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SENTENCE — COUNTY JAIL — BY MAGISTRATE FOR DEFINITE TERM — CONVICTION — MISDEMEANOR — PERSON SENTENCED, AFTER COMMENCING TO SERVE SENTENCE, MAY BE GRANTED CLEMENCY ONLY BY GOVERNOR.

SYLLABUS:

A person sentenced to a county jail by a magistrate for a definite term because of conviction of a misdemeanor may be granted clemency after commencing to serve such sentence only by the Governor.

Columbus, Ohio, January 8, 1944

Hon. Joel S. Rhinefort, Prosecuting Attorney
Toledo, Ohio

Dear Sir:

Your request for my opinion reads:

“A justice of peace in Lucas County, Ohio, sentenced a person, who is now confined in the county jail serving sentence, for a period of six months in the county jail and pay a fine of \$200.00 and costs. The prisoner has served about a month of the jail sentence. I have been asked if there is any way in which the prisoner can be released from his jail sentence. In looking up the matter, I have come across an opinion of the Attorney General found in the Opinions of the Attorney General, Volume 2 for the year 1935 and bearing the number of 4408, which in my opinion, covers the matter and in substance holds that a prisoner who is only liable for a fine and costs and not jail sentence, can be released under Section 13452-10, if compliance is made with that provision, but not if a jail sentence is involved. My understanding is that the only way in which a person can be released from a jail sentence is by action of the governor of the state of Ohio.”

In Opinion No. 4408 of the Opinions of the Attorney General for 1935, found in Volume II, page 786, to which opinion you refer, the then Attorney General reached the following conclusions as shown by the 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."

In this opinion, attention was called to the case of Municipal Court of Toledo v. State, ex rel. Platter, 126 O. S., 103, in which it was held that criminal procedure in this state is regulated entirely by statute and that courts may order suspension of sentences in criminal cases only when authorized by statute.

Sections 13452-1 to 13452-11, inclusive, General Code, provide for the suspension of the imposition of sentence of persons who have been convicted or pleaded guilty, except in cases of juvenile delinquents and persons convicted of certain serious felonies which are enumerated in Section 13452-2, General Code. Section 13453-1, et seq., General Code, provide for the suspension of the execution of a sentence pending the perfection of proceedings to review the judgment in a higher court. Section 13451-8, General Code, provides for conditional sentences for misdemeanors, and Section 13451-8b, General Code, provides that in the case of misdemeanors the court may at the time of sentence remit the same or suspend the sentence in whole or in part upon such terms as it deems just. Such order remitting or suspending the sentence must be made at the time the sentence is imposed. State, ex rel. Clum, v. Municipal Court, 132 O. S., 147.

In State, ex rel. Gordon, v. Zangerle, 136 O. S., 371, it was said at page 374 in the opinion of the court delivered by Williams, J.:

"There are three separate and distinct major methods of extending clemency in Ohio: (1) The Governor may, after conviction, grant reprieves, commutations and pardons by virtue of Section 11, Article III of the state Constitution, which contains this provision: 'He (the Governor) shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. * * *'; (2) the board of parole under authority of Sections 2211 to 2211-9, inclusive, General Code (now succeeded by the pardon and parole commission, Amended Substitute Senate Bill No. 82, 118 Ohio Laws, _____, passed April 27, 1939, which repeals Sections 2211 to 2211-9, inclusive, Gen-

eral Code), is given power of parole; and (3) a judge or magistrate by force of Sections 13452-1 to 13452-8, inclusive, General Code, may after conviction or plea of guilty, suspend the imposition of sentence and place a defendant on probation under supervision, except in cases of juvenile delinquency and certain specified felonies."

In addition to these methods pointed out by Judge Williams, there is, of course, the power of parole by the county commissioners with the consent of the prosecuting attorney, sheriff and sentencing judge under Section 13452-10, General Code, and the power of the county auditor to discharge persons confined in the county jail for the non-payment of fines or amercements due the county pursuant to the authority granted him by Section 2576, General Code.

However, none of the provisions of the statutes to which reference has been made would authorize the release of a person confined in a county jail under sentence thereto for a definite term under the circumstances set forth in your letter. The magistrate could have suspended execution of the sentence at the time he imposed it, but from your letter I assume that this was not done. I know of no way in which such prisoner can now be legally discharged except, as you suggest, by executive pardon.

You are therefore advised that a person sentenced to a county jail by a magistrate for a definite term because of conviction of a misdemeanor may be granted clemency after commencing to serve such sentence only by the Governor.

Respectfully,

THOMAS J. HERBERT
Attorney General