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STATE CAPITOL
PHOENIX, ARIZONA

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DEPARTMENT OF LAW OPINION NO. 73-13 (R-42)

REQUESTED BY: THE HONORABLE WILLIAM MICHAEL SMITH
Yuma County Attorney

QUESTION: Is a defendant convicted under A.R.S. §§ 36-1002 through 36-1002.08, as amended 1961, entitled to the benefit of the good behavior and double time deductions of A.R.S. § 31-251, as amended 1970, and A.R.S. § 31-252 in determining whether the person convicted has served the respective minimum statutory periods required under these sections before the person can be eligible for release on parole?

ANSWER: No.

In Department of Law Opinion No. 63-35 it was stated that a person convicted under A.R.S. §§ 36-1002 through 36-1002.08 "may still be entitled" to the good behavior and double time deductions of A.R.S. § 31-251, as amended 1970, and A.R.S. § 31-252. Although not perhaps necessarily required by the exact question presented in Opinion No. 63-35, this opinion discussed language in the various narcotics sections providing that a minimum number of years must be served before a person convicted under A.R.S. §§ 36-1002 through 36-1002.08 can be eligible for release "on parole, or on any other basis, until he has served not less than [a specific number of] years in prison".

Opinion No. 63-35 was written in 1963. It concluded that the language in the narcotics sections was no different than the language in various other statutory sections which provided that punishment shall be "for not less than" a certain number of years, except that the narcotics sections "are more wordy". The opinion then relied on the principle that "repeals by implication" are not favored in deciding that, since the extra credit time deductions applied to the similar "less wordy" statutes, they should also apply to all computations of time under the narcotics sections, including the minimum time which must be served before release on parole "or on any other basis".

Since Opinion No. 63-35 there have been several developments suggesting that the interpretation that these time credits should apply to the minimum parole time computation is not consonant with the legislative intent of the narcotics statutes. These developments also make it clear that the minimum parole language of the narcotics statutes does not make them merely "more wordy", but indicate a legislative intent to deal with narcotics violations in a special manner.

Probably the most significant of the developments since Opinion No. 63-35 are recent Arizona Supreme Court decisions that convictions under the narcotics statutes do not vest trial judges with the ordinary sentencing discretion they have under most statutes. Rather, the Supreme Court has held that the sentencing provisions of the narcotics statutes are mandatory. There is no discretion left in the sentencing judge. State v. Tyree, Supreme Court No. 2497, April 4, 1973; State v. Moreno, Supreme Court No. 2454, April 12, 1973.

Using a parity of reasoning in the same mandatory sentencing provision, it seems clear that the Legislature has removed the ordinary statutory rights to parole figured with the computation of the extra time credits (A.R.S. §§ 31-251, 31-252, 31-411) by providing a person sentenced under the various narcotics sections "shall not be eligible for release upon completion of sentence, or on parole, or on any other basis, until he has served not less than [a varying number of] years in prison."

This explicit, mandatory provision follows immediately after the penalty clause in each of the narcotics sections (A.R.S. §§ 36-1002 through 36-1002.08). Since the minimum number of years which must be served before parole are often the same as the minimum sentence (e.g., A.R.S. §§ 36-1002, 1002.02), and the minimum and maximum sentences are presumably subject to the extra time credits, the only logical reason for providing that no release can be had in any circumstance until not less than a certain number of years in prison have been served is to make a person convicted under these sections serve a certain number of years regardless of any good time credits.

Another development consistent with the interpretation that the good time credits should not apply to the minimum parole provisions is the Legislature's addition of A.R.S. § 13-653 in 1965. A.R.S. § 13-653 is the child molestation statute and provides that there should be no possibility of parole until the minimum sentence has been served. This parole limitation is followed by a provision that a person convicted under A.R.S. § 13-653 shall not be entitled to the time credit provisions of A.R.S. §§ 31-251 and 31-252 until he has served one year--the minimum sentence under A.R.S. § 13-653.

It is thus clear that in an analogous situation to the parole limitations in the narcotics statutes the Legislature did not intend that the extra time credits should apply in figuring eligibility for parole.

Similarly, by making different minimum parole periods for each section of the narcotics statutes couched in a mandatory number of years, it is obvious that the Legislature considered each separate narcotics violation, and determined that for each offense a certain number of years should be spent in prison before release or the person should be placed on probation. By specifying a certain number of years separately from the general penalty provision, the Legislature's only purpose could have been to disassociate this parole period from the general sentencing provisions which are subject to the extra time provisions.

Furthermore, since passage of the Uniform Narcotic Drug Act, the Supreme Court has recognized the grave dangers and ever increasing problems presented by drugs and narcotics in Arizona. See State v. Wadsworth, 109 Ariz. 59, 505 P.2d 230 (1973). This is consistent with the statement of the Senate Narcotics Study Committee after holding lengthy hearings and composing what is now A.R.S. §§ 36-1002 through 1002.08. See Journal of the Senate, First Special Session, 25th Arizona Legislature, at pp. 32-33 (1961); Journal of the House, First Special Session, 25th Arizona Legislature, at p. 30 (1961).

Finally, since the passage of the narcotics sections, several Arizona appellate decisions have suggested that the minimum parole provisions should be figured without using

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the extra time credits. See State v. Ross, 15 Ariz.App. 174, 487 P.2d 20 (1971), vacated on other grounds, 108 Ariz. 245, 495 P.2d 841 (1972); State v. Smith, 13 Ariz. App. 507, 478 P.2d 122 (1971); State v. Dominguez, 16 Ariz. App. 592, 494 P.2d 1338 (1972); State v. Ross, 108 Ariz. 245, 495 P.2d 841 (1972).

This interpretation would not have the effect of implicitly repealing A.R.S. §§ 31-251 and 31-252. Rather it would harmonize the apparently inconsistent mandatory language of the narcotics statutes with the general parole and extra credit statutory provisions. See, generally, State v. Superior Court, 107 Ariz. 224, 485 P.2d 549 (1971); State Land Department v. Tucson Rock and Sand Company, 107 Ariz. 74, 481 P.2d 867 (1971).

This obtains because, after the prisoner has served the time during which he is ineligible for parole, he would be entitled to the extra time credits of A.R.S. §§ 31-251 and 31-252 towards his parole date or release date. Thus, the strict mandatory intent of the Legislature regarding serving a certain number of years would be met while, at the same time, preserving the statutory effects of the extra time credit sections in most cases.

Those parts of Opinion No. 63-35 which are inconsistent with this interpretation are no longer the opinion of this office, and future action taken under the above sections should be pursuant to the opinion herein.

Respectfully submitted,

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