

INSTITUTIONS: Writ of Habeas Corpus may issue to bring prisoner from penal institution to answer and defend a criminal charged alleged to have been committed prior to incarceration.

10-10

October 9, 1935



Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

Your request for an opinion dated September 20, 1935, is as follows:

"This office is confronted with a rather unusual question of proceeding and I would appreciate the suggestions of your office concerning the following situation.

Several months ago one Russell Storck was apprehended in this city in the act of burglarizing a large wholesale mercantile establishment. He had his preliminary hearing and was bound over to await the action of our local Court of Common Pleas. At the time the case was called in the Court of Common Pleas a change of venue was requested and granted by the Court, the cause being sent to the Circuit Court of Marion County at Palmyra. In the default of bond, Storck was committed to the Sheriff of this County. About a month ago a Habeas Corpus proceeding was filed in the Supreme Court for his release on bond and the Supreme Court ordered his release under a Five Thousand Dollar bond. At this hearing Your Mr. Nolen of your office handled

the matter. The application for bond was heard by Judge Alford and the sureties being sufficient, Storek was released and the case especially set for October 28th. Soon after his release Storek was apprehended at Poplar Bluff charged with burglary in the second degree. He was either convicted or entered a plea of guilty in the Circuit Court of Butler County, under the name of Jack Monroe, and was sentenced to serve a term of two years in the Missouri State penitentiary and at the present time is now an inmate in that institution. This office is particularly desirous of trying Storek, alias Monroe on October 28th and it is my opinion that our Circuit Judge is empowered, upon proper application, to issue a writ of Habeas Corpus Ad Testificandum directed to the warden of the penitentiary ordering Storek's release for the purpose of trial and requesting that he be delivered in person to the Sheriff of our County.

I have been unable to find any authorities pro or con on this particular point, but am advised by Warden Saunders of the penitentiary that such procedure has been followed on various occasions.

I am strongly of the opinion that Storek, alias Monroe purposely arranged the matter in Butler County so as to avoid trial in this court where he is charged with burglary and larceny under the habitual criminal act. I would deeply appreciate any suggestions your office might have as to the legality of removing him from the penitentiary for the purpose of trial and also as to your thoughts on my suggested procedure.

Thanking you and with sincere personal regards, I am."

In the case of State v. Rudolph, 17 S. W. (2d) 932, 1. c. 933, our Supreme Court said:

October 9, 1935

"There is no constitutional or statutory provision prohibiting the trial of a defendant during the time of his incarceration in the penitentiary, and the guarantee by the Constitution of a speedy trial makes no exception of a defendant so incarcerated. Section 22, art. 2, Const. If Meininger could be tried after sentence and while under bond, there is no reason why the defendant, Stocks, cannot be tried after sentence and during the service of time in the penitentiary. On principle, there is no difference. Those interested will find this conclusion sustained by all the cases cited and reviewed in State ex rel. Meininger v. Breuer, supra, 304 Mo. loc. cit. 406-414, 264 S. W. 2d. In the cases there reviewed, all the courts hold that a convict may be taken by the state from the penitentiary and tried for an offense committed prior to his incarceration. To hold otherwise would make of the penitentiary a shelter for criminals."

Again at 934, the Court said:

"The writ at common law includes several forms. Among the number: (a) Habeas corpus ad subjiciendum (you have the body to submit), (b) habeas corpus ad prosequendum (you have the body to prosecute). 21 Cyc. 353; Burrill, L. Dict.; 3 Blackstone, Comm. 129, 130.

Our Code only regulates the use of the principal writ (habeas corpus ad subjiciendum). The petition herein does not call for the principal writ but for a writ ad prosequendum; therefore, we are confronted with no statute."

CONCLUSION.

We are of the opinion that where one charged with burglary is out on bond, and while on bond convicted of an-

Honorable Walter G. Stillwell

-4-

October 9, 1935

other crime and committed to the State Penitentiary, said convict can be brought from the Penitentiary to the county and jurisdiction of his original crime and can be prosecuted for the original crime upon the issuance of the Writ of Habeas Corpus ad prosequendum by the Circuit Judge having jurisdiction of the original crime. Said Writ should direct the Warden to give custody of the prisoner to your sheriff that he may be prosecuted as charged.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H