

PAROLE: Parole authorities have power to parole convict where punishment imposed and affirmed by Supreme Court is a fine and jail sentence.

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November 10, 1947

Honorable Joseph W. Brown
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. Brown:

Your letter of recent date requesting an opinion of this department received. The pertinent part of your letter reads as follows:

"We desire to request your opinion as to whether or not the Circuit Court or the Parole Board of the County has jurisdiction to grant a parole to a prisoner who has been convicted of a felony wherein a jail sentence was assessed which judgment was then appealed to the Supreme Court and affirmed by such Court. There seems to be only two decisions of the Supreme Court wherein this subject was under consideration. These cases are Ex Parte Ike Foister, 203 Missouri 687 and State ex rel. Gentry vs Montgomery 297 S.W. 30.

"Neither of the above decisions covers the exact facts of the case in this County which was a prosecution for drunken driving. This charge as you know is a felony wherein the punishment assessed may be either confinement in the penitentiary or the county jail or a fine. The punishment assessed in the present instance was confinement in the county jail and a fine, which sentence was affirmed by the Supreme Court."

The question presented by your request is whether or not the paroling authorities of Greene County, Missouri, lose jurisdiction to grant a parole on a felony charge wherein the punishment assessed is confinement in the county jail and a fine, after the judgment and sentence of the trial court has been affirmed by the Supreme Court of the State of Missouri on an appeal.

The matter of parole being statutory, we will consider Sections 4139, 4140, 4199 and 9180, R. S. Mo. 1939, in the order named.

Section 4139, supra, provides:

"In all cases where the appeal or writ of error shall be prosecuted by the party indicted in the supreme court, and where the punishment assessed shall be imprisonment in the penitentiary, and where the judgment wherein the appeal or writ of error is prosecuted shall be affirmed, such court shall direct the sentence pronounced to be executed, and for this purpose the supreme court shall order the marshal of such court to arrest the convict, and deliver him to the proper officer of the penitentiary."

(Emphasis ours.)

The above section without qualification makes it the duty of the Supreme Court, upon affirming a judgment of a trial court, to direct the Marshal of such court to make the arrest and deliver him to the officer of the penitentiary when the punishment assessed is for a term in the penitentiary. There being no qualifications of these terms, it is apparent that the punishment must be a term in the penitentiary before the court will direct the Marshal to execute its mandate.

Section 4140, supra, provides:

"Where the supreme court shall make an order, as directed in the last preceding section, the clerk of the court shall forthwith deliver a certified copy of such order to such marshal, who shall without delay, either in person or by such assistants as the supreme court may direct, arrest such convict wherever he may be found in this state, and transport him to the penitentiary, and deliver him to the proper officer thereof."

This section doubly emphasizes the provisions of Section 4139, supra, that the Marshal, when directed by the Supreme Court to arrest the convict, upon the affirmance of the sentence and judgment of the lower court, shall deliver him to the proper officer of the penitentiary. No provision is made in either of these sections for the Marshal to be ordered to execute any order made by the affirmance of a conviction by the Supreme Court to make an arrest and deliver the convict to the officers of the county in which the conviction was had.

Section 4199, supra, provides:

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

Section 9180, supra, provides:

"In any judicial circuit in this state composed of a single county, and having two judges of the circuit court, and not more, and where the circuit court is held only at the county seat of such county, and which have, or may hereafter have, a population of not less than 60,000 inhabitants, nor more than 200,000 inhabitants, and which does not contain any city of the first class, there is hereby created a board of paroles to be known as such, which shall be composed of the judges of the circuit court of said county so composing said judicial circuit. The judge of division one of said circuit court shall be ex officio chairman of said board of paroles under this law, and the clerk of said circuit court shall be ex officio clerk of said board of paroles and said clerk shall be paid a salary of \$1,200.00 per year, to be paid monthly by the treasurer of said county. The powers and duties of said board shall be exercised and the salary of the members of said board shall be paid, pursuant to the provisions of sections 9181 to 9186, both inclusive."

It is well to consider the orders made by the Supreme Court in affirming felony and misdemeanor cases. In a felony conviction where the judgment and sentence of the trial court on appeal is affirmed by the Supreme Court of Missouri, and where the punishment assessed is imprisonment in the penitentiary, such court issues its order, through the Clerk of that court, directing the Marshal to take the body of the convict and deliver him to the Warden of the penitentiary.

Where the Supreme Court affirms a conviction of a trial court on a misdemeanor charge, when such appeal is properly before the Supreme Court, the court does not make an order directing the Marshal to make any arrest or deliver the person to any law enforcing officer, but only affirms the judgment of the trial court, and leaves the execution of the judgment to the county officials.

In this instance, we have a person convicted of a felony charge (driving a motor vehicle while intoxicated), which offense is subject to graduated punishment from a term in the penitentiary ranging down to a fine, jail sentence, or both, and presents a complex situation.

In the case of State ex rel. Gentry v. Montgomery, 317 Mo. 811 (a misdemeanor conviction), the court said, at l. c. 814, 815:

"* * * When the trial court received our mandate with directions to execute the judgment, it clearly had the power to grant a parole to the defendant, for the reason that the judgment at all times, whether it be considered a judgment of the circuit court or a judgment of this court, contained our parole law as a part of the judgment. Therefore, it is of no consequence whether the judgment be considered a judgment of the circuit court or a judgment of this court at the time of its execution. While the parole law is a part of the judgment in some felony cases, the trial court loses the power to grant a parole in a felony case on affirmance of the judgment, for the reason that by Section 4095 and 4096 this court is directed to have its marshal execute the sentence pronounced. * * *"

(Emphasis ours.)

Sections 4095 and 4096 referred to in the above quotation are now Sections 4139 and 4140, R. S. No. 1939.

In the case of *Ex parte Foister*, 203 No. 687, the court said, at 1. c. 693:

"It is very earnestly and ably argued by counsel for the petitioner that the proviso in section 2817, which provides that the court shall have no power to parole any prisoner after he has been delivered to the warden of the penitentiary, by implication confers the power upon such court to enter such order of parole before the prisoner has been delivered to the warden of the penitentiary. That section is only susceptible of one reasonable construction, and that is that it is only applicable where the proceeding is entirely confined to the circuit court. In other words, it simply means that if a defendant is convicted and held for some days before the sheriff conveys him to the penitentiary, at any time before he is delivered to the warden the circuit court may exercise the power of parole, but after the judgment and sentence has been executed and the sheriff has delivered him to the warden, then such proviso is a limitation upon such power. But that section has no application to cases pending in the Supreme Court upon appeal, where, under the plain and express provisions of the statute, it is made the duty of this court, where the judgment is affirmed, to take all necessary steps to enforce the execution of that judgment."

(Emphasis ours.)

The underscored portion of the above quotation gives the impression that the statute empowering the circuit court to parole a person convicted of a felony would not be applicable where the case is on appeal before the Supreme Court. We think, from the tenor of these cases, and the statutes, that the Supreme Court did not intend to interfere with the jurisdiction of the trial court, where the punishment imposed was that of a fine, jail sentence, or both.

We are of the further opinion that it would require the inclusion of all the elements in the statutes above quoted to remove

the parole power of the trial court in such cases, and, where the punishment as affirmed is not for a term in the penitentiary, and where the Supreme Court has not directed the Marshal of said court to make the arrest and deliver the convict to the Warden of the penitentiary, the local authorities would not be deprived of their power to parole, since the punishment as imposed and affirmed is comparable to that of the punishment imposed in misdemeanor cases and of which the trial court, or, in this instance, the local parole authorities, would have the right to parole on misdemeanor punishments after an affirmance by the Supreme Court.

Conclusion

Therefore, it is the conclusion of this department that where the Supreme Court has affirmed the sentence of conviction of one convicted of a felony, where the punishment imposed is comparable to that of the punishment for a misdemeanor, and where the Supreme Court has not directed how the sentence should be executed, that the Supreme Court does not intend to interfere with the jurisdiction of the trial court in its authority to parole; and that the trial court, or parole board, as in the instant case, would have the right to exercise its jurisdiction in granting paroles.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

GPW:CP