

**OPINION NO. 77-067****Syllabus:**

When a court imposes a sentence of actual incarceration under the provisions of R.C. Chapter 2925, the Drug Abuse Control Act of 1975, without specifying a maximum or minimum sentence in accordance with R.C. 2929.11, and where the minimum sentence for the offense is greater than the period of actual incarceration required, the minimum sentence serves as the minimum term. (1976 Op. Att'y Gen. No. 76-059, clarified.)

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**To: George F. Denton, Director, Ohio Department of Rehabilitation and Corrections, Columbus, Ohio**  
**By: William J. Brown, Attorney General, October 31, 1977**

I have before me your request for a clarification of 1976 Op. Att'y Gen. No. 76-059. Your letter states that some confusion has arisen concerning application of the conclusion stated therein when the period of actual incarceration is less than the minimum sentence under R.C. 2929.11. Your inquiry may be summarized as follows:

What is the minimum term which must be served when the period of actual incarceration required for offenses under R.C. Chapter 2525 is less than the minimum sentence prescribed under R.C. 2929.11 for those offenses?

R.C. 2929.11 establishes the minimum and maximum sentences applicable to each degree of felony. For the reasons discussed in 1976 Op. Att'y Gen. No. 76-059, "actual incarceration" as defined by R.C. 2929.01(D) must be distinguished from the sentencing provisions of R.C. 2929.11. R.C. 2925.01(D) states that:

(D) 'Actual incarceration' means a person is required to be imprisoned for the stated period notwithstanding any contrary provisions for suspension of sentence, probation, shock probation, parole, and shock parole. An offender serving actual incarceration is eligible for time off for good behavior pursuant to Section 2967.19 of the Revised Code if confined in a state penal institution, or pursuant to criteria established by the adult parole authority pursuant to division (E) of Section 2967.01 of the Revised Code if confined in a state reformatory institution, which in either case shall be calculated on a minimum term which is the period of actual incarceration.

There are three offenses in R.C. Chapter 2925 that require actual incarceration. R.C. 2925.02 (corruption of another with drugs); R.C. 2925.03 (trafficking in bulk amounts of drugs); R.C. 2925.21 (theft of drugs). As I stated in Opinion No. 76-059, supra, the General Assembly viewed these offenses as being particularly harmful. Hence, it has mandated, as a deterrent to the commission of these crimes, a period of actual incarceration for offenders. This period is one of imprisonment without hope of suspension, probation, shock probation, parole or shock parole.

In each of the above mentioned sections, a period of actual incarceration is specified. In addition, the offense set forth in each such section is a felony that falls within the classifications set forth in R.C. 2929.11. For example, R.C. 2925.03(E) provides:

(3) Where the offender has violated division(A)(7) of this section, trafficking in marijuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony

drug abuse offense, the court shall impose a sentence of actual incarceration of one year.

The section provides that a period of actual incarceration is required and that the commission of the offense constitutes a felony of the second degree. R.C. 2929.11(B)(2) specifies a minimum sentence for a felony of the second degree of two, three, four, or five years. Although the two provisions may, on first impression appear inconsistent, the inconsistency is more apparent than real. "Actual incarceration" speaks only to the period of time in which an offender must be imprisoned without possibility of release. Such a definition is compatible with the minimum sentences mandated by R.C. 2929.11. Thus, where one is convicted of a violation of R.C. 2925.03(A)(7), and given an indeterminate sentence, the minimum term would be two years. Of this period, the offender would be required to serve six months of "actual incarceration". After this time was served, one would be eligible for a suspended sentence, parole or probation, if applicable, for time remaining on the minimum sentence.

Therefore, where a minimum sentence provided in R.C. 2929.11 is greater than the period of actual incarceration set forth in R.C. Chapter 2925, that greater time period is the minimum term. To hold that the period of actual incarceration is the minimum sentence where it is less than the time period mandated by R.C. 2929.11 would, in effect, ignore the classification of felonies in R.C. 2925.02, R.C. 2925.03 and R.C. 2925.21. If these felony classifications were found not to refer to R.C. 2929.11, they would have no other referant in the Revised Code, and would thus be rendered superfluous. I cannot find that the General Assembly, in enacting R.C. Chapter 2925, the Drug Abuse Control act of 1975, intended such a result.

I concluded in Opinion No. 76-059, supra, that:

"When a court imposes a sentence of actual incarceration under the provisions of the Drug Abuse Control Act of 1975 without specifying a maximum or minimum sentence in accordance with R.C. 2929.11, then the period of actual incarceration serves as the minimum term. . . "

The above discussion clearly indicates that the period of actual incarceration was designed to act as the minimum term only when that period is greater than the minimum sentence under R.C. 2929.11. However, to the extent that Opinion No. 76-059, supra, has created confusion on this question, it is hereby clarified.

Therefore, it is my opinion, and you are so advised that:

When a court imposes a sentence of actual incarceration under the provisions of R.C. Chapter 2925, the Drug Abuse Control Act of 1975, without specifying a maximum or minimum sentence in accordance with R.C. 2929.11, and where the minimum sentence for the offense is greater than the period of actual incarceration required, the minimum sentence serves as the minimum term. (1976 Op. Att'y Gen. No. 76-059, clarified.)