

school district, upon the failure of the local board to perform them in accordance with law, in compliance with section 7610-1, General Code, is not in anywise dependent upon whether or not the local board had complied with the terms of section 5625-33, General Code, in the making of contracts or with the so-called minimum salary law in the employment of teachers, or whether it had been extravagant in the administration of the schools under its control and for that reason had become short of funds.

2. It becomes the duty of a county board of education, by virtue of section 7610-1, General Code, to take over and perform the duties devolving under the law on a board of education of a school district within the county school district with respect to the schools of such district, when the local board fails to perform those duties and acts for the maintenance of its schools which the law requires and authorizes to be performed, and the county board is satisfied of such failure.

3. Before any funds may be paid from the general fund of the county upon vouchers of the county school district upon authorization of the said county board in pursuance of its duties under section 7610-1, General Code, said funds must first be appropriated for that purpose by the commissioners of the county.

Respectfully,

JOHN W. BRICKER,

Attorney General.

76.

CRIMINAL LAW—CONCURRENT AND CUMULATIVE SENTENCES—
WHEN PERSON SERVING INDETERMINATE SENTENCE ELIGIBLE
FOR PAROLE.

SYLLABUS:

1. *Where several sentences are imposed for separate and distinct offenses charged in separate indictments or in separate counts of the same indictment, the sentences run consecutively unless a contrary intention is expressed by the court in its judgment. Opinions of the Attorney General for 1932, No. 4701 followed and approved.*

2. *A person serving several indeterminate sentences consecutively in the Ohio Penitentiary is deemed to be serving one continuous term for the purposes of parole. Such a person is eligible for parole on the expiration of the aggregate of the minimum terms of his several sentences, less good time off for good behavior as provided by section 2210, General Code. A prisoner who is serving successive or cumulative sentences is also eligible for parole, as provided by section 2210-1, General Code, providing the aggregate of the minimum terms of his several sentences is longer than fifteen years.*

3. *The provisions of section 2166-1, enacted in 114 O. L. 188, do not apply to an indeterminate sentence to the Ohio Penitentiary for a term of ten to thirty years imposed on a person after being convicted for a violation of section 710-172, General Code.*

COLUMBUS, OHIO, January 27, 1933.

HON. LELAND S. DOUGAN, *Chairman, Ohio Board of Parole, Columbus, Ohio.*

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

"I will set out a few facts and then state my question. On August 2, 1928, F. P. C. was sentenced to the Ohio Penitentiary for the crime of embezzlement and forgery and the following quotation is taken from a certified copy under date of August 1, 1928, received at the Ohio Penitentiary August 2, 1928.

'F. P. C. having pled guilty to the indictments for embezzlement and forgery, it is therefore the sentence of the court that he be imprisoned in the Penitentiary of this State and kept at hard labor (no part of the time to be kept in solitary confinement) until legally discharged. And that said imprisonment shall be for a period of duration not less than 10 years or more than 30 years in case 3948 and also not less than 10 years and not more than 30 years in case 3938 to begin upon the expiration of sentence in case 3948, and not less than 3 years nor more than 20 years in each of cases number 3928, 3929, 3930, 3931, 3932, 3933, 3934, 3935, 3936, 3937.'

The inmate as you see has already served since August 1928 and according to the records of the Penitentiary, he has been serving on sentence of 10 to 30 years on case 3948. According to the provision of the new law he is up for hearing to consider whether or not he can be given a final release on sentence under 3948 which he is now serving under Ohio Penitentiary No. 59024 and start on a new sentence under a new number under case 3938.

To make myself more clear the question is—do the ten concurrent sentences as outlined above in the sentence of the Judge attach to case 3948 or case 3938. If they do attach to case 3948 and run concurrently with 3948, would the new number give him a consecutive sentence of 10 to 30 years, or if the concurrent sentence attach to the case 3938, how long would he have to serve to be eligible to be heard by the new Board on the 10 to 30 year sentence under 3938 running concurrently with the ten consecutive sentences in case that they attach to 3938 instead of 3948, which sentence he is now serving.

Also when does a man become eligible under the new law serving an embezzlement sentence of 10 to 30 years which now goes back automatically from nothing to 30 years, and if the concurrent sentences do attach to 3938, or the new number that he might get at this time, would he have to serve a minimum of a forgery sentence of 10 months if these forgery sentences ran concurrently with 3938 or which in fact would be his new number and new sentence."

It is a well established rule of law in Ohio that, where a person is sentenced to serve two or more terms of imprisonment upon different indictments or different counts of the same indictment, there is a presumption that the sentences are to be served consecutively and not concurrently, where the sentencing court fails to expressly state whether the several sentences are to be served concurrently or consecutively. This rule of law was announced by the Supreme Court of Ohio in the case of *Anderson vs. Brown*, 117 O. S. 393, in the second paragraph of the syllabus, which reads as follows:

"Where the record is silent as to whether two or more sentences of imprisonment or fines on the same individual are to be executed cumulatively, the presumption obtains that the sentencing court intended

that the prisoner should serve the full aggregate of all imprisonments or pay the full aggregate amount of all fines, or that the same should be covered by the credit allowance thereon, as provided in Section 13717, General Code. (*Williams vs. State*, 18 Ohio St., 46, approved and followed.)"

To the same effect is Opinion No. 4701 in the Opinions of the Attorney General for 1932. The syllabus reads as follows:

"Where several sentences are imposed for separate and distinct offenses after conviction thereof on several counts in the same indictment, the sentences run consecutively unless a contrary intention is expressed by the trial court in its judgment."

See also 12 O. Jur. 702.

Incidentally, the rule of law announced by the Supreme Court in the case of *Anderson vs. Brown*, *supra*, is contrary to the weight of authority. See 16 C. J. 1307; 8 R. C. L. 242; *State vs. McKeller*, 67 S. E. 314 (S. C.); and *United States vs. Patterson*, 29 Fed. 775.

In view of the rule of law laid down by the Supreme Court in the case of *Anderson vs. Brown*, *supra*, the sentences imposed by the trial court in cases Nos. 3928 to 3937, inclusive, referred to by you in your letter, must be presumed to run consecutively and not concurrently, as stated in your letter. The trial court having expressly stated that the sentences in cases Nos. 3938 and 3948 were to be served consecutively and since the sentences in cases Nos. 3928 to 3937, inclusive, are presumed to run consecutively, it becomes unnecessary to answer your first inquiry as to whether the sentences in cases Nos. 3928 to 3937, inclusive, attach to the term of imprisonment in case No. 3938 or case No. 3948, inasmuch as the twelve separate and distinct sentences of imprisonment imposed by the trial court are to be served consecutively and not concurrently.

Your inquiry also raises another question and that is, where a prisoner is serving two or more consecutive sentences, whether the allowance for good time, provided by section 2210, General Code, should be computed separately on each term of imprisonment or should be computed as if the sentences were for a single term or one continuous term of imprisonment. In other words, one of the points involved in your inquiry is whether, in determining the question of when a prisoner sentenced to serve several terms of imprisonment consecutively becomes eligible for parole, the separate sentences are to be considered as a continuous term or separate and distinct sentences.

Section 2166, both before and after its amendment in 114 O. L. 188, provided that:

"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."

The chapter in which section 2166 is found relates to the parole of prisoners other than life termers for the crimes of murder in the first degree and treason from the Ohio Penitentiary. The legislature having expressly stated in section

2166 that for the purpose of parole prisoners serving consecutive sentences in the Ohio Penitentiary shall be deemed to be serving one continuous term of imprisonment, it follows that a prisoner serving consecutive sentences would be eligible for parole only after serving the aggregate of the minimum terms of his several sentences, less good time off as provided by section 2210. The provision of section 2166 quoted herein was so construed by my predecessor in passing on the question as to when a prisoner serving consecutive sentences in the Ohio Penitentiary became eligible for parole. This opinion, which was rendered prior to the enactment of section 2210, can be found in the Opinions of the Attorney General for 1930, at page 1924. The syllabus reads as follows:

“Where one is convicted of two or more separate felonies and the court orders said sentences to be served cumulatively, by the terms of Section 2166 of the General Code, the prisoner shall be held to be serving one continuous term and will not be eligible to parole until he has served the aggregate of the minimum terms.”

See also Opinions of the Attorney General, 1932, No. 4537; and *Fisher vs. Hallowell*, 202 N. W. 103 (Iowa).

Section 2210, enacted in 114 O. L. 530, provides in substance that a person serving an indeterminate sentence in a state penal institution shall be granted certain credits for good behavior which are deducted from the “minimum sentence or term of imprisonment” that the person must serve. Section 2210 also provides that:

“At the expiration of the minimum sentence diminished as herein provided, each prisoner shall be eligible for parole as provided by law.”

In view of the provision of section 2166 quoted herein, it is the duty of the penal authorities, in determining the good time to be allowed a prisoner serving consecutive indeterminate sentences as provided by section 2210, to compute and allow the same upon the theory that the prisoner is serving a single continuous term of imprisonment equal to the aggregate of the minimum and maximum terms of his several sentences. In other words, such computation is not to be made and allowed for each separate sentence or term of imprisonment as it is served.

It is my opinion that by virtue of sections 2166 and 2210 a prisoner serving twelve consecutive indeterminate sentences would not be eligible for parole until he has served the aggregate of the minimum terms of his several sentences less good time off as provided by section 2210. If the aggregate of the minimum terms of imprisonment is for a period longer than fifteen years, the prisoner would be eligible for parole as provided by section 2210-1, which reads in part as follows:

“* * * a prisoner sentenced for a minimum term of imprisonment longer than fifteen years, shall become eligible for parole at the expiration of fifteen years’ imprisonment, subject to the provisions of law governing diminution of sentence for good behavior in prison.”

Your attention is called to Opinion No. 4455 of the Opinions of the Attorney General for 1932, wherein my predecessor, in construing the provision of section 2210-1 quoted herein, said that:

"Section 2210-1 can be only interpreted as providing that * * * a prisoner serving a general sentence, whose minimum term is longer than fifteen years shall be eligible for parole at the end of fifteen years, providing such prisoner is not eligible for parole sooner than that time after deducting from such minimum term the time allowed for good behavior by section 2210."

Your last inquiry is whether an indeterminate sentence imposed on a prisoner confined in the Ohio Penitentiary for the violation of a statute for which no minimum term of imprisonment has been fixed by the legislature comes within the purview of the provisions of section 2166-1, General Code. The prisoner mentioned in your letter was evidently convicted and sentenced in cases Nos. 3938 and 3948 for a violation of the provisions of section 710-172. The penalty for the violation thereof is imprisonment in the Ohio Penitentiary for not more than thirty years or a fine of not more than ten thousand dollars or both. The legislature on the enactment of section 710-172 did not fix a minimum term of imprisonment for a violation of that statute but did, in express terms, fix a maximum term of imprisonment. The prisoner was sentenced to the Ohio Penitentiary at the time the indeterminate sentence law of 1921 was in effect, which law provided that all sentences for felonies, except treason and murder in the first degree, were to be general (indeterminate) sentences with the right of the trial court to fix a minimum term of imprisonment greater than the minimum term which the statute prescribed for the offense.

Section 2166, as amended in 1921 by the Norwood Act, which was in effect at the time the prisoner was sentenced for violating the provisions of section 710-172, read in part as follows:

"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, 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."

Section 2166 was amended by the legislature in 114 O. L. 188 and reads in part as follows:

"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."

Under the provisions of section 2166, as amended in 114 O. L. 188, courts are required to sentence a person for an indefinite period of time only and cannot

fix the minimum term of imprisonment as has been the practice under the Norwood Act.

The legislature also enacted in the same bill (114 O. L. 188) section 2166-1, General Code, and repealed section 13451-19, General Code, which authorized courts in felony cases to fix the minimum terms of imprisonment for indeterminate sentences in the same manner as provided in section 2166 prior to its amendment in 1931. Section 2166-1, as enacted by the legislature in 1931, provides that:

“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.”

The legislature has expressly stated that the provisions of section 2166-1 shall apply only to indeterminate sentences in which the sentencing court, under the Norwood Act of 1921 and section 13459-19, had fixed *a minimum term greater than the minimum term prescribed by statute for the particular felony*. Section 2166-1 specifically provides that “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 “larger minimum period” imposed by a court by virtue of section 2166, as enacted in 1921, and section 13451-19. It is also to be noted that the phraseology contained in section 2166-1 expressly limits the provisions of that section to a prisoner who has served “*the minimum term provided by law for the felony of which*” the prisoner was convicted. The phrase “the minimum term provided by law for the felony” excludes indeterminate sentences imposed on persons convicted of violating statutes for which the legislature has failed to fix minimum terms of imprisonment. The legislature, by restoring the statutory minimums to indeterminate sentences in place of the minimum terms of imprisonment fixed by the courts of this state under the Norwood Act, intended no doubt to eliminate the possibility of prisoners sentenced prior to 1931 serving longer minimum sentences than prisoners sentenced under section 2166, as amended in 1931, for the same offense.

It is to be noted, however, that the legislature, in enacting section 2166-1, failed to take into consideration the fact that in many instances there is no statutory minimum provided by law for a felony. The failure of the legislature to take that fact into consideration on the enactment of section 2166-1 was evidently an oversight which can be rectified only by the legislature. To interpret section 2166-1 so as to include indeterminate sentences imposed for the violation of statutes which do not provide in their penalties for minimum terms of imprisonment would be reading something into the statute that does not otherwise exist. As heretofore stated, section 2166, at the time the prisoner referred to in your letter was sentenced, required the court to impose an indeterminate sentence with a minimum term of imprisonment within the bounds fixed by the statute defining the felony. The court having fixed the minimum term of imprisonment at ten years and there being no “minimum term provided by law” for the viola-

tion of section 710-172, General Code, I am of the opinion that such a sentence does not come within the purview of the provisions of section 2166-1, General Code.

Your attention is called to the Opinions of the Attorney General for 1927, page 1894, wherein it was held in the second paragraph of the syllabus that:

"A judgment of a court imposed upon one convicted of a violation of Section 710-172, General Code, which reads: 'It is therefore considered and adjudged by the court that the defendant be imprisoned and confined in the Ohio Penitentiary at Columbus, Ohio, for not more than thirty years, and to be kept at hard labor but without solitary confinement and to pay the costs of this prosecution in the amount of \$....., for which execution is awarded,' fixes no minimum period of duration of sentence. A prisoner so sentenced is eligible for parole at any time after his commitment to the Ohio Penitentiary, provided such prisoner is recommended as worthy of such consideration by the warden and chaplain of the penitentiary and notice thereof is published in accordance with Section 2171, General Code."

It will be apparent at once on a reading of that opinion that the question passed upon therein by my predecessor was the converse of the question presented in your inquiry. The ruling of my predecessor is not in conflict with my conclusion because minimum terms of imprisonment were imposed by the trial court in cases Nos. 3938 and 3948.

It is therefore my opinion, in specific answer to your inquiry, that:

1. Where several sentences are imposed for separate and distinct offenses charged in separate indictments or in separate counts of the same indictment, the sentences run consecutively unless a contrary intention is expressed by the court in its judgment. Opinions of the Attorney General for 1932, No. 4701 followed and approved.

2. A person serving several indeterminate sentences consecutively in the Ohio Penitentiary is deemed to be serving one continuous term for the purposes of parole. Such a person is eligible for parole on the expiration of the aggregate of the minimum terms of his several sentences, less good time off for good behavior as provided by section 2210, General Code. A prisoner who is serving successive or cumulative sentences is also eligible for parole, as provided by section 2210-1, General Code, providing the aggregate of the minimum terms of his several sentences is longer than fifteen years.

3. The provisions of section 2166-1, enacted in 114 O. L. 188, do not apply to an indeterminate sentence to the Ohio Penitentiary for a term of ten to thirty years imposed on a person after being convicted for a violation of section 710-172, General Code.

Respectfully,

JOHN W. BRICKER,

Attorney General.