Opinion No. 58-171

August 15, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F Pyatt, Assistant Attorney General

TO: Dr. Manuel N. Brown, Director, Board of Parole, Santa Fe, New Mexico

QUESTION

QUESTION

Various situations were presented involving the right of a parolee to make bail, if accused of crime, or if accused of parole violation.

CONCLUSION

As an accused in a criminal case, he is entitled to make bail the same as any other defendant. He is not entitled to make bail pending detention to investigate parole violation, as a parolee.

OPINION

ANALYSIS

You have asked various questions under different situations, all of which appear to grow out of the commencement of criminal proceedings against a parolee. Specifically, you are interested in the availability of bail to the parolee.

The major premise which must be kept in mind throughout is that the revocation of parole, and the prosecution of a parolee for offenses committed while on parole, are two separate and distinct proceedings. The distinction rests, not upon legal technicalities in procedure, but upon the vast difference between the State's accusing one of crime (with all the attendant burdens of the State and rights of the citizen), on the one hand, and what is essentially the treatment of convicts on the other.

With this distinction in mind, and it is one fundamental in scope, we proceed to answer your inquiry along the lines suggested above.

In Opinion of the Attorney General No. 57-33, rendered February 27, 1957, we held a parolee, pending investigation of parole violation, is not entitled to bail. That holding answers your questions presented here when is is borne in mind that the criminal proceedings are separate and distinct.

At this point, it may not be amiss to refer again to certain fundamentals. In doing so, the answers to your questions will become more apparent.

In **Ex parte Parks,** 24 N.M. 491, 174 P. 206, it was held that bail is never required as punishment, but is required to secure the attendance of **a defendant** to submit to the punishment of the court; that it is used to prevent flight to evade punishment; and that it is used to compel execution of the sentence.

A parolee is hardly a defendant. He is already convicted. He is not awaiting punishment as it has already been imposed. There is then nothing by way of punishment or execution of sentence for him to evade. Execution has already occurred.

Of interest is **Ex parte Vigil,** 24 N.M. 640, 175 P. 713, wherein a parolee received a revocation of his parole and was summarily returned to service within the walls of the penitentiary. Our Court held this could be done when the then constituted authority (the superintendent of the penitentiary) deemed the parole to have been violated. It was further held this could be done without notice and hearing, and that such was not reviewable by the courts.

Now, in all respects, the **Vigil** case cannot be said to state the law as of the present time. For example, Sec. 41-17-28, N.M.S.A., 1953 Comp., 1957 Supp., accords a hearing to a parole violator. Still, the present statutes (41-17-13 to 41-17-34, (P.S.) include the concept that a parolee is still a prisoner, allowed, however, to serve his sentence outside the walls of the penitentiary. See particularly Sec. 41-17-24 (P.S.). Presumably, the Vigil rule that the revocation cannot be reviewed by the courts is still in effect. Such is hardly a situation entitling one to bail on investigation of parole violation.

Further light is cast on the situation by **United States** v. **Hollien,** 105 F. Supp. 987, holding that a hearing on an alleged parole violation is a summary proceeding, and is not a "criminal prosecution" entitling the convict to a speedy and public trial as used in the Constitution of the United States, Sixth Amendment. While analogous, but not in point, we think like reasoning precludes bail.

The **Hollien** case is also significant for the basic premise under which we must proceed. It recognized that retaking a parolee is not a criminal proceeding. Hence,, criminal prosecutions would not come within the official concern of the parole authorities.

Along these lines it must be remembered that parole is in no sense a matter of right, but rather is a matter of grace, resting in the Parole Board's discretion. **Owens** v. **Sope,** 60 N.M. 71, 287 P. 2d 605, which cited the **Vigil** case as authority.

In **Ex parte Patterson,** 94 Kan. 439. 146 P. 1009, it was held that a violation for parole **is not a new offense,** and that revocation of parole is neither an added punishment for the old offense nor **a punishment for any other offense,** but is rather a matter of disciplinary regulation of prison management.

Attention must be given to the case of **People** v. **Moore,** 62 Mich. 496, 29 N.W. 80, holding that one who is pardoned by the governor, on condition, cannot be held while accused of violating the conditions of his pardon, **without bail.** The court reasoned breach of the conditions of the pardon must be established as any other crime; that the pardoned man could not be released half free and half slave; nor could he be released subject to the warden's arbitrary return.

It might be we could distinguish the case as involving a pardon, with which we are not here concerned, but it is not necessary to belabor the distinction here. Suffice it to say the reasoning does not accord with that advanced by out Court as to parole violators in the **Vigil** case. We adhere to the latter.

Interestingly enough, in the later case of **People** v. **Dudley,** 173 Mich. 389, 138 N.W. 1044, under what was essentially violation of suspended sentence, the Court held that upon termination of the suspension, the violator was not entitled to benefit of counsel, to be confronted by witnesses, nor to trial by jury. The reasoning was that the violation of the terms of suspension is not a crime, but rather is a breach of contract; and that the constitutional rights were given in criminal proceedings, which were not involved. This hardly is in line with the earlier **Moore** decision.

Compare **Ex parte Lucero,** 23 N.M 433, 168 P. 713, holding that one is entitled to notice and hearing on revocation of suspended sentence if an issue of fact is involved, although no particular formalities need be observed, **including jury trial,** unless identity is in issue.

Thus the authorities establish that parole violation, and commission of crime while on parole, will give rise to two separate and distinct proceedings. Accordingly, a parolee if accused of crime, would be entitled to bail, as an accused in a criminal case, the same as any other person. But as a parolee, he is not entitled to make bail. This might be academic if the Parole Board revoked the parole and returned the man to prison, **for parole violation.** On the other hand, the Parole Board might not find a violation, and would permit continuation of the parole, in which case the man would have every right to bail in accordance with law, as if he had never been convicted. If charges have been filed, and the parolee makes bail, we think it follows that nonetheless the parole authorities could arrest and detain pending investigation of parole violation, or violations at a subsequent time.

If a parolee is detained on a criminal charge, you ask if the man can be returned to the penitentiary for parole revocation hearing, before disposition of charges by, for example, the district attorney. Since Sec. 41-17-24 gives the penitentiary legal custody of parolees, we think that jurisdiction attached prior to, and hence prevails, over that of the court in which the charges are pending. This, however, is a technical matter and we feel sure the Parole Board and the penitentiary will desire to fully cooperate with law enforcement agencies throughout the State.

While we have repeatedly said parole violations, and criminal charges against a parolee are two separate offenses, we do not see how the Parole Board could find otherwise than that parole had been violated, if conviction in the criminal case was obtained.