entry. However, a nunc pro tunc entry can only be employed to correct a clerical mistake and cannot be invoked to correct a mistake or oversight of the judge or to render a judgment different from that actually rendered. Aronberg v. Aronberg, 316 SW2d 675; McCarthy v. Eidson, 262 SW2d 52; Greggers v. Gleason, 29 SW2d 183. A judgment which has been corrected by the court to allow credit for the time spent in jail prior to sentencing should be endorsed by the sheriff unless the nunc pro tunc judgment specifies the number of days spent in jail prior to sentencing. If the court actually specifies in the original judgment or in the correction thereof the number of days spent in jail prior to sentencing, we are of the opinion that this should be accepted in lieu of an endorsement by the sheriff and that the number of days specified therein should be calculated as a part of the sentence.

We were advised by Warden Nash that the facts set out in question number 8 relate to an actual case. He stated that the sheriff in county "A" had endorsed the length of time spent in jail in that county prior to the change of venue on the letter he received from the judge and returned the letter to the judge. The judge then forwarded the letter bearing the endorsement of the sheriff to the Department of Corrections.

The sheriff of county "B" could not have endorsed the time spent in jail in county "A," and it would have been difficult and very inconvenient for the sheriff of county "B" to have obtained the endorsement of the sheriff in county "A" on the commitment papers. The commitment papers would have had to have been mailed or delivered to the sheriff in county "A" in some manner or else he would have had to travel to county "B" for that purpose.

Honorable James D. Carter

We believe that in those cases where the facts are as set out in question number 8, a letter from the sheriff, in which is set out the length of time spent in jail in the county from which the change of venue was taken, sufficiently complies with the requirements of Section 546.615, supra, and that you should accept such a letter in lieu of an endorsement on the commitment papers.

CONCLUSION

Therefore, it is the opinion of this department that:

(1) Every person convicted of a criminal offense in the State of Missouri is, by operation of law, entitled to have the time spent in jail subsequent to the date of sentencing and prior to delivery to the Department of Corrections calculated as a part of the sentence imposed upon him.

(2) Every person convicted of a criminal offense in the State of Missouri is entitled to have the time spent in jail prior to the date of sentencing calculated as a part of the sentence imposed upon him if the court so orders in its judgment.

(3) The officer required by law to deliver the convicted person to the Department of Corrections is required by Section 546.615, V.A.M.S., to endorse on the commitment papers the length of time spent in jail subsequent to the date of sentencing and prior to the date of delivery to the Department of Corrections as well as the length of time spent in jail prior to sentencing where the court has awarded credit for such time. If the convicted person has no jail time which he is entitled to have calculated as a part of the sentence, the delivering officer should so endorse this fact upon the commitment papers.

(4) As a court can only speak by and through its records, an informal letter from a judge advising that it was his intention to allow credit for time spent in jail prior to the date of sentencing has no legal effect.

(5) The trial court has no authority to amend or modify a judgment to allow credit for the length of time spent in jail prior to the date of sentencing after the judgment has been entered except to make a nunc pro tunc entry to correct an error or omission in the original judgment.

(6) In those cases where the court allows credit for the length of time spent in jail prior to the date of sentencing, and the

Honorable James D. Carter

convicted person has been confined in jail in two different counties by virtue of the fact that a change of venue was taken from the county wherein prosecution was instituted, a letter from the sheriff in the county from which the change of venue was taken, giving the number of days spent in jail in that county, is sufficient compliance with the endorsement requirements of Section 546.615, V.A.M.S.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

Yours very truly,

JOHN M. DALTON
Attorney General

CKH/mlw