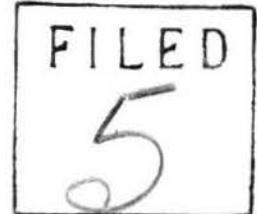


CRIMINAL PROCEDURE: Return on death warrant may be made to circuit clerk if court not in session.

May 16, 1939

5-17

Hon. William E. Barton, Judge
Nineteenth Judicial District
Houston, Missouri



Dear Sir:

This will acknowledge receipt of your letter of May 9, 1939, requesting our interpretation of Section 3725, Laws of 1937, page 223, as to the return of a death warrant.

This statute reads:

"After the execution the warden must make a return upon the death warrant to the court by which judgment was rendered, showing the time, mode and manner in which it was executed."

Prior to the repeal and reenactment of this section, it read (Sec. 3725, R.S. 1929):

"The officer executing a sentence of death shall make return on the warrant of the execution thereof, * * * * and be by said officer returned to the clerk of the court from which said warrant was issued. * * * *"

The question here turns on the meaning to be given to the deletion from the old section - that part requiring the warrant to be returned to the clerk of the court and now requiring the return to be made "to the court".

Does this mean the warrant must be returned into open court while in session or does mere filing with the clerk still suffice?

There is no statute in our criminal code which would seem to throw any light on this question. However, Section 3680, R.S. Missouri, 1929, makes "the provisions of law in civil cases, * * * * to enforce the remedies * * * of parties" extend to criminal cases "so far as they are in their nature applicable thereto." The return on a death warrant would seem to be incident to the enforcement of a remedy of the state.

A death warrant is nothing more than an execution issued by the circuit court on its judgment. Section 1155, R.S. Missouri, 1929, provides, "Every execution issued from any court of record shall be made returnable at the next succeeding term", or if the party entitled thereto shall otherwise direct, it is "returnable to the second succeeding term".

It has never been doubted that this provision means that executions must be returned in open court. *United States Bank v. Pritchard*, 20 S.W. (2nd) 939 (Mo. App.).

However, this provision to our minds, does not settle the question. In a civil case, the circuit court can know that once an execution is issued, nothing can delay the levy and return at the next term, absent an appeal and supersedeas bond. But in a criminal case, there are several things which might prevent an execution being had on the date fixed. An appeal would stop the execution, and if affirmed, the Supreme Court fixes the date. A sanity inquisition would delay the date. The Governor may grant a reprieve. Any of these, if they occurred, would prevent the execution from being had on the date fixed by the circuit court. If the delay was of sufficient length, then the warden could not make his return on the death warrant at the next term or second succeeding term of court.

It is, no doubt, for these reasons that the Legislature in Section 3725, R.S. Missouri, 1929, made the death warrant returnable to the clerk of the court.

The only reason or purpose for requiring a return of the death warrant to the court (or clerk) is so that the court may know and the records reflect that the judgment has been carried out. "To get at the true meaning of language employed in a statute we must look to the whole purpose of the act, the law as it was before the enactment and the change in the law to be made". (Pembroke v. Houston, 180 Mo., 1.c. 636). Neither will a statute be so construed "as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation". (State v. Irvine, 72 S.W. (2nd) 1.c. 100).

What change in the law was there to be made? The mode and place of execution was the change to be made. There was cause for that since county executions by hanging had become gala occasions, but the reasons for the return to be made to the clerk of the court still exist. There is no certainty that an execution will take place on schedule.

The term or word "court" when used in a technical sense means the court in session, not the judge or clerk thereof (State ex rel. v. Woodson, 161 Mo., 1.c. 453; State v. Horn, 79 S.W. (2nd) 1.c. 1045). But there is nothing in Section 3725, Laws of 1937, page 223, which indicates to us that the Legislature used it in a technical sense. On the contrary, to so construe it leads to an absurd result, in that the court, if compelled to call a special term to receive the return on this death warrant, would find it impossible to give to the deceased defendant the five days' notice required by statute (Sec. 1852, R.S. Missouri, 1929). Thus, we think the word "court" should be construed in a non-technical sense and to mean a return to the repository of the court's records which is the office of the clerk of the court.

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If the return of the warden be made during term time, however, we think it should be received in open court. The practice in this state is to file all instruments, during term time, with the court.

It might be well also for the court, at the first regular term after the warden has made his return and filed it with the clerk, to call the matter up and formally receive the return in court. This would effect a literal compliance with the statute since it fixes no definite date for the return to be made, nor does Section 1155, supra, apply to fix a date for the reasons above given.

CONCLUSION

Therefore, it is our opinion that the warden's return of a death warrant may be made to the clerk of the court which rendered the judgment if, when the return is made, the court is not in session. If the court is in session, said return should be received and filed in open court.

Respectfully submitted,

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