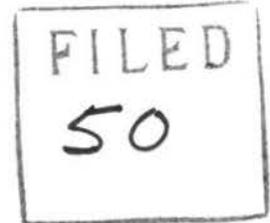


CONVICTS: Section 549.071, RSMo 1969, author-  
PROBATION AND PAROLE: izes courts to grant extensions  
of paroles subject to statutory  
restrictions and authorizes such courts to grant terms of parole  
which extend beyond the original expiration date of a parolee's  
sentence.

OPINION NO. 50

March 12, 1975



Mr. W. R. Vermillion, Chairman  
Board of Probation and Parole  
Post Office Box 267  
Jefferson City, Missouri 65101

Dear Mr. Vermillion:

This opinion is in response to a request for an interpretation of Section 549.071, RSMo 1969, in the light of two different issues. The first question deals with the issue of whether the statute gives a judge the authority to extend the "parole period" of an individual on judicial parole.

As is evident from the definition of the terms "probation" and "parole" in Section 549.058(2) and (3), RSMo 1969, the difference between these two terms lies in whether the sentence imposed upon a defendant has in any part been executed before that defendant is released on the conditions imposed by the court. When no part of the sentence has been served, the defendant is considered to be on "probation". However, when a part of the sentence has been executed, the defendant is considered to have been "paroled". Although these terms have been used interchangeably by the courts in the past, the legislature wrote the section of the statutes under the heading "Judicial Paroles" in a manner which consistently differentiates the two terms. As a result, Section 549.071, RSMo, 1969, is divided into two different parts, the first dealing with judicial probation and the second dealing with judicial parole.

Section 549.071, RSMo 1969, is as follows:

"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

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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 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 the 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." [Emphasis added].

Section 1 of the statute deals with the criteria under which a court may grant a probation and also allows the court the option of granting the probation before or after imposition of sentence. This part of the statute also contains several restrictions on the court's power to grant probation, including the requirement that the probation be for a "specific term"; the requirement that there be minimum and maximum terms for felony and misdemeanor offenses; and the restriction that the court may grant only one extension of the original period of probation. Section 2 of the statute deals with judicial paroles and contains the criteria under which they may be granted. Section 2 also incorporates provisions of Section 1 of the statute by stating that the court's power to grant judicial parole is "subject to the restrictions herein provided, . . ." Restrictions in Section 1 of Section 549.071, RSMo 1969, which would apply to judicial paroles would be the requirements that the parole be set for a "specific term" and that there be minimum and maximum periods at which the terms can be set for felony and misdemeanor offenses. The question

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with which we are concerned is whether this phrase incorporates also the restriction that the court may grant no more than one extension of a parole and, therefore, by way of implication, grants the court the power to extend terms of parole as well as terms of probation.

The statute must be construed in the light of the purpose for which it was enacted. Missouri courts have long recognized that the probation and parole statutes have as their purpose the reformation of those convicted of crimes. Ex parte Mounce, 307 Mo. 40, 269 S.W. 385, 387 (Mo. Banc 1925). The purpose is "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping that individual." Morrissey v. Brewer, 408 U.S. 471, 472, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The need for a flexible approach to be taken in regard to the duration of terms of parole has been emphasized by Missouri courts. Ex parte Mounce, supra, at 387. In light of this, the statutes under the heading "Judicial Paroles" should be construed in a manner which helps effectuate their reformative purpose.

The statutes provide that the court may grant an absolute discharge at the end of the period of judicial parole only when it is satisfied that "the reformation of the defendant is complete and that he will not again violate the law, . . ." Section 549.111.1, RSMo 1969. Without the power to extend a period of judicial parole, the court would have no flexibility in dealing with a situation in which a parolee has had those types of adjustment problems which would require his continued supervision but which do not amount to violations of his conditions of parole nor indicate that he will again violate the law. Without the power to extend his period of parole, the court would be faced with the alternatives of reincarcerating him or granting him an absolute discharge. Neither of these alternatives would assist the parolee in working out his problems but in most cases would serve as a setback to the parolee and to the interest of society in having him become a law-abiding citizen.

It is, therefore, reasonable to interpret the phrase, "subject to the restrictions herein provided, . . ." in Section 549.071.2, RSMo 1969, as indicating a legislative intent to grant courts the power to extend judicial parole periods in the same manner in which they extend terms of judicial probation. This reading of the statute is consistent with the terms of Section 549.141, RSMo 1969, which speaks of court actions, including that of extension, as applying to court orders placing defendants upon parole as well as upon probation.

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Moreover, it is evident from a reading of Smith v. Carnes, 481 S.W.2d 242 (Mo. Banc 1972), that the Supreme Court of Missouri has interpreted Section 549.071, RSMo 1969, as granting trial courts the power to extend terms of judicial parole as well as terms of judicial probation. The court's opinion concerned the issue of whether a probationer's initial term of probation along with an extension of that initial term may exceed that period of time which the statute sets forth as being the maximum period during which a defendant may stay on probation. The court held that the provision in the statute prohibiting probation for a term longer than that specified in the statute had reference to the entire period of time that the court is authorized to keep a defendant on probation and not merely to the initial period designated by the court at the outset of the probationary period. It is significant that in the course of its decision the court spoke of both probation and parole as being involved in this issue.

" . . . The provisions of the present law, §549.071, RSMo 1969, do not provide that the time allowed to the court for keeping a misdemeanor on probation or parole is to be counted from the date of the extension of the initial period but, to the contrary, provide that the probation or parole itself cannot be for a longer period than two years. In short, the present law does not allow for the two-year limitation to commence to run at any point in time other than that point in time when the misdemeanor is first placed on probation or parole." [Emphasis added]. Smith v. Carnes, supra, at 245.

Even though the court was not addressing itself to the specific issue of whether the trial court had the power to grant an extension of a judicial parole, it is evident from a reading of the decision that the court felt that the issue to which it was addressing itself had ramifications for extensions of judicial paroles as well as for extensions of judicial probations.

From the foregoing considerations, it is the opinion of this office that Section 549.071, RSMo 1969, does grant those courts authorized by Section 549.061, RSMo 1969, to place defendants on judicial parole the power to extend the initial term of the parole subject to the restriction that it may not grant more than one such extension.

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The second question with which we are concerned involves the issue of whether a court may grant judicial parole under Section 549.071, RSMo 1969, for a term which would run beyond the expiration date of the sentence from which the defendant is being paroled. In other words, we are concerned with the following hypothetical situation: a defendant is sentenced to the county jail for one year. After the defendant has served six months of the sentence, the court grants him parole for a term of two years. Obviously, this two year term of parole would carry eighteen months beyond the end of the original sentence. Does the court have the power to extend the defendant's parole period beyond the time in which he would have been released had he served out his full sentence?

The term of years during which a defendant may be paroled by a court is not in any way controlled by the number of years for which he was originally sentenced. It was established by the Supreme Court of Missouri in Ex parte Mounce, supra, at 387, that restrictions on the duration of probation and parole are controlled exclusively by statutory language. The Supreme Court was addressing itself to a situation in which a man had been sentenced to two years imprisonment and released on what is now termed probation. The statutes in effect at that time provided for a maximum period during which such probation could be continued. However, there was no requirement that the trial court set probation at a specific term of years. The trial court revoked the defendant's probation more than two years after he was sentenced but before the maximum term for his probation had run. Defendant applied for a writ of habeas corpus on the ground that he could not be sent to prison to serve his sentence after the time for the original sentence expired. The court held that a probationer could be sent to prison to begin serving his term because there was no statutory language to the effect that "there was any relation whatever between the time during which a parole [probation] may be continued, and the length of the term of imprisonment imposed in the sentence, from the execution of which a defendant may be paroled [placed on probation]." Id. at 387.

At the present time, the statutes concerning judicial paroles contain no language establishing a correlation between the term of imprisonment and term of parole. Section 549.058 through Section 549.197, RSMo 1969. The only restrictions placed on the duration of parole are found in Section 549.071, RSMo 1969, which sets forth the minimum and maximum terms for which a defendant may be paroled. Because the power to parole can be limited only by statutory language, the absence of any provision in our

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statutes relating the duration of parole to the term of imprisonment indicates that the trial court may set forth a term of parole which extends beyond the expiration date of the original sentence.

This conclusion is in harmony with the purposes behind a sentence of imprisonment and a term of parole. Imprisonment is for the purpose of punishment and the legislature has set forth in the statutes the maximum term beyond which an individual should be punished for a particular crime. It is a general rule that the maximum period of punishment normally varies in proportion to the gravity of the crime. However, parole is not for the purpose of punishment but rather serves the purpose of reforming the defendant. Ex parte Mounce, supra, at 387. It is recognized that the reformation of a defendant may take longer than the number of years provided for his punishment. Id. at 387. For instance, even though a defendant may have committed a crime which merited his being punished for two years in prison, it might well take three years to accomplish his reformation.

The divergent purposes of sentencing and of parole are more recently expressed in McCulley v. State, 486 S.W.2d 419 (Mo. 1972). In that case, the Supreme Court of Missouri dealt with the problem of whether the second sentence which a defendant had received for a particular crime was more severe than the first sentence. The defendant had previously pled guilty to a felony and had received a sentence of two years imprisonment. However, after serving part of that sentence, he was allowed to withdraw his guilty plea. Subsequently he decided to plead guilty again. On his second guilty plea, he was sentenced to seven (7) years but given immediate probation. The issue concerned whether the second sentence was more severe than the first and whether it would thereby serve to punish the defendant for attacking his first guilty plea and inhibit convicted persons from attempting to attack their convictions.

Even though the court was concerned with an issue different from the one with which we are concerned here, it provided a useful analysis of the differing concepts of sentence and parole. The court held that the sentence on a conviction or guilty plea is the legal consequence of such guilt. Parole or probation, however, is not a part of the sentence imposed upon a defendant. Id. at 423. A sentence does not include as part of it ameliorating orders such as probation or parole. Such orders neither lengthen nor shorten the sentence. This is entirely consistent with the view that the sentence is for purposes of punishment and the parole is for purposes of reformation. Therefore, whether we consider the question from a viewpoint of statutory language or whether we consider it from the viewpoint of the respective

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purposes of sentencing and parole, it is evident that the length of a prisoner's sentence has nothing to do with the duration of his term of parole. It is, therefore, the opinion of this office that a court may grant an initial term of parole or an extension of that initial term pursuant to Section 549.071.2, RSMo 1969, which would retain the defendant on parole for a period of time beyond the original expiration date of his sentence.

CONCLUSION

Therefore, it is the opinion of this office that Section 549.071, RSMo 1969, authorizes courts to grant extensions of paroles subject to statutory restrictions and authorizes such courts to grant terms of parole which extend beyond the original expiration date of a parolee's sentence.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul Robert Otto.

Very truly yours,

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

JOHN C. DANFORTH  
Attorney General