

849.

OHIO BOARD OF CLEMENCY—AUTHORITY TO SUSPEND PAROLES—
SECTIONS 2174, 2175 and 13706, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. *Sections 2174 and 2175, General Code, do not apply to that class of prisoners in the Ohio Penitentiary, who, after being placed upon probation by the trial court, have had their probation terminated by such court, as provided by Sections 13706 et seq., General Code, and have been sentenced to the Ohio Penitentiary.*

2. *The Ohio Board of Clemency is without authority to suspend for a definite term of years, a parole granted to a prisoner, who, having violated the conditions of his parole or conditional release, has been declared to be delinquent by the Ohio Board of Clemency, which has entered such fact in the proceedings of the board. Such prisoner must serve the unexpired period of the maximum term of his imprisonment.*

COLUMBUS, OHIO, August 10, 1927.

Ohio Board of Clemency, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your letter of recent date which reads as follows:

“In view of your opinion No. 727 of July 11, 1927, as to parole violators of the Ohio Penitentiary, we beg leave to present two questions in order that our work may be performed properly.

No. 1—Prisoner No. 54,929 was admitted to the Ohio Penitentiary November 17, 1925, as a violator under the probation law and with a new sentence to follow. His probation was terminated December 1, 1925, and he then began serving his first sentence of one to twenty years.

On December 7, 1926, he was recommended by the Warden and Chaplain of the Ohio Penitentiary as worthy of consideration for a hearing and the Board took the following action:

‘Final release December 7, 1926, as No. 54,929 to begin new sentence.’

The original sentence as noted above was one to twenty years. The new sentence which he began serving under that order is one to three years.

Question—Was the action of the Board of Clemency on December 7, 1926, null and void according to your opinion of July 11, 1927, or did the Board have the right to grant a Final Release from the old sentence at that time, and will the Warden and Chaplain have the right to advertise him as worthy of a hearing for consideration for parole after he has served one year of his new sentence of one to three years?

That is to say, are all actions of the Board of Clemency in the cases of parole violators brought in with a new sentence to follow null and void in those cases where a Final Release has been granted on the old sentence, and the *prisoner is still in the Ohio Penitentiary serving the new sentence?*

No. 2—Prisoner No. 50,833 was admitted to the Ohio Penitentiary April 20, 1922, with a new sentence of five to fifteen years. Under the opinion

of Attorney General Crabbe as to the Norwood Law this prisoner was released on parole from the Ohio Penitentiary on July 30, 1924.

On July 1, 1925, he was returned to the Ohio Penitentiary as delinquent with a new sentence to follow. He had his hearing before the Board of Clemency on August 4, 1925, and his parole was revoked for two years which will expire in August, 1927.

QUESTION—Was the action of the Board revoking the parole for a term of years null and void under your opinion noted above, or did the prisoner acquire the right to be considered at the meeting to be held in August, 1927?

That is to say, have prisoners *still confined in the Ohio Penitentiary*, acquired any right to be heard again according to your opinion referred to above, when *the revocal has been for a term of years* instead of to the maximum?

We understand your opinion noted above to mean that no prisoner whose parole has been revoked is entitled to any hearing before the Board of Clemency for the shortening of his sentence by parole. Any shortening that can occur to be by commutation only.

We understand, also, that no prisoner whose parole has been revoked and is serving his maximum sentence is entitled to any reduction of time under the 'good conduct' law in force before the parole law of 1913 was enacted.

The two questions propounded above are brought to your attention, however, to cover cases where partial action has been taken by the Board of Clemency, releasing a prisoner on an old sentence or revoking his parole for a period of time, but who still remain inside the walls of the penitentiary. It is to remove any doubt regarding the rights of these classes of prisoners that we are trespassing upon your time and patience."

1. In answering your first inquiry your attention is directed to Sections 13706 et seq., of the General Code, Section 13706 reading as follows:

"In prosecutions for crime, except as mentioned in Section 6212-17 of the General Code, and as hereinafter provided, where the defendant has pleaded or been found guilty and it appears to the satisfaction of the court or magistrate that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall be immediately sentenced, such court or magistrate may suspend the imposition of the sentence and place the defendant on probation in the manner provided by law, and upon such terms and conditions as such court or magistrate shall determine."

Under the conditions and limitations contained in this section, the trial court is authorized to suspend the imposition of sentence and place the defendant on probation in the manner provided by law, and upon such terms and conditions the court shall determine. Such probation shall continue for such period as the trial court shall determine, not exceeding the maximum term of imprisonment, if any, for which he might be sentenced, and in any event not to exceed five years. The court, at any time during the probationary period fixed, may terminate the probation and impose any sentence which might originally have been imposed.

Section 13706, *supra*, before the Act of March 24, 1925, (111 v. 423) in which act said section was amended as it now reads in the General Code, provided as follows:

"In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate 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 that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence, at any time before such sentence is carried into execution, and place the defendant on probation and under the supervision of the penitentiary or of the reformatory, or place the defendant on probation and in charge of a court constable as probation officer, in which latter event the court shall have the power to terminate the probation and enforce the sentence at any time, whereupon the warden or superintendent of the penal institution shall receive such defendant as upon original sentence. A defendant placed on probation to a court constable shall be deemed to be discharged at the expiration of the minimum sentence imposed by the court, if previous to that time his probation has not been terminated by the court."

You do not state in your letter whether the sentence of from one to twenty years was imposed before the amendment of the above section, and the execution thereof suspended or whether the imposition of such sentence was suspended and the prisoner placed on probation, without any sentence having been imposed, as provided in Section 13706, *supra*, as it now reads. However, in either event the conclusions herein reached would be the same. Nor is it clear from your letter or from additional information furnished at my request upon what dates the two sentences were imposed on prisoner No. 54,929, or whether the sentences were to run concurrently. However, I shall assume that the sentences imposed were not to be served concurrently, and that the sentence of from one to twenty years, imposed in the case in which the prisoner was placed upon probation by the trial court was first imposed and that, when the prisoner's probation was terminated by such court, he started first to serve this sentence.

The syllabus of Opinion No. 727, dated July 11, 1927, Opinions, Attorney General for 1927, to which you refer, reads:

"1. Under the provisions of Section 2174, General Code, where a prisoner has violated the conditions of his parole or conditional release, and the Ohio Board of Clemency has declared such prisoner to be delinquent and entered such facts in the proceedings of the board, such prisoner shall thereafter be treated as an escaped prisoner owing service to the state and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment and the Ohio Board of Clemency is without authority again to restore such prisoner to parole.

2. The Ohio Board of Clemency is without authority to 'annul' a sentence as that word is used in Section 2175, General Code."

Sections 2174 and 2175, General Code, therein construed, respectively, relate

solely to a "prisoner violating the conditions of his parole or conditional release" granted by the Ohio Board of Clemency, that is "a prisoner at large upon parole or conditional release" granted by the Ohio Board of Clemency, and *have no application whatever* to a prisoner committed to the Ohio Penitentiary for a violation of the conditions of probation as fixed by the trial court. In other words, Sections 2174 and 2175, General Code, relate to that class of prisoners under sentence to the Ohio Penitentiary, who, having served a minimum term provided by law for the crime for which convicted, or, prisoners for murder in the second degree, having served under such sentence ten full years, have been allowed to go upon parole or conditional release outside the building and inclosure of the penitentiary and thereafter violate the conditions of such parole or conditional release.

Answering your question specifically as indicated above the ruling heretofore made in Opinion No. 727, *supra*, does not apply in the case presented by your first inquiry. The action taken by the Ohio Board of Clemency on December 7, 1926, *viz.*, the granting of a final release, with respect to the one to twenty year sentence, was in accordance with law and if the sentences imposed on Prisoner No. 54,929, were to be served consecutively then on and after he had served the minimum term fixed by the court for such second felony, *viz.*, one year, if the warden and chaplain of the penitentiary recommend such prisoner as worthy of such consideration, the Ohio Board of Clemency may consider such prisoner's application for parole. Your disposition of applications for parole should be governed by the terms of Section 2172, General Code, *viz.* :

"A prisoner shall not be released upon parole, either conditionally or absolutely, unless, in the judgment of the board of managers, his release will not be incompatible with the welfare of society. Such judgment shall be based upon the record and character of the prisoner as established in the penitentiary."

2. The case of Prisoner No. 50,833, presented by your second inquiry, comes squarely within the ruling heretofore made in Opinion No. 727, *supra*. Such prisoner, having violated the conditions of his parole or conditional release, and the Ohio Board of Clemency having declared such prisoner to be delinquent and entered such fact in the proceedings of the board, must by the terms of Section 2174, General Code, serve the unexpired period of the maximum term of his imprisonment. There being no authority in the Ohio Board of Clemency to suspend *for a definite term of years*, a parole granted such prisoner and any action so attempting to suspend his parole was of no legal effect. Such prisoner, as provided in Section 2174, General Code, must serve the unexpired term of his imprisonment unless terminated by commutation or pardon and the Ohio Board of Clemency may not again legally consider his application for parole.

Respectfully,
EDWARD C. TURNER,
Attorney General.