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## CONSECUTIVE SENTENCES—AND ELIGIBILITY FOR PAROLE—§§2941.40, 2941.43, 2965.35, R.C.

## SYLLABUS:

Where a convict is tried for an offense in one of the circumstances stated in Section 2941.40, Revised Code, and is sentenced and returned to the penitentiary to serve consecutive sentences under Section 2941.43, Revised Code, such convict's eligibility for parole is determined by the provisions of Section 2965.35, Revised Code.

Columbus, Ohio, June 10, 1960

Hon. William M. Vance, Member, Ohio Pardon and Parole Commission  
21 West Broad Street, Columbus, Ohio

Dear Sir:

Your request for my opinion, which I will consider to be a request of the Ohio pardon and parole commission, reads as follows:

"In the text of your opinion No. 1333, 1960, there is a discussion of our second question which concerns Sections 2941.40, 2941.43 of the Revised Code of Ohio. This discussion begins in the middle of Page 5 of the mimeographed opinion and extends through page 7. Its conclusions are not reflected in the syllabus. The gist of your conclusions are that a convict who escapes and is indicted for such escape, or a, convict who is returned to court for trial on another indictment, on conviction shall be sentenced and the sentence cannot begin to run until the expiration of the former sentence.

"This ruling creates a terrific morale problem and may result in serious inequities. Let me cite two 'horrible examples.'

"1. John Doe wrote a check for \$5,00, signing his true name, but drawn on a bank where he had no account. He cashed it at a bar and was subsequently indicted for forgery.

"He pleaded guilty and was sentenced to the penitentiary. He proved to be a model prisoner and was transferred to an honor camp awaiting parole. One day he walked away from the job and was apprehended a half mile away. He was indicted for escape, under section 2901.11, Revised Code, pleaded guilty, and was sentenced to a term of from one to five years and returned to the penitentiary.

“Under the ruling, he could not begin to serve this 1-5 year sentence until the expiration of his 1 to 20 year sentence and, since he could not be paroled and earn a final release on his first sentence, in the absence of executive pardon he could not be considered for parole until twenty years had passed—the same as a first degree murderer serving life.

“2. Richard Roe also wrote a bad check for \$5.00 under the same circumstances as John Doe. Later that evening, intoxicated, he wrote another bad \$5.00 check and cashed it at a bar. He was indicted and convicted on the first charge and sentenced to a 1 to 20 year term. A month later he was indicted for the second charge, returned for trial, convicted and again sentenced for a 1 to 20 term.

“Under this ruling he would not be parolable until after 20 years. Had these charges been tried together, the Court could, and probably would, have made them run concurrently. The police or prosecutor, by withholding prosecution on the second check, in effect invaded the judicial powers of the court and made a twenty year term mandatory.

“May I suggest a possible way out of this dilemma, other than waiting a year or more for legislative action?

“Section 2965.35 of the Revised Code, provides, in part as follows:

“ ‘A person serving several indeterminate sentences consecutively shall become eligible for parole upon the expiration of the aggregate of the minimum terms of his several sentences \* \* \* For the purpose of this section, a person is serving consecutive sentences *whenever a court specifies that any sentence begin at the completion of another sentence* \* \* \*’

“ ‘Branch 4 of the syllabus of your opinion states that ‘Such specification by the court may be either (1) by an express provision to that effect in the sentence, or (2) by necessary implication \* \* \*’

“Since, under sections 2941.43 and 2901.11 of the Revised Code, it is required that the latter sentence begin at the completion of a former sentence, and under the above quoted part of the syllabus the consecutive nature of the sentence may be either express or implied, we suggest that these cases arising under section 2941.40 and 2941.43 of the Revised Code be treated under the provisions of section 2965.35.”

The questions concerns Section 2941.43, Revised Code, relating to a convict who is tried for an offense in one of the circumstances stated in Section 2941.40, Revised Code, which reads:

"A convict is the penitentiary or a state reformatory, who escaped, or forfeited his recognizance before receiving sentence for a felony, or against whom an indictment or information for felony is pending, may be removed to the county in which such conviction was had or such indictment or information was pending, for sentence or trial, upon the warrant of the court of common pleas of such county.

"This section does not extend to the removal of a convict sentenced to be imprisoned for life, unless the sentence to be imposed or the indictment or information pending against him is for murder in the first degree."

Section 2941.43, Revised Code, reads as follows :

"If the convict referred to in section 2941.40 of the Revised Code is acquitted, he shall be forthwith returned by the sheriff to the penitentiary to serve out the remainder of his sentence. If he is sentenced to imprisonment in the penitentiary, he shall be returned thereto by the sheriff and the term of his imprisonment shall begin at the expiration of the term for which he was in prison at the time of his removal. If he is sentenced to death, such sentence shall be executed as if he were not under sentence of imprisonment in the penitentiary."

Under these statutes, therefore, the term of imprisonment on the later sentence does not begin until the expiration of the term of imprisonment for which the convict was in prison at the time of his removal.

As you note, Section 2941.43, *supra*, was discussed in in Opinion No. 1333, Opinions of the Attorney General for 1960, issued on May 6, 1960. In that opinion, I considered the question of the applicability of Section 5145.01, Revised Code, to said Section 2941.43. Section 5145.01, *supra*, reads in part as follows :

"\* \* \*

"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 felonies for which he was sentenced and, for the purposes of Sections 5145.01 to 5145.31, inclusive, of the Revised Code, he shall be held to be serving one continuous term of imprisonment.

"\* \* \*"

Regarding this question, I stated :

"In any event, it is my view that Sections 2941.39 to 2941.43, inclusive, Revised Code, constitute special legislation to which

the general provisions of Section 5145.01, Revised Code, do not apply. Hence, following the rationale of the *Henderson* case, *supra*, and the plain terms of Section 2941.43, Revised Code, service under the second sentence cannot begin until the "expiration" of the first, either by service of the maximum, or by some other means provided by law. One such means is executive pardon. See 41 Ohio Jurisprudence, 292, Section 14."

In your request you note examples of possible severe hardships which might arise from a strict compliance with the provisions of Section 2941.43, *supra*. You also suggest that the provisions of Section 2965.35, Revised Code, as pertaining to minimum terms for purposes of parole, might be construed to take precedence over the provisions of Section 2941.43, *supra*.

On reviewing the sections here involved, I again note that Section 2941.43, *supra*, is a special section in that it deals with a special situation and undoubtedly constitutes an exception to the provisions of Section 5145.01, *supra*. The question then remains whether the provisions of Section 2965.35, *supra*, are applicable to a convict who has been removed from the penitentiary or a state reformatory for sentence or trial (Section 2941.40, *supra*), and has received another sentence, to the penitentiary (Section 2941.43, *supra*).

Section 2965.35, *supra*, as effective May 24, 1957, reads as follows:

"A person serving several indeterminate sentences consecutively shall become eligible for parole upon the expiration of the aggregate of the minimum terms of his several sentences less the diminution of minimum sentence provided for in section 2965.31 of the Revised Code. Where the aggregate of the minimum terms is longer than fifteen years, eligibility for parole shall be determined in accordance with section 2965.23 of the Revised Code. For the purpose of this section, a person is serving consecutive sentences whenever a court specifies that any sentence begin at the completion of another sentence, whether or not any such sentences are to be served in a reformatory or a penitentiary or both."

Under the provisions of Section 2941.43, *supra*, the convict does not begin to serve the second term until the expiration of the first. Regarding the parole of such a convict while serving said first term, I stated in Opinion No. 1333, *supra*:

"Now it is obvious that where a prisoner has a second term to serve after termination of the first, the commission will not be

in a position to give him a 'release from confinement,' and hence, in such case, could not effectively release such prisoner prior to the termination of his maximum sentence."

The release here referred to is given under authority of Section 2965.17, Revised Code, and is a "final release" give na paroled prisoner when he has performed all the conditions of his parole. Referring to such release, I also stated in Opinion No. 1333, *supra* :

"Such a release, however, as pointed out above, involves (1) an actual freedom from confinement and (2) a period of supervision on parole, conditions obviously impossible to meet if the prisoner is to begin immediately to serve another sentence. I thus conclude that the commission *in such case, i.e.*, a prisoner sentenced under Section 2941.43, Revised Code, is without power to terminate an earlier term by its own 'administrative actions' as you suggest.

"I note, incidentally, that the original prototype of existing Section 2941.43, Revised Code, was enacted in 1866 (63 Ohio Laws, 20) at which time all sentences were determinate, *i.e.*, for a particular period of years. This statute seems out of harmony with the present system of parole, and it could well be thought to merit legislative attention to bring the treatment of these special cases into harmony with those systems."

While a prisoner serving two terms under Section 2941.43, *supra*, could not under the provisions of that section be paroled on the first term before commencing the second term, the question remains whether such prisoner could be considered to be within the purview of Section 2965.35, *supra*, and be eligible for parole upon the expiration of the aggregate of the minimum terms of his several sentences less the diminution of minimum sentence provided for in Section 2965.31, Revised Code. Such a prisoner would be serving consecutive sentences as, by law, one is to follow the other. Whether he is serving consecutive sentences within the purview of Section 2965.35, *supra*, however, is not so readily answered.

Section 2965.35, *supra*, states that for the purposes of the section a person is serving consecutive sentences "whenever a court specifies that any sentence begin at the completion of another sentence." In Opinion No. 1333, *supra*, I concluded that Section 2965.35, *supra*, is applicable in all cases of consecutive sentences whether so imposed in express terms or necessarily so impose by mere silence on the point. I must note at this time, however, that my conclusion in that regard pertained to instances where the judge has a discretion to designate or not designate while the sen-

tences in Section 2941.43, *supra*, are made consecutive by the statute itself.

In summary, Section 2941.43, *supra*, is a special statute which ordinarily would take precedence over the provisions of a general statute in conflict therewith. Also, there is a question as to whether a convict serving consecutive sentences as a result of the provisions of Section 2942.43, *supra*, may be considered to be serving consecutive sentences within the purview of Section 2965.35, *supra*. On the other hand, Section 2965.35, *supra*, dealing with the minimum time to serve before parole, might be considered to be a special statute to that extent; and said statute was enacted in 1957, years after the original enactment of the statute which is now Section 2941.43, *supra* (65 Ohio Laws, 20; 1866). Thus, it might well be argued that the legislature in enacting Section 2965.35, *supra*, intended that the provisions of that section should govern over all existing sections as regards the parole of prisoners.

Because of the inconsistency existing in the statutes here considered, the general rule of law in Ohio as regards statutes grounded upon principles of humane public policy appears pertinent. In this regard, it is stated in 37 Ohio Jurisprudence, 737, Section 415:

“Statutes enacted in Ohio for the protection of human life, or statutes of equitable character and beneficent tendency, or statutes granting a valuable right and grounded upon principles of a humane public policy, have ben given a liberal construction by the courts.

I am of the opinion that the instant question falls with the purview of the humane public policy rule and feel that a liberal construction may be given the statutes concerned.

Thus, I conclude that a convict who has been returned to the penitentiary to serve consecutive sentences under Section 2941.43, *supra*, is, under Section 2965.35, Revised Code, eligible for parole upon the expiration of the aggregate of the minimum terms of his sentences less the diminution of minimum sentence provided for in Section 2965.31, Revised Code. In this connection, it is to be noted that until the prisoner's second sentence has been imposed, the provisions of Sections 2965.35, *supra*, do not apply, and hence no part of his time served under the earlier term could be credited against the minimum term under the later sentence. Thus, the minimum term under the second sentence must be served before the convict is eligible for parole.

In view of the foregoing, it is my opinion and you are advised that where a convict is tried for an offense in one of the circumstances stated in Section 2941.40, Revised Code, and is sentenced and returned to the penitentiary to serve consecutive sentences under Section 2941.43, Revised Code, such convict's eligibility for parole is determined by the provisions of Section 2965.35, Revised Code.

Respectfully,

MARK McELROY

Attorney General