

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date February 14, 1967

To Warden Allan L. Robbins

Dept. Maine State Prison

From Courtland D. Perry, Assistant Atty. Gen'l.

Dept. Mental Health and Corrections

Subject Affect on Sentence of Release on Bail Pending State's Appeal. Kenneth MacKenzie
MSP.#11563

FACTS:

Kenneth MacKenzie commenced execution of a 6-12 year sentence for Breaking, Entering and Larceny in the Nighttime on September 25, 1963. He prosecuted his appeal to the Maine Supreme Judicial Court and his exceptions to a denial of his motion to suppress evidence and to admission of that evidence at his trial were overruled by that Court on May 6, 1965. Exhausting his State remedies he petitioned the Federal District Court for the District of Maine for the writ of Habeas Corpus which was granted on December 14, 1965. The Court also ordered MacKenzie to be given a new trial within 60 days therefrom. From this order of the Federal District Court the State prosecuted its appeal to the First Circuit Court of Appeals and on January 28, 1966 the Judge of the Federal District Court for the District of Maine ordered MacKenzie released on bail from the Maine State Prison in language as follows:

"...that petitioner's application for bail pending appeal is hereby granted and it is ordered that petitioner be released from confinement upon his furnishing of bail..."

MacKenzie was released pursuant to this order on February 7, 1966. On July 11, 1966, the First Circuit Court of Appeals reversed the decision of the Federal District Court and ordered the writ discharged. The United States Supreme Court denied certiorari and MacKenzie surrendered himself to the Warden of the Maine State Prison on October 29, 1966 in obedience to the order of the Federal District Court, pertinent language of which is as follows:

"...that the petitioner who was released on bail pending appeal surrender himself forthwith to Allan L. Robbins, Warden of the Maine State Prison from whose custody petitioner was released by order of this Court..."

Thus, MacKenzie was free on bail from the Maine State Prison for 264 days.

QUESTION:

Is MacKenzie considered to have been serving his sentence while free on bail from the Maine State Prison for the 264 day period, February 7, 1966 to October 29, 1966?

ANSWER:

No.

OPINION:

It is the general rule that execution of sentence is stayed pending appeal when a defendant is released on bail.

Under the Federal Rules of Criminal Procedure Rule 46 (a) (2) and 38 (a) (b) release

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on bail stays the execution of sentence. Mr. MacKenzie petitioned for his release on bail under Rule 46 (a) (2); his motion was granted.

It is the opinion of this office that Kenneth MacKenzie was effectively removed from the custody and control of the Warden of the Maine State Prison by the January 28, 1966 order of the Judge of the District Court, and that for the 264 days during which he was at liberty, free from such custody and control, he was not in execution of his sentence, and should not be credited with such time.



Courtland D. Perry
Assistant Attorney General