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1. OFFENSE — AMENDMENT OR REPEAL OF STATUTE DEFINING OFFENSE DOES NOT AFFECT EXISTENT PROSECUTIONS AT TIME OF AMENDMENT OR REPEAL, UNLESS OTHERWISE EXPRESSLY PROVIDED — SECTION 26 GENERAL CODE.

2. ROBBERY — WHERE CRIME COMMITTED, PUNISHABLE BY IMPRISONMENT IN OHIO PENITENTIARY, TERM NOT LESS THAN TEN NOR MORE THAN TWENTY-FIVE YEARS — PERSON INDICTED, CONVICTED AND SENTENCED UNDER SECTION 12432 GENERAL CODE, SUBSEQUENT TO AMENDMENT, EFFECTIVE SEPTEMBER 6, 1939, 118 O.L.611 — UNARMED ROBBERY, PUNISHABLE, IMPRISONMENT, OHIO PENITENTIARY, NOT LESS THAN ONE NOR MORE THAN TWENTY-FIVE YEARS, — SENTENCE BY TRIAL COURT, ONE TO TWENTY-FIVE YEARS, APPARENTLY UNDER SAID SECTION AS AMENDED, IS INOPERATIVE — PRISONER MUST SERVE SENTENCE UNDER EXISTENT STATUTE AT TIME CRIME COMMITTED.

SYLLABUS:

1. By force of the provisions of Section 26, General Code (formerly Section 79 R.S.), the amendment or repeal of a statute defining an offense does not in any manner affect causes of prosecution existing at the time of such amendment or repeal unless it be otherwise expressly provided in the amending or repealing act. (The State of Ohio v. Lawrence, 74 O. S. 38 (1906)).

2. Where a person committed the crime of robbery as defined by Section 12432, General Code, as it formerly read, which crime was then punishable by imprisonment in the Ohio penitentiary for a term of not less than ten nor more than twenty-five years, and such person was indicted, convicted and sentenced subsequent to the amendment of Section 12432, supra, the effective date of which amendment was September 6, 1939 (118 v. 611), the amendment providing that the crime of unarmed robbery should be punishable by imprisonment in the Ohio penitentiary for not less than ONE nor more than twenty-five years, and the trial court, apparently acting under Section 12432, supra, as amended, imposed or attempted to impose a sentence of from one to twenty-five years, such action by the trial judge is inoperative, and the prisoner must serve the sentence prescribed by the statute as it existed at the time of the commission of the crime.

Columbus, Ohio, February 4, 1942.

Mr. Frank D. Henderson, Warden, Ohio Penitentiary,
Columbus, Ohio.

Dear Sir:

I have your letter requesting my opinion, which reads as follows:

> "I am enclosing herewith a letter from the Prosecuting Attorney of Mahoning County written to the Record Clerk of this institution with reference to the case of Frank Chako OP No. 78610 in order to determine the exact status in this case as to the proper sentence he should carry at this institution, whether it should be 1 to 25 years for *unarmed robbery* or 10 to 25 years for *robbery*.
>
> I would appreciate an informal reply as to how we should enter this case in the records of the Ohio Penitentiary."

With your letter you transmit a communication from the office of the Prosecuting Attorney of Mahoning County, which reads:

> "There is a difference of opinion among the various members of our staff regarding the (sentence to be served by Frank Chako, OP No. 78610) * * * (The) crime for which he was committed, to-wit: Robbery, was committed on December 30, 1938, at which time the robbery statute made no distinction between 'Armed Robbery' and 'Unarmed Robbery,' both being classified simply as Robbery, and carrying an indeterminate sentence of ten to twenty-five years.
>
> In September, 1939, new robbery statutes were enacted which did distinguish, so far as penalty was concerned, between Armed Robbery and Unarmed Robbery. Chako was indicted after the effective date of the new statutes, to-wit, September, 1939. He could not be indicted under the old act because his connection with the robbery was unknown at the time. In other words, he was indicted after the effective date of the new act for a crime committed during the existence of the former statute which made no distinction between armed robbery and unarmed robbery.
>
> The writer has always clung to the view that he should be tried and sentenced under the law as it existed on the date of the commission of his crime, to-wit, December 30, 1938. However, inasmuch as he was indicted after September, 1939, for unarmed robbery, it is the contention of some of my associates that his penalty should be governed by the re-enacted statute.
>
> I am very much interested in having the question determined inasmuch as another person who was jointly indicted with Chako has been apprehended within the last two or three days, and the question will come before the Court again, because I understand he is going to plead guilty and insist that he is entitled to a sentence of one to twenty-five years.

I would appreciate it very much if you would submit this question to the Attorney General for his opinion upon the facts as above stated."

(Matter in parenthesis supplied.)

You have furnished me with a copy of the indictment in the case about which you inquire, which indictment was found at the May Term, 1941, of the Court of Common Pleas of Mahoning County and filed with the Clerk of Courts on June 18, 1941. This indictment reads in part as follows:

"That Frank Chako and Nick Vukovich late of said county, on the 30th day of December in the year of our Lord one thousand nine hundred and thirty-eight, at the County of Mahoning aforesaid in and upon one Harold T. Harris then and there being, unlawfully and forcibly did make an assault and then and there personal property, to-wit: United States money of the value of thirty-five Thousand ($35,000.00) Dollars, of the personal property of the Railway Express Agency, Inc., from the person and against the will of the said Harold T. Harris, unlawfully, forcibly, by violence, and by putting him, the said Harold T. Harris in fear, did steal, take and carry away with intent then and there the personal property aforesaid unlawfully to steel, contrary to the statute in such cases made and provided and against the peace of the State of Ohio."

A certified copy of the sentence imposed by the court at the September Term, 1941, thereof, also furnished by you, is to the effect that the defendant "having plead guilty of robbery," it was the sentence of the Court "that he be imprisoned in the Penitentiary of this state and kept at hard labor (No part of the time to be kept in solitary confinement) and until legally discharged. And that said imprisonment shall be for a period of duration not less than one year nor more than twenty-five years. And that he pay the costs" of prosecution. Chako was admitted on October 9, 1941, in the Ohio Penitentiary.

At the time of the commission of the offense with which we are here concerned, Section 12432, General Code, defining the crime of robbery, read as follows:

"Whoever, by force or violence, or by putting in fear, steals and takes from the person of another anything of value is guilty of robbery, and shall be imprisoned in the penitentiary not less than ten years nor more than twenty-five years."

Subsequent thereto, and prior to Chako's indictment, conviction and sentence, Section 12432, supra, was amended, the minimum sentence being reduced to one year. In the same act in which this amendment

was made, Section 12432-1, General Code, defining "armed robbery," punishable by imprisonment in the penitentiary for not less than ten or more than twenty-five years, was enacted (118 v. 611; Eff., 9-6-39).

Also pertinent to your inquiry are Sections 26 and 2166, General Code, both of which were in effect in their present form at the time the crime in question was committed and at the time of the amendment of Section 12432, supra.

Section 26, General Code, formerly Section 79, Revised Statutes, reads as follows:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

Section 2166, supra, provides in part as follows:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated in the manner and by the authority provided by law, but no such terms shall exceed the maximum term provided by law for felony of which the prisoner was convicted, nor be less than the minimum term provided by law for such felony. * * * If through oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter and receive the benefits thereof, as if he had been sentenced in the manner required by this section. As used in this section the phrase 'term of imprisonment' means the duration of the state's legal custody and control over a person sentenced as provided in this section."

The law applicable to the question presented by you is well stated in 15 Am. Jur. 164, 167, the text reading in part as follows:

> "Statutes are frequently adopted which change the nature, degree, or kind of penalty or punishment which may be imposed for the commission of criminal acts. * * * Repealed statutes are sometimes re-enacted or statutes adopted changing the mode or place of confinement, the length of imprisonment, or the method of execution after the person affected by them has been convicted.

Sometimes general statutes or constitutional provisions contain saving clauses, although frequently this is not true. * * *

Statutes which impose a punishment in addition to that prescribed by the existing law or which establish punishment for acts antecedently done that were not punishable in the manner formerly prescribed are ex post facto. The punishment may be lessened, but never increased, as against anyone for a crime already committed. A fortiori, a statute which increases the punishment as to a crime for which the defendant has been convicted or which aggravates the punishment after conviction is ex post facto. * * *

As a general rule, when a statute, after the time a criminal act is committed but before the time of conviction therefor, mitigates the punishment for such an offense, the accused may elect as to whether he shall be punished under the old or new act. Sometimes statutes provide that with the consent of the party affected, the new law shall be applied. Others stipulate that the new law shall be applied unless the defendant elects to be tried under the old law. The question of election does not arise where the punishment is increased by the new statute. *Occasionally, the new statute contains saving clauses providing that they shall not affect any pending prosecution;* and when this is true, there of course cannot be any election to be punished according to the new law even though the penalty is ameliorated by it." (Emphasis mine.)

See also the annotations contained in 103 A.L.R. 1032, 1934, citing the cases of Edward v. Bryan, 214 Ala. 441, 108 So. 9, 52 A.L.R. 784 (1926), and Freeman vs. Hampton, 67 Colo. 90, 185 Pac. 251 (1919).

With the general principles here applicable as set forth in the above excerpt from 15 American Jurisprudence in mind, we must take into consideration the effect of the provisions of Section 26, General Code (formerly Sec. 79, R.S.), upon a prosecution for a crime committed during the existence of a statute defining such crime, which statute was amended or repealed after the commission of the offense but before the conviction and sentencing of the accused. This question has several times been before the courts of Ohio. See Bergin v. The State, 31 O.S. 111 (1876); Campbell v. The State of Ohio, 35 O.S. 70 (1878); Chinn v. The State, 47 O.S. 575, 26 N.E. 986, 11 L.R.A. 630 (1890); The State of Ohio v. Lawrence, 74 O.S. 38, 77 N.E. 266 (1906); Luff v. The State of Ohio, 113 O.S. 379, 149 N.E. 384 (1925) and State v. Bell, 6 O.N.P. (n.s.) 475, 16 O.D. (N.P.) 602 (1906).

In the Lawrence case, supra, the first branch of the syllabus is as follows:

"By force of the provisions of section 79, Revised Statutes,

the repeal or amendment of a criminal statute in no manner affects pending prosecutions, or causes of prosecution existing at the time of such amendment or repeal, unless it be otherwise expressly provided in the amending or repealing act. (The first clause of the syllabus of In re Kline, 70 Ohio St., 25, qualified.)

At page 44, et seq., of the opinion, it was said as follows:

"* * * While, unquestionably, the law is that the repeal of a statute which authorizes a prosecution and imposes a penalty operates to prevent any prosecution, trial or judgment thereafter for an offense committed against said statute while it was yet in force, unless a contrary intent appears in the repealing statute, or some other than existing statute, yet it is equally the well settled law, of this State at least, that it is not necessary upon the repeal of a criminal statute, in order to preserve or save existing causes of prosecution, or the right to prosecute therefor, that the intent so to do shall appear in the repealing statute itself, for by section 79, Revised Statutes, it is expressly provided, that the repeal of a criminal statute shall in no manner affect causes of prosecution existing at the time of the repeal, unless it be otherwise expressly provided in the repealing act. * * * In the present case, the indictment against the defendant Howard F. Lawrence was found and returned by the grand jury of Holmes county, on September 29, 1903. The crime charged in said indictment was alleged to have been committed by him on April 26, 1901. The statute defining the crime charged, and in force on April 26, 1901, is section 6816, Revised Statutes, * * *. The punishment upon conviction under this section, is prescribed and provided for in section 6817, Revised Statutes. * * * Between the date of the commission of the alleged crime and the time of the finding of the indictment, to-wit, on May 2, 1902, above section 6817 was amended (95 O. L. 344), and said original section 6817, in force on April 26, 1901 was repealed. The repealing act containing no saving clause as to the then existing causes of prosecution. Did this repeal of section 6817, as held by the circuit court, destroy, or take away, the right of the state to prosecute for offenses existing under section 6816, at the time of such repeal? This, we think, is answered, not only by the provisions of section 79, Revised Statutes, but also by the opinion of this court in Chinn v. State, 47 Ohio St., 579. In the latter case, Chinn was indicted at the May term, 1890, of the court of common pleas of Lawrence county, for the crime of incest. The indictment charged the crime to have been committed August 10, 1879; subsequent to the latter date, but prior to the date of the finding of the indictment, the statute in force at the time of the alleged commission of the crime had been repealed. Minshall C. J., in the opinion in that case, discussing the effect of such repeal, says: 'though the offense charged in the indictment is laid as having been committed before the repeal, yet, by virtue of section 79, Revised Statutes, the right of the state to prosecute for existing offenses, was not affected by the repeal. Railroad Co. v. Belt, 35 Ohio St., 479-481.' * * * It

follows, therefore, that the circuit court erred in holding, that the repeal of original section 6817, deprived the state of all right thereafter to prosecute the defendant, Howard F. Lawrence, for a cause of prosecution existing against him at the time said section was repealed. * * *"

It is my opinion that the holding of the Supreme Court in the Lawrence case and the other cases cited is dispositive of your question and that Chako was not entitled to the benefit of Section 12432, General Code, as amended on September 6, 1939 (118 v. 611), nor was he entitled to elect to be sentenced under the new statute.

It remains to consider the effect of the judgment and sentence of the court, who apparently imposed or attempted to impose sentence in accordance with the provisions of Section 12432, supra, after its amendment and as it now exists. Under the authorities above cited, this action was plainly erroneous. However, in view of the provisions of Section 2166, supra, more specifically that part thereof which requires that no time in the Ohio penitentiary "shall exceed the maximum term provided by law for the felony of which the prisoner was convicted, *nor be less than the minimum term provided by law for such felony,*" I am of the opinion that the term of Chako's imprisonment is fixed by the statutes of Ohio, including Section 12432, General Code, as it existed at the time the crime was committed and by Section 2166, supra. In this connection your attention is directed to the case of Ex Parte Thorpe, 137 O.S. 325, 18 O.O. 516, 30 N.E. (2nd) 335 (1940), affirming the same case as reported in 66 Oh. App. 128, 19 O.O. 395, 32 N.E., (2nd) 571 (1940).

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

1. By force of the provisions of Section 26, General Code, formerly Section 79 Revised Statutes, the amendment or repeal of a statute defining an offense does not in any manner affect causes of prosecution existing at the time of such amendment or repeal unless it be otherwise expressly provided in the amending or repealing act. (The State of Ohio v. Lawrence, 74 O.S. 38 (1906)).

2. Where a person committed the crime of robbery as defined by Section 12432, General Code, as it formerly read, which crime was then punishable by imprisonment in the Ohio penitentiary for a term of not

less than ten nor more than twenty-five years, and such person was indicted, convicted and sentenced subsequent to the amendment of Section 12432, supra, the effective date of which amendment was September 6, 1939 (118 v. 611), the amendment providing that the crime of unarmed robbery should be punishable by imprisonment in the Ohio penitentiary for not less than *one* nor more than twenty-five years, and the trial court, apparently acting under Section 12432, supra, as amended, imposed or attempted to impose a sentence of from one to twenty-five years, such action by the trial judge is inoperative, and the prisoner must serve the sentence prescribed by the statute as it existed at the time of the commission of the crime.

Respectfully,

THOMAS J. HERBERT
Attorney General.