

PARDONS AND PAROLES - Judges of circuit and criminal courts may place on probation defendant under certain circumstances.

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February 4, 1942

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Hon. G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri

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Dear Sir:

Your request for an opinion in reference to Section 9156 R. S. Missouri, 1939, has been received.

You inquire as to whether or not Section 9156, supra, overrules the holding in the cases of *Ex parte Bugg*, 163 Mo. App. 44, 145 S. W. 831, and *Ex parte Thornsberry*, 254 S. W. 1087. You further inquire as to whether there can be an execution for costs after a parole or suspension of sentence has been granted. There is quite a distinction between a pardon and a judicial parole and suspension of sentence.

Under Article 5, Section VIII of the Constitution of Missouri, only the Governor is granted the power of pardon. However, under Section 9156, supra, the several courts of this State may place on probation any defendant eligible for judicial parole.

Section 9156, supra, reads as follows:

"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, may place on probation any defendant eligible for judicial parole under Sections 4199 to 4211, inclusive, of Article 18, Chapter 30, Revised Statutes of Missouri, 1939. After a convic-

tion, or a plea of guilty, the courts and boards of parole named in this Section may suspend the imposition or execution of sentence of any person legally eligible for judicial parole under said Sections 4199 to 4211, inclusive, and may also place the defendant on probation."

This Section was enacted the first time in the Laws of Missouri, 1937, page 400, section 1. In that same Act it was provided that the appointment of members of the parole board who would have jurisdiction over inmates of the several penal institutions of the State.

In the case of Ex parte Bugg, 163 Mo. App. 44, l. c. 47, the court said:

"On the question of the power of the court to indefinitely suspend execution after sentence and judgment, the conflict is not so great. This power has been upheld in North Carolina, State v. Whitt, 23 S. E. 452, but the weight of authority seems to be largely against this proposition and to our mind it is clear in the absence of a statute authorizing it, to permit a court after judgment is pronounced to indefinitely postpone its execution is in effect to permit the court to usurp the pardoning power which is lodged elsewhere and cannot be upheld upon either reason or authority. \* \*"  
(Underscoring ours.)

It will be noted that in the above quotation the court specifically said: "It is clear that in the absence of a statute authorizing it." The opinion in this case was handed down by the Springfield Court of Appeals on April 1, 1912.

The law authorizing a judicial parole or probation was enacted and is set out in the Laws of Missouri, 1937, page 400. The legislature in enacting Section 9156, supra, has overruled the rule of law that was set out in the case of Ex parte Bugg, supra.

You also mentioned the case of Ex parte Thornberry, 254 S. W. 1087. In that case, at page 1090, par. 11, the court said:

"The reason for the rule is found in the nature of our systems of government, national and state. The power to grant reprieves and pardons and that to sentence for crime being distinct and different in their origin and nature, their exercise has been kept separate and distinct, the one having been confided to the executive and the other to the judicial department. The recognition of the power of a court to suspend a sentence indefinitely or to stay its execution would be to allow the judicial department to usurp the power and exercise one of the functions of the executive department. This is upon the well-grounded theory that a court's powers in the administration of the criminal law is limited, upon the conviction of the accused, to the imposition of the sentence authorized to be imposed. 8 R. C. L. p. 248, sec. 252 et seq. and cases." (Under-scoring ours.)

It will be noted that in the above partial opinion the court said: "that a court's powers in the administration of the criminal law is limited, upon the conviction of the accused, to the imposition of the sentence authorized to be imposed."

The opinion in this case was handed down by the Supreme Court of Missouri en banc on October 6, 1923, and that rule of law has been overruled by Section 9156, supra, which was enacted and set out in the Laws of 1937, page 400, section 1.

In your request you also state that there can be no execution for cost or fee bill obtained by reason of such parole or suspension of sentence by the court authorized to grant such judicial parole or suspension of sentence. It has been held in this State that even upon a commutation, parole or pardon by the Governor, the parolee, or defendant, while at large, was still under sentence.

In the case of Lee v. Gilvan, Warden, 229 S. W. 1045, Par. 1, the court said:

"By section 12543, R. S., the Governor is authorized to grant commutations, paroles, and pardons. Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of section 2292, and, having been charged, tried, and convicted of another offense while so at large, 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative."

The criminal cost sections are Sections 4220, 4221, 4222, 4223 and 4225 R. S. Missouri, 1939. In all of the sections it does not refer to the sentence, but merely says "shall be convicted." Section 4221, supra, provides for the payment of costs by the State in certain cases, where the defendant has been convicted and has been sentenced. Under Section 9156, supra, however, and under Sections 4199 to 4211, inclusive, (R. S. Missouri, 1939)

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no parole can be granted until there is a sentence of punishment.

In your request you are assuming that the courts, in granting the judicial parole have not sentenced the defendant, but the courts, in complying with Section 9156, supra, and Sections 4199 to 4211, inclusive, supra, of Article 18, Chapter 30, R. S. Missouri, 1939, must first sentence the defendant, and, if he is eligible under Section 4199 to 4211, inclusive, may then place said defendant on probation.

#### CONCLUSION

In view of the above authorities, it is the opinion of this Department that Section 9156, and Sections 4199 to 4211, inclusive, R. S. Missouri, 1939, are later laws and change the rules in the holdings in the cases of Ex parte Bugg, 163 Mo. App. 144, 145 S. W. 831 and Ex parte Thornberry, 254 S. W. 1087.

Respectfully submitted

W. J. BURKE  
Assistant Attorney General

APPROVED:

VANE C. THURLO  
(Acting) Attorney General

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