HABEAS CORPUS: Convicts may be taken from the penitentiary under a writ of habeas corpus ad prosequendum and tried on another charge.

3615 R S Mo 1929
1749 R S Mo 1929

October 5, 1933

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Honorable Melvin Englehart
Prosecuting Attorney
Fredericktown, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of September 29, relating to certain convicts which you have confined in your county at the present time. Your letter is herewith quoted:

> "Please give me an immediate reply to the following inquiry.
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> In the March Term of Circuit Court of Madison County, Missouri, Sam Thomas, Pete Grego, Angelo Strazzo and Joe Moda, were charged with bank robbery, of the Security Bank of Fredericktown, Mo., May 25, 1932 and entered pleas of guilty. They were each sentenced to ten years in the state penitentiary and were incarcerated there as per the sentence. These same men were returned to Fredericktown, Mo., Sept. 23, 1933, as witnesses for the state in the prosecution of their accomplice in the above mentioned bank robbery. While on this trial was in process of being tried, the state has discovered that the four men mentioned above committed another robbery on the above mentioned date. These four men are now in the custody of the sheriff of Madison County, and will remain there until the quarantine that is now in force at the state penitentiary, is lifted. Does the state have the authority to try these men in the Circuit Court of this county at the present Sept., Term., when they were released to the sheriff of this county on Writs of Habeas Corpus Ad

> Testificandum as witnesses in the case of State of Missouri vs. Clarence O.Simmons? Will it be necessary for the prosecuting attorney of this county to secure a permit from the Warden of the State Penitentiary to try these men for that purpose at the present term?
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> Please advise me at once, and if by telephone if possible. Also, as Prosecuting Attorney of this County, I hereby request the Office of the Attorney General of the State of Missouri, to furnish Assisting counsel to the Prosecuting Attorney in this Case. I remain."

The four convicts were brought to your county under Section 3618, Revised Statutes Missouri 1929, same being as follows:

> "Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf;and whenever any convict, confined in the penitentiary, shall be considered an important witness in behalf of the state, upon any criminal prosecution against any other convict, by the attorney-general or prosecuting attorney conducting the same, it shall be the duty of the court, or judge thereof in vacation, in which the prosecution is pending, to grant, upon the affidavit of such attorney-general or prosecuting attorney, a writ of habeas corpus, for the purpose of bringing such person before the proper court to testify upon such prosecution; such convict may be examined, and shall be considered a competent witness against any fellow convict for any offense actually committed whilst in prison, and whilst the witness shall have been confined in the penitentiary."

Under Section 1749 R. S. Mo. 1929, which is as follows:

> "A prisoner who shall be brought before any court, public body or officer, upon a writ of habeas corpus, to testify, shall be remanded, after having testified, to the prison from which he was taken,"

the convicts or prisoners are to be remanded to the penitentiary, but you state the convicts are remaining in your county jail awaiting the lifting of the quarantine at the penitentiary. You therefore still have the prisoners or convicts within the jurisdiction of Madison County.

In the case of State ex rel. Billings, Prosecuting Attorney v. Rudolph, Warden of State Penitentiary, 17 S. W. (2nd series) 933, wherein a situation arose similar to the one you present which in our opinion is determinative of the question. This case overrules a number of other cases and we are herewith quoting the pertinent parts:

> "After the decision in State ex rel.Meininger v.Breuer,supra,Meininger was tried and convicted while under bond pending on appeal from a prior judgment and sentence to the penitentiary. State v. Meininger (Mo. Sup.) 290 S.W.1007. There is no constitutional or statutory provision prohibiting the trial of a defendant during the time of his incarceration in the penitentiary,and the guarantee by the Constitution of a speedy trial makes no exception of a defendant so incarcerated. Section 22,art.2, Const. If Meininger could be tried after sentence and while under bond, there is no reason why the defendant Stocks, cannot be tried after sentence and during the service of time in the penitentiary. On principle, there is no difference. Those interested will find this conclusion sustained by all the cases cited and reviewed in State ex rel.Meininger v. Breuer, supra,304 Mo. loc.cit.406-414,264 S. W. 8. In the cases there reviewed, all the courts hold that a convict may be taken by the state from the penitentiary and tried for an offense committed prior to his incarceration. To hold otherwise would make of the penitentiary a shelter for criminals.
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> In Commonwealth v. Ramunno, 219 Pa. 209, 68 A.loc.cit.185, 14 L. R. A. (N.S.) 209, 123 Am. St. Rep.653, 12 Ann. Cas.818, the Supreme Court of Pennsylvania said:
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> 'On the prisoner's other contention not much ought to be said, for nothing can be said in support of it. At all times he was within the commonwealth. By its process he had been committed to one of its penal institutions for a violation of one of its laws. It

not only did not object to his being brought into the jurisdiction of one of its courts to answer a more serious charge than the one upon which he had been committed, but asked, at the instance of a district attorney representing it in his district, that his body should be produced, to be subjected to punishment upon a charge which he was called to answer, different and distinct from that for which he had formerly been convicted. The warden of the penitentiary having him in custody made no question as to the commonwealth's right to take him away; and, under the circumstances, when he reached the jurisdiction in which he was to be tried for the most serious offense known to the law, it was none of its concern how he got there. A prison is not a place of refuge for a criminal. It is for his punishment, to which he is involuntarily committed, and the same power that commits him can take him from it when in the interest of justice he should be transferred elsewhere to answer for his misdeeds.'

In Rigor v. State, 101 Md. 465, 471, 61 A. 631, loc.cit.634, the Supreme Court of Maryland said:

'The penitentiary is not a place of sanctuary, and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt.'

In Ponzi v. Fessenden, 258 U. S. 254, loc.cit. 260, 42 S. Ct. 309, 310, (66 L.ed. 607, 22 A. L.R. 879,) it is said:

' One accused of crime, of course, cannot be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense' - citing cases. 'If that is accorded him, he cannot complaint. The fact that he may have committed two crimes gives him no immunity from prosecution of either.'

In Flagg v. State, 11 Ga.App. loc.cit.40, 74 S.E. 563, the court said:

'When a convict is serving a penal sentence he is in the custody of the state or its authorities. In a sense he is the property of the state; his labor belongs to the state. Having forfeited his right to freedom, he is completely under the dominion and control of the state, with no rights save those which the law in its humanity may accord him. It would indeed be remarkable if the state, which has full power to reach out and bring into court one of its citizens while in the full enjoyment of his liberty, could not find a process by which one of its convicts could be brought into court for any purpose for which his presence could lawfully be required. We have not the slightest doubt of the full and complete power of the courts to adopt appropriate measures to obtain a convict's presence in any proper case.'

Being in the custody of the state, no constitutional or statutory right of the defendant, Stocks, is violated by the state changing its place of custody from the penitentiary to the circuit court room of Dunklin county. While absent from the penitentiary for trial, he is in custody under the sentence. "

It is also held in the case supra, that the circuit courts have the power to issue a habeas corpus ad prosequendum, the same being the writ which would be necessary in the instant case. The court in passing upon the question said:

"While not ruling the question, some observations on the authority of circuit courts to issue writs of habeas corpus ad prosequendum will not be amiss. If a circuit court issued such a writ, no question of conflicting or territorial jurisdiction would be involved. The writ is equivalent to a warrant for an arrest. It should be executed as warrants are executed. Sections 3909, 3911, and 3814, R. S. 1919. Our courts have power to issue all warrants which may be necessary in the exercise of their respective jurisdictions. Section 2341, R. S. 1919.

In Ex parte Marmaduke, 91 Mo. 228, loc. cit. 251, 4 S. W. 91, 99 (60 Am. Rep. 250), it is said:

'Independent of any such statute (Rev.St. 1919, sec.2341),courts, having been created for the purpose of administering public justice, have, in consequence of their being courts, the inherent right to effectuate their jurisdiction by all process necessary for that purpose. * * * The rule being, that, whenever power of jurisdiction is conferred, everything necessary to make either effectual is implied. 1 Kent. Com. 463, and cas. cit.'

In re Edward Talbot, 8 Ohio Dec. 744, loc. cit. 747, it is said:

'A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court, once having by its process acquired the right to adjudicate upon a person or thing, it has what is called jurisdiction, This power of jurisdiction* * * * is the object of process.'

In Commonwealth v. Ross, 13 Pa. Dist. R. 493, it is held that a district court has authority to issue such a writ to cause a defendant who is confined in the penitentiary outside of the territorial jurisdiction of the court to be brought before it for trial on an indictment for felony.

In Ex parte Marmaduke, supra, the St. Louis criminal court issued a writ of habeas corpus ad testificandum, which was served in Cole county on the warden of the penitentiary. The authority of that court to issue the writ was not questioned."

We suggest, as you have the convicts now in your local jail, that if you desire, you could proceed to file preliminary complaints and hold preliminary hearings if the convicts remain in your county, and, if you so desire, you could secure a writ of habeas corpus ad prosequendum and proceed to have the same served on the warden and this would forestall the convicts being returned to the penitentiary. You state that if they are to be

tried in the present term of your circuit court, trial must be had immediately, otherwise it will be six months before the probability of a trial. We suggest that in the event that you are unable to obtain a trial this term of court that the convicts be returned to the penitentiary and later you could have them returned to your county by the writ mentioned above.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General,

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