

3164.

PRISONER—SENTENCED UNDER SECTION 13744-1 G. C. AS HABITUAL CRIMINAL—FIXED TERM OF YEARS—PAROLE—NOT ENTITLED TO BENEFITS OF SECTIONS 2210 AND 2210-1 G. C.—FINAL RELEASE—SEE SECTION 2163 G. C.—WHERE GOVERNOR COMMUTES SENTENCE—STATUS FOR FINAL RELEASE—STATUS OF INDETERMINATE SENTENCE—FIFTEEN YEARS—MINIMUM SENTENCE—ACTUAL OR CONSTRUCTIVE IMPRISONMENT.

SYLLABUS:

1. *A prisoner who is sentenced under Section 13744-1 as an habitual criminal to a fixed term of years is not entitled, in so far as eligibility for parole is concerned, to the benefits of Sections 2210 and 2210-1; such a prisoner, however, does come within the scope of Section 2163 relating to eligibility for final release.*

2. *Where the Governor commutes a minimum sentence to expire at once, the prisoner is immediately eligible for final release.*

3. *A prisoner who is sentenced for an indeterminate sentence with a minimum sentence of more than fifteen years is eligible for parole either after he has served for fifteen years as provided in Section 2210-1 or after the expiration of his minimum sentence reduced in accordance with the provisions of Section 2210, whichever period is the shortest. Such a prisoner, however, is not entitled to final release until he has served by actual or constructive imprisonment (parole), the period of his minimum sentence. (Opinion No. 106, 1933 Opinions of the Attorney General, Vol. 1, page 111, approved and followed.)*

COLUMBUS, OHIO, October 31, 1938.

MRS. MARGARET M. ALLMAN, *Director, Department of Public Welfare, State Office Building, Columbus, Ohio.*

DEAR MRS. ALLMAN: You recently forwarded to me a request for an expression in regard to three cases which have arisen in connection with the rights of prisoners incarcerated in penal institutions in this state.

This opinion is divided into three parts so that the answer may directly follow the statement of the question.

CASE No. 1

J. T. M. was on February 3, 1936, found guilty of grand larceny in the Common Pleas Court of Madison County and sentenced to an

indeterminate term of from one to seven years in the Ohio Penitentiary. On May 14, 1936, he was recalled to the said Common Pleas Court and was indicted and convicted of being an habitual criminal and was sentenced to the Ohio Penitentiary for a period of duration not less than the full term of seven years, to be counted from the fourth day of February, 1936. In your letter you ask whether or not this prisoner is eligible "for good time, either under the minimum or maximum sentence; or, should be served the entire seven years without the benefit of good time."

Section 13744-1, General Code, provides in part as follows:

"A person convicted in this state of arson * * * grand larceny, * * * who shall have been previously two times convicted of any of the hereinbefore specified felonies, separately prosecuted and tried therefor, either in this state or elsewhere, shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense; * * *"

Section 13744-3, General Code, upon which the proceedings on May 14, 1936, were predicated, provides in part:

"If at any time either before or after sentence, it shall appear that a person convicted of one of the felonies enumerated in this act, has previously been convicted of felonies as set forth in the two preceding sections, it shall be the duty of the prosecuting attorney of the county in which such last conviction was had to cause an indictment to be returned charging the said person with such previous convictions. Whereupon the court in which such last conviction was had shall cause the said person, whether confined in prison or not, to be served with a copy of such indictment and to be brought before such court. Such court shall inform the accused of his right to be tried as to the truth thereof, and shall require the accused to say whether he is the same person as charged in such previous convictions set forth in such indictment or not. * * * If the accused pleads guilty to such indictment, or if the jury finds him guilty, or if the court finds him guilty after waiver of a jury, the court shall sentence him to the punishment prescribed in the two preceding sections, as the case may be, and shall vacate the previous sentence, if sentence has been imposed, deducting from the

new sentence all time actually served by the defendant on the sentence so vacated. * * *

The effect of the sentence on May 14, 1936, was to wipe out the February 3, 1936, sentence and to substitute therefor the conviction which would have been made on February 3, 1936, if it had been known that the defendant was an habitual criminal. It is clear that Section 2210, General Code, does not apply to this particular prisoner because this section reads in the beginning thereof as follows:

“A person confined in a state penal institution and not eligible to parole before the expiration of a minimum sentence or term of imprisonment, or hereafter sentenced thereto under a general sentence, who has faithfully observed the rules of said institution, shall be entitled to the following diminution of his minimum sentence:”

It is clear that the prisoner in this case does not come within the terms of this statute as a person who will not be eligible “to parole before the expiration of a minimum sentence or term of imprisonment,” and equally clear that he was not sentenced to a general sentence.

Therefore, I feel that the rights of the prisoner here under consideration are determined by Section 2163, General Code, which provides in part as follows:

“A person confined in the penitentiary, *or hereafter sentenced thereto for a definite term other than life*, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, will be entitled to the following diminution of his sentence:

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(i) A prisoner sentenced for a term of six or more years, shall be allowed a deduction of eleven days from each of the months of his full sentence.” (Italics the writer’s.)

Clearly this prisoner was “sentenced thereto (sic. penitentiary) for a definite term other than life.” Therefore, if the prisoner does not violate any of the rules or discipline, except such as are excused, he will be entitled to eleven days for each of the months of his full sentence of eighty-four months, the total amount of which is Nine Hundred and Twenty-Four (924) days.

CASE No. 11

MCD in May, 1934, pleaded guilty to a bank robbery and was sentenced to a term of twenty years in the Ohio Penitentiary. Approximately seven months after he entered the Ohio Penitentiary his sentence was commuted by the Governor by an official commutation which read in part as follows:

"Whereas, it has been recommended that said minimum sentence be commuted to expire at once.

Therefore, by virtue of the authority vested in the Governor by the Constitution and laws of this State, I do hereby direct that the said sentence of L. MCD be commuted as aforesaid."

On October 22, 1936, MCD was granted a parole by the Board of Parole, effective the 15th day of May, 1937, on which day he was released on parole. Your question is whether or not the Board of Parole is vested with the power to grant MCD a final release.

Section 2211-6, General Code, inter alia confers the following power upon the Board of Parole:

"* * * When a paroled prisoner shall have performed all the terms and conditions of his parole the board may finally release him."

In this particular case the parole granted to MCD contained no conditions other than that MCD was required to report monthly. At a subsequent time this latter requirement was changed so that he was only required to report quarterly.

It was held in an opinion appearing in Opinions of the Attorney General for 1933, Volume I, page 111, that a final release could not be granted by the Board of Parole to a prisoner sentenced to the Ohio Penitentiary until the said prisoner had served at least the minimum term provided by law for the felony. However, in that case the question of a prisoner whose minimum sentence had been commuted was not considered.

Article III, Section 11 of the Constitution of the State of Ohio relating to the powers of the Governor provides that:

"He shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such condition as he may think proper; * * *."

It would seem obvious that if the Governor has power to commute the minimum sentence, it would flow from the grant of authority contained in the above constitutional provision. Therefore, after MCD received the commutation from the Governor of the minimum sentence, he had for all facts and purposes served his minimum sentence and following his parole, was eligible at any time for final release by proper action of the Board of Parole.

CASE III

You state the question in connection with case three as follows:

“* * * bank robbery is 20 years to life where the jury recommends mercy. Section 2210-1 provides that a prisoner sentenced for a minimum term longer than fifteen years shall become eligible for parole at the expiration of fifteen years ‘subject to the provisions of law governing diminution of sentence for good behaviour.’

Our question is:

Should we allow the good time provided for in Section 2210 on fifteen years and bring up such prisoners in nine years and six months or whether the good time should be deducted from the twenty years minimum bringing them up for their first hearing after they have served twelve years eight months? And, in such cases, where the prisoner has served the minimum of a 20 to life sentence under the bank robbery statute, after he is released on parole, does he ever become eligible for a final release? And can the Board grant him a final release and discharge?”

Section 2210-1 to which you refer in your communication provides as follows:

“A prisoner serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree, or a prisoner sentenced for a minimum term of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of fifteen years’ imprisonment, subject to the provisions of law governing diminution of sentence for good behavior in prison. The above provisions shall apply to prisoners sentenced before or after the taking effect of this act.”

Section 12441, General Code, relates to bank robberies and reads in part as follows:

“Whoever, by day or night, maliciously enters a bank or other financial institution which receives upon deposit or otherwise for safe-keeping the moneys or public funds, of individuals or corporations, and attempts to commit or commits a felony with firearms or other deadly weapons, shall be imprisoned in the penitentiary during life; provided, that if the jury upon the trial of any such indictment as a part of their verdict finds the accused guilty, and recommends mercy, the court may sentence the accused to not less than twenty years in the penitentiary.”

It was held by the then Attorney General in an opinion appearing in 1932 Opinions of the Attorney General, Volume II, page 803, that:

“Persons serving life sentences for the crimes of kidnaping, rape, maiming with acid, burglary, bank robbery and larceny of an inhabited dwelling are eligible for parole at the expiration of fifteen years’ imprisonment, as provided by Section 2210-1, General Code.

The minimum time provided for in Section 2210-1, General Code, in which a person serving a sentence of imprisonment for life for a crime other than treason or murder in the first degree can become eligible for parole, is not subject to the diminution of sentence for good behavior provided for in Section 2210, General Code.”

However, it should be noted that this opinion refers to prisoners who are sentenced for life and in that opinion there appears at page 808, the following statement in regard to the applicability of Section 2210-1, General Code, to prisoners sentenced to minimum terms of longer than fifteen years:

“The provisions of diminution of sentence for good behavior, contained in Sections 2210 and 2210-1, apply only to the minimum term of general sentences and the diminution of sentence clause in Section 2210-1 quoted herein can not be construed as referring back to the clause in that section which provides that a prisoner serving a sentence of life imprisonment for a crime other than treason or murder in the first degree shall be eligible for parole at the end of fifteen years of imprisonment. That clause can and must be construed as applying to a sentence whose minimum term is longer than fifteen years, since the diminution of sen-

tence for good behavior is computed on the basis of the minimum term of a general sentence and deducted from the minimum term only."

It would, therefore, appear that prisoners coming within the classes of cases herein considered are not eligible for parole until the expiration of fifteen years, unless they are entitled to time off for good behavior, in which case they would be eligible after the expiration of twelve years and eight months.

I base this conclusion upon the statement appearing in the hereinbefore quoted 1932 opinion, *supra*, and the fact that the diminution of sentence for good behavior as provided for in Section 2210, to my mind, only applies to the minimum sentence set by the court in sentencing the prisoner.

As pointed out above, it was held in the 1933 opinion, *supra*, that a prisoner is not entitled to release until he has served, by actual or constructive imprisonment, at least the minimum term provided by law. In this case the minimum term is twenty years and, therefore, the particular prisoner can not be released until the period of his imprisonment or the period of his parole equals the term of his minimum sentence, having in mind the prisoner on parole is considered as being constructively imprisoned.

Respectfully,

HERBERT S. DUFFY

Attorney General.

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APPROVAL—AGREEMENT, JOHN JASTER, JR., DIRECTOR OF HIGHWAYS, STATE OF OHIO, WITH THE PENNSYLVANIA RAILROAD COMPANY, LESSEE OF THE PITTSBURG, FORT WAYNE AND CHICAGO RAILWAY COMPANY, ELIMINATION OF GRADE CROSSING OVER TRACKS, ON STATE HIGHWAY No. 501, DESCRIBED POINT IN RICHLAND COUNTY, OHIO.

COLUMBUS, OHIO, October 31, 1938.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration and formal approval a proposed agreement by and between John Jaster, Jr., Director of Highways of the State of Ohio, and The Pennsylvania Railroad Company, lessee, of the Pittsburg, Fort Wayne and Chicago