

CRIMINAL LAW: Discussion of sentences to Intermediate Reformatory and transfer to Penitentiary.

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Honorable Thomas E. Whitecotton
Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Warden Whitecotton:

The Attorney General wishes to acknowledge receipt of your letter of May 28, 1945, in which you make the following request for an opinion:

"Frequently we receive at the Missouri State Penitentiary men under the age of twenty-five years without serious previous criminal histories and who, it would appear from a penological and social point of view, should be incarcerated at the Intermediate Reformatory. However, we are not clear on some points of the law pertaining to transfers from the penitentiary to the reformatory. Would you, therefore, give us your opinion relative to such transfers?"

"The following are examples of two problems with which we are now confronted: A boy is sentenced to the Intermediate Reformatory for two years for stealing an automobile, and at the same time is sentenced to five years to the Missouri State Penitentiary for stealing an automobile, the latter sentence to begin at the expiration of the former sentence. The boy has a good record at the reformatory and will not be nineteen years of age until October, 1945."

"Quite frequently we receive boys seventeen, eighteen and nineteen years of age who, as juveniles, have been at Missouri Training School or similar institutions in other states. There seems to be some division of opinion as to whether or not incarceration as a juvenile would be recognized as a felony conviction.

"It is in such instances as the above that we need your opinion in order to be guided properly in making decisions relative to the transfer to Missouri Intermediate Reformatory of young men who have been sentenced to Missouri State Penitentiary."

The solution of your questions is a matter of statutory construction and application. Due to the fact that the Intermediate Reformatory was established many years after the Penitentiary and that the statutes pertaining to the Reformatory were not as carefully drawn as they might have been, some exceedingly difficult questions can arise in connection with the interpretation and application of these statutes. The laws relating to the Intermediate Reformatory are found in Article 6, Chapter 48, R. S. Mo. 1939. Section 9103 provides for the establishment of the institution, and Section 9117 provides who may be sentenced to it. This section is as follows:

"(9117) If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term proscribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

Also important in considering your questions is Section 8998, R. S. Mo. 1939, relating to the Missouri Training School for Boys, which section provided:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri Training School for Boys; and any boy under the age of seventeen years convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. Any boy under the age of seventeen years convicted of a misdemeanor in any court of record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri Training School for Boys. No boy under seventeen years of age convicted of a felony shall hereafter be committed to the county jail as a punishment for such offense. Any court having a criminal jurisdiction, in which any male person, between seventeen and twenty-five years of age, shall, upon a plea of guilty, or by the verdict of a jury, be convicted of a felony, and his punishment assessed at imprisonment in the penitentiary, may, in its discretion, at the same term at which such plea of guilty is entered or conviction occurs, and before such person is transferred to the penitentiary, commute the punishment to confinement in the Missouri intermediate reformatory for such term as the court may deem proper, but not for a longer time than that fixed in the sentence to the penitentiary; but such court shall first ascertain and determine that said conviction or plea of guilty is the first conviction or plea of guilty of such person for a felony, and that the

previous conduct, habits and associations of the person so convicted or pleading guilty warrant such commutation."

This last section originally related to what is now the Missouri Training School for Boys, but was amended after the construction of the Intermediate Reformatory, with regard to persons between seventeen and twenty-five years of age.

Section 9118, R. S. Mo. 1939, authorized the transfer of persons from the Missouri Reformatory (now Missouri Training School for Boys) and the Penitentiary to the Intermediate Reformatory. This section is as follows:

"Transfers may be made under the following conditions:

"a. As soon as the construction of the intermediate reformatory is to be undertaken, or as soon as its agricultural or industrial activities require laborers, the commissioners of the department of penal institutions shall have power, with the consent of the governor to transfer to the tract of land upon which the intermediate reformatory is to be located any or all inmates of the Missouri reformatory at Boonville and of the Missouri penitentiary, who at the time of their last conviction were between the ages of seventeen (17) and twenty-five (25) years and who are serving their first sentence for conviction of a felony. The number of convicts thus to be transferred at any time is to be limited to the number that can be properly housed, guarded and cared for and that can be employed efficiently, and economically in the construction and operation or maintenance of the intermediate reformatory. In so far as practicable the construction of the intermediate reformatory shall be carried on by means of the labor of such offenders eligible to admission to it. In making such transfers as are herein authorized preference shall be given to those inmates of the Missouri reformatory at Boonville and who are eligible to transfer to the intermediate reformatory. In making the transfer of inmates of the Missouri penitentiary who are eligible to

transfer to the intermediate reformatory preference shall be given to the younger ones and those who for good reason are most worthy or in need of such a transfer.

"b. The department of penal institutions shall have the power, with the consent of the governor, to transfer to the penitentiary any prisoner who subsequent to his committal to the intermediate reformatory, shall be shown to their satisfaction to have been, at the time of his conviction, twenty-five years of age or over, or to have been previously convicted of a felony; and may also transfer any apparently incorrigible prisoner, whose presence in the reformatory appears to be seriously detrimental to the well-being of the inmates of the institution. And the superintendent may, by written requisition, request the return to the intermediate reformatory of any person who may have been so transferred subject to the approval of the commissioners. Each person so transferred to the penitentiary shall be held therein, and subject to all rules and discipline thereof until he becomes eligible for release, according to the rules adopted for the penitentiary, unless recalled to the reformatory, as herein provided, by the department of penal institutions. And it shall be the duty of the warden of the penitentiary to receive such prisoners as may be transferred to him, and properly care for them till such time as their return may be asked for or until the time of their official release from said penitentiary; it is further provided, that if in any case it shall be found by the department of penal institutions and the governor of this state, that a prisoner confined in the Missouri penitentiary or the Missouri reformatory at Boonville, has been improperly sentenced to either of these institutions, and that such prisoner should have been sentenced to the intermediate reformatory, such prisoner may, with the consent

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of the governor, be transferred to the intermediate reformatory, to be and become an inmate therein, subject to the rules and discipline of such reformatory; and it shall be the duty of the general superintendent of said reformatory to receive such prisoner into said reformatory as may be so transferred, and properly care for such prisoner therein until such time as such prisoner may be lawfully paroled or discharged therefrom. In like manner, transfers may be made from the Missouri reformatory at Boonville to the intermediate reformatory of any offender who, subsequent to his commitment, shall be shown to their satisfaction to have been, at the time of his conviction seventeen years or more of age, but less than twenty-five and for the first time convicted of a felony. In case of any transfers herein set forth the convict is not to remain under the custody of the department of penal institutions for a longer time than that fixed in the original sentence."

Each of these sections requires that persons sentenced or transferred to the Intermediate Reformatory be serving sentence under a first conviction. Under this situation of the law, in the first example you use, the second sentence could not have been to the Intermediate Reformatory even though the boy is within the proper age group to be sentenced to the Intermediate Reformatory.

In regard to the second matter, a judgment finding a juvenile to be a delinquent is not a conviction of an offense and should never be so considered. The laws relating to juvenile delinquency are found in Articles 9 and 10, Chapter 56, R. S. Mo. 1939, article 9 treating the matter in counties of 50,000 inhabitants and over, and article 10 pertaining to counties under 50,000 inhabitants. In each of these articles is found a definition of a delinquent child. Section 9673, Article 9, Chapter 56, defines a delinquent as follows:

"* * * The words 'delinquent child' shall include any child under the age of seventeen (17) years who violates any law of this state, or any city or village ordinance,

or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of ill-repute; or who knowingly patronizes or visits any policy shop or place where any gaming device is or shall be operated; or who patronizes or visits any saloon or dramhouse where intoxicating liquors are sold; or who patronize or visits any public pool room or bucket shop; or who habitually wanders about the street in the nighttime without being on lawful business or occupation; or who habitually wanders about the streets or roads or public places during school hours without being on any lawful business or occupation; or who habitually wanders about any railroad yards or tracks, or jumps or who habitually hooks on to any train, or enters any car or engine without lawful authority, or who is either habitually truant from any day school, or who, while in attendance at any school, is incorrigible, vicious or immoral; or who habitually uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct in any public place or about any schoolhouse; or who habitually and willfully, and without the consent of its parents, guardian, or other person having legal custody and control of such child, absents itself from home and remains away at night, or loiters and sleeps in alleys, cellars, wagons, buildings, lots or other exposed places. * * *

And Section 969B, Article 10, Chapter 56, has the following definition:

"* * The words 'delinquent child' shall include any child under the age of seventeen years who violates any law of this state, or any city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters

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a house of ill-repute or any place where any gaming device is operated; or any saloon or dramshop where intoxicating liquors are sold; or who is either habitually truant from any day school, or who, while in attendance at any school, is incorrigible, vicious or immoral. * *"

These definitions are not identical but a judgment of delinquency under either has the same effect. The purpose of the Juvenile Act is not to convict minors of criminal acts but to safeguard and reform children that may have erred, *Ex parte Januszewski*, 196 Fed. 123. The following quotation from the case of *State ex rel. Matacia v. Buckner*, 300 Mo. 559, l. c. 364, is very enlightening on the juvenile delinquency law:

"The second contention is that the proceeding is one for the punishment of crime and that the act is invalid because it denies relator the protection of certain constitutional provisions applicable to trials for crime. There is language in the act that gives color to the view that it authorizes trial and punishment for crime. It is obvious that a child on trial for crime with a view to his conviction and punishment for the crime itself, as such, is entitled to invoke all the constitutional provisions applicable in such a situation. If he is old enough to be tried and punished for crime, he cannot be denied constitutional rights as a defendant in a criminal case because he has not attained a particular age. (*State ex rel. v. Tinker*, 258 Mo. l. c. 19, et seq.) The act has another aspect in which it is not affected by this rule. Its principal, if not sole, purpose is not trial and punishment for crime, but the protection and support of neglected children and the reformation of delinquent children. It is well settled that in the case of delinquent children the State has the power in proper circumstances to take over their custody in order to insure their security, training

and reformation (State ex rel. v. Tincher, supra, and cases cited; In re Sharp, 15 Idaho, 120, 18 L. R. A. (N. S.) 886, and note; In re Hook, 95 Vt. 497, 115 Atl. 730.) The power exerted by the State, parens patriae, is asserted in its right to supply proper custody and care in lieu of that of which neglected and delinquent children are deprived. (Farnham v. Pierce, 141 Mass. 1, c. 205; Ex parte Ah Peen, 51 Cal. 280; In re Turner, 94 Kan. 115, and cases cited.) A proceeding under the act, the aim of which, as in this case, is the exertion of the State's power, parens patriae, for the reformation of a child and not for his punishment under the criminal law, is not a criminal case, and the constitutional guaranties respecting defendants in criminal cases do not apply. This is obviously true and is the rule of the decisions. (In re Sharp, supra, and cases cited; Com. v. Fisher, 213 Pa. 48; State v. Brown, 50 Minn. 353; Pugh v. Bowden, 54 Fla. 302; Ex parte Bowers, 78 Ore. 1, c. 395; In re Powell, 6 Okla. Cr. 1, c. 507 et seq.; Ex parte Januszowski, 196 Fed. 123; United States ex rel. v. Behrensohn, 197 Fed. 953; Ex parte Bartee, 76 Tex. cr. 1, c. 287 et seq.) In this case the alleged criminal act of relator is not set up as a charge of crime and a predicate of punishment under the criminal law, but merely as the thing which brings relator within the definition of 'delinquent children' in the act and shows he is within the class over which the State is authorized to exert its power of quasi-parental control. (Childress v. State, 133 Tenn. 1, c. 123.) The informations are so drawn. The proceeding is not transformed into a prosecution for crime by the mere adoption of practice in criminal cases as far as applicable under the act. The purpose and substance of the act remains as before. Convenient machinery at hand is

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borrowed by the act to avoid the necessity of setting up independent machinery of its own."

Another helpful quotation is taken from the case of State ex rel. Shartel v. Trimble, 353 Mo. 888, l. c. 891:

"* * * A minor under the age of seventeen years cannot be convicted of a crime in a proceeding in a juvenile court, as the term conviction is understood in law. (State ex rel. v. Walker and Ex parte Bass, supra; State v. Naylor, 328 Mo. 335, 40 S. W. (2d) l. c. 1082 (6).) The juvenile court can only adjudge a child a neglected child or a delinquent child. The two terms have a distinct and separate meaning under the Juvenile Act. A child may be of good character and yet, through no fault of its own, be declared a neglected child. (3) A delinquent child means one who has been guilty of violations of the law or is incorrigible, vicious or immoral. (Sec. 14136, R. S. 1929, Ex parte Naccarat, 328 Mo. 722, 41 S. W. (2d) 176.) If a child is proceeded against as a delinquent the final judgment of the juvenile court, if against the child, can only be a judgment declaring it to be delinquent. It is immaterial whether the misconduct charged against the child, by the information, consists of violations of the criminal statutes or of conduct, though not violations of the law, which nevertheless renders the child incorrigible, vicious or immoral. In either case the judgment must be that the child is a delinquent. The juvenile court then has the authority to place the minor on probation or in some institution other than the penitentiary. * * *"

From these extracts from decisions it is apparent that a judgment of delinquency rendered in the juvenile court is not a conviction but a civil judgment.

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Conclusion

From the foregoing it is the conclusion of this Department that sentences to the Intermediate Reformatory can only be pronounced upon a first conviction and that any subsequent sentence must be to the Penitentiary. Further, that a judgment of juvenile delinquency cannot be considered as a conviction, even though the delinquency was proven by proof of acts which constitute felonies under the laws of Missouri.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

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