

PENITENTIARY--CONVICTS--WARDENS: Right of Warden to issue certificate of delivery to officers delivering persons to penitentiary.

12-10
December 7, 1934.



Honorable J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

Your letter of October 30th, requesting an opinion is as follows:

"It has been the custome of the Sheriffs of the various counties in the state to bring all prisoners who have been committed either to the Penitentiary or to the Intermediate Reformatory to the Penitentiary for delivery and receipt.

"The question has been raised as to whether the officials of the Penitentiary have the legal right to accept and receipt for prisoners who have been sentenced direct to the Intermediate Reformatory by the Circuit Courts, the contention being that the responsibility for wrongful imprisonment and the correctness of the commitments accompanying the prisoners should rest with the authorities of the institution to which the prisoner is committed.

"It is the opinion of this office that each institution should receive and receipt for its own inmates. It is therefore the desire of the Warden's office to know of your office what its rights and duties are. A written opinion from you at an early date will be appreciated."

In Missouri the Commissioners for the Department for Penal Institutions have the statutory power to con-

trol and manage the admission of prisoners and inmates to Penal Institutions, and this statutory power refers to all penal institutions in this State. This power, referring to admission of prisoners and inmates, is not left to the commissioners' general powers which are provided in Section 8341 R. S. Mo. 1929, and which read as follows:

"The state prison board shall at all times and under all circumstances mentioned or authorized under this article reserve the supervision of all prisoners under sentence and committed to said board."

This power, referring to admission of prisoners and inmates, is specifically provided for by the Legislature in Section 8323, R. S. Mo. 1929, which provides:

"Every power heretofore conferred by law upon the state prison board, and every duty heretofore required by law of said board, is hereby transferred to and vested in the commission of the department of penal institutions, and by said commission may be exercised and shall be performed with the same legal force and effect as the same might, or should, heretofore have been done by the prison board, it being the express purpose and intent of this law to transfer to said commission all rights, powers, privileges, duties and functions heretofore enjoyed, exercised or performed by said prison board, and in the exercise of such powers, and the performance of such duties, or any thereof, the said commissioners of the department of penal institutions shall have authority, and they are hereby authorized, to do any act of thing with reference to the control and management of the penal institutions herein referred to, including the admission of prisoners, or inmates thereto, the buying or

selling of supplies, surplus products, or raw materials, with the same legal force and effect as the same, or any thereof, might heretofore have been done by the said state prison board."

It is true that the prison commissioners can make general rules for the different penal institutions, but their right to make rules is "subject to law", and where the Legislature has acted, any rule that they make must give way to the law. Their power to make rules and employ a warden at the Penitentiary and a Superintendent at Algoa is set out in Section 8338 R. S. Mo. 1929, which follows:

"The state prison board shall, subject to law, have the exclusive government, regulation and control of the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls and of all other penal or reformatory institutions hereafter created and of all persons who now are or who hereafter shall be legally sentenced to either of the institutions hereinabove mentioned or referred to and who shall be committed to the custody of said board, and said board shall make and enforce such by-laws, rules and regulations as they from time to time deem necessary and proper in the management of all institutions of persons now or hereafter legally committed to said board, and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article. Said board shall employ and at all times control a warden, deputy warden, superintendent of industries, superintendents, matrons, physicians, chaplains, trade foremen, turnkeys and guards, and all other officers and employes, as the board may, under law, from time to time deem necessary and proper for the efficient administration of said board."

Since the Commissioners can make rules, within statutory limitations, we must look to the Statutes and see if the Legislature has provided any statutory procedure governing the admission of prisoners or inmates to penal institutions relating to the formality necessary when dressing in an inmate or a convict.

Section 3717, R. S. Mo., 1929, provides for the delivery of convicted persons to the penitentiary as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Section 8413, R. S. Mo. 1929, provides for accepting and receipting for prisoners and inmates delivered, as follows:

"Whenever any convict shall be delivered to said board, the officer having such a convict in charge shall deliver to the board the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the board a certificate of the delivery of such convict."

Before we can construe the word "keeper" in Section 3717, supra, we must first understand the powers and duties of the warden when construed along with the other statutory powers and duties of the Commissioners. The powers and duties of the Warden are set out in Section 8396, R. S. Mo. 1929, and follow:

"The warden shall exercise a general control and supervision over the government, discipline and police regulations of the penitentiary in accordance with the orders, rules

and regulations adopted by the board for the government of said penitentiary, and shall see that all such orders, rules and regulations are duly enforced. They shall make such orders, rules and regulations for the government of subordinate officers and employes as they shall deem necessary and proper and shall see that the same are duly enforced. The same shall be in writing and shall be entered in a book to be kept by the board for that purpose; and they shall cause to be posted, printed copies of said rules, together with a fair copy of section 8442 in conspicuous places about the prison that they may be seen by the officers and prisoners."

CONCLUSIONS.

It is our opinion that the word "keeper" as used in Section 3717, supra, refers to the warden in the exercise of his police powers. In the light of Section 8396, supra, the warden is the keeper of the penitentiary, but he supervises prisoners under the law and under the rules and regulations adopted by the board. Since the legislature has provided that delivering of prisoners and inmates shall be made to him as "keeper" it becomes his duty to take physical custody of prisoners and inmates delivered in the receiving cell at said penitentiary and keep them subject "to the government, discipline and police regulations adopted by the board." With such a keeping he fulfills his statutory duty, and with such a keeping his authority is at an end as far as it can be exercised over prisoners or inmates.

It is our opinion that the Commissioners have no authority to pass a rule contrary to Section 8413, supra, which provides also for delivery of persons to the board of Commissioners. The physical delivery of the prisoner or inmate to the warden as "keeper" of the penitentiary is also a constructive delivery of said prisoner or inmate to the Commissioners, and when they prisoner or inmate is delivered physically to the warden for police regulations, the officer making the delivery is not finished with his mission until he delivers "to the board the certified copy of the sentence received by such office from the clerk of the court," and it is his duty to "take from the board a certificate of the delivery of such convict." The quoted portions of the statute are not subject to an interpretation that a "certificate of delivery" from

the warden is in compliance with the Statute. The word "shall" as used in the Statute makes it the mandatory duty of the board to receipt for delivery, and the board has no authority to make a rule which will supplant the necessity of the board giving the statutory "certificate of delivery", if the officer delivering the prisoner so demands. Section 8338, supra, also speaks of prisoners being "committed to the custody of the board".

On the other hand, it is our opinion, that where the board by rule has commanded the warden or superintendent at Algoa to issue a "certificate of delivery" independent of the one provided for in the statutes, the warden or superintendent must comply with the rule, and where the person delivering the prisoner or inmate accepts the warden's or Superintendent's certificate issued under the rule as a sufficient receipt of delivery, then he is the only person who can compel the board to issue the statutory "certificate of delivery" which would be in addition to the warden's "certificate of delivery issued under the rule". He has been shorted, under the Statute, if he delivers a prisoner without receiving a certificate of delivery from the board itself.

The Surety Bonds, of the Warden or of the Superintendent at Algoa, assuring the faithful performance of their duties, would not be subject to default because either issued a "certificate of delivery" under a rule of the Commissioners. Without such a rule neither has the statutory authority to issue same, and either may make their bondsmen liable for the bad doing of that which they had no authority to do in the first place. When a "certificate of delivery" is issued by virtue of a rule, the responsibility for unlawful imprisonment is upon the Commissioners and their bondsmen.

Respectfully submitted

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Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

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