

1360.

PAROLE—OHIO PENITENTIARY—PRISONER MUST SERVE MINIMUM TERM FIXED BY COURT—SECTION 2163, GENERAL CODE, INAPPLICABLE TO PRISONER CONVICTED IN 1923—GOOD BEHAVIOR DISCUSSED.

SYLLABUS:

1. *Section 2163, General Code, has no application to a prisoner convicted in 1923 and sentenced to the Ohio Penitentiary for a term of not less than twenty nor more than twenty-five years.*

2. *A person who is sentenced to the Ohio Penitentiary for not less than twenty years nor more than twenty-five years for the crime of robbery is not eligible for a parole until he shall have served within the penitentiary the minimum term of imprisonment fixed by the trial court, viz., twenty years.*

COLUMBUS, OHIO, December 14, 1927.

HON. RALPH E. HOSKOT, *Prosecuting Attorney, Dayton, Ohio.*

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

“Section 2163 of the General Code shortens the period of confinement of prisoners in the Ohio State Penitentiary, for good behavior.

1. Does that section apply to a prisoner convicted in 1923 and sentenced in that year to the Ohio State Penitentiary for a twenty-five year period with a minimum of twenty years, under Section 12432 of the General Code?

2. If the above section does apply to this case, how is this time computed? In other words, when would such a prisoner be eligible for a parole, and, for example, what time off is he entitled to, assuming that he has no discredits at this time?”

Section 2163, General Code, to which you refer, was enacted May 4, 1891, (88 O. L. 556) and, so far as pertinent to your inquiry, provides:

“A person confined in the penitentiary, or hereafter sentenced thereto for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, will be entitled to the following diminution of his sentence:

* * * * *

(Italics the writer's.)

By the plain provisions thereof the benefits of Section 2163, supra, are available only to two classes of prisoners of the Ohio Penitentiary, viz.:

1. Persons “confined in the penitentiary” on the date when said act, supra, became effective.

2. Persons “hereafter sentenced thereto for a definite term other than life.”

Without setting forth the complete legislative history of Section 2166, General Code, (see Opinion No. 221, dated March 22, 1927, Opinions, Attorney General for

1927) your attention is directed to the fact that such section, prior to 1913, (103 O. L. 29) authorized courts to impose sentences to the Ohio Penitentiary for a definite term or "if the court having said case thinks it right and proper to do so, a general sentence of imprisonment in the penitentiary."

On February 13, 1913, (103 O. L. 29) the legislature passed an act amending Section 2166, which was entitled:

"An Act—To provide for indeterminate penitentiary sentences and to repeal Section 2166, General Code."

This act read in part as follows:

Section 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 by the Ohio Board of Administration (now the Ohio Board of Clemency) as authorized by this chapter, but no such terms shall exceed the maximum, nor be less than the minimum term provided by law for the felony of which the prisoner was convicted. * * * " (Words in parenthesis the writer's.)

On March 15, 1921, (109 O. L. 64) the legislature again amended Section 2166, supra, to read as it now appears in the General Code, Section 2 of the act in which it was passed reading:

"That said original Section 2166 of the General Code and all laws or parts of laws inconsistent with this act be, and the same are hereby repealed."

Section 2166, General Code, provides:

"Courts imposing sentences to the Ohio Penitentiary for felonies, except treason, and murder in the first degree, shall make them general, but they shall fix, within the limits prescribed by law, a minimum period of duration of such sentences. All terms of imprisonment of persons in the Ohio Penitentiary may be terminated by the Ohio Board of Administration, (now the Ohio Board of Clemency) as authorized by this chapter, 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 fixed by the court 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 oversight 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." (Italics and words in parenthesis the writer's.)

In answer to your first question, your attention is directed to a former opinion of this department which appears in Vol. I, Annual Report of the Attorney General for 1914, at page 745, wherein, on page 749, after quoting Section 2163, supra, the following language appears:

"This statute was rendered nugatory by the indeterminate sentence law of February 13, 1913, since definite terms in the penitentiary were dispensed with by that act and the prisoners sentenced to the penitentiary under the new indeterminate sentence law receive no deduction of time for good behavior by force of the provisions of any statute such as Section 2163 above quoted. For example, a prisoner committed the crime of burglary before the passage of the indeterminate sentence law and was sentenced under it after its passage, to a term of from one to fifteen years, as provided by Section 12438. Under this sentence the Ohio Board of Administration may keep the prisoner imprisoned 15 full years if they see fit. If he had been given a definite sentence, as was the almost universal custom prior to the enactment of the new indeterminate sentence law, under the law in force at the time the crime was committed, and the judge had given him a maximum sentence of fifteen years, he would, if his behavior in the penitentiary was good, have been entitled as a matter of law, to his release in nine years and six months. The new indeterminate law compels the court to impose upon the prisoner an indeterminate sentence instead of a definite one and thereby grants to the Ohio Board of Administration the power to compel the prisoner to serve five years and six months more than they could have compelled him to serve had he been convicted and sentenced under the definite sentence law in force at the time he committed the crime."

and on page 750 of the same opinion :

"After a consideration, therefore, of Section 26, of the General Code, and Section 10 of Article I of the constitution of the United States, it is my opinion that the indeterminate sentence law (103 O. L. page 29) passed February 13, 1913, and effective May 29, 1913, is to operate only upon prisoners who have committed crimes on or after May 29, 1913, the day upon which that law became effective. I would therefore advise you as follows, with respect to the sentences of prisoners received at your institution since May 29, 1913.

First. Where the court has imposed a definite sentence :

If the prisoner was sentenced on or after May 29, 1913, and the crime was committed before that date, the definite sentence imposed by the court should stand and the prisoner should be released at the expiration of his 'short term' in accordance with Section 2163. If a person was sentenced on or after May 29, 1913, and the crime was committed on or after that date, the definite sentence imposed by the court should be made to read upon your records as an indeterminate sentence, in accordance with the provisions of the new indeterminate sentence act, to the effect that :

'If through oversight 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.'

Second. Where the court has imposed an indeterminate sentence :

If the prisoner was sentenced for a crime committed before May 29, 1913, he should not have been sentenced under the indeterminate sentence law (103 O. L., p. 29.) But whether such sentence would be legal in view of the power

of the court under the old section of the Revised Statutes to impose an indeterminate sentence, is another question, and one which I think could better be settled by habeas corpus than by an opinion from this department and I would therefore suggest this as the proper proceeding to determine this question."

In an opinion of this department which appears in Vol. II, Annual Report of Attorney General for 1914, at page 1588, wherein, after quoting Section 2163, *supra*, the following language is used on page 1590:

"Prisoners sentenced to indeterminate sentences, were not 'sentenced thereto for a definite term other than life' and do not under this section gain a diminution of sentence; and the fact that the prisoner's maximum term has been reduced by a commutation of sentence from the governor does not, of course, operate to place him in any different position with respect to this section. Such prisoner was not sentenced to a definite term of imprisonment and therefore is not entitled to a diminution of sentence under this section."

The following language appears on page 225, Opinions, Attorney General for 1924:

"Your fifth question is whether a sentence in which the minimum fixed by the court is the maximum is such a 'definite term' as would entitle the prisoner to privileges of Section 2163.

Section 2163, as far as pertinent, provides:

'A person confined in the penitentiary, or hereafter sentenced thereto for a definite term other than life having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the board of managers shall excuse, shall be entitled to the following diminution of his sentence.

* * *

It will be noted that the section uses the words 'sentenced thereto for a definite term,' and as I have advised in the answer to your first question that such a sentence is not a definite sentence, Section 2163, General Code, would not apply."

Your attention is directed to the only adjudicated case which I know of that passes directly upon the question you present. I refer to *In the Matter of the Application of James Lynch, for a writ of Habeas Corpus, No. 77, 978, Court of Common Pleas of Franklin County, Ohio, decided September 20, 1918.* In the opinion of the court, Judge Rogers used the following language:

"It appears that the applicant was sentenced by this court at the January Term, 1915, to the Ohio Penitentiary, for pocket picking, and entered upon his sentence on the 25th of January of that year.

The sentence imposed, according to the statute at that time was general, and not fixed or limited in its duration.

The applicant claims that by virtue of the statute of this state he has served the maximum time provided by law, and for that reason his detention by the warden is unlawful.

The applicant's contention is that he is entitled to the benefit of what is usually termed 'the good time law,' or in other words a diminution of his sentence by reason of good behavior, and that such good time deducted from the maximum sentence would entitle him to his discharge from the penitentiary. The question, therefore, is as to whether or not the applicant is entitled to the benefit of Section 2163, G. C., relative to the diminution of sentence for good behavior, so as to shorten the term of his incarceration. * * *

In order to solve this question, it may be well to recite in part the history of the legislation on the subject. Long prior to the applicant's incarceration, to-wit, by an enactment passed April 11th, 1890, (87th Ohio Laws, 164), the legislature declared that every sentence to the penitentiary of a person thereafter convicted of a felony, except for murder in the second degree, who had not previously been convicted of a felony, and served a term in a penal institution, might be, if the court having said case thinks it right and proper, a general sentence of imprisonment in the penitentiary. There was also at that time the statutes in force providing, in substance, that the court had the power to fix the term of sentence for a limited period, the statute usually giving the minimum and the maximum, between which the court had the discretion to fix the period of sentence.

The statute above mentioned, relative to general sentences, was in force until repealed by the General Code, passed February 14th, 1910, and approved February 15th, 1910.

Prior to, as well as during the existence of the general sentence statute above mentioned, the good time statute, which is now Section 2163, G. C., was in force.

Again, by enactment of the legislature in the year 1913, (103 Ohio Laws 29) it was provided as follows:

'Section 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 duration.'

At this time presumably there were prisoners incarcerated in the penitentiary who had been sentenced under both the general sentence statute theretofore repealed, as well as under the statutes fixing a limited and definite term of service. In other words, there were two classes of persons presumably incarcerated in the penitentiary, one class serving a general sentence and another class serving a limited or fixed term of sentence, when the act above mentioned again providing for a general sentence of all prisoners was passed and became the law for the guidance of courts in the future sentencing of all convicts except those excepted from the act.

It will be seen therefore that at the time of the passage of the general sentence law under which the applicant was sentenced, there were the two classes of prisoners that were to be governed by the laws respectively in force with respect to the classes at the time that they were convicted and sentenced. In the one class were those who had a fixed and determinate term, and in the other class were those who had a general term, not fixed, but according to the title of the bill in question, had an indeterminate sentence imposed upon them.

By reason of the change in the statute there were two classes or kinds of sentences which it was the duty of the warden to carry out or execute, the one the sentence of the prisoner having a limited term, and the other the sentence of a prisoner having an indeterminate term, and two schemes for executing those sentences respectively were provided by the statute. Where the term was fixed and limited by the sentence of the court prior to the enactment of

Section 2166 (103 Ohio Laws, 29) Section 2163 applied to such prisoners, as follows: 'A prisoner confined in the penitentiary or hereafter sentenced thereto for a definite term other than life, having passed the entire period of his imprisonment without violation of the rules and discipline, except such as the Board of Managers shall excuse, will be entitled to the following diminution of his sentence: * * * Then follows the right of deduction of good time by reason of the non-violation of the prison rules.

On the other hand, when the prisoner is sentenced subsequent to the enactment of the general sentence law the scheme there provided shall govern the conduct of the warden in the matter of the prisoner's incarceration, and the length of time which he shall serve. These two classes of prisoners so far as the execution of sentence with respect to them, is concerned, are governed by the two different schemes under the statute. The provision, therefore, relative to the applicant, and the service of his sentence, under the general sentence law, is not limited or in any wise controlled by the provisions of the statute relative to the execution of the sentence of a prisoner under the fixed and limited sentence statute.

I see no reason why the prisoner should be permitted to take advantage of the statute relative to definite term of service, when he was sentenced, not for a fixed and definite term, but under the general sentence law, and the prisoner not having served the full term of the statute, to-wit, five years for pocketpicking, he is not unlawfully restrained of his liberty, and should be remanded to the custody of the warden, and the proceeding in habeas corpus dismissed, which may be accordingly done."

In view of the foregoing and answering your first question specifically, it is my opinion that Section 2163, General Code, has no application to a prisoner convicted in 1923 and sentenced to the Ohio Penitentiary for a term of not less than twenty nor more than twenty-five years.

In answer to your second inquiry your attention is directed to Opinion No. 149, dated March 5, 1927, Opinions, Attorney General for 1927, the syllabus of which reads:

"1. Under the provisions of Section 2166, General Code, it is mandatory that the trial court when imposing sentences, except for treason and murder in the first degree, fix a minimum period of duration of sentence within the limits prescribed by the statute fixing the penalty for such crime.

2. The Board of Clemency is without authority to release a prisoner under sentence to the Ohio Penitentiary until he shall have served the minimum period of duration of such sentence fixed by the court under the provisions of Section 2166, General Code."

and to Opinion No. 221, dated March 22, 1927, Opinions, Attorney General for 1927, the syllabus of which reads:

"1. The Ohio Board of Clemency is without authority to allow a prisoner to go upon parole outside the building and inclosure of the penitentiary unless and until such prisoner shall have served within the penitentiary, the minimum term of imprisonment fixed by the trial court for the felony of which the prisoner was convicted.

2. Where, therefore, the trial court fails to fix the minimum period of duration of the sentence imposed, as required by Section 2166, General Code, or where the trial court through oversight or otherwise imposes a sentence

for a definite term, a prisoner so serving in the Ohio Penitentiary is eligible for parole when he shall have served the minimum term provided by the statute defining the crime of which such prisoner was convicted."

In view of the foregoing and answering your second inquiry specifically, it is my opinion that a person who is sentenced to the Ohio Penitentiary for not less than twenty years nor more than twenty-five years for the crime of robbery is not eligible for a parole until he shall have served within the penitentiary the minimum term of imprisonment fixed by the trial court, viz., twenty years. A prisoner so sentenced in 1923 would not be entitled to time off for good behavior even though he has no demerits at this time.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1361.

PARK—CITY NOT HAVING PARK COMMISSION MAY PURCHASE LAND
OUTSIDE CITY LIMITS FOR PARK PURPOSES.

SYLLABUS:

A city not having a park commission is authorized to purchase land outside of the city limits and not contiguous thereto for park purposes, if the acquisition of such land is reasonably necessary for the purpose.

COLUMBUS, OHIO, December 14, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your communication of recent date requesting an opinion on the question stated by you, as follows:

"May a city not having a park commission purchase land outside of the city limits and not contiguous thereto for park purposes?"

Section 3615, General Code, provides that each municipal corporation shall be a body politic and corporate and among other things provides that such municipal corporation may "acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any municipal purpose authorized by law."

Section 3631, General Code, provides that each municipal corporation shall have power:

"To hold and improve public grounds, parks, park entrances, free recreation centers and boulevards, and to protect and preserve them. To acquire by purchase, lease, or lease with privilege of purchase, gift, devise condemnation or otherwise and to hold real estate or any interest therein and other property for the use of the corporation and to sell or lease it, or to donate the same by deed in fee simple to the State of Ohio as a site for the erection of an armory."

So far as pertinent to the question at hand, Section 3939, General Code, 112 O. L. 379, provides: