

CRIMINAL PROCEDURE: On disqualification of a requested judge, the regular judge and not the requested judge shall request another judge.

June 24, 1943



Mr. G. Logan Marr
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First National Bank Building
Versailles, Missouri

Dear Sir:

We are in receipt of your letter of June 24, 1943, in which you request an opinion from this department, as follows:

"Before Judge Blair of our circuit went to the army, he specially set for June 21, a murder trial, and admonished the defendant to be sure and be ready for trial. The Court order provided that Judge W. M. Dinwiddie of Columbia would be over and take charge of the case on June 21, 1943, the adjourned day of the regular April term 1943. This was by virtue of authority of sec 4040-1939.

"Judge W. M. Dinwiddie had to hold court in his circuit, in Columbia, and could not come here on June 21, the day set. Judge Blair, then arranged, to have Judge Chas. Jackson to come up from the Camden County Circuit. Then when June 21, came, Judge Chas. Jackson, had to hold court in Camden County, and he Chas. Jackson, sent Judge Tom Moore from Ozark, Mo., of the 31st Circuit. Judge Tom Moore, held Court here on June 21, and Court was adjourned to Wednesday June 23, 1943.

"Judge R. A. Bruerer of Gasconade County, was up, today, and he refused to take jur-

isdiction, saying that the only judge to act as a substitute judge, was Judge W. M. Dinwiddie.

"In the murder case, that Judge Tom Moore continued to July 26, 1943. The case was not tried because the defendant turned up in Court without an attorney, and the local attorneys that were appointed by the Court, begged for a continuance on the ground that in a murder case they could not get ready on three hours notice.

"Here is the question that I raising, what kind of legal tangle is the record on, in this business of substitute judges calling in other judges to try the case. I am sure that there will be no stipulation of agreement between the state and the attorneys for the defendant, to have Judge Tom Moore try the case July 26. If the defendant goes to trial and is convicted and is sent to the pen, has he been tried by a judge with jurisdiction and authority to set in the case? In case of the absence of the regular judge, it seems that the statute should be closely followed, and that any conviction that the state should be made to stand up. These two continuance in this state case has been very expensive because the witnesses have been out of Kansas City and St. Louis. What is your opinion about Judge Tom Moore trying the case on July 26, 1943."

Section 4040, R. S. Mo. 1939, reads as follows:

"If, in any case, the judge shall be incompetent to sit, for any of the causes mentioned in section 4037, 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; 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, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require, and may grant a change of venue in said case to the circuit court of another county in the same circuit, or to another circuit or criminal court; and when said cause shall be removed to the circuit court of another county in the same circuit, it shall be the duty of the judge so requested to appear and hold the court at the time set for the trial of said case in the circuit court of the county to which said case shall be removed: Provided, that if the person elected as such special judge shall refuse to serve, or if the judge so requested shall fail to appear and hold the court at the time appointed for the trial of said case, the judge of said court shall reset said case for trial to suit the convenience of the judge so requested to try said case, or may notify and request the judge of some other circuit to appear and try said cause as heretofore provided. Should said judge so requested fail to appear and hold the court at the time appointed for the trial of said case, the judge of the court shall order a change of venue in said case to some other circuit. Said order may be made in term time, or by the judge of the court in vacation, by an order in writing, which the judge shall file with the clerk of the court in which such cause is pending. Whenever the judge so requested shall appear and hold the court for the trial of said case, he shall, in addition to the

salary now allotted by law, receive his actual expenses and five dollars per diem for the time necessarily engaged in the trial of said cause, and in going to and returning from the place of trial, which shall be paid out of the state treasury upon the certificate of the clerk of the court in which such cause is pending. Whenever the special judge elected to try a cause shall appear and hold the court for the trial thereof, he shall receive ten dollars per day for the time necessarily engaged in such trial, and five dollars per day while going to and returning from the place of trial if he reside outside of the county where said cause is tried, to be paid out of the state treasury upon the certificate of the clerk of the court where said cause is tried."

The above section was passed upon by the Supreme Court of this state in the case of State v. Gillham, 174 Mo. 671, which reversed the opinion of the Court of Appeals in the same case, reported in 97 Mo. App. 296. In this case the Supreme Court of Missouri, at page 672, said:

"On December 5, 1900, an information was filed against the appellant in the St. Louis Court of Criminal Correction charging him with a criminal offense. Subsequently an amended information was filed. On the said fifth day of December, the date of the filing of the first information, Honorable Willis H. Clark, the regular judge of said court, voluntarily disqualified himself to try the cause against the appellant and called in Judge E. M. Hughes of the Eleventh judicial circuit to try it. As Judge Hughes failed and refused to sit, Judge Clark called in Judge Neville of the

Twenty-third judicial circuit, the appellant objecting and excepting to that order. Afterwards on February 28, 1901, affidavits were filed by the appellant disqualifying Judge Neville; whereupon on the same day that judge made an order calling in Hon. J. W. McElhinney of the Thirteenth judicial circuit to sit in the case, to which order the appellant at the time objected and excepted. The cause was tried before Judge McElhinney, the defendant found guilty and his punishment assessed at \$200, from which judgment he appealed.'

* * * * *

"* * * In the case of State v. Wear, 145 Mo. 162, BURGESS, J., discussing section 4177, Revised Statutes 1889, very similar to this section now under discussion, said: 'The defendant and prosecuting attorney could avail themselves of it or not, just as they saw proper, and as the record does not show to the contrary, the presumption will be indulged that it was their own fault that they did not do so, and that they in fact waived the privilege.'

"With these views, we are clearly of the opinion that Judge Clark had the authority to invite Judge Neville to try said cause.

"This brings us to the last and most vital question in this case. The record in this cause discloses that Judge Neville responded to the request to try this cause; but it further appears that defendant, by application in due form, disqualified him from presiding in the trial of the case. Whereupon, on the same day, Judge Neville made an order calling in Judge McElhinney, judge

of the Thirteenth circuit, to try said cause. To the making of this order, objections and exceptions were duly preserved. It is earnestly urged that Judge Neville had no power or authority to make the order requesting Judge McElhinney to try this case. This is the question that confronts us and it is important, for it is the first time that this precise question has been presented to this court for review.

"Under the law, courts of general jurisdiction have certain inherent powers, but this particular power to request the judge of another circuit to try a case, does not fall within the inherent power vested either in the court or the judge. This authority must depend for its support absolutely upon the provisions of our statute. The authority for the exercise of the power to request the judge of some other circuit to try the cause is contained in section 2597, Revised Statutes 1899, which provides, so far as pertinent to the question involved:

"If, in any case, the judge shall be incompetent to sit for any of the causes mentioned in section 2594, 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 cause down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request the judge of some other circuit to try the cause; 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 cause; and he shall, during the trial of said cause, possess all the powers and perform all the duties of a circuit judge at a regular term of such court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require,

and may grant a change of venue in said cause to the circuit court of another county in the same circuit, or to another circuit; and whenever said cause shall be removed to the circuit court of another county in the same circuit, it shall be the duty of the judge so requested to appear and hold the court at the time set for the trial of said cause in the circuit court of the county to which said cause shall be removed: Provided, that if the person elected as such special judge shall refuse to serve, or if the judge so requested shall fail to appear and hold the court at the time appointed for the trial of said cause, the judge of said court shall reset said cause for trial, to suit the convenience of the judge so requested to try said cause, or may notify and request the judge of some other circuit to appear and try said cause, as heretofore provided.'

"It will be observed that this section confers this power upon the judge of the circuit, or the judge of the particular court, of which he is judge, and not upon the court, and the very terms of this section indicate clearly that this power is vested in the regular judge of the circuit or of the court, and not in the judge who may temporarily be exercising powers of the regular judge, in some particular case. The language of that section is, 'notify and request the judge of some other circuit to try the cause.'

"This statute clearly intended, to the end that judges of circuits or of courts might dispose of the cases pending before them, to confer the power upon the judges of these courts, to request a judge of another circuit to try such causes as are contemplated by law.

"The rule as to where the power to request the judge of another circuit is vested, is

clearly and forcibly announced in the case of State v. Newsum, 129 Mo. 154. BURGESS, J., speaking for the court, says:

"The statute does not require that the request by the judge of one circuit of the judge of another circuit court to hold a term of court, or part thereof, or to try any particular criminal case, shall be by an order of record, but it expressly provides that the judge may make such request, which evidently means that he may do so in his capacity as judge, and not necessarily while he is sitting as a court."

"Judge Neville certainly could not have set the case down for hearing, adjourned the court, returned to his home, and made the request of Judge McElhinney to try said cause. If he could not do this, he is equally wanting in power to make the order in court."

"The authority to make the request of a judge of some other circuit to try the case is vested in the judge and he can make this request in chambers as judge, and even in vacation of his court."

"It is of common occurrence and in perfect accord with the statute, where the regular judge is disqualified, to set the case down for some particular time, adjourn court, return home in another county, not even intimating in court as to whom he will ask to try it, then by letter request the judge of another circuit to appear at a certain time to try the case, and the judge requested appears and presents his letter of request as authority for trying the case."

"We are clearly of the opinion that the authority to request a judge of some other

circuit to try a case, as contemplated by section 2597, supra, is vested alone in the regular judge of the circuit or of the court over which he presides, and that section gives no power or authority to a judge of another circuit requested to try a particular case, to exercise such right."

Section 2597, R. S. No. 1899, mentioned in the above quotation, is now Section 4040, R. S. No. 1939.

Also, the Supreme Court, in the case of State v. Malone, 333 No. 594, 1. c. 509, 62 S. W. (2d) 909, said:

"I. Honorable Frank Kelly, the regular judge, had been disqualified and had called another circuit judge, Honorable E. M. Dearing, to try the case. Judge Dearing presided at the first trial, but after the case was remanded he disqualified himself and declined to preside further, whereupon Judge Kelly called Honorable Will H. D. Green, judge of the Twentieth Judicial District, to try the case. Judge Green accepted the call and presided at the second trial. In his brief appellant challenges the authority of Judge Kelly to call another judge upon the refusal of Judge Dearing to preside further in the case but in oral argument here his counsel withdrew that complaint, so it need not be noticed further than to say that when Judge Dearing declined to act Judge Kelly, the regular judge, not Judge Dearing, had the right and it was his duty to provide another judge. (State v. Gillham, 174 No. 671, 74 S. W. 859; State v. Hudspeth, 159 No. 178, 60 S. W. 136.)"

Also, in the case of State v. Huett, 340 No. 934, 1. c. 943, 104 S. W. (2d) 252, the court said:

"* * * Section 3651, Revised Statutes 1929 (Mo. Stat. Ann., p. 3206), provides that when the judge is incompetent to sit for any of the causes mentioned in Section 3648, supra, and no person to try the case will serve when elected as such special judge, the judge of said court--not the court--(see State v. Gillham, 174 Mo. 671, 74 S. W. 359) shall set the case down for trial and notify and request another circuit or criminal judge to try the case, whose duty it is to appear and hold the court for the trial of the case."

Section 3651, R. S. Mo. 1929, mentioned in the above quotation, is now Section 4040, R. S. Mo. 1939.

Also, in the case of State v. Perkins, 339 Mo. 27, 1. c. 33, 95 S. W. (2d) 75, the court said:

"So we say in the case at bar. When Judge McAnnally became disqualified after he had been called and entered upon the discharge of his duties, the case then stood in the Circuit Court of Shannon County, as though Judge McAnnally had never been called, or had refused to accept when he was called. The right to a change of venue or a change from the judge being a mere statutory privilege which a defendant may waive, it must undoubtedly be true that after the application for a change was filed, and before the regular judge acted upon it by calling Judge McAnnally, it could have been withdrawn. If Judge McAnnally's disqualification or refusal to act after he was called, placed the case back in the position it was before he was called, with authority in **the** regular judge to call in another judge, it must follow that the application could be withdrawn before another judge was called and assumed charge."

In your request you state that Judge Blair, of your circuit, first appointed Judge W. M. Dinwiddie, who could not be there on the date set for the trial, and that Judge Blair then arranged to have Judge Charles Jackson to come up from the Camden County Circuit. We are assuming that this arrangement was a request from Judge Blair to Judge Charles Jackson. If such is the case, it appears that the only person who can now try the cause is Judge Charles Jackson and not Judge Tom Moore.

CONCLUSION

It is, therefore, the opinion of this department that the authority to request a judge of some other circuit to try a case, as contemplated by Section 4040, R. S. No. 1939, is vested alone in the regular judge of the circuit court, or the court over which he presides, and that section gives no power or authority to a judge of another circuit requested to try a particular case to exercise such right.

It is, therefore, the opinion of this department that Judge Tom Moore, who has been requested by Judge Charles Jackson of Camden County Circuit to try the cause mentioned in your request, does not have jurisdiction over the cause.

It is further the opinion of this department that if Judge Charles Jackson was requested to appear and try the cause mentioned in your request, after Judge W. M. Dinwiddie did not appear on the date set for the trial, then the proper judge to try the cause is Judge Charles Jackson.

It is further the opinion of this department that, in assuming that Judge Sam Blair disqualified himself by reason of his absence in the United States Army, the last and final judge that he requested, that is, Judge Charles Jackson, should be the proper judge to sit in this particular case.

Respectfully submitted,

APPROVED:

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WJB:CP