

2151.

STATE PENAL OR REFORMATORY INSTITUTION — SENTENCES OF IMPRISONMENT—WHERE RECORD SILENT AS TO TWO OR MORE SENTENCES EXECUTED CUMULATIVELY — PRESUMPTION, INTENT PRISONER SHOULD SERVE AGGREGATE OF ALL SENTENCES—SENTENCE CONCURRENT—MUST BE SERVED IN SAME INSTITUTION OR PLACE—

ESCAPED PRISONER—PAROLEE—WHERE CONFINED TO OHIO STATE REFORMATORY AND COMMITTED ANOTHER CRIME — COURT SPECIFIED SECOND SENTENCE SHALL RUN CONCURRENTLY WITH FIRST—PRISONER, REGARDLESS OF AGE, SUBJECT TO TRANSFER TO OHIO PENITENTIARY—

STATUS, "PERSON NOT PREVIOUSLY CONVICTED OF CRIME" — WHERE TWO OR MORE CRIMES COMMITTED IN ONE OR MORE COUNTIES AND IN FOREIGN STATE—TRIAL IN ONE OR MORE COUNTIES OF OHIO—SEE OPINIONS ATTORNEY GENERAL, 1939, PAGE 2351.

## SYLLABUS:

1. *Where the record is silent as to whether two or more sentences of imprisonment are to be executed cumulatively, under the law of Ohio, as declared by the Supreme Court in the case of Anderson, Sheriff, v. Brown, 117 O. S. 393, 159 N. E. 372 (1927), the presumption obtains that the sentencing court intended that the prisoner should serve the aggregate of all sentences to imprisonment.*

2. *Sentences to imprisonment adjudged to be served concurrently must be served in the same institution or place.*

3. *Where an escaped prisoner, or a prisoner on parole from the Ohio State Reformatory, commits another crime and is sentenced for such crime to the Ohio State Reformatory, the court specifying that the second sentence shall run concurrently with the first or existing Ohio State Reformatory sentence, such prisoner is subject to transfer to the Ohio Penitentiary regardless of his age.*

4. *Where a person commits two or more crimes in one or more counties in the state of Ohio and in a sister state within a period of a few weeks, and is tried in one of the counties of this state and sentenced to the Ohio State Reformatory, and is later tried and convicted in another county in this state for one of the crimes committed before his commitment to the Ohio State Reformatory, he is under the law of Ohio a person who has not been previously convicted of crime and if otherwise eligible may be committed to the Ohio State Reformatory.*

Columbus, Ohio, April 6, 1940.

Honorable Charles L. Sherwood,  
Director, Department of Public Welfare,  
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your letter requesting my opinion, which letter is in the following language:

“We acknowledge receipt of your opinion No. 1577, December 14, 1939.

You state that ‘where a person is convicted of or pleads guilty to two or more felonies and is sentenced on the same day,’ or ‘where a prisoner is simultaneously convicted or sentenced on two or more

felonies, such person is in the eyes of the law a first offender and is not a prisoner who has been previously convicted of crime.'

Since the terms 'on the same day' and 'simultaneously' are used, may we have a supplementary opinion on the following specific questions:

1. When a man on escape or parole from the Ohio State Reformatory commits another crime and is sentenced for such offense to the Ohio State Reformatory, the court designating that such sentence shall run concurrently with the first or existing Ohio State Reformatory sentence, is such prisoner legally in the Ohio State Reformatory on the second offense, irrespective of his age, or is he subject to transfer to the Ohio Penitentiary?

2. J. B. committed a series of crimes in Cuyahoga County, Lucas County, and Connecticut within a period of a few weeks. He was apprehended in Pennsylvania, brought back to Ohio and was tried in Cuyahoga County on a charge of robbery, and was sentenced to the Ohio State Reformatory where he was admitted October 29, 1932. At that time he was twenty years of age.

At the time of the trial in Cuyahoga County he was under indictment in Lucas County for robbery. On December 21, 1935, he was released from the reformatory on the Cuyahoga County sentence and was returned to Lucas County upon a detainer which had been filed against him. He pleaded guilty to the Lucas County charge and was sentenced to the Ohio State Reformatory, Robbery—10 to 25 years, admitted January 7, 1936 (twenty-three years of age).

On August 20, 1936, this man was transferred to the Ohio Penitentiary upon the order of the Director of the Department of Public Welfare, acting under the provisions of Sections 2131, 2140 and 2210-2 G. C., and the Opinion of the Attorney General No. 5745.

Is this man legally confined in the penitentiary upon this transfer?"

Your questions will be considered in the order asked.

1. It seems to me that your first question is answered by the third branch of the syllabus of Opinion No. 5745, rendered to the then Director of Public Welfare under date of June 25, 1936, and the first branch of the syllabus of Opinion No. 1577, rendered to you under date of December 14, 1939, which latter reads as follows:

"1. Where a parolee from a state penal or reformatory institution is convicted of a second or subsequent felony committed while out on parole and is sentenced to the Ohio State Reformatory, such prisoner should be transferred to the Ohio Penitentiary by the Department of Public Welfare, under authority of and in

accordance with the provisions of Sections 2140 and 2210-2 of the General Code. (Opinion No. 5745, Opinions, Attorney General, 1936, approved and followed)."

It is noted that you specifically state that the court imposing the second sentence provided that such sentence should run "concurrently with the first or existing Ohio State Reformatory sentence." This the court had power and jurisdiction to do, although, as will be hereinafter seen, the prisoners about whom you inquire in your first question are subject to transfer to the Ohio Penitentiary.

While it is not the general rule, it is the law of Ohio, as declared by the Supreme Court in the second branch of the syllabus of the case of *Anderson, Sheriff, v. Brown*, 117 O. S. 393, 159 N. E. 372 (1927), that:

"Where the record is silent as to whether two or more sentences of imprisonment or fines on the same individual are to be executed cumulatively, the presumption obtains that the sentencing court intended that the prisoner should serve the aggregate of all imprisonments or pay the full aggregate amount of all fines, \* \* \*."

See also *Hoop v. State*, 26 Abs. 598, 600 (C. of A., Montgomery County, 1938); Opinions, Attorney General, 1932, Vol. II. pp. 919 and 1208; 1933, Vol. I. p. 69; 1935, Vol. II; p. 801; and 1935, Vol. III, p. 1539.

The general rule is well stated in the annotation contained in 70 A. L. R. 1511, 1512, in the following words:

"\* \* \* in the absence of a statute to the contrary, if accused is convicted of more than one offense or under more than one count, sentences of imprisonment imposed under the different counts, or for different offenses, if by the same court, will be construed as running concurrently, and the accused will be discharged at the expiration of the longest term, unless the sentences expressly state otherwise, or unless for other reasons (*as that the imprisonment is in different places*) it clearly appears that the court intended that the sentences should run consecutively, and not concurrently."

(Emphasis the writer's.)

You will observe from the words above underscored that sentences cannot be served concurrently if the imprisonment is to be in *different* institutions or places. This was expressly held in the opinion in the *Anderson* case, supra, in which Judge Kincade said as follows at pages 397 and 398:

"If the jail, instead of being treated as a single institution, were considered by the cell numbers, and a man were sentenced to be imprisoned for 25 days in cell No. 1, and at the same time he

were sentenced to be imprisoned for 25 days in cell No. 2, and the same sentences were to be imposed with respect to cells No. 3 and No. 4, would any one suspect that the 25 days spent in cell No. 1 could be counted as answering sentences that applied to cells No. 2, No. 3, or No. 4, or that the court intended it to be worked out in that way? A man can no more serve 100 days by serving 25 days than he can add 100 days to his age by living 25 days. *The situation presents a physical impossibility which is not relieved at all by the statement of the sentencing court that the sentences are to be served concurrently. \* \* \** (Emphasis the writer's.)

Apparently it was in recognition of this rule of law that the trial courts sentenced the prisoners in question to serve the second sentences imposed in the Ohio State Reformatory, although this does not mean that such prisoners must be retained there. It is, of course, the duty of the superintendent of the Reformatory to receive a prisoner committed to that institution, if the commitment papers are issued by a court of competent jurisdiction and are valid on their face. As held in Opinion No. 1277, Opinions, Attorney General, 1927, Vol. III, p. 2297:

"1. The judgment or sentence of the trial court is a finality, unless and until the same be set aside or modified by a court of competent jurisdiction, and the superintendent of the Ohio State Reformatory, the Ohio Board of Clemency and all other administrative officers are bound thereby, in the absence of action thereon by a court having jurisdiction so to act.

"2. The superintendent of the Ohio State Reformatory is without authority to refuse to receive a prisoner sentenced thereto by a court of competent jurisdiction, if the commitment papers of such person are legal and valid on their face."

Notwithstanding the fact that it is the duty of the superintendent of the Reformatory to receive prisoners duly committed to such institution by a court of competent jurisdiction, such prisoners are, after their commitment, subject to the provisions of both Sections 2210-2 and 2210-3, General Code. As you shall have noted, Section 2210-2, supra, provides among other things that if "through oversight or otherwise, a prisoner is sentenced to the \* \* \* Ohio State Reformatory who is not legally eligible for admission thereto", he shall be transferred to the proper institution as therein provided.

Section 2210-3, General Code, provides:

"Any prisoner legally sentenced or committed to a penal or reformatory institution may be transferred therefrom to another such institution but he shall continue to be subject to the same conditions as to term of sentence and parole as if confined in the institution to which he was originally sentenced or committed."

These two sections are in *pari materia* with Section 2140, General Code, and the three sections must be construed together. Section 2140 reads as follows:

“The Ohio board of administration, with the written consent of the governor, may transfer to the penitentiary a prisoner, who, subsequent to his committal, shall be shown to have been more than thirty years of age at the time of his conviction or to have been previously convicted of crime. The Ohio board of administration may so transfer an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution.”

See also Opinion 1317, Opinions, Attorney General, 1937, Vol. III, p. 2249, the second branch of the syllabus reading:

“When a prisoner while on parole commits another felony and upon conviction thereof is sentenced to the Ohio State Reformatory and the court orders that the new sentence shall run concurrently with the sentence which the prisoner was serving on parole, such prisoner is subject to transfer to the Ohio Penitentiary as one previously convicted of crime but such second sentence shall run concurrently with that being served at the time of parole violation.”

In this opinion my immediate predecessor in office said, after quoting Section 2210-2, General Code, and italicizing the words “who is not legally eligible for admission thereto”, as follows:

“The other provisions of law cited herein authorize such superintendent, upon learning of a previous sentence to a state prison or of a previous conviction of crime, to report that fact to the Ohio Board of Administration, which board, with the consent of the Governor, may transfer such prisoner to the penitentiary.”

It follows, therefore, that any prisoner sentenced to the Ohio State Reformatory, through oversight or otherwise, who is not legally eligible for admission to such institution, may and should be transferred to the Ohio Penitentiary, in accordance with the provisions of the sections of the General Code above referred to and quoted in part, and consequently it is my opinion that prisoners in the category described in your first question are subject to such transfer.

2. It seems to me that there should be no difficulty in applying the law to the facts stated in your second question. All the crimes of which J. B. was found guilty were committed prior to his first conviction. Under the authorities cited in Opinion No. 1577, *supra*, therefore, he was and is a first offender and, not having been previously sentenced to a state prison, he

could have been legally sentenced to imprisonment in the Ohio State Reformatory and should not have been transferred to and confined in the Ohio Penitentiary, unless he were so transferred under the provisions of Section 2140, General Code, as being an "apparently incorrigible prisoner whose presence in the Reformatory \* \* \* (appeared) to be seriously detrimental to the well being of the institution."

In view of the foregoing, and in specific answer to your questions, it is my opinion that:

1. Where an escaped prisoner, or a prisoner on parole from the Ohio State Reformatory, commits another crime and is sentenced for such crime to the Ohio State Reformatory, the court specifying that the second sentence shall run concurrently with the first or existing Ohio State Reformatory sentence, such prisoner is subject to transfer to the Ohio Penitentiary regardless of his age.

2. Where a person commits two or more crimes in one or more counties of the state of Ohio and in a sister state within a period of a few weeks, and is tried in one of the counties in this state and sentenced to the Ohio State Reformatory, and is later tried and convicted in another county in this state for one of the crimes committed before his commitment to the Ohio State Reformatory, he is under the law of Ohio a person who has not been previously convicted of crime and if otherwise eligible may be committed to the Ohio State Reformatory.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.