

PENAL INSTITUTIONS: Conditional Commutation by Governor is forfeited when ?

January 30, 1939



Mr. Robert C. Edson
Director of Probation and Parole
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated December 16, which reads as follows:

"At the request of the Board of Probation and Parole I am submitting the following facts to you with the request that you render an opinion for this Board concerning the same;

Elmer Pettus was received at the Algoa Intermediate Reformatory and was registered as #2089. He was released on parole from this institution. The final and maximum date of his sentence was November 28, 1938. This was the maximum day of servitude for the penalty imposed by the Court. However, on November 14th, 1938 he pleaded guilty in Scott County on the charge of making a forged and counterfeit check, for which he received a three year sentence at the Missouri State Penitentiary. The Board of Probation and Parole did not receive a report of this violation and sentence until after November 28, 1938, which, as previously stated, was the maximum expiration date of his original sentence to Algoa Intermediate Reformatory. Now, the Board is desirous of obtaining an opinion from you as to whether, in spite of the fact that a violation of parole was committed prior to the final date of expiration, yet because no action was taken by the Board until the maximum date of expiration of sentence, do we now have authority to revoke the parole of the said Elmer Pettus.

January 30, 1939

I trust that I have given you sufficient information so that an opinion may be rendered in this case. However, should you desire more information please be assured that we will do our best to furnish it to you."

In State vs. Asher 246 S. W. 911, l. c. 913, the Supreme Court said:

"Section 8, article 5, of our Constitution gives the Governor 'power to grant * * * pardons, after conviction * * * upon such condition and with such restrictions and limitations as he may think proper.'

Section 4144, R. S. 1919, provides that- -

'In all cases in which the Governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper.'

No provision is made either in the Constitution or the statute for 'paroles' by the Governor. The question therefore depends on the meaning of word 'parole', used in reference to discharge of prisoners from the penitentiary. * * * * *

It must follow from the foregoing that a parole is a conditional pardon, and that a 'parole' given by the Governor is but an exercise of the power vested in him by the Constitution and statute with respect to the issuance of conditional pardons."

In the case of Jacobs vs. Crawford, 308 Mo. 302, 272 S. W. 931, l.c. 933, the Supreme Court said:

"Petitioner was not entitled to a parole as a matter of right. The granting thereof was a matter of grace upon the part of the Governor. Petitioner accepted it, burdened with the condition that, if he did not keep his parole, it might be revoked,

and that he would be compelled to 'serve out the remainder of his sentence.' Such condition was neither illegal, immoral, nor impossible of performance. The condition was stated in the order granting the parole, and petitioner is bound thereby.

Having failed to observe the conditions of his parole, petitioner was arrested and returned to the penitentiary to serve out the remainder of his sentence. As the remainder of such sentence has not been served, because petitioner is not entitled to have the time that he was at large under his parole and prior to its revocation deducted from the remainder of his sentence, his imprisonment was legal when our writ was issued, and has not since become illegal."

46 Corpus Juris, page 1201, Section 56 reads in part:

"The conditions of a pardon may be such as to be operative for the period of time for which the convict was sentenced, or for some less period; and by the weight of authority a pardon is not illegal or impossible of performance because its conditions require observance for a period of time extending beyond that in which the sentence should have been served * * * *"

46 Corpus Juris, page 1202, Section 57 reads in part:

"A conditional pardon is a grant to the validity of which acceptance is essential. It may be rejected by the convict; and if rejected there is no power to force it upon him. When once accepted it follows that its conditions become binding * * * *"

46 Corpus Juris, page 1202, Section 61 reads in part:

"A breach of the condition of a pardon avoids and annuls it. Execution of the original sentence may then be enforced. This is true, although the term for which the convict was sentenced has expired unless the application of a different rule is required, by operation of a statute, or by the pardon itself, * * * * *"

46 Corpus Juris, page 1204, Section 63 reads in part:

"Where a convict is pardoned on condition that if after discharge, he should commit a felony, the commutation should be void, and, in addition to the penalty assessed for the subsequent felony, he should serve so much of his original conviction as he had not served at the time of the discharge, on a breach of the condition he may be detained by the warden. * * * * *"

CONCLUSION

We are of the opinion that in Missouri, the Governor's conditional commutation on sentence of a convict, when executed under constitutional and statutory prerogative, by operation of the law, is in fact a conditional pardon.

In your request you have not favored us with copies of the provisions of the conditional commutation of convict Elmer Pettus, but have submitted us a form in blank which is usual in such cases, and containing the provisions and condition "that the said _____ shall not violate any law in Missouri, * * * * that if recipient fails in any respect to comply with the condition of commutation, then the commutation shall stand forfeited and the original sentence shall stand and remain in full force." We assume these conditions to be identical in the matter of convict Elmer Pettus, and we assume that the term fixed by the Governor in said conditional commutation did not end on a date prior to the maximum date of his sentence, that is November 28, 1938.

Under the facts which you have submitted, and the facts which we have assumed as above set out, we are of the opinion that convict Elmer Pettus' conditional commutation was in force at the time that

January 30, 1939

he committed his subsequent crime hence his conditional commutation was forfeited by his criminal act. This being true, it was proper for the Governor, on recommendation of the Parole Board, at the subsequent time that he discovered this forfeit conditional commutation, to direct the warden to apprehend the convict and imprison him on his original sentence. This power of the Governor is not abated by the reason of the fact that his order to apprehend is made subsequent to the maximum date of expiration of sentence.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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