

Opinion No. 101**Pardon Board — Probation, Power to Revoke — Probation, Supervision of Judges — False Arrest, Liability For—Bond for Pardon Board Representatives.**

HELD: 1. Judges imposing probationary sentences may either retain supervision of such sentence, or may place supervision under the jurisdiction of the state pardon board.

2. Jurisdiction of the state pardon board in supervising a prisoner's probation does not confer authority for revocation of probation other than for a period of time sufficient to have the prisoner brought before the committing judge or his successor.

3. Representatives of the board of pardons are answerable to prosecution for false arrest or denial of a person's rights to the same extent as other public officers and they should be bonded in an amount determined to be adequate by the State Board of Examiners.

December 15, 1956

Mr. Benjamin W. Wright
Director
State Board of Pardons
Deer Lodge, Montana

Dear Mr. Wright:

You have asked for my opinion regarding the following questions:

1. If a judge imposes a probationary sentence must supervision of such sentence be placed in the pardon board?
2. If such supervision is placed in the pardon board and the pardon board determines the probationer is violating the terms of his probation does such board have the authority to revoke the probationary sentence?
3. What is the criminal or civil liability of a member of the pardon board, or its executive officer,

if not bonded, in a matter of alleged false imprisonment or alleged denial of due process of law?

Your first question asks: "If a judge imposes a probationary sentence must supervision of such sentence be placed in the pardon board?"

Section 94-7821. R.C.M. 1947. as amended by the 1955 legislative Session, provides that:

"In all prosecutions for crimes or misdemeanors, except as herein-after provided, where the defendant has pleaded or been found guilty, or where the court or magistrate has power to sentence such defendant to any penal or other institution in this state, and it appears that the defendant has never before been imprisoned for crime either in this state or elsewhere (but detention in an institution for juvenile delinquents shall not be considered imprisonment), and where it appears to the satisfaction of the court that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and where it may appear that the public safety does not demand or require that the defendant shall suffer the penalty imposed by law, **said court may suspend the execution of the sentence and place the defendant on probation in the manner herein-after provided.** Nothing in this act contained shall in any manner affect the laws providing the method of dealing with the juvenile delinquents. Any judge, who has suspended a sentence of imprisonment under this section, or his successor, is authorized thereafter, in his discretion, during the period of such suspended sentence to revoke such suspension and order such person committed, or may, in his discretion, order the prisoner placed under the jurisdiction of the state board of pardons as provided by law, or retain such jurisdiction with his court as is authorized by him or his successor. Prior to such revocation of the order of such

suspension, the person affected shall be given a hearing before said judge." (Emphasis Supplied.)

The following statement taken from the above section indicates a clear intention by the Legislature to give the committing judge the power either to handle the probation directly, or have supervision handled by the Pardon Board established by the 1955 Legislative Session:

"... Any judge . . . may, in his discretion, order the prisoner placed under the jurisdiction of the state board of pardons as provided by law, or retain such jurisdiction with his court as is authorized by him or his successor. . . ."

It is therefore my opinion that a judge imposing a probationary sentence may either retain supervision of such sentence in his court, or may place supervision under the jurisdiction of the State Pardon Board.

In considering your second question, "If such supervision is placed in the Pardon Board and the Pardon Board determines the probationer is violating the terms of his probation does such Board have the authority to revoke the probationary sentence?", the same section must be considered, it provides in part that:

"... Any judge, who has suspended a sentence of imprisonment under this section, or his successor, is authorized thereafter, in his discretion, during the period of such suspended sentence to revoke such suspension and order such person committed, or may, in his discretion, order the prisoner placed under the jurisdiction of the state board of pardons as provided by law, or retain such jurisdiction with his court as is authorized by him or his successor. **Prior to such revocation of the order of such suspension, the person affected shall be given a hearing before said judge.**" (Emphasis Supplied.)

Under the provisions of Section 94-7821, supra, it is obvious that the Pardon Board does not have the jurisdiction to revoke a probationary sentence, but rather that such authority is specifically reserved to the committing judge or his successor. This same intent is apparent from the following language taken from the new Probation, Parole, and Executive Clemency Act, Chapter 153, Laws of 1955, now Section 94-9823, R.C.M., 1947:

"Definitions. When used in this act, unless the context otherwise requires:

(a) 'Probation' is the release by the court without imprisonment except as otherwise provided by law, of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and **subject to the supervision of the board upon direction of the court. . . .**" (Emphasis Supplied.)

The same act, in Section 94-9830, R.C.M., 1947, states in part as follows:

" . . . The probation and parole officer may recommend, and by order duly entered, a court may modify any condition of probation or suspension of sentence at any time. . . ."

The following, Section 94-9831, R.C.M., 1947, makes provision for an arrest of a probationer by an agent of the Pardon Board, but it further states that:

" . . . Upon such arrest and detention, the probation and parole officer shall immediately notify the court with jurisdiction over such prisoner, and shall submit in writing a report. . . . Thereupon, . . . the court may continue to revoke the probation or suspension of sentence, and may require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed. . . . Section 94-7824, R.C.M., 1947, provides that:

"Whenever a sentence to any penal or other institution in the state has been imposed, but the execution thereof has been suspended and the defendant placed on probation, the effect of such order of probation shall be to place said defendant under the control and management of the state board of pardons and he shall be subject to the provisions of the probation, parole and executive clemency act."

Although Section 94-7821, supra, contains language stating that the court may, ". . . order the prisoner placed under the jurisdiction of the state board of pardons . . .", and Section 94-7824, supra, can be construed to indicate jurisdiction is placed in the Board for all purposes, the clear intent of the Legislature as evidenced by the numerous statutory references set forth above shows that the "jurisdiction" of the Board of Pardons extends only to "supervision" of the prisoner's probation, and does not confer any authority to revoke probation except for a sufficient period of time to have the prisoner brought before the committing judge or his successor.

It is therefore my opinion that the jurisdiction of the Pardon Board in **supervising** a prisoner's probation does not confer authority for revocation of probation other than for a period of time sufficient to have the prisoner brought before the committing judge or his successor.

Your final question asks: "What is the criminal or civil liability of a member of the Pardon Board, or its executive officer, if not bonded, in a matter of alleged false imprisonment or alleged denial of due process of law?"

Section 94-3506, R.C.M., 1947, provides in part that:

"Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person, or detains him against his will, or

seizes or levies upon any property, or disposes any one of his lands or tenements, without a regular process or lawful authority therefor, is guilty of a misdemeanor. . . . ”

Section 94-3576, R.C.M., 1947, defines “false imprisonment” as follows:

“False imprisonment is the unlawful violation of the personal liberty of another, and is punishable by fine not exceeding five thousand dollars, or by imprisonment in the county jail not more than one year, or both.”

Article III, Section 3, of the State Constitution, guarantees all persons the right to be free in their actions in all places “in all lawful ways”. Members or employees of the Pardon Board are not criminally or civilly liable for arrests or imprisonments made for cause, namely for violation of conditions of probation. Although the legislative enactment setting up the new Pardon Board does not contain provisions for bonds to be given by the Board or its representatives, Section 6-102, R.C.M., 1947, states that:

“All other state officers not herein mentioned shall give bonds in such amounts as shall be fixed by the state board of examiners.”

Bonds are required for the protection of the public so that persons unlawfully restrained will be able to have substantial property subject to execution under proper judgment.

It is therefore my opinion that members or representatives of the Pardon Board are answerable to civil or criminal prosecution for false arrest or denial of a person’s rights to the same extent as other public officers and they should be bonded in an amount to be determined to be adequate by the State Board of Examiners.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.