

CRIMINAL PROCEDURE - Special judge selected by
COURTS Prosecuting Attorney and Defendant to
try criminal case, cannot parole con-
victed defendant.

December 21, 1937.

Hon. W. P. Wilkerson,
Prosecuting Attorney
Scott County,
Sikeston, Missouri.

Dear Mr. Wilkerson:

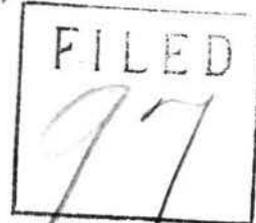
This department is in receipt of yours
of the 18th instant in which you submit the follow-
ing inquiry:

"Will you please advise me whether
a special Judge may parole a person
who has plead guilty to a felony,
where the parole follows immediately
after the plea, allocution, judgment
and sentence and before the special
judge leaves the bench?"

From the data furnished with your letter
we note that your inquiry is directed to the power
of a special judge selected by agreement of the
prosecuting attorney and defendant in a criminal
case in accordance with the provisions of Section
3649 R. S. Mo. 1929.

The powers of a special judge so selected
are defined in Section 3650 R. S. Mo. 1929, which
reads as follows:

"The special judge elected as pro-
vided in the next preceding section
shall immediately after his election
take an oath to support the Constitu-
tion of the United States and of the
state of Missouri, and to hear and
try the particular cause or motion
pending without fear, favor or
partiality; and such special judge
shall possess during such trial or
hearing, and in relation thereto
only, all the powers, perform the



duties, and be subject to the same restrictions as the judge of said court, but shall have no power whatever in any other cause than the one specified in the order of record; and upon the conclusion of the trial of said cause in said circuit or criminal court, his power and duties as such special judge shall instantly cease and determine."

It will be noted that the powers of such special judge are expressly limited to the "trial and hearing" and to matters "in relation thereto only". The question, therefore, is: Is the granting of a parole to a convicted defendant a part of the "trial and hearing" of a case or a matter in relation thereto?

We think this question has been definitely answered in the case of State ex rel vs. Kelly, 309 Mo. 465 l. c. 472, wherein it is held:

"In other words the special judge is invested with all the powers of a trial judge which are necessary or adequate for the judicial ascertainment of the fact of defendant's guilt or innocence. When that fact is so determined his power ipso facto ceases. (State v. Shea, 95 Mo. 85; Ex parte Clay, 98 Mo. 578; State ex rel. v. Wofford, 111 Mo. 526.)

"Of course the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate determination of defendant's guilt or innocence, are so related to the trial of the cause as to be deemed incident thereto. But the granting of a parole has naught to do with the

ascertainment of guilt or innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (Secs. 4156 and 4157, R. S. 1919), and that judgment has become a finality. (Sec. 4167, R. S. 1919.) The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence, or a conditional pardon, is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment his powers and duties as special judge came to an end."

In the foregoing case, the court was discussing the power of a judge of another court who had been called in to try a particular case, but reference to the powers of such other judge under such circumstances, as set forth in Section 3651 R. S. Mo. 1929, will show that such powers are clearly as broad as the powers of a special judge selected by the prosecuting attorney and defendant as defined in Section 3650. It is not reasonable to assume that the legislature intended to invest an attorney elevated to the office of special judge of a particular case, by agreement of the prosecuting attorney and defendant, with greater powers than those granted to a regular judge of another court who had been called in to try a particular case.

Furthermore, the power to grant paroles to convicted persons is vested by Section 3809 R. S. Mo. 1929, as follows:

"The circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

It will be noted such power is vested in certain "courts". In the case of State ex rel. v. Woodson, 161 Mo. 444 l. c. 453, the Supreme Court of Missouri defined a court as follows:

"A court is a judicial assembly. The judge of the court is its presiding officer. While the judge is often called the "court", yet he is only so rightly called when the tribunal over which he presides is in session. Bouvier gives to the word "court" this definition: 'A body in the government to which the public administration of justice is delegated. The presence of a sufficient number of the members of such a body, regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions.'"

Section 3811 R. S. Mo. 1929, in setting forth the cases in which paroles may be granted, reads, in part as follows:

"* * *the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: * * *"

Again Section 3812 provides, among other things, that:

" * * * the court granting said parole or the judge thereof in vacation may terminate said parole at any time without notice to such person by * * *"

Likewise Section 3815 R. S. Mo. 1929 requires the person paroled:

"* * * to appear at each regular term of the court granting the parole or at the court at which the judge granting the parole presides, during the continuance of such parole, and furnish, at his own expense, proof to the satisfaction of the court that he has, since his parole or since the last date at which such proof had been furnished, complied with all the conditions of such parole and conducted himself as a peaceable and law-abiding citizen."

Section 3816 gives to the court the power, "in its discretion, by order of record", to grant a final discharge to the paroled person.

From the above statutes relating to paroles, it is clear that the power to grant paroles to convicted persons is vested in the courts as Governmental Institutions and that such courts exercise the further power of supervision of such paroled persons, the power to terminate such paroles and the power to grant final discharge to the paroled person. If the regular judge of the court in which a person was convicted, by reason of his being disqualified to try the case, is also disqualified from granting and supervising a parole and of granting to the paroled person a final discharge, the question arises as to who would supervise the paroled person, revoke his parole or finally discharge him, if the attorney who happened to be the special judge in the trial of this case should die.

Under such a theory the whole system of paroles would be rendered ineffectual.

The use of the words, "may in his discretion, by order of record parole such person", may give rise to the question as to whether the judge is the one in whom the power to parole is vested, instead of the court. Some discussion of this question was had in the case of State ex rel. v. Kelly, supra, l. c. 473, 474, but we do not interpret that discussion as holding that the judge is the seat of the power to parole, instead of the court. In fact we think the discussion on this question definitely indicates a contrary holding.

CONCLUSION

It is, therefore, the opinion of this department that a special judge, selected by agreement of the prosecuting attorney and defendant in accordance with the provisions of Section 3649 R. S. Mo. 1929, to try a particular criminal case, does not have the power to grant a parole to the defendant who pleads guilty or is convicted in the hearing of such case.

Yours very truly,

APPROVED:

HARRY H. KAY,
Assistant Attorney General.

J. E. TAYLOR,
(Acting) Attorney-General.

HHK:LB