

4408.

COURT—MAY NOT SUSPEND EXECUTION OF SENTENCE
AFTER IT HAS BEEN IMPOSED IN MISDEMEANOR CASE
—INDIGENT PRISONER PAROLED WHEN.

SYLLABUS:

1. *A trial court in a misdemeanor case, by virtue of the provisions of section 13451-8b, General Code, can at the time of sentence suspend the execution of any sentence it has imposed. However, after such a time, a trial court during and after term does not for the purpose of clemency have the power to suspend the execution of a sentence after it has been imposed.*

2. *The county commissioners, acting under section 13452-10, General Code, with the consent of the prosecuting attorney, sheriff and sentencing judge can parole an indigent prisoner confined in the county jail only for the non-payment of fine and costs, even though such prisoner was originally committed to such institution to serve time and to pay the fine and costs.*

COLUMBUS, OHIO, July 10, 1935.

HON. JOHN B. MEISTER, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads in part as follows:

“I very respectfully ask your opinion upon the following state of facts:

At the October, 1934, Term of the Court of Common Pleas four defendants were convicted of misdemeanors.

Two of the defendants were sentenced to be confined in the county jail for the period of three months, and to pay the costs of prosecution, and committed until the costs were paid, with the further provision that two months of the sentence of confinement in the jail be suspended conditioned upon good behavior.

One defendant was sentenced to be confined in the county jail for the period of six months and to pay the costs of prosecution, and committed until the costs were paid.

One defendant was sentenced to be confined in the county jail for the period of six months, to pay a fine of \$200 and the costs of prosecution, and committed until the fine and costs were paid, secured to be paid or he be otherwise discharged according to law.

Fulton county has no workhouse nor a contract with any workhouse.

Error was prosecuted to the Court of Appeals and the judg-

ment was affirmed in January, and execution of sentence commenced February 5th.

The two defendants first above referred to served their sentences, including time for the payment of the costs and have been discharged from the jail under the former order of suspension.

The other two defendants are still in jail. One of such defendants is occasionally sick and is taken to the hospital for treatment, where he will stay for a few days and then be returned to the jail.

The October 1934 term of court, of course, expired with the end of the year; the January term expired March 31, and the April term convened April 1st.

Under the above statement of facts is there any statutory authority in the Court, the County Commissioners, or any other official to at this time release either or both of the defendants from further custody, or place either or both upon parole or probation subject to conditions imposed?"

Since the enactment in 1929 of sections 13422-1 to 13459-14, inclusive, of the General Code (113 O. L., 123), known as the Code of Criminal Procedure, the Supreme Court in the case of *Municipal Court of Toledo, et al., vs. The State, ex rel. Platter*, 126 O. S., 103, held that a trial court in a criminal case did not have the power, either inherent or statutory, to suspend the execution of a sentence previously imposed upon a person convicted of a misdemeanor. The first, second and third branches of the syllabus of that case read:

"1. Criminal procedure in this state is regulated entirely by statute, and the state has thus created its system of criminal law covering questions of crime and penalties, and has provided its own definitions and procedure.

2. By statute, authority is conferred upon trial judges to suspend imposition of sentence and place the defendant upon probation; also discretionary power is conferred upon trial judges to suspend execution of sentence of one convicted of a bailable offense for such period as will give the accused time to prepare, file or apply for leave to file a petition for review of such conviction. Also provision is made for conditional sentence in misdemeanors.

3. The trial courts of this state do not have the inherent power to suspend execution of a sentence in a criminal case and may order such suspension only as authorized by statute."

See also *Madjorous vs. State*, 113 O. S., 427, 429, 433; *Ex Parte Steinmetz*,

35 O. App., 491; *Shondell vs. Bradley*, 42 O. App., 8; *Ex Parte United States*, 242 U. S., 26; and 16 C. J., 1333.

At the time the case of *Municipal Court of Toledo, et al., vs. The State, ex rel. Platter*, supra, was decided (January 11, 1933), the legislature had made provision for the suspension of the imposition of sentence (sections 13452-1 to 13452-11, inclusive, General Code), suspension of execution of sentence pending the perfecting of error proceedings (sections 13453-1 to 13453-6, inclusive, General Code), and the conditional sentence of persons convicted of misdemeanors (section 13451-8, General Code). After the decision in that case, the legislature supplemented section 13451-8 by enacting in 115 O. L., 543, section 13451-8b which reads:

“Any court sentencing a person for misdemeanor forbidden by statute or ordinance, may at the time of sentence remit the same or suspend such sentence in whole or in part, upon such terms as he may impose.”

It is apparent from a reading of this section that the legislature has by express statutory provision empowered a trial court in a criminal case to suspend the execution of sentence imposed on a person convicted of a misdemeanor. However, the suspension of the execution of sentence must be made at the time the prisoner is sentenced. There is no language in this section which would indicate that a trial court has the power for the purpose of clemency to suspend the execution of sentence either during or after term of court after a prisoner has been sentenced.

Section 13451-8, General Code, reads:

“When a person shall be convicted of a misdemeanor punishable either by fine or imprisonment, or both, the court may award against such offender a conditional sentence, and order him to pay a fine with or without the cost of prosecution within a limited time to be expressed in the sentence, and in default thereof, to suffer such imprisonment as is provided by law and awarded by the court. The court may also place such an offender on probation, with the condition that he pay a fine and costs or either of them, as the case may be, in installments within a limited time, and may, in case of the default in any of such payments, impose such sentence as is provided by law.

The person against whom such conditional sentence shall be awarded, shall be forthwith committed to the custody of an officer of the court, until such sentence be complied with; and if he shall not pay the fine within the time limited he shall be committed to

the county jail, and it is hereby made the duty of the sheriff in such case, to execute the sentence according to the terms thereof."

It is clear from a reading of this section, as well as section 13451-8b, that after a prisoner has been sentenced in a misdemeanor case a trial court, subsequent to the imposition of such sentence, no longer "has the power to suspend the execution of such sentence". Likewise, an examination of the Code of Criminal Procedure discloses no statute which authorizes the suspension of the execution of a sentence previously imposed upon a person convicted of violating the criminal statutes of this state.

With the exception of the provisions contained in section 13451-8b, General Code, the language of Day, J., in the case of *Municipal Court of Toledo, et al., vs. State, ex rel. Platter*, supra, at pages 108 and 109, is still pertinent and applies to the facts set forth in your letter. Judge Day, at pages 108 and 109, said:

"As to the second proposition, pertaining to the power of the municipal court to suspend execution of sentence, it should be noted that there is a distinction between suspension of *imposition* of sentence and suspension of *execution* of sentence. We find no statutory authority to suspend the *execution* of the sentences previously imposed by such court on conviction of violating a state law, except to enable defendant to prosecute error or to be placed on probation, as provided by statute; nor did the municipal court have inherent power so to do.

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In view of the fact that in this state crimes are defined by statute, and procedure in criminal cases is of statutory provision, we must look to the statute for authority to suspend execution of sentence. 12 Ohio Jurisprudence, 49; *Weaver vs. State*, 120 Ohio St., 44, 165 N. E., 573; *Stockum vs. State*, 106 Ohio St., 249, 253, 139 N. E., 855."

Under the facts stated in your letter, the familiar principle of law in this state, as announced in *Lee vs. State*, 32 O. S., 113, that a court during term and before a sentence has been executed, has the power to set aside a sentence in a criminal case to correct errors and mistakes, is not applicable.

Your attention is called to the provisions of sections 2576, 11148 to 11150, inclusive, and 13451-10, General Code. Section 2576 provides:

"The county auditor may discharge from imprisonment any person confined in county jail for the non-payment of a fine or amercement due the county, except fines for contempt of court or

an officer of the law, when it is made clearly to appear to him that the fine or amercement cannot be collected by such imprisonment.”

Section 11148 reads as follows:

“When a person, resident in this state or not, is arrested, or in custody of a sheriff, or other officer, on mesne or final process, in a civil action, the officer having such person in custody, if requested by him, shall go with such person before the commissioner of insolvents of the county where he is arrested, or in custody, who shall, if required, make out for such person, under his direction, an accurate schedule in writing of all debts by him owing, specifying the names of the persons to whom owed, and the original consideration thereof, and whether they are by bond, note, or otherwise. Also, an accurate schedule in writing of all debts and demands owing to him, with a pertinent description of all contracts, in which he is interested, and of all property, of every kind, real and personal, in possession, remainder, or reversion, to which he has any claim. Such applicant must surrender to the commissioner all written evidences of title and of claims and his books of account.”

Section 11149 provides as follows:

“Nothing herein shall deprive a person of any right he may have to hold property exempt from the payment of his debts, or to require him to assign or surrender such property or rights in action to the commissioner. A separate schedule must be made of the exempted property. The commissioner shall decide all questions as to the value of property selected by the debtor as exempt, and all other questions in that behalf.”

Section 11150 reads:

“Except persons confined in workhouses established by municipal corporations, a person who is imprisoned under process for a fine, penalty, or costs, in a criminal proceeding, shall be entitled to the benefit of the two next preceding sections after he has been imprisoned thereunder for the period of sixty days, unless the judgment in the case requires imprisonment till the fine, penalty, or costs, be paid.”

Section 13452-10 provides:

“The county commissioners of a county not having a work-

house, may, on the written recommendation of the judge who has tried the case and the sheriff of the county where the prisoner is confined, release on parole an indigent prisoner confined in the jail of such county, for non-payment of fine and costs alone. The parole in such case shall be in writing, signed by the prisoner so released and conditioned for the payment of the fine and costs by him in labor or money in installments or otherwise, and shall be approved by the prosecuting attorney of the county, and the provisions of G. C. §6212-17, shall not prevent the commissioners from releasing such indigent prisoner as herein provided."

The auditor of your county would not be authorized to exercise the power conferred upon him by section 2576, General Code, under the facts stated in your letter, because the prisoners are serving sentences which consist of time and a fine. Likewise, if the prisoners were serving fines only, there are no facts in your letter which would indicate that the fines imposed were due the county, and, for that reason, section 2576 would not be applicable.

The provisions of sections 11148 to 11150, inclusive, General Code, cannot be invoked inasmuch as the prisoners mentioned in your letter are incarcerated under a sentence which provides that they shall stand committed until the fine and costs are paid. Under section 11150, an insolvent debtor cannot be released from imprisonment if the judgment in the case requires "imprisonment until the fine, penalty, or costs, be paid".

Section 13452-10, General Code, was considered in Opinion No. 4392 rendered by this office on July 5, 1935. The syllabus reads as follows:

"The county commissioners, acting under section 13452-10, General Code of Ohio, cannot parole an indigent prisoner confined in the county jail only for non-payment of fine and costs without the consent of the prosecuting attorney, sheriff and the sentencing judge."

In the course of that opinion it was stated that:

"The probation and parole of persons committed to jails and penal institutions in Ohio is governed solely by statutes in Ohio. The *Municipal Court of Toledo, et al., vs. State, ex rel. Platter*, 126 O. S., 103, 108, 109.

Section 13452-10 is the only statute in the General Code which pertains to and governs the release by county commissioners of persons incarcerated in a county jail. * * *

It is quite evident from a reading of this statute (section 13452-10) that the county commissioners with the consent of the

sentencing judge, the prosecuting attorney and the sheriff of the county where the prisoner is confined, can release from imprisonment a prisoner who is an indigent and who is unable to pay the fine and costs assessed against him. There is no language in this section which would indicate that an indigent prisoner could be released by the county commissioners without the recommendation of the sentencing judge."

See also *Kohler vs. State, ex rel. Goldstein*, 24 O. App., 272.

From a reading of section 13452-10, General Code, it is evident that the legislature intended to empower the county officials designated therein to release indigent prisoners who are confined in jail only for non-payment of fine and costs, and this is true even though the prisoners may have originally been committed to serve time and pay fine and costs. Therefore, under the facts stated in your letter, if the prisoners have served their sentence of time and are now being confined in jail solely for the non-payment of fine and costs, the county commissioners, with the consent of the prosecuting attorney, sheriff and sentencing judge, may release such prisoners from jail.

Specifically answering your inquiry, it is my opinion that a trial court in a misdemeanor case, by virtue of the provisions of section 13451-8b, General Code, can at the time of sentence suspend the execution of any sentence it has imposed. However, after such a time, a trial court during and after term does not for the purpose of clemency have the power to suspend the execution of a sentence after it has been imposed.

The county commissioners, acting under section 13452-10, General Code, with the consent of the prosecuting attorney, sheriff and sentencing judge can parole an indigent prisoner confined in the county jail only for the non-payment of fine and costs, even though such prisoner was originally committed to such institution to serve time and to pay the fine and costs.

Respectfully,

JOHN W. BRICKER,
Attorney General.