

3429.

PRISONERS, OHIO PENITENTIARY — EXCEPTION, THOSE SENTENCED FOR LIFE — WHERE THEY ATTEND SCHOOL, ENTITLED TO DIMINUTION OF SENTENCE, ONE MONTH FOR EACH ADVANCEMENT IN GRADE — SECTION 2195 ET SEQ., G.C. — MANDATORY DUTY, DEPARTMENT OF PUBLIC WELFARE, TO ADOPT REASONABLE RULES TO MAKE SECTION 2195-7 G.C. EFFECTIVE — STATUS, EDUCATED PRISONERS WHO TEACH — SUCH DIMINUTION OF SENTENCE MAY NOT BE FORFEITED OR TAKEN AWAY FOR ANY CAUSE — SAID STATUTES APPLY TO SENTENCES: GENERAL OR INDETERMINATE, DEFINITE OR FIXED TERM, MAXIMUM AND MINIMUM TERM.

SYLLABUS:

1. *By virtue of Section 2195-6, General Code, prisoners confined in the Ohio penitentiary, other than those sentenced for life, attending the school provided for in Section 2195 et seq., General Code, are entitled to one month diminution of their sentence for each advancement in grade in such school, and under Section 2195-7, General Code, educated*

prisoners, assigned to duty as teachers in such school, are entitled to such diminution of their sentences as may be prescribed in rules adopted by the department of public welfare, it being the mandatory duty of such department to adopt such reasonable rules as will make effective the provisions of the section.

2. *Diminution of sentence under either Section 2195 or Section 2195-7, General Code, may not be forfeited or taken away for any cause.*

3. *The provisions of Sections 2195-6 and 2195-7, General Code, have application to general or indeterminate sentences as well as to sentences to the penitentiary for a definite or fixed term, and the diminution provided for in Section 2195-6, General Code, has application both to the maximum and minimum term of a general or indeterminate sentence.*

Columbus, Ohio, February 15, 1941.

Hon. Charles L. Sherwood, Director, Department of Public Welfare,
Columbus, Ohio.

Dear Sir:

This office has your request for my opinion which reads as follows:

“Section 2159 (88 v. 566) provides that a daily record of the conduct of each prisoner and his diligence in the performance of his work shall be kept.

Section 2163 (88 v. 566) provides for a diminution of sentence of prisoners for good conduct under certain conditions and terms. This section was enacted when the definite sentence law was in effect and applies only to prisoners serving definite terms.

Section 2195-6 (103 v. 274) provides for a diminution of sentence for advancement in school. As this section was enacted while Section 2163 was on the statute books and in general effect before the repeal of the Norwood law, there appears to be no doubt that the legislature intended this to provide an additional diminution.

Section 2195-7 provides that when prisoners who are assigned to duty as teachers in the prison school, the Board of Administration (Department of Public Welfare) shall adopt rules for the diminution of sentence of such teachers, and the time so gained under such rules shall not be forfeited or taken away for any cause.

Section 2210 (114 v. 531), (effective August 5, 1931) is really an amendment to Section 2163 and was enacted after the

definite sentence law was repealed. It therefore takes the place of Section 2163 except in the cases of prisoners still confined on definite sentences.

In our opinion Sections 2195-6 and 2195-7 G.C. are effective, and prisoners attending school shall be entitled to one month's diminution on their sentences for advancement in grade, and those serving as teachers under Section 2195-7 are entitled to such diminution as the department may determine, in addition to the diminution provided by Sections 2210 or 2163 G.C. Note that such diminution cannot be forfeited because of violation of rules or discipline or for any other cause."

Section 2163, General Code, referred to in your letter, reads in part as follows:

"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:

(Here follows a schedule setting forth the deductions allowable, which vary according to the length of the sentence.)

(Emphasis and words in parenthesis mine.)

Section 2210, General Code, provides in part that:

"A person confined in a state penal institution and not eligible to parole before the expiration of the minimum sentence or term of imprisonment, or hereafter sentenced thereto under a general sentence, who has faithfully observed the rules of said institution, shall be entitled to the following diminution of his minimum sentence:

(Here follows a schedule like that contained in Sec. 2163, supra.)

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

(Words in parenthesis and emphasis mine.)

It has been held by the Supreme Court that the provisions of Section 2163, supra, apply only "to prisoners confined in the Ohio penitentiary for a definite term" and not "to a prisoner who has received a general sentence under the provisions of Section 2166, General Code." See *O'Neil v. Thomas, Warden*, 123 O.S. 404 (1930); *Ex Parte Tischler*, 127 O.S. 404 (1933); and *Ex Parte Thorpe*, 137 O.S. 325 (1940).

In the *Tischler* case the petitioner was convicted of robbery and sentenced on May 5, 1921, "to serve an indeterminate sentence of one

to fifteen years in the Ohio penitentiary." The petitioner contended that by virtue of Section 2210, General Code, "credits allowed for good behavior must be deducted from his indeterminate sentence."

In the opinion by Judge Allen, it was said as follows at page 409, et seq.:

" * * * Section 2210, General Code, as given above *does not provide for a deduction of credits allowed for good behavior from an indeterminate sentence.* It specifically provides at the end of the section that each prisoner shall be eligible for parole. In the first part of the section, the fact that this enactment only reduces time within which the prisoner is eligible for parole is emphasized by the phrase, 'A person confined in a state penal institution and not eligible to parole.' *This section 2210, is sharply differentiated from Section 2163, General Code, which does establish an absolute diminution of sentence for good behavior in reference to definite sentences.* * * * " (Emphasis mine.)

From the foregoing, you will observe that Section 2210 does not take "the place of Section 2163 except in the cases of prisoners still confined on definite sentences" as suggested in your communication; but rather Section 2210 supplements Section 2163, by making provision for the diminution of the minimum term of a general or indeterminate sentence to imprisonment in any state penal institution, while the latter section provides only for the diminution of a definite, fixed or limited term other than life of a person confined in the Ohio penitentiary. By their express terms, both of these sections are confined to time off for "good behavior."

That definite, fixed or limited sentences to imprisonment in the Ohio penitentiary may still be lawfully imposed by trial courts will be seen by an examination of Section 12427, General Code, which fixes the punishment for "kidnapping for the purpose of extortion" at "imprisonment in the penitentiary during life; provided, however, if the person so abducted or kidnaped has been liberated unharmed prior to the commencement of trial, the said person so convicted shall be imprisoned in the penitentiary for not less than twenty years"; of Section 12441, General Code, relating to the crime commonly called "armed burglary" or "armed robbery" of a bank, which provides that a person convicted thereunder "shall be imprisoned in the penitentiary during life; provided, that if the jury upon the trial of any such indictment as a part of their verdict finds the accused guilty and recommends mercy, the court may sentence the accused

to not less than twenty years in the penitentiary"; and of the so-called "Habitual Criminal Act," Section 13744, General Code, et seq.

The power and authority of a trial court to impose a definite sentence under Section 12441, supra, was expressly upheld by the Supreme Court in *Ex Parte Fleming*, 123 O.S. 16 (1930), in which a *definite* sentence to the penitentiary for *twenty-five* years, as imposed by the trial judge, was held valid. And for a more thorough consideration of this subject your attention is invited to Opinion No. 2741, Opinions, Attorney General, 1940, rendered to you under date of September 10, 1940, in which the above sections and the Fleming case and other related cases are more completely discussed.

Sections 2195-6 and 2195-7, General Code, with reference to which your inquiry is primarily concerned, respectively read as follows:

Section 2195-6.

"A prisoner, other than one sentenced for life, attending such school, shall be entitled to one month diminution of his sentence for each advancement in grade, which diminution shall not be forfeited or taken away because of a violation of any rule of discipline or for any other cause. The record in the school of a prisoner sentenced for life shall be given special consideration in an application for pardon, parole or commutation of sentence."

Section 2195-7.

"Educated prisoners may be assigned to duty as teachers in such school. The board of administration shall adopt rules for the diminution of the sentence of such teachers, and the time so gained under such rules shall not be forfeited or taken away for any cause."

The provisions of these two sections are plain as are their directions explicit. I have little difficulty, therefore, in reaching the conclusion that the suggestions contained in the last paragraph of your inquiry are correct and that Sections 2195-6 and 2195-7, supra, having neither been suspended, amended nor repealed by the Legislature, are in full force and effect; that a prisoner imprisoned in the Ohio penitentiary other than for life, attending the school provided for in Section 2195-6 and cognate sections of the General Code, is "entitled to one month diminution of his sentence for each advancement in grade; and that the educated prisoners assigned to duty as teachers in said school, are entitled to such diminution of their sentences as may be provided for in rules adopted by the Ohio "board of administration," that is, the department of public welfare (Sec. 154-26 and sec. 154-57, G.C.) It is further my opinion that

credit for good time earned in either case may not be forfeited or taken away for any cause.

With reference to the application of the provisions of Sections 2195-6 and 2195-7, *supra*, two questions of more difficulty are presented; and these are: (1) Whether the diminution of sentence therein provided for is limited to definite sentences, or whether such provisions also apply to general or indeterminate sentences; and (2) if such diminution applies to the latter, is the same appropriate only to the minimum term of such a sentence or to the maximum term.

I am inclined to the view that these sections have equal application to general or indeterminate sentences as to sentences for a definite or fixed term. One of the well settled rules of statutory interpretation is that acts passed by the law-making body are passed with a full knowledge of the existing condition of the law and with reference to it. See 59 C.J. 1038, and authorities cited. See also page 1053, *Id.*, where it is stated that the "rule that statutes in *pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature." For Ohio cases so holding see *State ex rel. Morris v. Sullivan*, 81 O.S. 79, 90 N.E. 146 (1874) and *Jones v. Wilson Carr and Co.*, 16 O.S. 420 (1866). An examination of the legislative history of Sections 2195-6 and 2195-7, *supra*, and Section 2166, General Code, discloses that the 80th General Assembly, which enacted Sections 2195-6 and 2195-7 on April 17, 1913, in "An Act—Providing for the establishment and maintenance of a day school for prisoners at the Ohio Penitentiary" (103 v. 273), also amended Section 2166, General Code, on February 13, 1913, so as to make, except when otherwise provided, the imposition of general sentences *mandatory* upon the trial court, and not discretionary as theretofore (103 v. 29). Section 2166 as amended in 1913 was in substance as it now appears in the General Code (114 v. 188), with the exception that the words "As used the phrase 'term of imprisonment' means the duration of the state's legal custody and control over a person sentenced as provided in this section" were added thereto. It would seem, therefore, especially in view of the well settled principles of statutory interpretation above stated, that it was the legislative intent that Sections 2195-6 and 2195-7 should have application to general or indeterminate sentences as well as to sentences which are definite or fixed.

Touching the question as to whether or not the diminution provided for in Sections 2195-6 and 2195-7 relates only to the minimum term of

a general sentence or to the maximum term, or both, it will be noted that there is no express language in either section, or elsewhere in the General Code, providing that the types of diminution here involved shall apply only to the minimum of a general sentence.

One of the canons of construction of statutes is, that every statute is to be construed with reference to its intended scope and the purpose of the legislature in enacting it; and where the language used is ambiguous or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute. Black on Interpretation of Laws, p. 76.

As stated in 37 O., Jur. 662, a long list of Ohio cases being cited in the footnotes:

“In construing a statute, courts frequently refer to the ‘design’ thereof, or to that which is ‘designed’ to be accomplished thereby. When the real design of a legislature, in ordaining a statute, although it is not precisely expressed, is yet plainly perceivable or ascertainable with reasonable certainty, the language of the statute should be given such a construction as will carry that design into effect.”

See also p. 675 of the same text, where it is said:

“In construing a law of doubtful meaning or application, the policy which induced its enactment, or which was designed to be promoted thereby, is a proper subject for consideration. *Unless precluded by the language of the statute, it should be given effect in furtherance of the policy it was designed to introduce or assist. Accordingly, a construction should be avoided which would defeat the policy of the statute.*”

It is manifest that the purpose of the Legislature in enacting Sections 2195-6, 2195-7 and cognate sections of the General Code, was to encourage prisoners in the Ohio penitentiary by means of education the better to fit themselves to resume their places in society as self sustaining citizens. As above suggested, with but a few exceptions, all sentences to the Ohio penitentiary are now general or indeterminate and if the purpose of the Legislature above set forth is to be accomplished, and if the sections in question are to have any real and substantial effect, it must be concluded that the diminution here under consideration should apply to the maximum term of an indeterminate sentence as well as to the minimum. Such a construction and interpretation certainly extends encouragement to a large number of prisoners, offers inducement both to study and to teach, and carries into effect the Legislature’s obvious intention to rehabilitate as well as to punish the prisoners in the Ohio penitentiary.

In passing, it should be noted that both by virtue of the title of the act in which Sections 2195-6 and 2195-7 were enacted, above quoted, as well as by the express provisions of Section 2195 and pertinent sections of the General Code, the two sections here being interpreted are limited in their application to prisoners in the Ohio penitentiary.

For the reasons above set forth, and in specific answer to your question, it is my opinion that:

1. By virtue of Section 2195-6, General Code, prisoners confined in the Ohio penitentiary, other than those sentenced for life, attending the school provided for in Section 2195 et seq., General Code, are entitled to one month diminution of their sentence for each advancement in grade in such school, and under Section 2195-7, General Code, educated prisoners, assigned to duty as teachers in such school, are entitled to such diminution of their sentences as may be prescribed in rules adopted by the department of public welfare, it being the mandatory duty of such department to adopt such reasonable rules as will make effective the provisions of the section.

2. Diminution of sentence under either Section 2195-6 or Section 2195-7, General Code, may not be forfeited or taken away for any cause.

It is further my opinion that:

3. The provisions of Sections 2195-6 and 2195-7, General Code, have application to general or indeterminate sentences as well as to sentences to the penitentiary for a definite or fixed term, and the diminution provided for in Section 2195-6, General Code, has application both to the maximum and minimum term of a general or indeterminate sentence.

Respectfully,

THOMAS J. HERBERT,
Attorney General.