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1. SENTENCE—WHERE PERSON CONVICTED AND SENTENCED TO OHIO PENITENTIARY—COMMITMENT PAPERS DO NOT CONTAIN SENTENCE ACTUALLY IMPOSED AS SHOWN BY JOURNAL ENTRY OF COURT—DUTY OF WARDEN TO CORRECT RECORDS TO CONFORM TO CORRECTED COPY OF SENTENCE—SECTION 13455-1 G.C.
2. PERSON CONVICTED, ATTEMPTING TO INDUCE CONVICT TO ESCAPE—CONVICT SENTENCED, FIVE DIFFERENT VIOLATIONS OF SECTION 13384 G.C., THREE SENTENCES TO BE SERVED CONSECUTIVELY, TWO CONCURRENTLY WITH FIRST—SUCH PERSON SHOULD BE IMPRISONED IN PENITENTIARY, TERM NOT EXCEEDING FIFTEEN YEARS.
3. NO MINIMUM TERM PRESCRIBED FOR SUCH OFFENSE—PRISONER ELIGIBLE FOR PAROLE ANY TIME AFTER INCARCERATION—SUBJECT TO REQUIREMENTS SECTION 2209-17 G.C. AS TO NOTICE.

SYLLABUS:

1. Where a person is convicted and sentenced to the Ohio Penitentiary and the commitment papers furnished to the warden pursuant to Section 13455-1, General Code, do not contain the sentence actually imposed by the court as shown by its journal entry, and a corrected copy of such sentence is furnished thereafter to the warden, it is his duty to accept same and correct his records accordingly.

2. A person who has been convicted of attempting to induce a convict to escape from the penitentiary, which said convict had been convicted and sentenced for five different violations of Section 13384, General Code, three of said sentences to be served consecutively and two concurrently with the first, should be confined in the penitentiary for a term not exceeding fifteen years.

3. There being no minimum term prescribed by law for such offense, such person becomes eligible for parole at any time after his incarceration in the Ohio Penitentiary, subject, however, to the requirements of Section 2209-17, General Code, with respect to notice of such intended parole.

Mt. Vernon, Ohio., September 3, 1942

Hon. W. Thurman Todd, Prosecuting Attorney,
Mt. Vernon, Ohio.

Dear Sir:

You have requested my opinion as follows:

"As Prosecuting Attorney of Knox County, Ohio, I have a matter to submit to you with a request that you furnish me with an opinion upon the questions submitted at the conclusion of the statement of facts, which are as follows:

At the January Term of the Court of Common Pleas of Knox County, Ohio, one R. F. was found guilty by a jury, of attempting to induce a convict to escape from the Ohio Penitentiary. He was indicted, found guilty and sentenced to the Ohio Penitentiary under Section 12,833 of the General Code of Ohio, which is as follows:

'No. 12833 AIDING OR INDUCING CONVICTS TO ESCAPE. Whoever aids, induces or attempts to induce a convict to escape or attempt to escape from the penitentiary shall be imprisoned in the penitentiary for a term not exceeding that for which such convict was committed; whoever aids or assists a person, lawfully confined in a jail or other place of confinement, to escape or attempt to escape therefrom, shall be fined not less than fifty dollars nor more than five hundred dollars or imprisoned not more than ninety days, or both.'

A certified copy of the Journal Entry of Sentence is hereto attached.

R.F. was committed to the Ohio Penitentiary on the 22nd day of February, 1942. With the certified copy of the above mentioned Journal Entry and Cost Bill there was also accompanying said papers an additional commitment paper, a 'Certified Copy of Sentence to Ohio Penitentiary', a copy of which is hereto attached.

It also will be noted that F. was convicted of attempting to induce one H.B. to escape from the Ohio Penitentiary. B. had pleaded guilty to extortion upon five counts. On three of said counts he was sentenced from one to five years, running consecutively and upon two counts he had been sentenced from one to five years, running concurrently.

It will be noted that from the Journal Entry referred to above the sentence of F. reads as follows:

'It is therefore the judgment and sentence of the Court, that said defendant R——— L. F———, alias F——— S———, be imprisoned in the Ohio State Penitentiary at

Columbus, Ohio, for a term not exceeding that for which convict H— B— No.— was committed to said penitentiary, and pay the costs of prosecution taxed at \$— for which execution shall issue.'

When F. was committed to the Penitentiary the 'Certified Copy of Sentence to Ohio Penitentiary' did not contain the sentence as stated above but stated that the defendant 'Pleaded Guilty' to the offense charged, rather than 'Was found guilty' and also contained a statement that F. was sentenced 'for a period of duration not less than three years nor more than fifteen years.' The result is that the records of the Ohio Penitentiary show that F. was committed 'For a period of duration not less than three years nor more than fifteen years,' rather than in the words of the actual sentence found in the Journal Entry as stated, to wit: 'for a term not exceeding that for which convict H— B— No.— was committed.' In other words the actual Court's sentence places no *minimum* sentence whereas the error complained of places a minimum of three years and a maximum of fifteen years.

The Clerk of Courts of Knox County, Ohio, after the error was discovered, forwarded a correct 'Certified Copy of Sentence to Ohio Penitentiary' which the Warden of the Penitentiary does not see fit to accept, thus leaving his records showing that F. is actually sentenced for 'not less than three years nor more than fifteen years.'

The questions presented, and which I submit and request answers are as follows:

- (1) What steps should be taken to correct the error that has been made so that the records of the Ohio Penitentiary will show the correct entries or period of confinement?
- (2) What interpretation should be given to the actual sentence appearing in the Court's Journal Entry of Judgment?
 - (a) Is F's sentence actually a sentence of 'Not less than three years nor more than fifteen years?' or
 - (b) Is his sentence one that in fact amounts to 'Nothing to Fifteen years' or in other words a sentence containing no minimum sentence?
- (3) Under the sentence when would F., under the law, be eligible to parole?

As stated above the unusual situation has been caused by an error, apparently on the part of the office of the Clerk of Courts of Knox County in the preparation of the commitment papers and should be remedied. * * *

With your letter you have enclosed a certified copy of a "Journal

entry on conviction, overruling motion for new trial and imposition of sentence," in the case. That portion of the entry imposing sentence is correctly quoted in your letter. You also have enclosed a copy of a paper entitled "Certified copy of sentence to Ohio Penitentiary." In this paper it is stated inter alia:

"The said R——— L. F———, alias F——— S——— having plead guilty to attempting to induce a convict to escape from the Ohio Penitentiary. It is, therefore, the sentence of the Court that he be imprisoned in the Ohio Penitentiary of this State, and kept at hard labor, no part of said time to be kept in solitary confinement, until legally discharged; that said imprisonment shall be for a period of duration not less than three years nor more than fifteen years, and that he pay the costs of this prosecution, taxed at Sixty-three 97/100 Dollars."

Section 13455-1, General Code, provides:

"A person sentenced for felony to the penitentiary or reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or such reformatory, by the sheriff of the county in which the conviction was had, within five days after such sentence, and delivered into the custody of the warden or superintendent of such institution, with a copy of such sentence, and such convict shall be kept within such institution until the term of his imprisonment expires or he is pardoned or paroled. If the execution of such sentence is suspended, and the judgment be thereafter affirmed, he shall be conveyed to the penitentiary or such reformatory within five days after the judge directs the execution of sentence, provided, however, that the trial judge or other judge of said court may, in his discretion and for good cause shown, extend the time of such conveyance."

The copy of the sentence which this section provides shall be delivered to the warden is what is commonly known as a mittimus.

In Ohio it is well settled that a court of record speaks only through its journal. *State, ex rel. Industrial Commission, v. Day*, 136 O.S., 477; *Will v. McCoy*, 135 O.S., 241; *Industrial Commission v. Musselli*, 102 O.S., 10; *Coe v. Erb*, 59 O.S., 259.

If, therefore, the "Certified copy of sentence to Ohio Penitentiary" does not conform to the sentence actually imposed by the court as shown by its journal entry duly recorded in its journal, the journal

entry controls and the certified copy must be disregarded to the extent of conflict.

In 16 C.J., 1329, it is said:

“If the commitment is defective the record may be resorted to in order to determine the legality of defendant’s imprisonment, or a proper mittimus can, if needed, be supplied at any time, even after habeas corpus. Thus the fact that a prisoner has been discharged on habeas corpus proceedings because of a failure to comply with the statute requiring a certified copy of the judgment to be furnished the jailer as his authority for detaining the prisoner will not prevent the court from ordering a proper commitment to be issued and the prisoner to be re-committed thereunder.

A commitment may be amended so as to conform to the proof as to the crime for which the prisoner was convicted, and to remedy other defects.”

See also 24 C.J.S., 163. If, therefore, a corrected “Certified copy of sentence to Ohio Penitentiary” is furnished to the warden, it is his duty to accept same and correct his records accordingly.

You state that B., the convict that F. was found guilty of attempting to induce to escape, was incarcerated in the Ohio Penitentiary under sentence for extortion. It appears that he had pleaded guilty to five different charges of this offense. Upon each charge he was sentenced to the penitentiary, and you state that three of said sentences were to run consecutively and two thereof were to run concurrently. By this I assume that you mean that the two which were to run concurrently were to be served concurrently with the first sentence imposed. I further assume that the offense of which B. was convicted is that defined by Section 13384, General Code, which provides for a penalty of from one to five years in the penitentiary.

It will be noted that the penalty provided by Section 12833, General Code, for attempting to induce a convict to escape or attempt to escape from the penitentiary is imprisonment in the penitentiary for a term not exceeding that for which such convict was committed. The section does not provide that a person convicted thereunder shall be imprisoned in the penitentiary for the *same* term or for a term not less than that for which the convict was committed. In other words, the

section provides a maximum of "a term not exceeding that for which such convict was committed," but does not provide any minimum.

If I am correct in my interpretation of your letter, B. was committed to serve three consecutive sentences of from one to five years each, and there was also imposed upon him two other sentences of from one to five years to be served concurrently with his first sentence. In order to determine the maximum of F's sentence, it is necessary therefore to ascertain B's maximum sentence. Under the facts stated, this maximum is obviously fifteen years.

However, as before noted, no minimum is fixed by Section 12833, General Code, *supra*, and F. is therefore serving a sentence of from naught to fifteen years.

In my Opinion No. 1621, found at page 2424 of Volume III of the Opinions of the Attorney General for 1939, the second paragraph of the syllabus is as follows:

"A prisoner committed to the Ohio penitentiary to serve a sentence for the violation of a statute which does not fix a minimum term of imprisonment, is eligible for parole at any time after his commitment to the Ohio Penitentiary, subject, however, to the requirements of Section 2209-17, requiring notice of such intended parole for the periods of time specified in said section. (Opinion No. 160, O.A.G., 1933, Vol. I, p. 184, approved and followed.) And this rule applies, even though the trial court, through oversight or otherwise, sentences such prisoner for a definite term or attempts to fix the minimum term at a definite number of years. (Opinions Nos. 76 and 1396, O.A.G., 1933, Vol. I, p. 69, and Vol II, p. 1261, overruled.)"

F. is therefore now eligible for parole, subject, however to the requirements of Section 2209-17, General Code, with respect to notice of such intended parole.

Summarizing, I am of the opinion:

1. Where a person is convicted and sentenced to the Ohio Penitentiary and the commitment papers furnished to the warden pursuant to Section 13455-1, General Code, do not contain the sentence actually imposed by the court as shown by its journal entry, and a corrected copy of such sentence is furnished thereafter to the warden, it is his duty to accept same and correct his records accordingly.

2. A person who has been convicted of attempting to induce a convict to escape from the penitentiary, which said convict had been convicted and sentenced for five different violations of Section 13384, General Code, three of said sentences to be served consecutively and two concurrently with the first, should be confined in the penitentiary for a term not exceeding fifteen years.

3. There being no minimum term prescribed by law for such offense, such person becomes eligible for parole at any time after his incarceration in the Ohio Penitentiary, subject, however, to the requirements of Section 2209-17, General Code, with respect to notice of such intended parole.

Respectfully,

THOMAS J. HERBERT
Attorney General.