



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 85- 149

Charles E. Simmons
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Kansas Department of Corrections
700 Jackson
Topeka, Kansas 66603-3798

Re: Criminal Procedure -- Code of Criminal Procedure;
Costs in Criminal Cases -- Liability for Costs

Synopsis: K.S.A. 1984 Supp. 22-3801(c) requires the Department of Corrections to reimburse a county for jury fees paid by the county for prosecutions resulting from crimes committed while a defendant is on parole or conditional release status from a state correctional institution. Cited herein: K.S.A. 1984 Supp. 22-3801; K.S.A. 28-150; 21-4204; K.S.A. 1984 Supp. 22-3717, as amended by L. 1985, ch. 111, §2; K.S.A. 60-1501.

* * *

Dear Mr. Simmons:

As chief legal counsel for the Department of Corrections, you request our opinion on the scope of K.S.A. 1984 Supp. 22-3801(c). That statute deals with liability for costs in criminal cases, and section (c) provides:

"Whenever jury fees are paid by the county in a case in which the defendant was a person who had been committed to an institution under the control of the secretary of corrections and had not been finally discharged or released from the institution, the department of corrections

shall reimburse the county for jury fees paid by the county. The reimbursement shall be paid from funds made available by the legislature for that purpose."
(Emphasis added.)

This statute should be read in conjunction with K.S.A. 28-150, which states the general rule that jury fees in civil and criminal cases shall be paid by the county.

You seek our opinion as to whether the Department of Corrections (DOC) is required to pay certain court costs resulting from the prosecution of persons who are parolees or who are on conditional release for crimes committed while on such status. You state that in the past the DOC has interpreted K.S.A. 1984 Supp. 22-3801(c) as being applicable only to those instances where an inmate was prosecuted for a crime committed while the inmate was physically located in his or her assigned institution, or during an escape from such facility. Given the content of applicable case law, we must reach an opposite conclusion, i.e. parolees and persons on conditional release are included as well.

It is well established that both a parolee and a conditional releasee are in the "legal custody" of the Secretary of Corrections. See Johnson v. Stucker, 203 Kan. 253 (1969); State v. Garton, 8 Kan.App.2d 142 (1982). We believe that a defendant who is still in the legal custody of the DOC falls within the purview of K.S.A. 1984 Supp. 22-3801(c) as someone who has not been "finally discharged or released from an institution." Therefore, the DOC is required to reimburse the county for jury fees paid by the county for prosecutions resulting from crimes committed while the defendant is on parole or conditional release status.

Both the Kansas Supreme Court and the Kansas Court of Appeals have addressed the issue of when a parolee becomes free from the custody of the state, and we believe their holdings are determinative of the question you ask. In Johnson v. Stucker, supra, the court addressed the issue of whether habeas corpus is an appropriate remedy for judicial review of the action of the state board of probation and parole. (K.S.A. 60-1501 offers the writ of habeas corpus to any person "who is . . . restrained of liberty.") The court found that habeas corpus is an appropriate remedy, stating that while it is true that a paroled prisoner has been conditionally released from actual custody, he remains in "legal custody" of

the institution from which he is released, and constructively is a prisoner of the state. 203 Kan. at 259.

In State v. Garton, supra, the Kansas Court of Appeals addressed the issue of when the five-year period commences to run for a parolee under K.S.A. 21-4204(1)(b). Defendant appealed from a conviction for unlawful possession of a firearm under the statute, which prohibits a person from possessing a firearm who has been convicted of a felony or has been released from imprisonment for a felony within five years preceding such violation. Defendant conceded that his arrest for possession of a firearm occurred within five years of his final release. However, he argued that his release from imprisonment for a felony must be computed from the date of his parole, rather than from the date of his final release from custody.

The Court of Appeals disagreed, stating that parole is a conditional release from physical custody, not a reduction of sentence or a pardon. K.S.A. 1984 Supp. 22-3717(g), as amended by L. 1985, ch. 111, §2(h). The parolee remains in the legal custody of the state, and so is constructively a prisoner. Johnson v. Stucker, supra, K.S.A. 1984 Supp. 22-3717(g), as amended. The court noted that while on parole, the parolee remains subject to arrest for violation of the conditions of his parole. K.S.A. 1984 Supp. 22-3717(g) as amended. In addition, any recommitment ordered by the Kansas Adult Authority must of necessity be to serve any unexpired portion of the parolee's sentence. Thus, the court of appeals held that defendant's release from prison for commission of a felony for purposes of K.S.A. 21-4204(1)(b) did not occur on his parole date, but rather on the date of his final release from custody. Likewise, we feel that a parolee or conditional releasee has not been "finally discharged or released from the institution" for purposes of K.S.A. 1984 Supp. 22-3801(c) until he has completed his parole time and his imposed sentence is over, thus releasing him from the legal custody of the Secretary of Corrections.

Our decision on this matter is further supported by the Supreme Court case of Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). In describing the function of parole in the correctional process, the Court stated:

"The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide

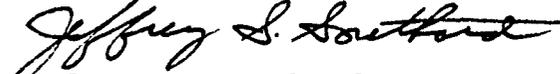
by certain rules during the balance of the sentence. To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen."

In short, the Supreme Court clearly indicated that a defendant on parole from confinement in a penal institution does not have the same privileges and freedoms as an ordinary citizen, even though he is no longer physically confined by the state.

We accordingly conclude that the scope of K.S.A. 1984 Supp. 22-3801(c), when considered with the Kansas and United States Supreme Court cases construing the meaning of parole for purposes of discharge and release, should be interpreted broadly. Prisoners on parole or conditional release are still under the "legal custody" of the Secretary of Corrections until such time as they have completed serving their sentences. Although they are no longer physically confined to an institution, constructively they are still prisoners of the state. As such, they have not been "finally discharged or released from the institution" under K.S.A. 1984 Supp. 22-3801(c). Therefore, the Department of Corrections is required to reimburse a county for jury fees paid by the county for prosecutions resulting from crimes committed while a defendant is on parole or conditional release status.

Very truly yours,


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