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INDETERMINATE SENTENCE LAW—DOES NOT ABROGATE POWER OF COURTS TO IMPOSE CONCURRENT SENTENCES—POWER OF BOARD OF CLEMENCY DISCUSSED.

SYLLABUS:

1. *Section* 2166, *General Code, commonly termed the "indeterminate sentence" law, does not abrogate the power of the courts of this state to impose concurrent sentences.*

2. *The term of imprisonment of an inmate of the Ohio Penitentiary, sentenced on the same day by the same court, upon two or more indictments, the sentences being ordered to run concurrently, may be terminated by the Board of Clemency upon and after the expiration of the longest minimum period of duration of sentence imposed in any one of the several cases.*

3. *One sentenced on the same day by the same court for from three to twenty years upon three indictments, the sentences to run concurrently, may be released by the Ohio Board of Clemency upon the expiration of the minimum term fixed by the court, to-wit: three years.*

4. *One sentenced on the same day by the same court for from one to twenty years and for from one to three years upon two indictments, the sentences to run concurrently may be released by the Ohio Board of Clemency upon the expiration of the minimum term fixed by the court, to-wit: one year.*

COLUMBUS, OHIO, April 19, 1927.

HON. C. LUTHER SWAIN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 3rd, 1927, which reads as follows:

"Two persons were sentenced to the Ohio Penitentiary at this term for two or more crimes.

One was sentenced for from three to twenty years, on three indictments of forgery, the sentences to run concurrently. The other prisoner was sentenced for one to twenty years on a charge of forgery, and for from one to three years on a charge of giving check with intent to defraud, the sentences to run concurrently.

The intent of the Court and the State was to clear up all charges against each person, and to have a minimum sentence of three years in the one case, and one year in the other case.

We are now informed by the Penitentiary authorities, through the forms used for statements of the Court and of the Prosecuting Attorney, and through the prisoners who have inquired of the authorities at Columbus, that the minimum term in the one case must be nine years, and in the other case two years. This was entirely contrary to the intent of the Court and the State.

Under what rule or opinion are the authorities acting when this procedure is followed? Is a Court without power to order that its sentence run concurrently?

We desire to play square with these prisoners, and if your opinion upholds the prison procedure, it will become necessary for the Court to set aside its sentence in two of the cases in one matter, and one case in the other, and have these indictments nolled, as we promised these convicts that there would be no charges against them when they were released."

In compliance with my request you forwarded to this office certified copies of the journal entries in the two cases inquired of in your letter.

In the case of *State vs. Briggs*, No. 3862, it was the sentence of the court that the defendant "be imprisoned in the penitentiary * * * for the term of not less than three years or more than twenty years, and until legally discharged. * * *"

In the case of *State vs. Briggs*, No. 3866, it was the sentence of the court that the defendant "be imprisoned in the penitentiary * * * for the term of not less than three years or more than twenty years, and until legally discharged, * * * " and it was ordered that "this sentence be concurrent with the sentence in Cause No. 3862."

In the case of *State vs. Briggs*, No. 3867, it was the sentence of the court that the defendant "be imprisoned in the penitentiary * * * for the term of not less than three years or more than twenty years, and until legally discharged * * *," and it was ordered that "this sentence be concurrent with the sentence in Cause No. 3862."

In the case of *State vs. Bray*, No. 3858, it was the sentence of the court that the defendant "be imprisoned in the penitentiary * * * for the term of not less than one year or more than twenty years, and until legally discharged, * * *."

In the case of *State vs. Bray*, No. 3859, it was the sentence of the court that the defendant "be imprisoned in the penitentiary for the term of not less than one year or more than three years, and until legally discharged * * *," and it was ordered that "this sentence be concurrent with the sentence in Cause No. 3858."

In all the years of litigation in criminal cases in Ohio there seems to have been no disposition on the part of anyone to question the proposition that one convicted upon two or more indictments charging separate offenses might be sentenced to imprisonment on each indictment and such has been the practice. The only question in that connection seems to have been whether the sentences imposed were to be regarded as concurrent or cumulative.

Section 13695, General Code, provides:

> "If the defendant has nothing to say, or if he shows no sufficient cause why judgment should not be pronounced, the court shall pronounce the judgment provided by law. * * *"

Section 2166, General Code, provides:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general, but they shall fix, within the limits prescribed by law, a minimum period of duration of such sentences. All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration, as authorized by this chapter, but no such terms shall exceed the maximum term provided by law for the felony of which the prisoner was convicted, nor be less than the minimum term fixed by the court for such felony. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment *may* equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced and, for the purpose of this chapter he shall be held to be serving one continuous term of imprisonment. 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 not been sentenced in the manner required by this section." (Italics the writer's.)

Cumulative sentences may be made in Ohio and also sentences may be made to commence *in futura*. See *Williams vs. State*, 18 O. S. 47; *Opinions of the Attorney General for* 1913, Vol. II, page 1000.

The general rule of law regarding sentences is that each sentence is to commence *at once* unless otherwise specifically stated. Unless the sentence pronounced, clearly and definitely expresses the purpose or intent that the terms are to be served consecutively, it will be held that the terms are to run concurrently.

The general rule as stated in 16 Corpus Juris, page 1307, is as follows:

> "Where defendant is found guilty of more than one offense, if the court desires to have imprisonment under one sentence commence on the expiration of another, the sentence must so state, or else the two terms of imprisonment will run concurrently. This rule does not apply, however, where different sentences are imposed by different courts or where the statute expressly provides that cumulative sentences shall operate consecutively."

And at page 1374, of the same authority:

> "In the absence of a statute to the contrary, if it is not stated in either of two or more sentences imposed at the same time that the imprisonment under any one of them shall take effect at the expiration of the others, the periods of time named will run concurrently and the punishments will be executed simultaneously. The fact that the terms of imprisonment are to be successive must be clearly and expressly stated. Where, however, different sentences are imposed by different courts, the rule as to sentences operating concurrently unless otherwise directed in the sentence does not apply."

The rule as stated in the case of Kirkman vs. McClaughrey, 152 Federal 255, is as follows:

> "Where sentence is passed against an offender in the civil courts (civil courts used in contradistinction of military courts), prescribing two different terms of imprisonment on the same date, the terms will be construed to run concurrently, unless the sentence expressly indicates an intention that they shall be served consecutively."

That the courts have gone a long way in this regard is illustrated by the case of *U. S. vs. Patterson*, 29 Fed. 775. In that case upon a plea of guilty to three indictments, one for misapplication of funds of a National Bank by the accused while cashier thereof, one for false entries to conceal such misapplication and a third for making a false statement with intent to deceive the examining officers—the district court pronounced sentence upon the accused as follows:

> "That the prisoner be confined at hard labor in the state's prison of the state of New Jersey for the term of five years upon each of the three indictments above named, *said terms not to run concurrently*, and from and after the expiration of said terms until the costs of this prosecution shall have been paid."

The court held that the words "said terms not to run concurrently" are uncertain and incapable of application and therefore void, and that the sentences commenced at once, and run concurrently.

A former opinion of this office directed to Warden Jones of the Ohio Penitentiary, which appears in Vol. II, Opinions of the Attorney General for 1914, page 980, holds:

> "When a prisoner is received at the penitentiary with two certificates

of commitment, for different offenses of the same date for one year, each sentence begins with the date of entry and they run concurrently.

In this opinion Attorney General Hogan used the following language:

> "I am unable to find any statute in Ohio which has definite bearing on this case, and therefore, conclude that these three sentences imposed at the same time, without specification of the time of their commencement, will be served concurrently. As the prisoner in this case was given three sentences on the same date, of one year each, it is your duty to discharge him after he has served one year's sentence."

Courts resolve all doubts in favor of a defendant and it may be said that a presumption exists against cumulative sentences unless the sentence pronounced clearly and definitely expresses the purpose and intent that the terms are to be served cumulatively. It is a familiar practice that wherever the court imposing several sentences desires to have one begin on the expiration of another, that fact is expressly stated in the sentence and whenever the court inadvertently fails to have the sentence recorded in that form, or from leniency, intentionally omits to add such a provision, and the defendant is committed in pursuance of such sentence, he is either voluntarily released by the warden or discharged on habeas corpus at the expiration of the longest term in either of the sentences. See Ruling Case Law 242, and cases cited therein.

The question that presents itself is whether or not the provisions of Section 2166, supra, affect the general rule of law as above stated. This section recognizes the power of a court to impose sentences for two or more separate felonies and in this regard provides:

> "If a prisoner is sentenced for two or more separate felonies, his term of imprisonment *may* equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced, and, for the purpose of this chapter, he shall be held to be serving one continuous term of imprisonment. (Italics the writer's.)

The object of the indeterminate sentence law is to vest in the court imposing sentence the power to make a general sentence of imprisonment in the penitentiary for felonies and to fix, within the limits prescribed by law, a minimum period of duration of such sentence.

Upon the expiration of such minimum term of imprisonment as fixed by the court, power is vested in the prison authorities to determine when a prisoner may be safely released upon parole and thus terminate his term of imprisonment.

Section 2166, supra, has in no way abrogated the power of courts of this state to impose concurrent sentences to the Ohio penitentiary, nor has it taken away from the courts of this state the power to impose cumulative sentences.

The portion of Section 2166, above quoted, can be held applicable *only* to consecutive or cumulative sentences or to cases where different sentences are imposed by different courts. In those cases where the court imposed consecutive or cumulative sentences or in the case of a prisoner confined under different sentences by different courts, unless otherwise directed, the term of imprisonment of such a prisoner "*may* equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced" and he is "held to be serving one continuous term of imprisonment" in order that this may be accomplished.

The inquiry in all such cases is, not what the court may have intended by its sentence and judgment, but rather what the sentence and judgment itself expressly

says. The mittimus recites the sentence. It alone advises the keeper of the jail or penitentiary for what term or terms and for what length of time he may lawfully detain the convict. His authority for detention is the writ of commitment. He cannot indulge in surmise in attempting to determine what in his judgment the sentence may mean as to the term of imprisonment.

I am unable to agree with a former opinion of this office which is found in Annual Report of the Attorney General for 1914, Vol. I, page 160, the syllabus of which reads as follows:

> "Under the indeterminate sentence law, it was the intention of the legislature to treat prisoners serving concurrent sentences as serving one term. The only way this can be done is to add the minimum and maximum terms for the different felonies and treat the prisoner as serving one term for the different felonies of which he was convicted, with such combined minimums and maximums as the limiting one which the board may act."

Nor can I agree with that part of Opinion No. 3825, Opinions of the Attorney General for 1926, the conclusion of which is based solely upon the 1914 opinion, supra.

Answering your question specifically, it is my opinion that the prisoner sentenced on the same day by the same court for from three to twenty years on three indictments of forgery where the journal of the court shows that the sentences are to run concurrently, must serve not less than three years, nor more than twenty years and that the prisoner who was sentenced on the same day by the same court for from one to twenty years on a charge of forgery and from one to three years on a charge of giving a check with intent to defraud, where the journal of the court shows that the sentences are to run concurrently, must serve not less than one nor more than twenty years. I am further of the opinion that Section 2166, General Code, does not abrogate the power of courts of this state to impose concurrent sentences, and that the term of imprisonment of an inmate of the Ohio penitentiary, sentenced on the same day by the same court, upon two or more indictments, the sentences being ordered to run concurrently, may be terminated by the Board of Clemency upon and after the expiration of the longest minimum period of duration of sentence imposed in any one of the several cases.

Respectfully,
Edward C. Turner,
Attorney General.

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DISAPPROVAL ABSTRACT OF TITLE TO LAND IN THE CITY OF MANSFIELD, RICHLAND COUNTY, OHIO, TO BE USED FOR ARMORY PURPOSES.

Columbus, Ohio, April 19, 1927.

In re: Re-examination of deed and abstract of title to lands in Mansfield for armory purposes.

Hon. Frank D. Henderson, *Adjutant General, Columbus, Ohio.*

Dear Sir—The deed and abstract covering a tract of land of 5.64 acres located in the city of Mansfield, which it is proposed to convey to the state of Ohio for armory purposes, have been re-submitted for examination. Said deed and abstract were returned to you on March 3, 1927, for certain corrections.