

PARDONS AND
PAROLES:

Special trial judge has no authority to parole a defendant, and the successor of the judge in the judicial circuit where the case was tried still maintains jurisdiction.

September 14, 1939

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

9-19



Dear Sir:

We are in receipt of your request for an opinion, under date of September 9th, 1939, which reads as follows:

"Porter Newman was charged with attempted arson and was tried by jury in the Circuit Court of Gentry County. Honorable Thomas A. Cummings, Judge of Judicial Circuit No. 4, was disqualified in the case. Honorable Rex Moore, then Judge of Judicial Circuit No. 3, was called in by Judge Cummings, and did, on September 21, 1937, preside at the said cause in the Circuit Court of Gentry County. The jury returned a verdict of guilty, to which they affixed a separate recommendation on the part of the jury that the defendant be paroled. In compliance with the recommendation of the jury the defendant was sentenced by Judge Moore to two years in the penitentiary and then was paroled.

"Since that time Judge Cummings has died. Honorable Ellis Beavers has been elected and is now serving as Judge of Judicial Circuit No. 4. Judge Moore has been relieved of his duties by mandate of the people, and the Honorable V. C. Rose is now serving as Judge of Judicial Circuit No. 3.

"Judge Moore states that he was called in this case as Judge of the Third Judicial Circuit to serve as a Special Judge under the statute. He further states that he was not recommended as a member of the Bar as a Special Judge of the case.

"The question we would like to determine is-- does Judge Beavers, as Judge of Judicial Circuit No. 4, in which the defendant was tried, maintain his jurisdiction, or does Judge Rose, the successor of Judge Moore, the Special Judge and also Trial Judge, maintain jurisdiction or does jurisdiction remain with Judge Moore as a member of the Bar?

Section 3648 R. S. Missouri, 1929, reads as follows:

"When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or, fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

Section 3651, R. S. Missouri, 1929, partially reads as follows:

"If, in any case, the judge shall be incompetent to sit, for any of the causes mentioned in section 3648, and no person to try the case will serve when elected as such special judge, the judge of said court shall in either case set the case down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request another circuit or criminal judge to try the case; *

* * * "

Section 3651, supra, in 1919 was known as Sec. 3994, R. S. Missouri. This section was passed upon in the case of State v. Kelly, 274 S. W. 731, l. c. 733, par. 3, where the court said:

" * * * Was Judge Ing such judge on the day he attempted to grant the paroles? When he appeared and assumed the duties of trial judge in the case of State v. Morgan and Burnett he thereupon became invested with the power of which the regular judge had been deprived by the filing of the disqualifying affidavits by the defendants. That power is defined and delimited by sections 3991 and 3994 (R. S. 1919) of the change of venue statute. The applicatory parts of those sections are as follows: Section 3991:

"! When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause * * * when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

"Section 3994:

"If, in any case, the judge shall be incompetent to sit, for any of the causes mentioned in section 3991, * * * the judge of said court shall * * * set the case down for trial * * * and notify and request another circuit or criminal judge to try the case; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said case; and he shall, during the trial of said case, possess all the powers and perform all the duties of the judge at a regular term of said court.'

"The first divests the regular judge of the power 'to hear and try said cause'; the second confers upon the judge called in 'all the powers * * * of the judge at a regular term of said court,' 'during the trial of said case.' 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, 8 S. W. 409; Ex parte Clay, 98 Mo. 578, 11 S. W. 998; State v. Wofford, 111 Mo. 526, 20 S. W. 236.

"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 (sections 4156 and 4157, R. S. 1919) and that judgment has become a finality (section 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. Consequently he was not the judge of the Cape Girardeau county circuit court on the 31st day of August, 1923, for any purpose whatever."

Under the holding of the above case the court made no distinction between a special judge elected under Section 3649 R. S. Missouri, 1929, or a judge requested to serve under Section 3651, supra. In the Kelly case the court held that a special judge or a requested judge did not have power to parole, even though they sat as a trial judge in the trial of a case, but they did hold that the special judge, or requested judge, had the authority to pass upon motions for new trials, granting of an appeal and the signing up of bills of exception. Under the ruling of this case Judge Rex Moore, then Judge of Judicial Circuit No. 3, and acting as a special or requested judge of Judicial Circuit No. 4, was not authorized in the paroling of the defendant after the sentence in conformity with the jury verdict. In that event the jurisdiction of the defendant still remained with the Judge of the Judicial Circuit No. 4, who was at that time the Honorable Thomas A. Cummings.

In your request you state that Judge Cummings has died and the Honorable Ellis Beavers has been elected and is now serving as Judge of Judicial Circuit No. 4. There is no question but the present Judge of Judicial Circuit No. 4 has jurisdiction over the defendant for the reason that he is a successor to all of the powers and duties inherent to Judicial Circuit No. 4. It was so held in the case of State v. Messino, 30 S. W. 2d 750, l. c. 756, par. 4, where the court said:

"We have found no case in which the authority of the successor of the trial judge to determine on its merits a motion for new trial or to settle and sign a bill of exceptions was denied on the ground that it would be a denial or abridgement of the constitutional right to trial by jury. While there are a number of early cases denying the authority, where no statute conferred it, for reasons given in Bass v. Swingley and U.S. v. Harding et al., supra, the tendency of later decisions in both federal and state jurisdictions is to recognize it, especially since stenography has come into general use as a means of preserving the evidence and incidents of the trial. As said in People v. McConnell, 155 Ill. 192, 40 N. E. 608, 610: 'Every facility possessed by the trial judge, except that of a personal recollection, is within the power of his successor in office. * * *'"

In this case a conviction was had and the death penalty assessed, but before a motion for new trial was heard the trial judge died, and the court held the new successor had the authority to pass upon the motion for new trial, although he had not heard the evidence in the case. In the case of Kelly, supra, the cause was tried by Special Judge Ing, who, after conviction, paroled the defendant, but the regular Judge, Frank Kelly, ordered the issuance of a capias execution for the collection of the fines and costs which had been adjudged

against the defendants in the cause. The writs directed the sheriff of Cape Girardeau County to collect the fines and costs on May 21st, 1923, and on August 31st, 1923, Judge Ing, the Special Judge made an order paroling the defendants from the fine and jail sentence. On a writ of prohibition, at the relation of the sheriff, who, on account of the parole issued by Judge Ing, refused to serve the execution, the writ of prohibition was dismissed for the reason that Judge Ing had no authority to parole defendants.

CONCLUSION

In view of the above authorities, it is the opinion of this department that Judge Rex Moore, then Judge of Judicial Circuit No. 3, and later acting as a special judge, or requested judge, of Judicial Circuit No. 4, was not authorized to parole defendant convicted in the trial of the cause where he was the trial judge.

It is further the opinion of this department that the jurisdiction of the defendant tried by Judge Rex Moore, as special judge or requested judge, still remained in the Judge of the Judicial Circuit No. 4, as to parole matters.

It is further the opinion of this department that since Judge Thomas A. Cummings has been succeeded by Judge Beavers, as Judge of Judicial Circuit No. 4, the jurisdiction of the parolee remains with Judge Beavers.

It is further the opinion of this department that since Judge Rex Moore, as acting and requested judge of Judicial Circuit No. 4, was not authorized to issue a parole under the Kelly case, his successor Judge Rose, now Judge of Judicial Circuit No. 3, cannot maintain jurisdiction of the defendant or have an execution issued thereunder.

In rendering the above opinion we are not unmindful of the case of Ex parte J. Sherwood Smith, 232 Mo. App. 521; the opinion in which was rendered in March, 1938. This case is in direct conflict with the case of

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State v. Kelly, 274 S. W. 2d 731. In the Smith case the Springfield Court of Appeals has held that a special judge may parole, by reason of certain laws enacted in 1937, page 403. We are still compelled to rely on the Supreme Court decision until the Court of Appeals' decision is finally adjudicated. The issues in the Court of Appeal case are now pending in the Supreme Court of the State of Missouri, by way of a Writ of Prohibition, which case is set to be heard en banc on October 4th, 1939. The case in the Supreme Court is listed as State ex rel Wilkerson v. Kelly, J.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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WJB:RW