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1. PROBATION — PERSON CONVICTED OF CRIME — SECTIONS 13452-1 TO 13452-11 GENERAL CODE — REMISSION, SUSPENSION OR EXECUTION OF SENTENCE — PERSONS CONVICTED OF “MISDEMEANOR FORBIDDEN BY STATUTE OR ORDINANCE” — SECTIONS 13451-8a, 13451-8b — SAID SECTIONS HAVE NO APPLICATION TO PERSONS CONVICTED, VIOLATION SECTIONS 1639-45 OR 1639-46 — SUSPENSIONS GOVERNED BY SECTIONS 1639-49, 1639-50.
2. JUVENILE COURT AUTHORIZED AND EMPOWERED TO SUSPEND INDEFINITELY OR PERMANENTLY EXECUTION OF SENTENCES UNDER CERTAIN STATUTES — IMPRISONMENT — BEFORE OR DURING COMMITMENT — JURISDICTION, AGE OR OTHERWISE — DEPENDENT, NEGLECTED OR DELINQUENT CHILD.

SYLLABUS:

I. Sections 13452-1 to 13452-11, General Code, making provision for the placing of a person convicted of a crime upon probation, and also Sections 13451-8a and 13451-8b, General Code, having to do with the remission, or suspension of the execution, of sentences imposed upon persons convicted of a “misdemeanor forbidden by statute or ordinance”, at the time of such sentence, have no application to persons convicted of violation of either Section 1639-45 or Section 1639-46, General Code, such suspensions being governed by Sections 1639-49 and 1639-50, General Code.

II. Under the provisions of Section 1639-49, General Code, read in the light of Section 1639-50, General Code, a Juvenile Court is authorized and empowered to suspend indefinitely or permanently the execution of sentences, imposed for violation of either Section 1639-45 or Section 1639-46, General Code, where imprisonment is imposed as part of the punishment, "before or during commitment, upon such condition as he imposes", at least for such period as the Juvenile Court does not, by reason of age or otherwise, lose jurisdiction over the dependent, neglected or delinquent child involved.

Columbus, Ohio, March 16, 1942.

Honorable Frank T. Cullitan, Prosecuting Attorney,
Cleveland, Ohio.

Dear Sir:

I have your request for my opinion which reads:

"I respectfully request your opinion on the following matter:

Adult persons are tried in the Juvenile Court under Sections 1639-45 and 1639-46, General Code. Persons convicted under either of these statutes are subject to imprisonment.

Section 1639-45 General Code provides in substance that a person found guilty of contributing to the dependency, neglect or delinquency of a child shall be fined from \$5.00 to \$1,000.00 or imprisoned from ten days to one year, or both.

Section 1639-46 General Code provides in substance that a person found guilty of failure to support his child may be sentenced to not more than one year imprisonment or fined not more than \$500.00, or both. The court may suspend sentence provided the defendant pays a stipulated sum each week for the child's support.

Section 1639-49 General Code provides that, every case of conviction where imprisonment is imposed as part of the punishment, the judge may suspend sentence, before or during commitment, upon such conditions as he imposes.

Manifestly, under Section 1639-49 General Code, the court is given the power to suspend execution of the sentence after it has been imposed. The Juvenile Code makes no provision for the court's control or supervision of persons under suspended prison sentences; nor is it anywhere stipulated in the Juvenile Code the length of time a person may be kept under such a suspended sentence. Suppose that a sentence of one year imprisonment was imposed on a person for violating either Section 1639-45 or Section 1639-46 General Code and that the sentence was *immediately* suspended under certain conditions. Can a person be held under such a suspended sentence as long as the welfare of the child involved requires it? Is the validity of the suspended sentence affected by its being operative for an indefinite period of time?

Section 13452-1 General Code provides in substance that where a person has been found guilty of a crime, the judge or magistrate may withhold imposition of sentence and place the defendant on probation provided the public good does not demand or require that he be immediately sentenced. It is worthy of note that juvenile delinquents are excepted from the operation of this statute but nothing is said to exclude adult offenders of the Juvenile Code from its application. Sections 13452-2 to 13452-11 General Code have to do with the court's power and control over probationers. Can the juvenile judge legally withhold the imposition of sentences of persons convicted under Sections 1639-45 and 1639-46 General Code and place them on probation pursuant to Sections 13452-1 to 13452-11 General Code?

Specifically then, my inquiry is: (1) Where a person is convicted of violating either Section 1639-45 General Code or Section 1639-46 General Code and execution of the imposed sentence is suspended upon certain conditions, how long may the convicted person be held subject to the suspended sentence? (2) Are Sections 13452-1 to 13452-11, inclusive, General Code, regarding probation of criminals, applicable to persons convicted under Sections 1639-45 and 1639-46 General Code?"

Section 1639-45, General Code, reads as follows:

"Whoever abuses a child or aids, abets, induces, causes, encourages or contributes toward the dependency, neglect or delinquency, as herein defined, of a child or a ward of the court, or acts in a way tending to cause delinquency in such child, or who aids, abets, induces, causes or encourages a child or a ward of the court, committed to the custody of any person, department, public or private institution, to leave the custody of such person, department, public or private institution, without legal consent, shall be fined not less than five dollars, nor more than one thousand dollars or imprisoned not less than ten days nor more than one year, or both. Each day of such contribution to such dependency, neglect or delinquency, shall be deemed a separate offense."

Section 1639-46, General Code, provides in part that:

"Whoever is charged by law with the care, support, maintenance or education of a child under eighteen years of age, and fails, neglects or refuses so to do, or who abandons such child, or who beats, neglects, injures or otherwise illtreats such child, or causes or allows him or her to engage in common begging, or whoever, being the father of an illegitimate child under the age of eighteen years and fails, neglects or refuses to care for, support, maintain or educate such child, upon complaint filed in a court exercising the jurisdiction conferred in this chapter, may be, after trial and conviction, sentenced to imprisonment for not

more than one year, or fined not more than five hundred dollars, or both, and the judge may order that such person stand committed until such fines and costs are paid; provided, that if he shall pay promptly each week to the court or to a trustee named by such court a sum to be fixed by it for such purpose, sentence may be suspended. * * * ”

Section 1639-49, General Code, is as follows:

“In every case of conviction and where imprisonment is imposed as part of the punishment, such judge may suspend sentence, before or during commitment, upon such condition as he imposes.”

Section 1639-50, General Code, is also pertinent to your inquiry. This section reads:

“When as a condition of suspension of sentence, bond is required and given, upon the failure of a person giving such bond to comply with the terms and conditions thereof, such bond may be forfeited, the suspension terminated by the judge, the original sentence executed as though it had not been suspended, and the term of any sentence imposed in such case shall commence from the date of imprisonment of such person after such forfeiture and termination of suspension. Any part of such sentence which may have been served, shall be deducted from any such period of imprisonment. When such bond is forfeited the judge may issue execution thereon without further proceedings.”

Sections 1639-45, 1639-46, 1639-49 and 1639-50, supra, were each first enacted in “An Act — To revise, consolidate and codify the juvenile laws of the state of Ohio by enacting sections 1639-1 to 1639-60, General Code, inclusive; and to repeal sections 1639 to 1683-1, inclusive, of the General Code of Ohio, relating to minor children,” passed by the 92nd General Assembly, and effective on August 19, 1937 (117 v. 520). Section 1639-46, supra, was amended by the 94th General Assembly in House Bill No. 56, effective August 5, 1941. The changes made, however, are in nowise material to this opinion.

Section 13452-1, General Code, also mentioned in your communication, provides as follows:

“In prosecutions for crime, except as mentioned in Section 6212-17 of the General Code, and as hereinafter provided, where the defendant has pleaded, or been found guilty and it appears

to the satisfaction of the judge or magistrate that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and the public good does not demand or require that he be immediately sentenced, such judge or magistrate may suspend the imposition of the sentence and place the defendant on probation in the manner provided by law, and upon such terms and conditions as such judge or magistrate may determine; provided, that juvenile delinquents shall not be included within this provision."

Section 6212-17, General Code, referred to in the above section, fixed penalties for violation of certain of the old "prohibition laws," and was repealed in 1933 (115 v. Pt. II, 118).

Section 13452-1, supra, was enacted by the 88th General Assembly in 1929, in "An Act — To revise and codify The Code of Criminal Procedure of Ohio, * * *."

You will observe that Sections 1639-45, 1639-46, 1639-49 and 1639-50 are all part of what is commonly called the "Juvenile Code," while Section 13452-1, supra, as well as Sections 13452-2 to 13452-11, General Code, having to do with the placing of persons convicted of crime upon probation, is a part of our Penal Code.

As will hereinafter appear, the purpose of the Legislature in passing the Juvenile Code, enacted as an exercise of the police power of the state, was "to protect children and to remove them from evil influences" (Adams and Hosford, Ohio Probate Practice and Procedure, Page 64), while the Penal Code and the several sections thereof were designated to punish those who transgress the law of the state and to deter them and others from committing other crimes and offenses. Not only were the sections of the Juvenile Code as they now exist enacted at a later date than those of the Penal Code, but they are sections dealing with a special subject, namely, the care and welfare of minors. As held in the first and third branches of the syllabus in the case of *Western and Southern Indemnity Co. v. Chicago Title and Trust Co., et al., Receivers*, 128 O.S. 422, 191 N.E. 462 (1934):

"1. Where two sections of the General Code contain inconsistent provisions relating to the same subject-matter, the later enactment must prevail and the earliest is repealed by implication. * * *

3. A special statute covering a particular subject-matter must be read as an exception to a statute covering the same and other subjects in general terms."

See also *State, ex rel. Elliott Co., v. Connor*, Supt. 123 O.S. 310, 175 N.E. 200 (1931), and *State, ex rel. Steller et al., Trustees v. Zangerle*, Aud., 100 O.S. 414, 126 N.E. 413 (1919).

Nothing is more well settled in this state than the doctrine enunciated in the case of *Municipal Court of Toledo et al., v. The State, ex rel. Platter*, 126 O.S. 103, 184 N.E. 1 (1933), to the effect that:

"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.*"

(Emphasis mine.)

In this case it was further held, as stated in the third branch of the syllabus, that 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 v. State*, 113 O.S. 427 (1925), — quoting with approval the opinion of Mr. Chief Justice White in the case of *Ex Parte United States*, 242 U.S. 27, 37 S. Ct. 72, 61 L. Ed. 129 (1916), — and *State of Ohio v. John Radcliff*, 18 O.N.P. (N.S) 273, 26 O.D. 87 (C. P. Franklin Co., 1915).

In the *Madjorous* case it was said as follows at page 433:

"It would be unprofitable to discuss the many cases cited in the briefs of counsel, as we think the best authority upon this subject is the very well-considered opinion of Chief Justice White, in which he reviews and discusses the leading cases at length and reaches the conclusion that the courts *do not possess the inherent power to suspend a sentence in a criminal prosecution*, except to stay the sentence for a time after conviction, for the purpose of giving an opportunity for a motion for a new trial or in arrest of judgment or during the pendency of a proceeding in error. The Ohio Legislature having dealt with the subject, and having made certain provisions and certain exceptions thereto, it will be presumed that the Legislature has exhausted the legislative intent and that it has not intended the practice to be extended further than the plain import of the

statutes already enacted. The well-known maxim, *expressio unius est exclusio alterius*, applies.”

(Emphasis mine.)

The second headnote in the Radcliffe case reads:

“The court has no inherent power to suspend sentence in a criminal case. The doctrine belongs to the common law which was never in force in Ohio on the subject of crimes and procedure. The power now given by statute to suspend sentences in certain cases is to be construed as a limitation of power as well as the conferring of power.”

With the quotation of the pertinent statutes and the observations above made, I now consider your questions in inverse order.

I. You ask in your second question whether Sections 13452-1 to 13452-11, incl., General Code, having to do with the probation of criminals, have application to persons convicted under Section 1639-45 and 1639-46, General Code. I am of the opinion that the answer to this question must be in the negative.

Three cases supporting this position are *The State, ex rel. Clum, Dir. of Law, v. Municipal Court of Cleveland, et al.*, 132 O.S. 147, 7 O.O. 242, 5 N.E. (2nd) 489 (1936); *In re Cooper*, 58 O.A. 519, 11 O.O. 599, 16 N.E. (2nd) 276 (1938), affirmed by the Supreme Court in 134 O.S. 40, 11 O.O. 416, 15 N.E. (2nd) 958 (1938).

The Clum case had to do with the provisions of Section 13451-8b, General Code (115 v. 543; Eff. 10-18-33), providing for the *remission or suspension of sentences* in case of conviction of misdemeanors “forbidden by statute or ordinance * * * at the time of sentence.”

In the Clum case, after holding in the first branch of the syllabus that Section 13451-8b, supra, authorizes “the suspension of sentence for the purpose of determining mitigating circumstances, not before, *but at the time sentence is imposed*,” the court declared in the second branch of the syllabus that:

“Such section, while it authorizes the trial court to suspend execution of sentence at the time of its imposition, does not require the court to specify the exact time or duration of such suspension. Where the court imposes sentence and at the same time suspends it for the purpose of hearing a motion or appli-

cation in mitigation, it has authority to continue the hearings on such application from time to time until it finally determines the terms of such suspension and whether the sentence shall be remitted or suspended in whole or in part."

In the opinion, by Judge Jones, it was said as follows at pages 149, 150 and 151:

"On January 11, 1933, and before the present amendment of our statute relating to the suspension of sentences, this court decided that trial courts did not then have inherent power to suspend sentences in criminal cases and could order such suspensions only as provided by statute. Municipal Court of Toledo v. State, ex rel. Platter, 126 Ohio St., 103, 184 N.E., 1. Recognizing such limitations upon the power of trial courts to grant suspensions, and no doubt induced by the foregoing decisions, about six months later the Legislature of Ohio supplemented and broadened the power to grant suspensions in misdemeanor cases, * * *

* * * An application or, if you will, a motion in mitigation of sentence may be made by counsel or the accused either in writing or orally; or it may be entered *sua sponte* by the court.

* * * The continuance of a hearing in mitigation *ipso facto* continues the suspension of sentence until the mitigating circumstances may be heard. * * *

In this connection your attention is directed to an opinion of one of my predecessors in office, namely, Opinion No. 4408, Opinions, Attorney General, 1935, Vol. II, p. 786, which held as stated in the first branch of the syllabus, 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."

Since, as disclosed by the request for the above opinion, two of the defendants involved had served the sentences imposed upon them in the county jail, and the other two were, at the time of the request, actually in confinement in the same institution completing the service of their sentences, the question of the powers of the court to continue the causes to a future date for the purpose of having a hearing in mitigation was in nowise involved and, of course, not considered.

The opinion of Judge Hamilton, of the Court of Appeals of Hamilton County, in the Cooper case, affirmed by the Supreme Court of Ohio as above indicated, is particularly referred to because of the very apposite language contained in such opinion. Judge Hamilton said as follows at pages 520 and 521:

“ * * * The new Juvenile Code is a codification of the former juvenile laws, and, as stated in Section 1639-59: ‘The purpose of this chapter is to secure for each child under its jurisdiction such care’, etc.

Section 12970, General Code, is a criminal statute. As was said by this court, in the case of *State, ex rel. Brown, v. Hoffman*, 23 Ohio App., 348, 155 N.E., 499: ‘The Juvenile Court does not deal with crimes. Its jurisdiction is limited to delinquent, neglected, or dependent minors, under the age of 18 years.’

In considering the question before us, the declared purpose of the juvenile chapter of the code must be borne in mind. The child is the whole consideration.

Section 12970, General Code, is a section dealing with adult misdemeanors, and provides punishment for criminal offenses. * * *

The act does give jurisdiction to the Juvenile Court to punish persons having the custody of a child or who owe the duty of support. This is for the purpose of enforcing performance of that duty. * * *

If Section 12970, General Code, is repealed it must be because it is inconsistent with Section 1639-46, General Code, a part of the juvenile act, or that that section is repealed by implication.

The writer, as above stated, is of the opinion that the repealing clause has reference only to juvenile matters and does not repeal all inconsistent provisions of the Ohio Criminal Code.

However that may be, no such inconsistency exists. True some of the matters constituting an offense in Section 12970, General Code, appear in Section 1639-46, General Code, but these were so provided in order to enforce protection for the child, which, as heretofore stated, is the purpose of the act to which the Juvenile Court is limited. * * *”

Like reasoning was used by Judge Myers in the opinion of the Supreme Court (134 O.S. 40), *supra*, affirming the Court of Appeals. At page 45, the court said:

“Section 12970, and other parts of the Criminal Code dealing with offenses against minors approach the problem from the standpoint of the adult, while it may be said that Section 1639-46 and other parts of the Juvenile Court Code approach the problem from the standpoint of the child. The Juvenile Court Code contains more of the elements of continued supervision and correction than does the Criminal Code relating to similar offenses.”

From the above discussion and from the three cases last above quoted from, these principles are readily deducible:

First, a statute later in time or dealing with a special subject matter, or both, will be treated as an exception to an earlier statute, or one dealing with a general subject.

Second, the Juvenile Code, as it now exists, was enacted subsequent to our Penal Code and has to do with the protection and welfare of minors, as contradistinguished from the Penal Code, the object of which is the punishment of criminals and prevention of crime.

Third, the purpose of Sections 1639-49 and 1639-50, supra, is to enable the Juvenile Courts to retain restraint, power and authority over adults violating Sections 1639-45 and 1639-46, to the end that they may enforce their orders relating to the care, custody, maintenance and morals of minors under their jurisdiction.

And, *fourth*, Sections 13452-1 to 13452-11, supra, and Sections 13451-8a and 13451-8b, are not applicable to Juvenile Courts, whose power to suspend is exclusively granted and limited by the provisions of Sections 1639-49 and 1639-50, General Code.

In passing I deem it proper to direct your attention to Opinion No. 2517, Opinions, Attorney General, 1934, Vol. I, p. 488, rendered to you under date of April 17, 1934, the syllabus reading:

“The judge of a juvenile court is not authorized to suspend the execution of a sentence after a person has been imprisoned for violation of either Section 1654 of the General Code or Section 1655 of the General Code and is not given authority to place such a person so imprisoned, on parole or probation.”

This opinion is no longer applicable, however, since the enactment of the new Juvenile Code in 1937, the language of Section 1639-49 being

entirely different from that of old Section 1666, General Code, which it superseded.

II. Coming now to the first question posed by you, your attention is directed to the statement contained in 15 Am. Jur. 135, with reference to "Indefinite or Permanent Suspension." The text reads in part:

"While the power to suspend sentence is fully recognized, there is a wide difference of opinion as to the extent of the power, some courts holding that it may be exercised only to a limited extent and others maintaining that the extent of the suspension is within the discretion of the court. In some jurisdictions indefinite suspension is recognized as a valid exercise of power. * * * In perhaps a numerical majority of cases, however, it is maintained that while courts may undoubtedly set aside verdicts of guilty and grant new trials or arrest the judgment, they have no power to allow a conviction to stand and at the same time defeat its operation by an indefinite postponement of sentence. To allow such a power, it has been said, would place the criminal at the caprice of the judge, for if the judge can delay the sentence one year he can delay it for fifteen years or any length of time, thereby leaving the defendant with a conviction hanging over him which may **at any time and regardless** of circumstances be enforced against him. * * *

The question is controlled by statute in many jurisdictions."

See also 33 L.R.A. (N.S.) 114; Id. Vol. 39 (N.S.) p.242; L.R.A., 1915c, 1170; and, Id., 1918c, 552, each of which contains lengthy annotations.

In at least two cases in Ohio, it has been held that courts "cannot, after pronouncing sentence, suspend execution indefinitely as a matter of leniency." See *Ex Parte Steinmetz*, 35 O.A. 491, (C. of A., Fairfield Co., 1930) and *In Re Petition for Habeas Corpus for Robert Shondell*, 28 O.N.P. (N.S.) 245 (C.P. Lucas Co., 1930).

However, I do not regard these cases as being here helpful. In the first place, they were decided before the plain pronouncement of the law contained in the Platter case and the Clum case, above quoted from, with reference to the regulation of criminal procedure by statute. Secondly, they were decided before the enactment of Sections 1639-49 and 1639-50, supra. And, third, in view of the plain wording of Section 1639-49, supra, and the broad powers thereby conferred upon Juvenile

Courts, especially when this section is read in the light of the provisions of Section 1639-50, supra, it seems to me that had the Legislature intended to limit the power of Juvenile Courts in connection with the suspension of the execution of sentences of persons convicted under either section 1639-45 or Section 1639-46, supra, such limitation would have been written into the statute, as in Section 13451-8a, General Code, which reads:

“Where any court is empowered or required to impose sentence of fine for any misdemeanor forbidden by statute or ordinance, such court may, in its discretion, direct the time and manner of payment of such fine, which time shall in no case exceed one year from the date of sentence.”

Moreover, since, as pointed out in the Cooper cases, supra, the prime and paramount purpose of the Juvenile Code is not to punish crime but to enable Juvenile Courts to enforce their orders with reference to dependent, neglected or delinquent children, it would seem logically to follow that the execution of such a sentence may be suspended until the juvenile, because of its age or otherwise, ceases to be a ward of the court.

For the reasons and upon the authorities above set forth, it is my opinion that:

I. Section 13452-1 to 13452-11, General Code, making provision for the placing of a person convicted of crime upon probation, and also Sections 13451-8a and 13451-8b, General Code, having to do with the remission or suspension of the execution, of sentences imposed upon persons convicted of a “misdemeanor forbidden by statute or ordinance,” at the time of such sentence, have no application to persons convicted of violation of either Section 1639-45 or Section 1639-46, General Code, such suspensions being governed by Sections 1639-49 and 1639-50, General Code.

II. Under the provisions of Section 1639-49, General Code, read in the light of Section 1639-50, General Code, a Juvenile Court is authorized and empowered to suspend indefinitely or permanently, the execution of sentences, imposed for violations of either Section 1639-45 or Section 1639-46, General Code, where imprisonment is imposed as part of the punishment, “before or during commitment, upon such condition as he imposes,” at least for such period as such Juvenile Court

does not, by reason of age or otherwise, lose jurisdiction over the dependent, neglected or delinquent child involved.

Respectfully,

THOMAS J. HERBERT
Attorney General.