

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum--Date 12 May 1972

to R. D. Kennedy, Acting Warden

Dept. Maine State Prison

From William J. Kelleher, Ass't Atty. Gen'l.

Dept. Mental Health and Corrections

Subject Effects of Title 34, Section 1631, Paragraph 4

SYLLABUS:

A prisoner serving a 30 to 60 day sentence pursuant to Title 34, Section 1631, Paragraph 4 as amended by P.L. 1971, C. 348 is under the care and control of the Warden of the Maine State Prison while he is so serving that sentence. However, he is considered on probation during that same 30 to 60 day sentence. This is only for the purposes of computation of his total probationary period. He is not under the control and care of the parole and probation authorities. The period of his probation runs from the imposition of sentence. The provisions of Title 34, Section 712 are not applicable to prisoners under Title 34, Section 1631, Paragraph 4.

QUESTIONS:

1. Can a person be serving a portion of his sentence in the Maine State Prison and be on probation at the same time and is such a person legally committed to the Prison?
2. Does the period of probation run from the date of imposition of sentence?
3. While the convict is in prison is he under the custody and control of the Warden?
4. Are the provisions of Title 34, Section 712 applicable to prisoners under Title 34, Section 1631, Paragraph 4?

ANSWERS:

1. Yes. (Qualified)
2. Yes.
3. Yes.
4. No.

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REASON:

Title 34, Section 1631, Paragraph 4 as amended by P.L. 1971, C. 348 reads,

"The court may impose a sentence to the State Prison, suspend execution of a portion of this sentence and order the respondent to serve any number of days provided it shall not be less than 30 days nor more than 60 days of the imposed sentence and place him on probation for a period of 2 years, provided he has not previously served a prison sentence. Such probation shall commence at the time of imposition of sentence."

From the language of this section, it is clear that the convict is serving a portion of his sentence. The last sentence of Paragraph 4 though, indicates that the probation shall commence from the time of imposition of sentence. There can be no other conclusion than that the convict is both serving a portion of his sentence and for purposes of computing the time of probation, also on probation. However, in regard to the serving of his sentence, he is like all other prisoners. Title 34, Section 551 lists the duties of the Warden of the Maine State Prison. It reads in part,

"He shall reside constantly within the precincts of the prison and have the care, custody and charge thereof, and of the convicts therein, in conformity to their sentences, and of the lands, buildings, machines, tools, stock, provisions and every other kind of property belonging to or within its precincts, under the direction and control of the department."

Title 34, Section 1631 clearly states that the prisoner is serving a portion of his sentence. While he is so serving that sentence, Section 551 indicates the Warden shall have the care and custody of him. Thus, he is under the same rules as any other prisoner in the custody of the Warden. While the last sentence of Paragraph 4, Section 1631, of Title 34, does create some confusion as to his exact status, for the reason set forth below, the conclusion is reached that he is on probation while serving that 30 to 60 day sentence, only for the purposes of computation of the 2-year period of probation as provided for in Section 1631.

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This is necessarily so. Phillips v. U.S., 212 F. 2d 327, 334, defines the ordinary meaning of "probation".

"Probation is not a reduction of sentence but is a discipline under supervision but without incarceration and is intended for those offenders who can, with safety to the public, be left at large after conviction and who may honestly and reasonably be believed to be susceptible of reformation."

It is clear then, that probation necessarily includes a measure of freedom. Thus, it is impossible for anyone serving 30 to 60 days in the Maine State Prison to be considered on probation in the ordinary sense of the word. However, the last sentence of Paragraph 4 tells us that the probation shall commence at the time of imposition of sentence. It is also true that the legislature did intend the prisoner to be in the custody of the Warden of the Maine State Prison during this 30 to 60 day sentence. The only logical conclusion is then, that the last sentence of Paragraph 4 is intended only for purposes of computation of the total probationary period.

There is case law on the question of the status of time spent in confinement but at the same time being on probation. However, these cases arise under different statutory authority than we have in Maine. Ex parte Hayes, 260 P. 2d 1030, 1032 (1953), states,

"The original imprisonment of six months and eighteen days was a lawful and proper condition of probation (as per California statute) which, as here and before mentioned, might have been accepted as it was, or entirely rejected."

The California statute allows a judge to suspend any imposition of sentence and put the convict on probation and at the same time make a condition of that probation the serving of his sentence in confinement. The Maine law is entirely different in that it provides for the imposition of sentence, a period of 30 to 60 days to be served in the Maine State Prison, and the remainder of the time to be spent on probation, at the same time allowing that probationary period to run from the date of imposition of sentence. The California convict has the opportunity to accept

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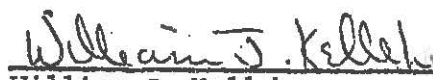
or reject the conditions of his probation. If he elects the latter, he is then liable to be sentenced. The Maine prisoner cannot accept or reject his sentence, but must immediately serve those 30 to 60 days, and then be liable to the provisions of his probation.

Ex parte Goetz, 117 P. 2d 47, 49, (1941), reads,

"An order placing a defendant on probation, even though it includes as a condition a period of detention in the county jail, is not a judgment and sentence."

This California case serves to emphasize that California law allows as a condition of probation the defendant to serve a period of time in jail. Under that statute, if the defendant later violates a condition of his probation, he is given no credit for the time spent in confinement. This is so because he was not at that time serving a sentence but instead complying with the provisions of his probation. The Maine convict is not so treated. Since he has been sentenced, and is serving a portion of that sentence, he must be given credit for that time spent in confinement if he later violates the conditions of his probation and is recommitted.

Title 34, Section 712 indicates that at the time of parole or discharge of any convict, the Warden may furnish him a sum not exceeding \$50 and shall take care that every convict on his discharge is provided with decent clothing. The Warden is also charged with providing him transportation. The use of the words "discharge" and "parole" in Section 712 served to eliminate from the benefits of Section 712 any person who does not so receive a discharge or parole. The prisoner who finishes a term of imprisonment under Section 1631 of Title 34 is neither discharged nor paroled from the prison. Section 712 only applies to those prisoners discharged or paroled from the Maine State Prison. See Title 34, §§ 702, 705 and § 1501 for descriptions of "discharge" and "parole".


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