

tained in the exception set out in the second sentence of section 7731-3, General Code. The syllabus, of course, is too broad and should have had the words added, "under eighteen years of age."

In view of the foregoing discussion, I am of the opinion that a county board of education may issue certificates to drive a school vehicle to women or girls over eighteen years of age, provided such persons show that they are over eighteen years of age, of good moral character and qualified for such position.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3565.

APPROVAL, BONDS OF CITY OF SHAKER HEIGHTS, CUYAHOGA COUNTY, OHIO—\$36,185.66.

COLUMBUS, OHIO, September 12, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3566.

APPROVAL, BONDS OF GALLIPOLIS CITY SCHOOL DISTRICT, GALLIA COUNTY, OHIO—\$64,000.00.

COLUMBUS, OHIO, September 12, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3567.

CRIMINAL LAW—SECTION 2166-1, GENERAL CODE, APPLICABLE TO PRISONERS ALREADY INCARCERATED AT THE TIME OF ITS PASSAGE.

SYLLABUS:

The provisions contained in section 2166, as amended, and supplemental section 2166-1, as enacted, in 114 Ohio Laws, Senate Bill 68, apply to prisoners already confined in the Ohio penitentiary as well as those who may be hereafter sentenced to that institution.

COLUMBUS, OHIO, September 12, 1931.

HON. CAMERON MEACHAM, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date, which reads in part as follows:

"I should like to have a ruling from you as to whether these two Sections (referring to Sections 2166 and 2166-1, General Code) apply to

all prisoners now in the Penitentiary or whether that applies to those sentenced on and after the date when these Sections go into effect."

Section 2166, as amended, and supplemental Section 2166-1, as enacted, in 114 Ohio Laws, Senate Bill 68, read as follows:

Sec. 2166. "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 the felony of which the prisoner was convicted, nor be less than the minimum term provided by law 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 purposes of this chapter, he shall be held to be serving one continuous term of imprisonment. If through over-sight 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."

Sec. 2166-1. "The power granted by Section 2166, General Code, as amended in this act, to terminate terms of imprisonment shall apply to any prisoner who shall have served the minimum term provided by law for the felony of which he was convicted, notwithstanding the fixing by the court of a larger minimum period under the authority of the act passed March 15, 1921, entitled 'To amend Section 2166 of the General Code relative to indeterminate sentences to the Ohio Penitentiary,' or under authority of Section 13451-19 of the General Code and shall apply to any person hereafter sentenced, notwithstanding that the felony may have been committed previous to the enactment of said laws."

Your inquiry is whether or not prisoners already confined in the Penitentiary will be eligible for parole at the expiration of the minimum term of imprisonment provided by law for the offense of which they have been convicted, regardless of the minimum term fixed by the sentencing court. In other words, your question is whether or not a prisoner serving a sentence in which a minimum term was fixed by the trial court by virtue of the provisions contained in Section 2166, General Code, prior to its present amendment, may now, by virtue of the provisions contained in Section 2166-1, General Code, be eligible to parole in the event he has served the minimum sentence prescribed by law for the offense of which he was convicted.

A careful reading of Sections 2166 and 2166-1 leads me to the conclusion that the provisions contained in Section 2166-1 are to apply to prisoners already confined in the penitentiary as well as those to be sentenced hereafter. For illustration, let us assume that a prisoner has been sentenced to the Ohio Penitentiary for the crime of larceny and the trial court has fixed the minimum of such sentence for five years instead of the minimum of one year, provided by law.

Under my interpretation of Section 2166-1 such a person would be eligible for parole at the expiration of the legal minimum, that is one year, less good time off, as provided by Section 2210, instead of the five-year minimum fixed by the trial court.

Under the provisions of Section 2166, courts are now authorized to sentence a person for an indefinite period of time only and can not fix the minimum term as has been heretofore provided by the Norwood Act, which will be superseded by the act here in question. To construe Section 2166-1 to apply only to persons hereafter sentenced would be placing a premium upon crime, since a prisoner hereafter sentenced would be released or eligible for parole sooner than a prisoner already confined within the walls of the penitentiary for the same crime but whose minimum term as fixed by the trial court is much longer than that provided by law. It can be readily seen that no matter how meritorious the case may be or how exemplary the conduct of a prisoner would be, the clemency board would be powerless to release such a prisoner until he had served the minimum term fixed by the sentencing court. In this way discrimination would be shown between a prisoner sentenced under Section 2166, prior to its amendment, and a person hereafter sentenced for a violation of the same law under Section 2166, as amended, and Section 2166-1. It was no doubt the purpose and the intention of the legislature, in supplementing Section 2166, to release prisoners already incarcerated in the penitentiary as well as those who may be hereafter sentenced to that institution. The purpose of this legislation was to relieve the housing conditions at the Ohio penitentiary by permitting persons whose cases are meritorious and who deserve another chance to be released from the penitentiary at the earliest date possible and to nullify the results of the Norwood Act which has caused a serious problem not only in the housing of the prisoners but also in the matter of providing work for them.

I also call your attention to the phraseology contained in Section 2166-1, wherein the legislature specifically states that prisoners serving minimum terms of imprisonment fixed by the sentencing court under the Norwood Act are to be the recipients of the benefits contained in Section 2166-1, General Code. The language that I refer to reads as follows:

"The power granted by Section 2166, General Code, as amended * * * shall apply to any prisoner who shall have served the minimum term *provided by law for the felony of which he was convicted, notwithstanding the fixing by the court of a larger minimum period* under the authority of the act passed March 15, 1921, entitled 'To amend Section 2166 of the General Code relative to indeterminate sentences to the Ohio Penitentiary.'"

(Italics the writer's).

If Section 2166-1 were only to apply to persons hereafter convicted and sentenced to the Ohio Penitentiary, it would have been both useless and illogical for the legislature to have specifically referred to persons whose terms of imprisonment were fixed by the trial court by virtue of the provisions contained in what is known as the Norwood Act.

The next question to be considered is whether or not Section 2166-1, General Code, would be unconstitutional as being retroactive and thus violative of Article II, Section 28 of the Constitution of the State of Ohio, as well as being ex post facto. Section 2166-1 can not be considered as being ex post facto inasmuch as it lessens instead of increases the penalty for prisoners already confined in the

Ohio Penitentiary. A criminal law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is considered as being *ex post facto* and therefore unconstitutional. On the other hand, a criminal law is not *ex post facto* when the punishment for a crime already committed is lessened and not increased. See 6 R. C. L. 299, 12 C. J. 1097.

The question of whether or not legislation of this type is retroactive has been settled by our Supreme Court in the case of *State, ex rel. Attorney General, vs. Peters*, 43 O. S. 629, the syllabus of which reads as follows:

“An act to amend an act entitled, “an act relating to the imprisonment of convicts in the Ohio Penitentiary, and the employment, government, and release of such convicts by the board of managers,” passed March 24, 1884, passed May 4, 1885 (82 Ohio L. 236), authorizes the board of managers to establish rules and regulations under which certain prisoners then or thereafter under sentence, who had served the minimum term provided by law for the crime for which they were convicted, may be allowed to go upon parole outside of the buildings and inclosures, but to remain while on parole in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of the institution, is not an interference with the executive or judicial powers conferred on these departments by the constitution of the state.”

The court, at page 651, said:

“It may be claimed that this act, so far as it affects past sentences, is retroactive, and therefore unconstitutional. This can not be, as by this provision the legislature is only prevented from interfering with the vested rights of individuals.

It does not hinder the state from divesting itself of any right of claim of its own. The only party who could object is the prisoner, and he can not, where it is clearly for his benefit. If the provisions of the law are not *ex post facto* in their nature, he can not complain.”

See also Opinions of the Attorney General, 1929, page 1593, at page 1595.

Specifically answering your question, I am of the opinion that the provisions contained in Section 2166, as amended, and supplemental Section 2166-1, as enacted, in 114 Ohio Laws, Senate Bill 68, apply to prisoners already confined in the Ohio Penitentiary as well as those who may be hereafter sentenced to that institution.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3568.

APPROVAL, BONDS OF WYANDOT COUNTY, OHIO—\$4,590.00.

COLUMBUS, OHIO, September 14, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.