

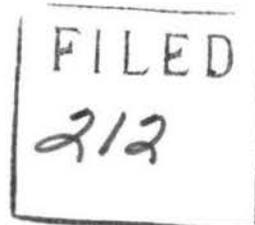
CRIMINAL LAW:
CRIMINAL PROCEDURE:
PROBATION & PAROLE:

The cumulative period of both parole and probation of a person convicted of a misdemeanor, granted pursuant to Sections 549.071 and 549.101, RSMo, may not exceed the two year maximum set out in Section 549.071.

OPINION NO. 212

August 21, 1972

Mr. Walter G. Sartorius, Chairman
Board of Probation and Parole
Post Office Box 267
Jefferson City, Missouri 65101



Dear Mr. Sartorius:

This is in reply to your letter requesting an opinion of this office concerning a construction of Section 549.071(1) and (2) and Section 549.101(2). In that request you ask:

"Does the maximum period of probation supervision as outlined in 549.071, Section 1, affect the period that a Judge may place an individual on parole as described in 549.071, Section 2, or 549.101, Section 2?"

In your opinion request, you present the hypothetical case where a person has been given one year probation on a misdemeanor charge, is then subsequently revoked and confined in the county jail, and after a period of incarceration is placed on judicial parole. Your question is whether the period of time for the probation combined with the subsequent parole may extend beyond the maximum two year period as set out in Section 549.071.

The statutes in controversy follow:

Section 549.071:

"1. When any person of previous good character is convicted of any crime and commitment to the state department of corrections or other confinement or fine is assessed as the punishment therefor, the court before whom the conviction was had, if satisfied that the defendant, if permitted to go at large, would not again violate the law, may in its discretion, by order

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of record, suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof and may also place the defendant on probation upon such conditions as the court sees fit to impose. The probation shall be for a specific term which shall be stipulated in the order of record. In the case of a felony offense no probation under this chapter shall be granted for a term of less than one year, and no probation shall be granted for a term of longer than five years. In the case of a misdemeanor offense no probation shall be granted for a term of longer than two years. The court may extend the term of probation, but no more than one extension of any probation may be ordered.

"2. The courts, subject to the restrictions herein provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed, will, if permitted to go at large, not again violate the law, parole the defendant upon such conditions as the court sees fit to impose."

Section 549.101:

"1. The court granting probation or parole may at any time before order of discharge without notice to the defendant order his apprehension by the issuance of a warrant for his arrest and his appearance in court forthwith. Any probation or parole officer assigned to or serving the court or judge having jurisdiction may arrest such defendant without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of the probation officer, violated the conditions of his probation. The written statement delivered with the defendant by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the defendant. After making an arrest the probation officer shall present to the detaining authorities a similar statement of the circumstances of violation. The court may in its discretion, with or without hearing, order the

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probation or parole revoked and direct that the sentence theretofore imposed be commenced and order execution thereof or in the event imposition of sentence was suspended the court may pronounce sentence and order execution thereof. The court may in its discretion order the continuance of the probation or parole upon such conditions as the court may prescribe. The court in its discretion may order the allowance in mitigation of the sentence credit for all or for part of the time the defendant was upon probation or parole.

"2. After probation or parole has been revoked, as provided in subsection 1, the court may in its discretion require the payment of all costs in the case and may grant a second probation or parole, but no more than two probations or paroles shall be granted the same person under the same judgment of conviction."

Our conclusion is compelled by a reading of the foregoing statutes and our construction of *Smith v. Carnes* (Mo. Sup. en banc 1972) 481 S.W.2d 242. In *Smith v. Carnes*, the Missouri Supreme Court held that the term of time which either "probation" or "parole" may take in misdemeanor cases can in no wise be longer than two years. In this regard, specific consideration should be given to footnote 2 of the court's opinion, which reads:

"The words 'probation' and 'parole' have been used interchangeably in the records of this case; however, petitioner's status has been consistently considered to be that of one on 'probation' under § 549.071. The difference between 'probation' and 'parole' is not significant in this case because when a person is placed on parole under § 549.071(2) the limitations applicable thereto are the same as the limitations applicable to one placed on probation under § 549.071(1)."¹

We read *Smith v. Carnes*, *supra*, and particularly footnote 2 to the court's opinion, to foreclose the extension of the period of parole set out in your hypothetical beyond a period of two years

¹For a discussion of the distinction between "probation" and "parole" see: *State v. Hicks* (Mo. Sup. 1964) 376 S.W.2d 160.

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for both probation before incarceration, and parole after incarceration. Thus, in the hypothetical you state, the period of probation prior to incarceration combined with the period of parole after incarceration for a misdemeanor may not exceed two years.

CONCLUSION

It is, therefore, the conclusion of this office that the cumulative period of both parole and probation of a person convicted of a misdemeanor, granted pursuant to Sections 549.071 and 549.101, RSMo, may not exceed the two year maximum set out in Section 549.071.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kenneth M. Romines.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General