

1084.

SUSPENSION OF SENTENCE—PENDING APPEAL—STATUS
OF DEFENDANT—PRISONERS TRANSFER TO PENITEN-
TIARY, WHEN—PAROLE AND RELEASE.

SYLLABUS:

1. *The suspension of sentence in a criminal case pending appeal by the defendant does not change the status of the defendant within the meaning of Section 2131, General Code, and in considering a subsequent sentence for a separate crime, the defendant has the status of a person "previously sentenced" notwithstanding the fact that his appeal has not been determined.*

2. *A prisoner in the Reformatory may only be transferred to the penitentiary under the provisions of Section 2210-2, General Code, where the sentence would have been to the Penitentiary if the court was cognizant of the defendant's previous sentence.*

3. *The rights of a prisoner transferred from the Reformatory to the Penitentiary under Section 2210-2, General Code, as to parole and release are those of a person committed to the Penitentiary.*

4. *The rights of a prisoner transferred from the Reformatory to the Penitentiary under Section 2210-3, General Code, are those of a person sentenced to a Reformatory and legally eligible for admission in the Reformatory at the time of sentence.*

5. *Where a prisoner has been sentenced to a penal institution and execution of sentence is suspended pending an appeal, and he is subsequently sentenced and committed for another crime and the former conviction is affirmed, he must complete the execution of the sentence which he had begun before commencing on the earlier appealed sentence.*

HON. MARGARET M. ALLMAN, *Director Department of Public Welfare, Columbus, Ohio.*

COLUMBUS, OHIO, September 1, 1937.

DEAR MADAM: I have received your communication of recent date which sets forth the following set of facts:

Cuyahoga County

1. September 21, 1934, one C. S. was indicted for robbery.
2. September 24, 1934, C. S. pleaded guilty to the said charge.
3. November 16, 1934, C. S. tried and found guilty and sentenced to reformatory.

4. November 19, 1934, motion for new trial filed and overruled. C. S. sentenced to Ohio Reformatory. Execution of sentence suspended until December 19, pending error proceedings in Court of Appeals.
5. December 10, 1934—case No. 44216—C. S. indicted for carrying concealed weapons.
6. December 12, 1934, C. S. pleaded not guilty.
Stark County
7. February 21, 1935, C. S. indicted for robbery in Stark County—No. 11494, and pleaded guilty.
8. February 11, C. S. was sentenced to Ohio State Reformatory for robbery.
9. February 12, C. S. was admitted to Ohio Reformatory.
10. February 26, Court of Appeals affirmed judgment in Common Pleas Court, Case No. 43825.
11. May 13, C. S. returned to Cuyahoga County, pleaded guilty in case No. 44216 and sentenced to Ohio State Reformatory for one to three years, sentence to run concurrently with sentence in case No. 43825.
12. May 14, C. S. returned to Reformatory and was reentered under Stark County sentence, case No. 11494.
13. December 7, 1934, C. S. was transferred to the Ohio Penitentiary on the Stark County sentence. Credit was given for time served in Reformatory.

In regard to the above stated set of facts you ask the following questions:

1. Was the Ohio Reformatory correct in reentering C. S. under the Stark County sentence when he was returned to the Reformatory on May 14, 1935?
2. Was the Stark County sentence, No. 11494, a second sentence in the reading of Sections 2140 and 2210-2?
3. Must C. S. serve the statutory minimum for robbery less the diminution provided in Section 2210-2 for the Stark County sentence?
4. What will be the status of C. S. upon the completion of the Stark County sentence?

I will consider these questions in the order stated. Your first question is concerned with the status of C. S. when he reentered the Reformatory on May 14, 1935. Section 13455-1, General Code, provides in part that:

“A person sentenced for felony to the penitentiary or a reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or such reformatory, by the sheriff of the county in which the conviction was had, * * * and such convict shall be kept within such institution until the term of his imprisonment expires or he is pardoned or paroled. * * *”

Therefore the Court of Cuyahoga County had no authority or jurisdiction to stay the execution of the Stark County sentence and since he had started upon the Stark County sentence it is clear that even though the Cuyahoga County Common Pleas Court had committed him to the Reformatory on May 13th, when he returned to the Reformatory it was to complete the execution of the sentence on the Stark County committal.

Your second question asks whether the Stark County sentence was the second sentence within the meaning of Section 2210-2, General Code. This section reads as follows:

“If through oversight or otherwise, a prisoner is sentenced to the Ohio penitentiary or the Ohio state reformatory who is not legally eligible for admission thereto, the warden or superintendent of said institution shall receive said prisoner and shall forthwith recommend to the department of public welfare, the transfer of said prisoner to the proper institution. Prisoners so transferred shall be entitled to the same legal rights and privileges as to the term of sentence, diminution of sentence and parole, as if originally sentenced and committed to the institution to which they have been transferred.”

The pertinent part of this section is “if through oversight or otherwise, a prisoner is sentenced to the Ohio penitentiary or the Ohio state reformatory who is not legally eligible for admission thereto,” and the question is whether C. S. was eligible for admission to the Reformatory at the time he was sentenced. Section 2131, General Code, provides inter alia that “the superintendent shall receive all male criminals between the ages of sixteen (16) and thirty (30) years sentenced to the reformatory, if they are not known to have been previously sentenced to a state prison.” Inasmuch as C. S. had on November 16, 1934, a date prior to the sentence in Stark County, been sentenced by the Cuyahoga County Court of Common Pleas to the Reformatory, it appears that he was not eligible for sentence to the Reformatory under Section 2131, General Code, and could be transferred under the provisions of Section 2210-2, General Code.

It is possible that a question might arise from the words in Section 2131, General Code, "if they are not *known* to have been previously sentenced". Section 2210-2, General Code, relating as it does to Section 2131, General Code, by reference to the eligibility of a prisoner for admission, should, in my opinion, be read in *pari materia* with Section 2131, General Code. Reading the two statutory provisions together, the intention of the legislature is obvious.

If at the time of sentence to the Reformatory under Section 2131, General Code, the fact of a previous sentence was not brought to the attention of the court or was not known and such fact is later established when the prisoner is in the Reformatory, then under the provisions of Section 2210-2, General Code, the warden or superintendent of such institution may transfer any prisoner who has been "previously sentenced to a state prison" to the Penitentiary. There is a further provision for transfer in Section 2140, General Code, which provides 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."

You will notice that this section uses the term "Ohio Board of Administration". By the provisions of Section 2211-4, General Code, "All powers and duties vested in or imposed by law upon any other officers, boards or commissions of the state, excepting the governor, with respect to recommendation, grant, or order of pardon, commutation of sentence, parole, reprove, reimprisonment, or release of persons confined in or under sentence to any of the penal and reformatory institutions of the state * * * are hereby transferred to, vested in and imposed upon the board of parole and shall be exercised in accordance with the provisions of this act." You will notice that this provision is silent as to the transfer of prisoners and therefore I am of the opinion that the Board of Parole does not have the power formerly had by the Ohio Board of Administration, under Section 2140, General Code, to transfer a prisoner from the Reformatory to the Penitentiary. Therefore, the only question remaining on this point is whether C. S. had been previously sentenced to a state prison within the meaning of Sections 2131 and 2210-2, General Code.

Your letter states that following the sentence on November 16th,

an appeal was filed and the execution of the sentence was suspended pending the appeal. The fact that an appeal was filed in a criminal case and sentence was suspended does not affect the question of whether or not the prisoner had been previously sentenced. The suspension of execution of the sentence in a criminal case pending an appeal is authorized by Section 13453-1. This suspension is only a deference of the execution of the sentence unless there is a reversal of the conviction. Thus Section 13453-9, General Code, provides that if the conviction of a defendant who, pending the determination of his appeal is committed to the penitentiary, is affirmed, such defendant "shall serve the balance of his sentence". The implication is clear that an allowance shall be made of time already served. Therefore it is clear that the fact that an appeal has been filed does not alter the fact that the prisoner has been previously sentenced or convicted and the suspension of the sentence is merely as aforesaid, a deference of the execution, and in my opinion has no effect upon the status of the prisoner as a person who has been convicted and sentenced.

In your third question you inquire whether C. S. must serve the statutory minimum for robbery less the diminution provided for in Section 2210-2, General Code, before he will be eligible for parole for the Stark County sentence. It was held in a previous opinion of this office to be found in Opinions of the Attorney General for 1933, Vol. I, page 111, that a prisoner in the Penitentiary could not be paroled before the expiration of his minimum term less the diminution provided for in Section 2210-2, General Code, but that a prisoner in the Reformatory could be paroled at any time following his admission to the institution. This opinion was based on the fact that Section 2169, General Code, provides that the Board of Parole may establish rules and regulations by which a prisoner serving a term of imprisonment for the conviction of a felony other than for treason or murder in the first or second degree "having served a minimum term provided by law for the crime for which he was convicted" or a prisoner under sentence for murder in the second degree having served under such sentence ten full years, may be allowed to go upon parole outside the building and inclosure of the Penitentiary. There is no like provision limiting the Board of Parole as to prisoners in the Reformatory and Section 2211-5, General Code, in the following language confers broad power upon the Board of Parole:

"The board of parole shall have the power to exercise its functions and duties in relation to parole, release, pardon, commutation, or reprieve upon its own initiative or the initiative of the superintendent of a penal or reformatory institution. * * *"

Therefore I concur in the above cited opinion.

Section 2210-3, General Code, provides that "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, diminution of sentence and parole as if confined in the institution to which he was originally sentenced or committed." This would seem to dictate that C. S. although transferred to the Penitentiary, would retain the same rights as to parole that he would have in the Reformatory. However, Section 2210-3 should not be read by itself, but it should be read in *pari materia* with Section 2210-2, General Code. This section starts out "if through oversight or otherwise, a prisoner is sentenced to the Ohio penitentiary or the Ohio state reformatory who is not legally eligible for admission thereto, * * *."

Therefore the legislature must have had two different classes of cases in mind in enacting these separate provisions, for it provided as to prisoners transferred under Section 2210-2, that "prisoners so transferred shall be entitled to the same legal rights and privileges as to the term of sentence, diminution of sentence and parole, as if originally sentenced and committed to the institution to which they have been transferred." In my opinion, inasmuch as C. S. was transferred to the Penitentiary under the authority of Section 2210-2, General Code, his rights of parole are governed by that section and not by the terms of any other section under which he might have been transferred. On this line of reasoning I must necessarily conclude that C. S. must serve his minimum sentence for robbery less the diminution thereof as provided by Section 2210, General Code, before he will be eligible for a parole on the Stark County sentence.

Your last question presents a problem more difficult of solution. First of all for determination is the question of whether C. S. must begin his Cuyahoga County sentence following the completion of his Stark County sentence. The case of *Anderson vs. Brown*, 117 O.S. 339, throws some light upon the problem. The facts in that case were as follows: The defendant was, in December, 1936, convicted in the Municipal Court for three separate violations of the criminal laws and was sentenced as follows: Crime No. 1—fine of \$200.00; Crime No. 2—30 days' imprisonment; Crime No. 3—fine of \$23.00. On February of the succeeding year the defendant entered a plea of guilty to an indictment in the Common Pleas Court and was sentenced by that court to imprisonment in the county jail for thirty days to pay a fine of Fifty (\$50.00) Dollars, thus the two imprisonment sentences aggregated sixty days (60) and the fines aggregated Two Hundred Seventy-five (\$275.00) Dollars. As journalized the sentences did not provide whether they should be served cumulatively or concurrently. The court quoted with

approval from the first syllabus of the case of *Williams vs. State*, 18 O. S. 45:

“Where a party is convicted at the same term of several crimes, each punishable by imprisonment in the penitentiary, it is not error, in sentencing the defendant, to make one term of imprisonment commence when another terminates.”

This early case from the day of its rendition to the present time has been authority for the proposition that the court had the power to make sentences cumulative rather than concurrent. However, in *Ander-son vs. Brown, supra*, the court went further and said as is set forth in the second syllabus:

“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 full aggregate of all imprisonments or pay the full aggregate amount of all fines, or that the same should be covered by the credit allowance thereon, as provided in Section 13717, General Code.”

The reasoning of the court in this case upon which the above conclusion was founded is equally applicable to the questions here considered. On page 397 the court said:

“It is not difficult to see why there are but few adjudicated cases on this subject. The fact is there is very little to adjudicate. There is no statute in Ohio directing whether sentence shall be cumulative or concurrent, and in view of the impossibility with respect to concurrent running of imprisonment sentences for separate violations of the criminal law, it seems fairly evident that the Legislature has appreciated the difficulty that would attend any attempted legislation to the effect that several sentences for several crimes should be served concurrently. No man can be imprisoned for two or more days in any one period of 24 hours. He might, of course, be imprisoned for 2 half days, or 4 quarter days in any 24 hours. No one can meet punishment imposed for 4 separate crimes by serving only the imprisonment designated for crime No. 1.

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 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. * * *"

On the basis of this decision this office has repeatedly held that where several sentences are imposed for separate offenses the sentences run consecutively unless a contrary intention is indicated. O.A.G. 1932, Vol. II, p. 919 and p. 1208; O.A.G. 1933, Vol. I, p. 89. It is true that in each of these opinions the Attorney General was considering several sentences passed at the same time and by the same court. However, this should not change the rule and therefore, in my opinion, upon the completion of his Stark County sentences, C.S. must begin the execution of his Cuyahoga County sentence, and the sole remaining question for determination is, at which institution should he serve the Cuyahoga County sentence and what will be his rights as to parole while serving such sentence.

As stated in your letter, C.S. was sentenced to the Reformatory in Cuyahoga County and therefore Section 2131, supra, must be considered to determine whether he was eligible for admission to said institution. It was held by this office in an opinion appearing in Opinions of the Attorney General for 1937, Vol. 111, page 2297, that the superintendent of the Reformatory has no authority to refuse to receive a prisoner sentenced to the Reformatory by a court of competent jurisdiction if the commitment is valid on its face. In this case there is no question as to the validity of the commitment and we must again refer to Section 2210-2, General Code, as to the right of the Department of Public Welfare to transfer C.S. The first part of this section reads:

"If through oversight or otherwise, a prisoner is sentenced to the Ohio Penitentiary or the Ohio state reformatory who is not legally eligible for admission thereto * * *"

At the time of the sentence by the Cuyahoga County court, C.S. was legally eligible for admission to the Reformatory and there was no error in the sentence. As I see it, Section 2210-2, means that where a

prisoner was sentenced to the Reformatory when he should have been sentenced to the Penitentiary, he may be transferred. For this reason I am of the opinion that C.S. cannot be transferred under the provisions of Section 2210-2, General Code, to the Penitentiary upon the completion of the Stark County sentence to serve out the sentence of Cuyahoga County of November 14th. This does not dispose of the entire matter because, as stated in your letter, C.S. was again sentenced on May 13th and the court in its sentence provided that the execution of the sentence for the carrying of concealed weapons should be concurrent with the Cuyahoga County robbery sentence. The court could provide that the sentence would be concurrent in time but it could not specify that they be served in the same institution, for when the court imposed the sentence on May 13th, C.S. had already been previously sentenced both in Cuyahoga County and in Stark County. Therefore, C.S. must serve a sentence for carrying concealed weapons in the Penitentiary and should be transferred there under the provisions of Section 2210-2, if he is sent back to the Reformatory upon the completion of his Stark County sentence, and as to his right of parole on the carrying concealed weapons conviction, he is governed by the laws pertaining to a prisoner sentenced to the Penitentiary and as to the Cuyahoga County robbery sentence he has the rights of a prisoner committed to a Reformatory though he be transferred to the Penitentiary under the provisions of Section 2210-3, General Code.

In conclusion, therefore, it is my opinion that:

1. C.S. must complete his Stark County sentence in the Penitentiary to which he was correctly transferred under the provisions of Section 2210-2, General Code, and then begin serving his Cuyahoga County sentences.

2. The suspension of a criminal sentence pending an appeal by the defendant, does not alter the fact that the defendant, within the meaning of Section 2131, General Code, has been convicted.

3. Inasmuch as C.S. was transferred from the Reformatory to the Penitentiary under the terms of Section 2210-2, General Code, his rights as to parole and release in connection with the Stark County sentence are the same as if he had been originally committed to the Penitentiary.

4. At the time of the sentence of C.S. for carrying concealed weapons, he was not eligible for admission to the Reformatory (Section 2131) and therefore this sentence must also be served in the Penitentiary and while serving this sentence, C.S.'s rights as to parole and release will be the same as if he were originally committed to the Penitentiary.

5. Upon the completion of his Stark County sentence and the sentence for carrying concealed weapons, C.S. may be transferred to

the Reformatory or retained in the Penitentiary under the provisions of Section 2210-3, General Code, but in either event his rights as to parole and release are the same as those of a person committed to the Reformatory, if he is legally eligible for admission thereto.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1085.

APPROVAL—BONDS OF CUYAHOGA COUNTY, OHIO,
\$4,000.00.

COLUMBUS, OHIO, September 1, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of Cuyahoga County, Ohio, \$4,000.00.

The above purchase of bonds appears to be a part of an issue of bonds of the above county dated October 1, 1934. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of November 19, 1934, being Opinion No. 3469.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said county.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1086.

APPROVAL—BONDS OF PARMA RURAL SCHOOL DISTRICT,
CUYAHOGA COUNTY, OHIO, \$10,000.00.

COLUMBUS, OHIO, September 1, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of Parma Rural School District, Cuyahoga County, Ohio, \$10,000.00.