



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Texas Prison System
Huntsville, Texas

Gentlemen:

Attention: Mr. H. E. Moore

Opinion No. O-3269

Re: The correct amount of time
to be served by Joe Taylor,
No. 97745.

Your letter requesting the opinion of this department as to the correct amount of time to be served by Joe Taylor, No. 97745, reads in part as follows:

"We respectfully submit the enclosed and attached data for an opinion from your Department:

"Joe Taylor, Texas Prison System No. 97745, was convicted in Cause No. 4100, in Stephens County, of 'Burning Insured Personal Property'; sentenced to two years in the penitentiary and received at this prison July 26th, 1941, his sentence to begin on July 18th, 1941. In pronouncing sentence, Hon. B. H. Atchison, Judge of the District Court of Stephens County sets forth, 'the sentence in this cause is to begin when sentence in cause No's. 2721, 2743, 2771, and 2772, The State of Texas Vs. Joe Taylor, in the District Court of Young County, Texas, shall have ceased to operate.' At the time Judge Atchison passed sentence in Cause No. 4100, the sentences from Young County were on appeal, and Judge Atchison states that he had been advised that these appeals were to be withdrawn; therefore, he passed sentence in the Cause No. 4100, from Stephens County to be cumulative to the sentences, then on appeal, from Young County.

"On a later date we received commitments in Cause No's. 2721, 2743, 2771, and 2772, in

the District Court of Young County, wherein the defendant, Joe Taylor, after being sentenced on May 6th, 1941, to serve a term of two years in each of these cases, sentences to run concurrently, gave notice of appeal, and at a later date was permitted by the Court of Young County, to withdraw the appeals in these Causes, and the Court sentenced him in the following manner: 'On this the second day of March, A.D., 1942, came on to be heard in regular order the motion of defendant, Joe Taylor, in the above entitled cause (2721, 2743, 2771, and 2772) and said defendant appearing by attorney in open court and stated that he did not desire to prosecute his said appeal but desired that he be sentenced and that his said sentence commence to run from and of this date and that same be made to run concurrently with any other sentence or sentences that may now or at any time be imposed against him; and the State appearing by and through it's District Attorney stated that it did not care to contest such motion, and the Court, after being advised in the premises, is of the opinion that such motion should be in all things granted. It is therefore considered, ordered, adjudged and decreed by the Court that said defendant, Joe Taylor, be permitted to withdraw his notice of appeal in the above styled and numbered Cause, and such appeal is hereby in all respects dismissed, and the sentence herein shall commence to run from and of this the 12th day of July, 1941, and such sentence shall run concurrently with any other sentence or sentences imposed against said defendant, if any there might be.'

"As the sentence in Cause No. 4100, in the District Court of Stephens County sets out that the sentence in such cause is to be cumulative of the sentence in the Causes No. 2721, 2743, 2771, and 2772, District Court of Young County; and the sentences in these Young County convictions state that such sentences are to be 'concurrent with any other sentence or sentences imposed against said defendant, if any there

might be,' and as this subject, Joe Taylor, has been imprisoned here since July 26th, 1941, under the sentence from Stephens County, it seems that the Court from Stephens County and the Court from Young County have issued conflicting orders, and we are at a loss as to properly determining the correct steps to take in this matter."

Under the facts stated in your letter, at the time Joe Taylor was convicted in the District Court of Stephens County, Texas, he had been convicted in the District Court of Young County, Texas, in four cases. The cases in which the defendant had been convicted in the District Court of Young County had been appealed, and while such cases were on appeal he was tried in the District Court of Stephens County. Taylor was convicted in the District Court of Stephens County and sentenced to two years in the penitentiary, he was received at the Prison on July 26, 1941, and his sentence in the Stephens County case was to begin when sentences in the four cases from Young County ceased to operate. In other words, the sentence in the Stephens County case was cumulative to the sentences in the cases from Young County.

The case of *Alsup v. State*, 206 S. W. 345, holds that notice of appeal in a preceding case did not deprive the court of the power to cumulate the term in the second case, which sentence in the second case would start when that in the preceding case ceased to operate.

Although the cases from Young County were on appeal at the time the case was tried in Stephens County the court in said county had the power to cumulate the sentence in that case with the sentences in the other cases from Young County and provide that the sentence in that case would start when the sentences in the cases from Young County ceased to operate.

We are informed by the Clerk of the Court of Criminal Appeals that mandates issued October 17, 1941, in the four cases appealed from Young County. The appeals in these cases were dismissed upon the request of the defendant.

In the case of *Powell v. State*, 63 S. W. (2d) 712, it is stated:

"When an appeal is taken, the sentence begins from the date of the mandate of the appellate court whether the judgment was affirmed or whether the appeal was dismissed at the request of the appellant." (Citing Ex parte Carey, 64 S. W. 841)

Therefore, it is our opinion that the sentences in the four cases from Young County began from the date of the mandate of the appellate court which was October 17, 1941.

Article 768, Vernon's Annotated Code of Criminal Procedure, provides in part:

"... In all cases where the defendant has been tried for any violation of the laws of the State of Texas, and has been convicted and has appealed from said judgment and/or sentence of conviction, and where said cause has been affirmed by the Court of Criminal Appeals, and after receipt of the mandate by the Clerk of the trial court, the judge is authorized to again call said defendant before him, and if, pending appeal, the defendant has not made bond or entered into recognizance and has remained in jail pending the time of such appeal, said trial judge may then in his discretion resentence the defendant, and may subtract from the original sentence pronounced upon the defendant, the length of time the defendant has lain in jail pending such appeal.

..."

The defendant, Joe Taylor, was sentenced by the District Court of Young County to serve a term of two years in each of the four cases, sentences to run concurrently. The first or original sentences in the District Court of Young County were pronounced on May 8, 1941. However, on the 2nd day of March, 1942, the District Court of Young County attempted to resentence the defendant and to make the sentences commence to run from and of that date (March

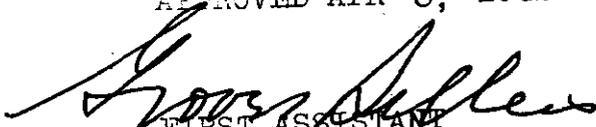
2, 1942) and that such sentences be made to run concurrently with any other sentence or sentences that may now or at any time be imposed against the defendant. We do not think that Article 988, supra, or any other authority which we have been able to find authorizes the District Court under the facts and circumstances heretofore mentioned to resentence the defendant in the above mentioned cases.

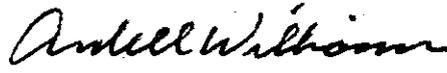
In view of the foregoing authorities and facts it is our opinion that the correct amount of time to be served by the defendant is four years, two years in the case from Stephens County and two years in the cases from Young County. In other words, the defendant should be given credit for the time served on the Stephens County sentence prior to October 17, 1941, and the Young County sentences would begin on that date. After the Young County sentences are served, then the balance of the unserved portion of the Stephens County sentence would begin.

Yours very truly

APPROVED APR 8, 1942

ATTORNEY GENERAL OF TEXAS


FIRST ASSISTANT
ATTORNEY GENERAL

By 
Ardell Williams
Assistant

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