

7463

1. MINOR—NOT PREVIOUSLY SENTENCED TO A STATE PRISON—CONVICTED OF FELONY AND SENTENCE SUSPENDED—CONVICTED OF SUBSEQUENT FELONY—SUBSEQUENT CASE SENTENCE OF IMPRISONMENT IN OHIO STATE REFORMATORY IMPOSED PRIOR TO SENTENCE IN EARLIER CASE OF IMPRISONMENT IN OHIO PENITENTIARY—SECTION 5143.03 R. C.
2. CONSECUTIVE TERMS OF IMPRISONMENT—FIRST IN REFORMATORY AND SUBSEQUENTLY IN PENITENTIARY—TERMS IN PENITENTIARY REGARDED AS ONE CONTINUING SENTENCE—SECTION 5145.01 R. C.—SENTENCE TO REFORMATORY NOT REGARDED AS PART OF ONE CONTINUING SENTENCE.
3. EXECUTION OF SENTENCES SUSPENDED UNDER SECTION 2949.02 R. C.—SUSPENSION PENDING EXECUTION OF SUBSEQUENT SENTENCE NOT INCLUDED.
4. PRISONER SENTENCED TO TWO OR MORE CONSECUTIVE TERMS OF IMPRISONMENT CANNOT BEGIN SUBSEQUENT TERM UNTIL RELEASED FROM PRIOR TERM.

## SYLLABUS:

(1) When a minor, who has not previously been sentenced to a state prison, is convicted of a felony and placed on probation following suspension of the imposition of sentence, and is thereafter convicted of a subsequent felony other than murder in the first or second degree, and sentence is imposed in such subsequent case prior to imposition of sentence in the earlier case, the sentence first imposed must be one of imprisonment in the Ohio State Reformatory at Mansfield as provided in Section 5143.03, Revised Code. The sentence later imposed in such earlier case should be one of imprisonment in the Ohio Penitentiary.

(2) When one has been sentenced to several consecutive terms of imprisonment, the first in the reformatory and those subsequent in the penitentiary, the terms in the penitentiary may, for certain purposes, be regarded as one continuing sentence, under the terms of Section 5145.01, Revised Code; but the sentence to the reformatory may not be added in and regarded as part of one continuing sentence.

(3) Since the execution of sentences may be suspended only for purposes enumerated in Section 2949.02, Revised Code, which does not include suspension pending the execution of a subsequent sentence, sentences must be served in the order in which they are imposed.

(4) A prisoner sentenced to two or more consecutive terms of imprisonment in the Ohio Penitentiary at Columbus or the Ohio State Reformatory at Mansfield cannot begin to serve on the subsequent term or terms of imprisonment until he has been granted final release from his prior term of imprisonment or that prior term of imprisonment has expired.

Columbus, Ohio, November 29, 1956

Ohio Pardon and Parole Commission, 307 Wyandotte Building  
21 West Broad St., Columbus 15, Ohio

Gentlemen :

I have before me your request for my opinion, which sets forth a situation of facts represented by the following schedule :

- |                     |  |
|---------------------|--|
| April 24, 1931.     | Birthdate of prisoner, R. G.   |
| May 1951.           | Indicted in Mahoning County, Case No. 18097 for violation of Section 12438, General Code, burglary of an uninhabited dwelling or other building. Entered a plea of guilty and applied for probation.   |
| June 8, 1951.       | Granted probation for two years.   |
| August 29-30, 1951. | Committed rape and kidnapping.   |
| September 1951.     | Indicted for rape, a violation of Section 12413, General Code, in Mahoning County, Case No. 18204. Pleaded guilty. Indicted for kidnapping, a violation of Section 13386-3, General Code, in Mahoning County, Case No. 18205. Pleaded not guilty.  |
| January 7, 1952.    | Sentenced in Case No. 18204 to imprisonment in the penitentiary at Columbus for a term of from three to twenty years.  |
| January 28, 1952.   | Probation in Case No. 18097 revoked. Sentenced to imprisonment in the reformatory at Mansfield for the term provided by law for violation of Section 12438, General Code—one to fifteen years. The journal entry provided that this sentence should run consecutively with the sentence imposed in Case No. 18204. |
| January 30, 1952.   | Sentenced in Case No. 18205 to imprisonment in the penitentiary at Columbus for a term of from five to thirty years, the sentence to run consecutively with that imposed in Case No. 18204.  |
| April 25, 1952.     | An order entered that R. G. began to serve the sentence in Case No. 18204 when discharged from Mansfield Reformatory under Case No. 18097.   |
| April 28, 1952.     | The journal entry of January 28, 1952—revoking probation and imposing sentence in Case No. 18097—amended to remove the provision that that sentence should run consecutively with that imposed in case No. 18204.  |

R. G. was received at the Mansfield Reformatory on February 1, 1952, and he was regarded by the institution as serving on his sentence of one to fifteen years imposed in Case No. 18097.

Your request raises several questions, as follows:

“First, we would like to know if the sentences under Case No. 18097, No. 18204, and No. 18205 are to be considered one sentence of from 9-65 years.

“Second, we would like to know if this is the case what part or whether all is to be served at the reformatory under G. C. 2131.

“Third, if there are two separate sentences involved whether the first sentence of from 1-15 years under Case No. 18097 shall be served at the reformatory and the sentence under Cases No. 18204 and No. 18205 should be served at the reformatory or at the penitentiary. This of course involves the question with regard to the sentences under Cases No. 18204 and 18205 as to whether or not G. is considered to have been previously sentenced to a state prison. It should be noticed the entry in Case No. 18204 which orders G. to serve the sentence under No. 18204 when he is discharged from No. 18097, was made on 25 April 1952 which is one day after G. attained his majority, and during the same term of court.

“Fourth, we would like to know whether under this Journal entry of 25 April 1952 it is necessary for us to give G. a final release from his reformatory sentence under Case No. 18097 in order to enable him to start his servitude, either at the penitentiary or reformatory, under Case No. 18204 and No. 18205 and, if so, at which institution and if such subsequent sentence is from 8-50 years, or if we may parole him to begin the new sentence.”

Apparently it was the intention of the trial court that the prisoner serve first a term of one to fifteen years in the reformatory and then two consecutive sentences of three to twenty and five to thirty years in the penitentiary. However, I am of the opinion that the court could not lawfully so sentence him.

I refer you to the language of Section 2131, General Code:

“The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory, *if they are not known to have been previously sentenced to a state prison*. Male persons between the ages of sixteen and twenty-one years convicted of felony shall be sentenced to the reformatory instead of the penitentiary. Such persons between

the ages of twenty-one and thirty years may be sentenced to the reformatory if the court passing sentence deems them amenable to reformatory methods. No person convicted of murder in the first or second degree shall be sentenced or transferred to the reformatory.”  
(Emphasis added.)

In case No. 18204 the prisoner was sentenced to the penitentiary improperly, he not being then twenty-one years of age and not having been previously *sentenced* to a state prison. At the time of the sentence in case No. 18204, the prisoner had been convicted in case No. 18097 but never sentenced. You will note the language of the statute then providing for probation, Section 13452-1, General Code:

“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.”  
(Emphasis added.)

There is a distinction between suspension of *imposition* of sentence and suspension of *execution* of sentence. Municipal Court of Toledo et al., v. The State ex rel. Platter, 126 Ohio St., 103. Under the probation statute, *supra*, the imposition of sentence was suspended. Thus, when the prisoner was sentenced in Case No. 18204, he had not yet been sentenced in Case No. 18097. And, since he had no previous sentence, the sentence in Case No. 18204 was his first sentence to a state prison. At the time, January 7, 1952, he was only twenty years of age. Under the terms of Section 2131, General Code, *supra*, he could not properly be sentenced to imprisonment in the penitentiary.

Then the prisoner was improperly sentenced in Case No. 18097. When, on January 28, 1952, his probation was revoked and he was sentenced to a term of one to fifteen years in the reformatory, he could not be sentenced to the reformatory because he had been previously sentenced to a state prison—the sentence in Case No. 18204, imposed on January 7, 1952. Section 2131, General Code, Section 5143.03, Revised

Code; Opinion No. 2692, Opinions of the Attorney General for 1934, page 712.

The sentence in Case No. 18205 appears to be correct.

I turn now to the question of whether these sentences must be served consecutively or concurrently. The prisoner was first sentenced in Case No. 18204, then in Case No. 18097, then in Case No. 18205. The journal entries originally provided that the sentence in Case No. 18097 should run consecutively to that in Case No. 18204, and that the sentence in No. 18205 should also run consecutively to that in case No. 18204. The court then ordered that the prisoner should serve his sentence in Case No. 18204 on release from his sentence in No. 18097. It then amended its order in case No. 18097, striking out the provision that the sentence in that case should run consecutively to the sentence in No. 18204. The court thus eliminated a seeming non-sequitur in its series of orders. As the amended orders stand, it is provided that the sentence in Case No. 18205 shall be served consecutively to that in No. 18204. The entries in No. 18097 and No. 18204 are silent as to whether the sentences shall be served consecutively or concurrently. When the orders do not specifically state, the presumption is that the penalties are cumulative. *Anderson v. Brown*, 117 Ohio St., 393. Thus all these sentences must be served consecutively.

As I have said, it was apparently the intention of the trial court that the prisoner should serve one to fifteen years in the reformatory and then consecutive sentences of three to twenty and five to thirty in the penitentiary. Under the law, the sentences must be served as follows: first, the sentence in Case No. 18204 of three to twenty years, at the reformatory; second, the sentence in Case No. 18097 of one to fifteen years; and, third, the sentence in Case No. 18205 of five to thirty years, in the penitentiary. The prisoner, being now confined in the reformatory, should be regarded by you as serving his term in Case No. 18204. You may proceed under the provisions of Section 2965.32, Revised Code, to arrange the confinement of the prisoner in the proper institution, regardless of the incorrect sentences.

It is within the power of the trial court, of course, to correct its orders, *nunc pro tunc*, to put them in conformity with the law.

I turn now to your enumerated questions.

You ask first whether the three sentences are to be regarded as one sentence of from nine to sixty-five years. Section 5145.01, Revised Code, provides in pertinent part :

“\* \* \*

\* \* \*

\* \* \*

“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 felonies for which he was sentenced and, for the purposes of sections 5145.01 to 5145.31, inclusive, of the Revised Code, he shall be held to be serving one continuous term of imprisonment.

“\* \* \*

\* \* \*

\* \* \*.”

Thus, the two sentences to be served in the penitentiary are to be regarded as one sentence of from six to forty-five years. There is no analogous provision in the chapter on reformatories. I conclude that the sentence to the reformatory must be regarded as one of from three to twenty years, and those in the penitentiary as one of from six to forty-five.

Your second and third questions are answered in the preceding discussion. In sum, the sentence in Case No. 18204 must be served at the reformatory and those in cases 18097 and 18205 at the penitentiary.

As to your fourth questions, since the prisoner cannot under the law serve his sentence in Case No. 18097 prior to serving his sentence in No. 18204, the journal entry of April 25, 1952, may be disregarded. The prisoner must serve his sentences in the order in which they were imposed because a court is not authorized to suspend the execution of a prior sentence pending the execution of a subsequent sentence. I refer you to Section 2949.02, Revised Code, which sets forth the only conditions under which the execution of a sentence may be suspended.

In your fourth question you also inquire whether it will be necessary for you to grant R. G. a final release from his first sentence before he may begin serving his subsequent sentences, or if you may parole him to begin serving his subsequent sentences. It is my opinion that a prisoner must be granted final release from a sentence before he may begin serving a subsequent sentence. A prisoner on parole is not discharged from the legal consequences of his crime; during the period of his parole he continues to be a prisoner, subject to the custody of the Department of Mental Hygiene and Correction. Opinion No. 1987, Opinions of the

Attorney General for 1940, page 257. Phrased another way the execution of a sentence of imprisonment is not interrupted or suspended by parole. Thus, if a prisoner were permitted to serve on a subsequent sentence of imprisonment while on parole from a prior sentence of imprisonment, he would be serving the two sentences concurrently, even though they might have been imposed as consecutive sentences. I am therefore of the opinion that R. G. can not begin to serve his sentences in cases 18097 and 18205 until he is granted final release from his sentence in 18204 or his term of imprisonment in 18204 has expired.

I am of the opinion and advise you that :

(1) When a minor, who has not previously been sentenced to a state prison, is convicted of a felony and placed on probation following suspension of the imposition of sentence, and is thereafter convicted of a subsequent felony other than murder in the first or second degree, and sentence is imposed in such subsequent case prior to imposition of sentence in the earlier case, the sentence first imposed must be one of imprisonment in the Ohio State Reformatory at Mansfield as provided in Section 5143.03, Revised Code. The sentence later imposed in such earlier case should be one of imprisonment in the Ohio penitentiary.

(2) When one has been sentenced to several consecutive terms of imprisonment, the first in the reformatory and those subsequent in the penitentiary, the terms in the penitentiary may, for certain purposes, be regarded as one continuing sentence, under the terms of Section 5145.01, Revised Code; but the sentence to the reformatory may not be added in and regarded as part of one continuing sentence.

(3) Since the execution of sentences may be suspended only for purposes enumerated in Section 2949.02, Revised Code, which does not include suspension pending the execution of a subsequent sentence, sentences must be served in the order in which they are imposed.

(4) A prisoner sentenced to two or more consecutive terms of imprisonment in the Ohio Penitentiary at Columbus or the Ohio State Reformatory at Mansfield can not begin to serve on the subsequent term or terms of imprisonment until he has been granted final release from his prior term of imprisonment or that prior term of imprisonment has expired.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General