

OFFICIAL OPINION NO. 03-02, Parole Eligibility

June 17, 2003

Laurie Feiler, Director
Non-Institutional Programs & Planning
Department of Corrections
3200 East Highway 34
Pierre, SD 57501-5070

OFFICIAL OPINION No. 03-02

Parole Eligibility

Dear Ms. Feiler:

You have asked for an opinion from this Office on "two issues involving the order of felony convictions on multiple transactions for purposes of computing parole eligibility pursuant to SDCL §§ 24-15-5 and 24-15A-32." That request is based on the following factual situation:

FACTS:

As outlined in statute, the number of felony convictions an offender has determines the fraction or percentage of the sentence he or she must serve prior to parole eligibility or initial parole release. Statute provides that, subject to SDCL 24-15-4, a person is eligible for parole:

- 1) If convicted of a felony for the first time, when he has served one-fourth of the time remaining;
- 2) If convicted of a felony for the second time, when he has served three-eighths of the time remaining; or
- 3) If convicted of a felony three or more times, when he has served one-half of the time remaining.

SDCL 24-15-5. In determining the "time remaining" before parole, the above statute provides that the statutory time granted for good conduct pursuant to Section 24-5-1 must first be deducted from the inmate's sentence.

A similar scheme applies to "new system" inmates convicted of crimes after July 1, 1996. Under SDCL 24-15A-32, an inmate's initial parole date is calculated by applying the percentage indicated in the grid set out therein to the full term of the inmate's sentence. Once again, the percentage of time to be served by the inmate prior to parole eligibility depends on the number of prior felony convictions.

Based on these facts, you have asked the following questions:

QUESTIONS:

1. Whether it is correct to use the date of conviction, date of offense, or date of sentence on multiple transactions to determine which is the first felony conviction and which is the second?
2. Assuming that date of conviction is the proper "trigger" date for determining the order of felony convictions, when should an offense resulting in a Suspended Imposition of Sentence be counted as a felony conviction? In the case of an offender who commits another felony while on probation and is sentenced to prison on that subsequent felony, you ask whether the date the offender was given the Suspended Imposition of Sentence is the conviction date or is the date their probation was revoked considered the conviction date?

IN RE QUESTION NO. 1:

It should be noted at the outset that, regardless of whether the sentences are made to run concurrently or consecutively, statute provides "two or more convictions arising from the same transaction shall be considered as one conviction." SDCL 24-15-6 and SDCL 24-15-7. The same is true for "new system" inmates. Under SDCL 24-15A-18, "in the determination of an inmate's initial parole date, two or more convictions arising from the same transaction . . . shall be considered as one conviction." See also SDCL 24-15A-19.

It is only when the sentences are said to "arise from different transactions" that they are considered as separate convictions. Unfortunately, there is no definition of the term "separate transactions" in the criminal or parole statutes. State v. Sieler, 1996 S.D. 114, ¶ 16, 554 N.W.2d 477, 481. As noted therein, the State Supreme Court has never directly ruled on what constitutes "separate transactions" under statute. Id. at ¶ 18, 554 N.W.2d at 482. It said that "this is essentially a fact-bound determination." Id.

In the case of multiple convictions arising from different transactions, the court must, therefore, enter a separate judgment for each conviction. SDCL 23A-27-4. The above statute was approved in Sieler where the defendant moved to correct his sentence, alleging that the two convictions stemming from his February 14, 1989, arrest were for the "same transaction" and that the penitentiary was therefore improperly treating him as having three convictions. The Court held, that as long as the judgment met the statutory requirements of SDCL 23A-27-4, the sentence was legal. Id. at ¶ 20, 554 N.W.2d at 483. According to the court, "if there are multiple convictions and separate judgments are entered, the sentence conforms to statute and will be upheld." Id.; State v. Thomas, 499 N.W.2d 621, 622 (S.D. 1993). The question of whether there are separate transactions can therefore typically be resolved by ascertaining whether there are separate judgments of conviction.

State v. Puthoff, 1997 S.D. 83, ¶ 6, 566 N.W.2d 439, 441, however, held that Defendant's convictions for burglary and aggravated assault should be considered separate convictions for parole eligibility purposes, despite the trial court's failure to enter separate judgments of conviction as required by SDCL 23A-27-4. There, the written judgment and sentence specifically stated that the offenses were for "separate transactions." Id. at ¶ 7, 566 N.W.2d at 442. While acknowledging that the addition of the words "separate transactions" to the written judgment and sentence affected Puthoff's parole eligibility, the court found that this "addition" did not violate the prohibition against the written sentence increasing the severity of the oral sentence. Id.

The court also rejected Puthoff's contention that a finding whether Defendant had been involved in two or more separate criminal transactions was a finding to be made by the Parole Board. According to Puthoff, making that finding was an exclusive executive branch function. It was therefore argued that the trial court violated the separation of powers by determining that his convictions were the result of separate transactions. Id. at ¶ 9, 566 N.W.2d at 442. The Supreme Court, however, found that Puthoff's argument, "ignores that whether separate transactions are involved in multiple criminal offenses is an inherent consideration in a criminal prosecution from the time of the drawing of the indictment or information." Id. at ¶ 11, 566 N.W.2d at 442. Puthoff's argument to the contrary was therefore found to be without merit.

In light of the above, I believe that the trial court, when it enters separate judgments of conviction or adds the words "separate transactions" to the written judgment and sentence, effectively determines that there are two or more convictions. If the court fails to enter

separate judgments or add the "separate transaction" language, it is my opinion that the sentences must be considered by the Parole Board as one conviction.

Even in cases, where separate judgments of conviction are entered by the court, it may not be possible to determine the "order" of convictions. Since, "separate transactions" may occur during the same episode, I do not believe that the "date of offense" is a viable option. It is my opinion that, except as explained later In Re Question No. 2, the date of conviction should continue in determining the order of convictions. That approach seems consistent with the language of statute SDCL 24-15-5, which utilizes the terminology "if convicted."

That being said, however, there are cases where separate judgments of conviction have been filed on the same date. Thomas, 499 N.W.2d at 621; Sieler, 1996 S.D. 114, ¶ 3, 554 N.W.2d at 478-79. In these situations the proper course of action, absent further statutory directive, is to seek clarification from the court as to the specific order of those convictions. In those cases where the court cannot or will not designate the order of felonies, I believe it would then, and only then, be appropriate to use the date of offense to determine the order of convictions for parole purposes.

In Re Question No. 2:

In the case of an offender whose prior suspended imposition of sentence is revoked as the result of a subsequent felony conviction, it is my opinion that the date of date of entry of the suspended imposition of sentence serves as the "trigger" date. This result is dictated by the holding in State v. Arguello, 1996 S.D. 57, 548 N.W.2d 463. The facts in Arguello are nearly identical to those presented in your opinion request. Defendant in Arguello pled guilty to third degree burglary and received a Suspended Imposition of Sentence placing him on probation for two years. While still on probation, Arguello was convicted of robbery and sentenced to fifteen years in prison. Id. at ¶ 3, 548 N.W.2d at 463. After his sentencing for the robbery, Arguello's original probation was revoked and he was sentenced to two years in prison for the earlier burglary. The court directed that the two-year sentence was to run consecutively to the fifteen-year sentence for robbery. Id. at ¶ 4, 548 N.W.2d at 463.

On appeal, the South Dakota Supreme Court found that the trial court had no authority to impose a consecutive sentence for burglary based on the plain language of SDCL 22-6-6.1. That statute, prior to its amendment in 2001, provided:

If a defendant has been convicted of two or more offenses regardless of when the offenses were committed or when the judgment or sentence was entered, the judgment or sentence may be that the imprisonment on the subsequent conviction may run concurrently with the imprisonment on any prior conviction or the imprisonment for the subsequent offense may commence at the expiration of the imprisonment upon any other offense.

The court, focusing on the language of the statute, found that a consecutive sentence could be imposed only for a "subsequent offense." Id. at ¶ 13, 548 N.W.2d at 465. According to the court, the judge "did not have the authority to give a consecutive sentence since he was sentencing on a prior, not a subsequent offense." Id.

That same result was later reached in State v. Meyers, 1997 S.D. 115, 571 N.W.2d 847 where the court was again confronted with a similar fact pattern. Meyers plead guilty to Third Degree Burglary and was sentenced to six years. Execution of that sentence, however, was suspended and Meyers was placed on intensive probation. As a condition of his probation, Meyers was ordered to serve six months in the county jail.

While serving his jail sentence, Meyers failed to return from work release and was charged with escape. Meyers pled guilty to the escape and also admitted to having violated the terms of his probation. Id. at ¶ 3, 511 N.W.2d at 847. As a result of his probation violation, Meyers was sentenced to six years on his burglary conviction. That sentence, however, stated that it was to be served consecutively to the two year sentence imposed in connection with the escape.

The Supreme Court, on appeal, found that Meyer's "prior offense" was third degree burglary and his "subsequent offense" was escape. Id. at ¶ 7, 571 N.W.2d at 843. The burglary sentence, therefore, could only be served prior to the escape sentence. The court rejected Meyer's argument that his earlier sentence for burglary, four years probation, "expired" when his probation was revoked. Id. at ¶ 10, 571 N.W.2d at 849.

Based on the holdings in the above-mentioned cases, it is my opinion that, under the example presented in your request for an opinion, the "prior offense" is the third degree rape. That crime is what made the inmate a probationer in the first instance. Id. at ¶ 11, 571 N.W.2d at 849. Although the forgery conviction occurred prior to the actual revocation of the Suspended Imposition of Sentence, it should nevertheless be treated as the "subsequent offense."

In summary, the date of conviction should generally be used in determining the order of convictions for parole eligibility purposes. In those cases where the separate judgments of conviction are entered on the same date, further guidance should be sought from the court. If the court will not or cannot designate the order of felonies, it would then be appropriate to resort to the date of offense to determine order of convictions. Finally in these cases where probation is revoked as the result of a subsequent felony conviction the date of entry of the Suspended Imposition of Sentence should serve as the "trigger" date to determine the order of convictions for parole purposes.

Very truly yours,

Larry Long
ATTORNEY GENERAL