

PENAL INSTITUTIONS: Sentences of a defendant who has appealed and later convicted on another charge, shall run concurrently.

August 24, 1939

Board of Probation and Parole
Jefferson City, Missouri

Attention: Mr. H. S. Johnson, Member.

Dear Sir:

Answering your request for an opinion from this office concerning a letter from the Hon. J. Arthur Francis, State Representative from Iron County, Missouri, we are herein setting out the facts stated in his letter to you, and are also giving the following opinion:

"In re: Berthold McBride, No. 42930. McBride was convicted in St. Charles County May 26th, 1932 was held in jail until May 8th, 1933 trying to give bond. Was received at the Penitentiary May 10th, 1933. He was released on bond by the Supreme Court June 16th, 1933. The case was appealed to the Supreme Court. During the time he was waiting for a ruling of the Supreme Court he was tried for an offense committed in the City of St. Louis and was convicted and given a sentence of 5 years. His former sentence was for 20 years. But before he was tried on the second charge the Supreme Court affirmed the former or 20 year sentence and the Marshall of the Supreme Court called on the Authorities to turn McBride over to him and they refused, wanting to try him on their charge, and convicted him. When he was received at the Penitentiary he was admitted in on the 5 year sentence and given the No. 44692 after serving until January 18th, 1937 on the 5 year term then he was dressed in on his old Number 42930 on his 20 year sentence.



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The 20 year sentence states that it is to run from the date of his conviction May 26th, 1932. Do these sentences run concurrently or consecutively?"

Section 12969, R. S. Missouri, 1929, reads as follows:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held: Provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

It will be noticed under the above section that it specifically states:

" * * * * if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence * * * "

Under the statement of facts set out in your request it will be noticed that Berthold McBride at the time he committed the crime in the city of St. Louis, was out under bond by the Supreme Court on an application for appeal. An appeal does not lie until after the defendant has been sentenced.

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As set out above under section 12969, supra, the defendant under that section must be under sentence and the section does not state final judgment. Under the facts, as set out in your statement, at the time the defendant was tried in the city of St. Louis on one charge, the former charge against him had been affirmed by the Supreme Court of this state. The fact that the defendant at the time that he committed the second crime had appealed the conviction for the previous crime, does not change the manner of the sentence of the defendant, under section 12969, supra.

The question was well settled in the case of Ex parte Simpson, 300 S. W. 491, l.c. 493, par. 3, where the court said:

"Petitioner had been convicted of grand larceny in Jackson county and, while at large in Jackson county under bond pending disposition of his appeal, was convicted of the crime of burglary. The circuit court of that county had the power, and indeed it was its duty, to make his term of imprisonment for the burglary commence at the expiration of his term of imprisonment in the grand larceny case. Section 2292, R. S. 1919; Ex parte Allen, 196 Mo. loc. cit. 233, 95 S. W. 415; State ex rel. Meininger v. Breuer, 304 Mo. 381, 264 S. W. 1; Ex parte Brunding, 47 Mo. 255."

Section 2292 R. S. Missouri, 1919, is now section 12969, R. S. Missouri, 1929. Under the holding in the above case it was the duty of the trial court to sentence the defendant in such a manner as to make his term of imprisonment for which he was sentenced on his previous trial. Also, in the case of Ex parte Green, 17 S. W. 2d, 939, l.c. 940, the court said:

"When the petitioner was returned to the penitentiary, he was there under commitments from the circuit courts of both St. Charles and Lafayette counties. The warden and other officials were without authority to determine the order in which the sentences should be

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served. That question is determined by section 2292, R. S. 1919, as follows:

' * * * And if any convict shall commit any crime in the penitentiary, or in any county in this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held.'

"It follows the petitioner is remanded to the custody of the Warden to serve the sentences imposed in accordance with the views herein expressed."

The holding in the above case specifically stated that the warden and other officials of the penitentiary were without authority to determine the order in which sentence should be served.

CONCLUSION

In view of the above authorities it is the opinion of this department that the sentences of Berthold McBride No. 42930, which sentenced him to twenty years in the state penitentiary on May 26th, 1932, and also which sentenced him to five years in the state penitentiary should run consecutively and not concurrently.

APPROVED:

Respectfully submitted,
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WJB:RW