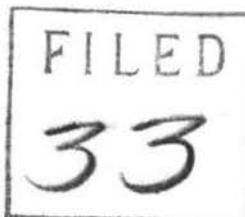


CIRCUIT COURT: Circuit Judge may hear case in other circuit when requested to do so by judge of that circuit.

October 13, 1949

10/27/49



Honorable James Glenn  
Prosecuting Attorney  
Macon, Missouri

Dear Sir:

Your recent opinion request reads as follows:

"In view of the recent opinion in the case of State of Missouri vs. Scott which I believe was handed down by the Supreme Court on September 9, a question has been raised as to a criminal trial now pending in this county. Your opinion is requested as to the procedure to be followed in the trial of this case.

"The facts are in this case that the defendant was charged with sodomy. After the case had been pending some time and in order to avoid trial the defendant filed a verified motion disqualifying the local Circuit Judge for prejudice. The local Judge called in Judge Walter A. Higbee of the 37th Judicial Circuit. Later a trial was held at which Judge Walter A. Higbee presided and resulted in a mistrial.

"Later, in order to avoid trial, the defendant filed a verified motion alleging prejudice of the inhabitants of this county against the defendant. On change of venue the case was sent to Shelby County, the only other county in this judicial circuit.

"In view of the recent decision in the above named case, it is felt that we will be met with the challenge as to Judge Higbee's right to try this case." \* \* \* \*

The question is whether or not Judge Higbee has authority to hear this case. We assume that the request to do so, made by

the local judge, was prompted by the provision of Section 4040 R.S. Missouri 1939, and that the request was in proper form with respect to this statute. However, a recent opinion of the Supreme Court of Missouri indicates the doubtful validity of Section 4040 and related sections under the 1945 Constitution.

We quote from this opinion of the Supreme Court of Missouri, State of Missouri v. Afton Scott, which has handed down on September 26, 1949, and which has not as yet been reported:

"\* \* \* \* Defendant's plea to the jurisdiction challenges the authority of Judge Maughmer to try the case. He was transferred to the Wright Circuit Court by an order of the Supreme Court made pursuant to Sec. 6, Art. V, Const. of Mo., 1945, and rule 11 of the Supreme Court. The facts are these: Judge Moulder, who succeeded Judge Jackson as the regular judge of the Wright Circuit Court, being unable to hold the June, 1948 Term (at which this case was docketed), made an order calling in Judge Blair of the 14th Circuit,. Defendant filed an application for a change of venue "from Judge Blair," which Judge Blair sustained, but he did not call in another judge. Instead, Judge Moulder reappeared, and entered an order disqualifying himself, and requesting the Supreme Court to transfer another judge to sit in the case under the constitutional provision above mentioned. This was done, and Judge Maughmer was ordered transferred. Defendant contends that when the change of venue was taken from Judge Blair, it became his duty, under Sec. 4040, R.S. '39, to call in another judge to try the case. It will be observed, that under the express provisions of that section, the duty to call in another judge arises only "if, \* \* \* \* no person to try the case will serve when elected as such special judge" (provision for the election of an attorney possessing the qualifications of a circuit judge being made by Sec. 4038, R.S. '39). These sections would seem to be of doubtful validity under the 1945 Constitution, but as that question is not briefed, it will not be determined. It may be well enough to point out that under Section 29, Article VI of the

1875 Constitution, certain provisions were made respecting substitute judges, and that the General Assembly was expressly authorized to "make such additional provision for holding court as may be found necessary." The new Constitution contains no such provision. On the contrary, its provisions are: "Any Circuit judge may sit in any other circuit at the request of a judge thereof." (Sec. 15, Art. V.) "The supreme court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto." (Sec. 6, Art. V.) Even if Sec. 4.040 is still valid, it cannot be thought to override the later constitutional provision just mentioned. We hold Judge Maughmer's transfer under Sec. 6, Art. V, to be valid, and he was, accordingly clothed with authority to hear the case."

Section 6 of Article V, Constitution of Missouri 1945, appears in the above quotation, Section 15 of this Article reads as follows:

"The state shall be divided into convenient circuits of contiguous counties. In each circuit there shall be at least one judge. The circuits may be changed or abolished by law as public convenience may require, but no judge shall be removed thereby from office during his term. Any circuit judge may sit in any other circuit at the request of a judge thereof. In circuits composed of a single county and having more than one judge, the court may sit in general term or in divisions."

Therefore, we see that there are two separate and distinct constitutional provisions whereby a circuit judge may be authorized to sit in a circuit other than his own. That these provisions are distinct and are so recognized by the Supreme Court is evidenced by Rule 11 of the Supreme Court of Missouri, wherein the provisions are treated as separate and distinct. Sec. 11.01 of Rule 11 reads:

"Under Section 6 of Article 5 of the Constitution the Supreme Court may temporarily transfer a judge of any appellate or circuit court, with the consent of such judge, to any other appellate or circuit court:

"(a) When an appellate court or circuit court requests the transfer of a judge to it; or

"(b) When the Supreme Court finds the administration of justice requires such transfer and orders same."

Section 11.03 of Rule 11 reads as follows:

"A circuit judge requesting another circuit judge to sit in his circuit under Section 15 of Article 5 of the Constitution shall send a copy of such request to the Chief Justice of the Supreme Court."

Furthermore, this position is clearly indicated by Section 11.04 of Rule 11, which reads:

"Circuit Judges, sitting either by request of the regular judge or by transfer order of the Supreme Court, may hold court in the same county and at the same time either with or separately from the regular judge or judges of the circuit."

Therefore, even though Section 4040 might be held invalid as indicated in *State v. Scott*, supra, no reversible error would arise by Judge Higbee's hearing the case in this instance, as he had been requested to do so by the local judge, and is therefore authorized to hear the case by reason of Section 15 of Article V of the 1945 Constitution.

#### CONCLUSION.

It is therefore the opinion of this department that a circuit

judge is authorized under Section 15 of Article V, Constitution of Missouri 1945, to hear a case in a circuit other than his own when requested to do so by the circuit judge of that circuit.

Respectfully submitted,

RICHARD H. VOSS  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General



RHV:p