



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83- 103

Mr. David Belling
Miami County Attorney
Box 245
Paola, Kansas 66071

Re: Crimes and Punishments -- Code; Sentencing --
Probation; Incarceration in County Jail.

Synopsis: Kansas law grants broad discretion to the district court to determine conditions of probation in criminal cases. Probation conditioned upon incarceration in the county jail is not unreasonable as a matter of law or beyond the power of the district court.
Cited Herein: K.S.A. 21-4601, 21-4602, 21-4610.

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Dear Mr. Belling:

As County Attorney for Miami County you have requested our opinion as to whether a person convicted of a felony may be required to serve time in county jail as a condition of probation. More specifically, you inquire whether there is statutory authority granting the district courts discretionary power to impose periods of incarceration as a condition of probation.

K.S.A. 21-4610, the statute applicable to your inquiry, provides in part:

"(1) Except as required by subsection (4) nothing in this section shall be construed to limit the authority of the court to impose or modify any general or specific conditions of probation or suspension of sentence.

.

"(3) The court may include among the conditions of probation or suspension of sentence any of the following and any other conditions that it deems proper." (Emphasis added.)

It is well-established that the granting of probation is exclusively a function of the trial court. State v. Adams, 218 Kan. 495 (1976). Kansas statutes and case law consistently provide that this grant of authority is to be liberally construed. For example, K.S.A. 21-4601 states that sentencing and probation statutes "shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities as revealed by case studies." Furthermore, as noted in Porth v. Templar, 453 F.2d 330 (10th Cir. 1971):

"The sentencing judge has a broad power to impose conditions of probation designed to serve the accused and the community; the only limitation is that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public." See also State v. Benson, 207 Kan. 453 (1971).

We find no Kansas statutes or court decisions which expressly limit the sentencing court's discretion so as to preclude, as a matter of law in all cases, the granting of probation based upon conditions which include incarceration. Prior to the 1957 revision of the Kansas criminal procedure laws, the Kansas Supreme Court sanctioned a similar condition, in Gray v. Graham, 128 Kan. 434 (1928). There, a criminal defendant was required as a condition of parole to serve six months in the county jail. The Court held that the district court had not abused its discretion and that the condition was valid.

"In granting parole under R.S. 62-2202 the trial court is authorized to make reasonable conditions and restrictions, the nature of which much depend largely on the circumstances

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of the particular case. In this case it is held that the conditions were not unreasonable.

"Ordinarily when one accepts the terms of a parole he is deemed to have agreed to the conditions named therein."
128 Kan. Syl. ¶1, 2.

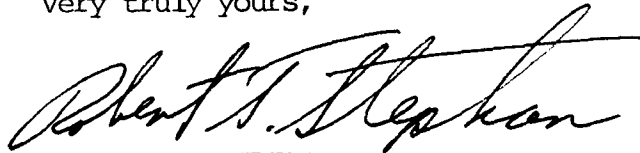
In the later case of In re McClane, 129 Kan. 739 (1930), the Court declared that it did not wish to go so far as to approve confinement in jail as a condition of parole in that case, but recognized the broad discretion given courts to determine conditions of parole. 129 Kan. at 741.

We are not unmindful that "probation" may imply release without incarceration. See K.S.A. 21-4602(3) defining probation as release without "imprisonment." However, we do not find such implications persuasive. Rather, we are persuaded by language of the Nevada Supreme Court, to wit:

"Whatever the semantic content of the term 'probation' may once have been, it can no longer be argued convincingly that 'probation' necessarily involves an immediate release from incarceration Probation has come to signify less a necessary and immediate release from custody than a carefully tailored program of rehabilitation, judicially fashioned to suit the needs and character of a particular convicted person." Creps v. State, 581 P.2d 842 (Nev. 1978).

Therefore, it is our opinion that Kansas law grants broad discretion to the district court to determine conditions of probation in criminal cases. Probation conditioned upon incarceration in the county jail is not unreasonable as a matter of law or beyond the power of the district court.

Very truly yours,



ROBERT T. STEPHAN
Attorney General



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:may