

CITIZENSHIP:

A defendant does not lose his citizenship even though convicted of a felony, if the punishment is a jail sentence or fine; if the court paroles him he is restored to citizenship rights under Section 3820, R. S. 1929.

October 24, 1938

11-10

Honorable Robert C. Edson  
Director of Probation and Parole  
State of Missouri  
Jefferson City, Missouri



Dear Mr. Edson:

Some time ago you submitted a question to this Department as to whether or not one Carl Darrow had lost his citizenship by reason of a certain conviction. Your letter is as follows:

"Pursuant to our telephone conversation concerning the restoration of citizenship of one Carl Darrow, I am herewith submitting to you the details of this case.

"Carl Darrow was arrested by J. W. McFarland, Deputy Constable, in St. Joseph, Missouri, charged with flourishing a deadly weapon, to-wit, a rifle, on March 2, 1935; he had preliminary hearing before Justice Balch, and his case was certified to the May term of Circuit Court in 1935. On June 5, 1935, he was tried in Division No. 3 of the Circuit Court before a jury, and found guilty, and given one year in jail. His case was appealed to the Supreme Court, where the decision of the Circuit Court was affirmed on March 11, 1937. He then applied for a parole through his attorney, Charles F. Keller.

This request was turned down and he was sent to jail May 5, 1937. Later he again applied for a parole through Mr. Keller, and this time he was granted a parole and released from jail November 20, 1937. The same Carl Darrow addressed a communication to Honorable Lloyd C. Stark, Governor of Missouri, in which he requested that Governor Stark restore him to full rights of citizenship. This in brief is a summary of the facts in the case.

"It will be greatly appreciated if we might have an opinion from you as to whether this subject, having been charged with a graduated felony and sentenced to serve one year in the county jail of Buchanan County, lost his citizenship as a result of this conviction and sentence to the county jail, and whether it will be necessary for Governor Stark to issue an order restoring him to full rights of citizenship."

In determining the ultimate conclusion it will be necessary to consult various statutes which bear directly or indirectly on the question.

We assume that Darrow was convicted under Section 4029, R. S. Mo. 1929, under the following provision:

"\* \*or shall, in the presence of one or more persons, exhibit any such weapon in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, \* \* \*"

The punishment prescribed by the statute is,

"he shall, upon conviction, be punished by imprisonment in the

penitentiary not exceeding two years, or by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment:"

We note that the statute is, insofar as the punishment is concerned, what is commonly known as graduated felony, in that the person convicted may be sentenced to the Penitentiary or to the county jail. In the instant case Carl Darrow was given one year in jail.

Section 4471, R. S. Mo. 1929, defines a "felony" as follows:

"The term 'felony,' when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary, and no other."

Section 4029, referred to above, has been construed as a felony section in the decision of *State v. Brown*, 267 S. W. 864, wherein the court said:

"Defendant was convicted in the circuit court of the city of St. Louis of the crime of carrying concealed weapons, and was sentenced upon the verdict of the jury to imprisonment in the workhouse of said city for six months. His appeal was properly lodged here, for the reason that the crime for which he was convicted, as defined by section 3275, R. S. 1919, is punishable by imprisonment in the penitentiary, and is therefore a felony. Section 3712, R. S. 1919."

Other decisions of the court which have declared an offense punishable by imprisonment in the Penitentiary not a misdemeanor because a fine or jail imprisonment was assessed, are: State v. Gilmore, 28 Mo. Ap. 561; State v. Melton, 117 Mo. 618. Therefore, irrespective of the fact that the defendant received a sentence of one year in jail and was not confined in the Penitentiary, we are of the opinion that he was convicted of a felony within the meaning of the statute.

By Article V, Section 8, of the Constitution of Missouri, the Governor is empowered to grant pardons, paroles and commutations. By Section 3798, R. S. Mo. 1929, the Governor is empowered by statute to grant pardons, which said section is as follows:

"In all cases in which the governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper."

Numerous statutes, such as Sections 3928, 3947, 3963, 4035, 4212 and 4404, R. S. Mo. 1929, define what crimes shall constitute or cause loss of citizenship. We find no section which specifically states that a crime committed under Section 4029, supra, shall cause loss of citizenship.

Section 4172, R. S. Mo. 1929, is as follows:

"Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust

or profit, within this state; Provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years; Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

The above section appears to be general in its terms but contains, like all other sections relating to the loss of citizenship, the clause, "under the provisions of this article." It therefore becomes necessary to consult the Constitution of the State of Missouri. Article VIII, Section 2, provides in part:

"\* \* no idiot, no insane person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Noting that the Constitution says that persons "may \* \* \* convicted of a felony, be excluded from the right of suffrage," it is necessary for us to consider Section 10178, R. S. Mo. 1929, which prevents persons convicted of a felony from voting. Said section provides in part as follows:

"\* \* nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a

full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

A collateral issue which enters into the question but which should be disposed of is the question of the circuit court's authority to grant Darrow a parole after he had appealed to the Supreme Court and the court had affirmed the sentence. We cite *State ex rel. Gentry v. Montgomery*, 317 Mo. 811, l. c. 814, from which we herein quote. It will be noted in the decision, however, that the circuit court paroled the defendant at the time of his conviction and the parole became a part of the judgment. The situation differs as to Darrow in that he was not paroled at the time he was convicted but after the mandate was received and the case affirmed and he was placed in jail, the court later paroled him. Quoting from the above case, it is said:

"When this court reviewed the judgment of the circuit court in the case of *State v. Horton*, the parole law of the State was a part of that judgment. We affirmed the judgment on the first count as a whole. When the trial court received our mandate with directions to execute the judgment, it clearly had the power to grant a parole to the defendant, for the reason that the judgment at all times, whether it be considered a judgment of the circuit court or a judgment of this court, contained our parole law as a part of the judgment. Therefore, it is of no consequence whether the judgment be considered a judgment of the circuit court or a judgment of this court at the time of its execution. While the parole law is a part of the judgment in some felony cases, the trial court loses the power to grant a parole in a felony case on affirmance of the judgment, for the reason that by

Section 4095 and 4096 this court is directed to have its marshal execute the sentence pronounced. This court having no authority to grant a parole, must execute the sentence according to the punishment assessed on the trial."

The reason mentioned by the court that the Supreme Court had no power to grant a parole in a felony case on affirmance of the judgment for the reason that under Sections 4095 and 4096, R. S. Mo. 1929, the marshal is directed to execute the sentence pronounced, we think is not always applicable for the reason that the marshal has no authority to carry out the mandate of the Supreme Court only in the event the defendant is actually sentenced to the Penitentiary. In other words, the above decision can be followed if the facts in the individual cases are such that the decision covers.

We think under Section 3810, R. S. Mo. 1929, which is as follows:

"The courts named in section 3809 of this article, or the judge thereof in vacation, subject to the restrictions hereinafter provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed by said court, or any person actually confined in jail under judgment of a justice of the peace, or sentenced to the state industrial home for girls, or to the Missouri training school for boys, will, if permitted to go at large, not again violate the law, parole such person and permit him or her to go at large upon such conditions and under such restrictions as the court or judge granting the parole shall see fit to impose; such court or judge may at any time, without notice to such persons, terminate such parole by simply

directing execution to issue on the judgment, or, in case the person, shall have been actually confined in jail, the parole may be terminated by directing the sheriff or jailer to retake such person under the commitment already in his hands. After a parole has been terminated, as above provided, the court or judge may, in his discretion, after the payment of all costs in the case, grant a second parole, but no more than two paroles shall be granted the same person under the same judgment of conviction. If a parole shall be terminated, the time such person shall have been at large on parole shall not be deducted from the time he or she shall be required to serve; but the full amount of the fine shall be collected or the full time in jail, or the state industrial home for girls, or the Missouri training school for boys, be served the same as if no parole had been granted."

the court had the power to parole Darrow even though he had been convicted of a felony and the same had been affirmed, for the reason that he did not receive a penitentiary sentence. If we are correct in this conclusion, then the terms of Section 3820, R. S. Mo. 1929, relating to what is commonly referred to as "parole law" apply. Said section being as follows:

"Any person who shall receive his final discharge under the provisions of sections 3809 to 3821, inclusive, shall be restored to all the rights and privileges of citizenship."



Conclusion.

We are of the opinion that Darrow by reason of the fact that he has been convicted of a felony has thereby lost his right of suffrage under the Constitution and the statutes, but if he has been finally discharged, under the terms of the parole which was granted him, his citizenship will thereby be restored under the terms of Section 3820, supra; but if he has not been finally discharged from his parole, then, if his citizenship is to be restored, it will be necessary for the Governor to restore the same by pardon.

Yours very truly

OLLIVER W. NOLEN  
Assistant Attorney-General

APPROVED:

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J. W. BUFFINGTON  
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