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STATE OF KANSAS

*Office of the Attorney General*

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VERN MILLER  
Attorney General

November 15, 1974

Opinion No. 74- 365

The Honorable Robert R. Raines  
Secretary of Corrections  
State Office Building, 11th Floor  
Topeka, Kansas 66612

Attention: Mr. Bernard J. Dunn  
Legal Counsel

Dear Secretary Raines:

You inquire, first, whether the

"Secretary of Corrections [may] control the rate of delivery of inmates from the county jails to the Department of Corrections by requiring that the inmates be accepted only at the Kansas Reception and Diagnostic Center and that they be kept in the county jail until there is bed space available for them at the Reception Center, as opposed to their temporary delivery to, and incarceration in, one of the other correctional institutions while awaiting acceptance by the Reception and Diagnostic Center."

Until recent date, it has been the practice that upon conviction, the offender was transported, as soon as the workload of the custodian sheriff would permit, to the Reception Center. If at the time the offender was to be removed from the county jail, the Center had no available accommodations, the prisoner was transported by the sherrif to another correctional institution instead, to be held there awaiting availability of accommodations at the Center.

You have questioned both the legality and correctional wisdom and soundness of this practice. You suggest that to place an offender in an institution without prior study and evaluation of the kind available at the Center, may result in placing an offender, for at least a short period of time,

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in a setting which may be inappropriate for his best rehabilitative improvement, may frustrate to some extent the ongoing rehabilitative program of the Department for persons so incarcerated pending evaluation and study, and may possibly disrupt to some extent the ongoing rehabilitative programs in the correctional institutions where such offenders are held, without prior evaluation and study, and recommendations based thereon.

Our concern, of course, extends only to the statutory basis upon which the alternative procedures may be deemed to be authorized or prohibited. K.S.A. 1973 Supp. 21-4609 states thus:

"When a convicted person is sentenced to imprisonment, the judgment of the court shall order that such person be committed, for such term or terms as the court may direct, to the custody of the secretary of corrections.

The secretary of corrections may designate as the place of confinement any available and suitable correctional institution or facility maintained by the state of Kansas or a political subdivision thereof.

Any person serving a sentence of imprisonment may be transferred from one institution to another by order of the secretary of corrections."

This broad discretion in the assignment of convicted persons to one or another correctional institution is somewhat restricted upon initial delivery of an offender to the custody of the Secretary. K.S.A. 1973 Supp. 75-5218 provides in pertinent part thus:

"When any person is sentenced to the custody of the secretary of corrections...., the clerk of the court wherein said conviction was had shall within three (3) days notify the secretary of corrections."

Upon receipt of this notice, transfer of inmates is directed pursuant to K.S.A. 1973 Supp. 75-5220:

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*"Upon receipt of such notice the secretary shall notify the sheriff having such offender in his custody, and said sheriff shall as soon as possible thereafter convey said offender to the Kansas reception and diagnostic center, together with the record of his trial and conviction as made up by the clerk, the expense of which conveyance shall be charged against and paid out of the general fund of the county whose sheriff shall convey said offender to the institution as herein provided. Any female offender sentenced according to the provisions of section 75 of this act shall not be conveyed to the Kansas reception and diagnostic center but shall be conveyed by the sheriff having such offender in his custody directly to the Kansas correctional institution for women...."*  
[Emphasis provided.]

The purpose of assignment to the Center is set forth in K.S.A. 1973 Supp. 75-5262 thus:

*"The primary function and purpose of the Kansas state reception and diagnostic center shall be to provide a thorough and scientific examination and study of all felony offenders of the male sex sentenced by the courts of this state to the custody of the secretary of corrections so that each such offender may be assigned to a state correctional institution having the type of security....and programs of education, employment or treatment designated to accomplish a maximum of rehabilitation for such offender. All such offenders shall be delivered to said center upon being sentenced by the court."* [Emphasis supplied.]

To reiterate the issue, the question posed is whether when the center has no available accommodations, an offender upon sentencing must be held in the custody of the sheriff having custody of the offender at the time of sentencing, until such time as the offender may be accommodated at the Center, or whether the offender may be delivered by the sheriff to the custody of the Secretary at any time after sentencing regardless of availability of accommodations at the Center, with the result that the offender is transported and held pending transportation to the Center at another correctional institution. In many cases, of course,

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this institution will be the Kansas State Penitentiary at Lansing, Kansas.

When a person is sentenced, the clerk of the district court wherein the conviction is had must notify the Secretary of Corrections within three days. The sheriff has no authority to deliver the prisoner to the Secretary within those three days, or indeed, thereafter, until as required by K.S.A. 1973 Supp. 75-5220, the Secretary, upon receipt of the notice from the clerk of the district court, thereafter notifies the sheriff having the offender in his custody. Thereafter, and only thereafter, may the sheriff deliver the prisoner to the custody of the Secretary, and when he does so, he may transport the prisoner only to the Reception and Diagnostic Center. The statute does not delineate what is the purpose of the notification from the Secretary to the sheriff prior to removal of the prisoner to the Center. One readily conceivable purpose of that communication would be to notify the sheriff when the Center will be able to receive the prisoner.

Once the prisoner is delivered to the Center by the sheriff, the Secretary has no authority to assign the prisoner to another correctional institution until the prisoner shall have been examined and studied and a rehabilitation program planned and recommended for him. Control of admission of offenders to the Center must, of course, and is by law vested in the Secretary. In our view, this particular provision, as well as those provisions set out above, compel the conclusion that upon conviction and sentencing, an offender is required to be held in the custody of the sheriff having custody at the time of sentencing, until he is notified by the Secretary pursuant to K.S.A. 1973 Supp. 75-5220 to transport the prisoner to the Center. In short, your first question, set out above, must be answered affirmatively.

Secondly, you inquire whether

"[i]f the sheriff delivers an inmate to the Reception and Diagnostic Center without specific clearance from the Secretary of Corrections or his designee, and there is no bed space available, may the Secretary of Corrections refuse to accept such inmate and require him to be returned to the county jail."

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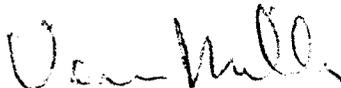
Once again, as indicated above, the sheriff has no authority to deliver a prisoner to the Center without notification to do so from the Secretary. The Secretary is free to refuse admission to the prisoner, in which instance the sheriff must continue to hold the prisoner in his custody until such time as the Secretary authorizes admission of the prisoner to the Center.

Lastly, you inquire whether

"the sentencing court [has]....any authority or jurisdiction to order the Secretary of Corrections to accept an inmate for incarceration in one of the other institutions of the Department of Corrections when there is no bed space available at the time at the Kansas Reception and Diagnostic Center, and to hold him there until space becomes available at the Reception Center."

Under K.S.A. 1973 Supp. 21-4609, the judgment of the sentencing court must direct that the person be committed to the custody of the Secretary of Corrections. Upon sentencing, disposition of the prisoner is governed by statute. Custody of the prisoner vests by operation of law in the Secretary. K.S.A. 1972 Supp. 75-5220 directs that until the prisoner is transferred to the Center, and hence to custody of the Secretary, he shall be held in the custody of the sheriff until notification to the sheriff by the Secretary, after which and only after which may the sheriff deliver the offender out of his custody into that of the Secretary. In our opinion, the sentencing court has no jurisdiction to alter the carefully prescribed procedure outlined by these statutes to direct the Secretary to accept custody of a prisoner at any institution other than that prescribed by law.

Yours very truly,



VERN MILLER  
Attorney General

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