



STATE OF KANSAS

*Office of the Attorney General*

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CURT T. SCHNEIDER  
*Attorney General*

March 19, 1975

Opinion No. 75-121

Mr. R. K. Hollingsworth  
Assistant District Attorney  
Sedgwick County Courthouse  
Wichita, Kansas 67203

Dear Mr. Hollingsworth:

Your recent letter raises a question of the legal effect of a sentence which, tracking the exact language of former K.S.A. 21-450 (second degree kidnapping), provided for a term of imprisonment "not exceeding thirty years."

The sole question to be resolved is whether the aforementioned language of the former statute creates a so-called "flat" sentence, i.e. a sentence without a minimum term such that the offender's initial eligibility for parole is computed from the term specified by the court (30 years in this case), or whether it creates an indeterminate sentence whose maximum duration may not exceed the term prescribed by the court and whose minimum, if it exists, must be deemed to emanate from some other source. Obviously, the decision has dramatic implications for the determination of an inmate's parole eligibility date.

Under the former code, the phrase "not exceeding" was a commonplace provision of sentencing statutes concerning many different crimes. In State v. Gaunt, 98 Kan. 186, 192, 157 P. 447 (1916), the Supreme Court interpreted identical language under a different criminal statute in assessing the effect of a sentence imposed thereunder. There the defendant contended that his sentence for third degree manslaughter for a term "not exceeding three years" did not constitute an indeterminate sentence since no minimum term had been prescribed by the court. However, the court

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held that Gen. Stat. 1909, §2791, by providing that "no person shall in any case be sentenced to confinement and hard labor for any term less than one year," statutorily prescribed an automatic minimum sentence of one year where the court did not otherwise provide. The continued vitality of this decision was recently acknowledged in State v. Frye, 209 Kan. 520, 522-523, 496 P.2d 1403 (1972).

This analysis seems dispositive in the instant situation. K.S.A. 21-109, the successor to the statute just described, retained the exact language of its predecessor and remained in effect until its repeal by L. 1969, ch. 180, §21-4701, July 1, 1970, and was thus applicable in this situation to the K.S.A. 21-450 offense, L. 1935, ch. 156, §2. It operated herein to supply a minimum term of one year to the court's sentence of "not exceeding 30 years". See attached opinion of the Attorney General, March 30, 1956, concerning Gen. Stat. 1949, 21-735a.

Therefore, after an analysis of the pertinent statutes under the former criminal code and court decisions applicable thereto, it is our opinion that the statutory language has the effect of creating an undeterminate sentence of from 1-30 years, the minimum term deriving from statute.

Very truly yours,



CURT T. SCHNEIDER  
Attorney General

CTS:en

March 30, 1956

Mr. Warren Palston  
Assistant County Attorney  
Butler County  
El Dorado, Kansas

In re: G. S. 1949, 21-735a

Dear Warren:

Reference is made to your letter of March 29, 1956, wherein you inquire whether a person convicted of violating the above captioned statute can be sentenced for a two-year term in the State Penitentiary.

We are inclined to doubt that the statute authorizes a sentence of two years. In part it provides that the punishment pursuant to conviction of violating this section shall be "by confinement at hard labor not exceeding three years, or in a county jail not less than six months." We are inclined to the view that the statute provides alternate sentences for the offense. The court may sentence the offender either to the county jail or to the penitentiary. If sentence is to the penitentiary, then it must be for a term of not to exceed three years under the indeterminate sentence law. Inasmuch as, pursuant to G. S. 1949, 21-109, no sentence to confinement and hard labor may be for a term of less than one year, the effect of the sentence would be a minimum of one year and a maximum of three years, the time of release being determined by the Prison Board.

On the other hand, if sentence is to the county jail, it may be for any specific period adjudged by the court, not less than six months nor, under the terms of G. S. 1949, 21-111, not more than one year.

Mr. Warren Ralston--2  
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I hope these comments may assist you.

Very truly yours,

JOHN ANDERSON, JR.  
Attorney General

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