

1081

MURDER—DEPARTMENT OF PUBLIC WELFARE—NO DUTY, NO AUTHORITY TO ORDER ANY DISPOSITION OF PERSON CONVICTED OF MURDER—WITHOUT RECOMMENDATION OF MERCY—PROVISO, UNLESS PRISONER—COMMITTED TO CUSTODY OF DEPARTMENT BY COURT HAVING JURISDICTION OVER PRISONER AFTER FINDING BY THE COURT THAT PRISONER IS INSANE—SECTIONS 13451-19 THROUGH 13451-23 G. C.

SYLLABUS:

The department of public welfare has no duty under the provisions of Sections 13451-19 to 13451-23, General Code, and has no authority to order any disposition of a person convicted of murder without recommendation of mercy, unless such convict has been committed to the custody of the department by a court having jurisdiction over the convict after a finding by said court that said convict is insane.

Columbus, Ohio, January 17, 1952

Hon. J. H. Lamneck, Director, Department of Public Welfare
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Enclosed find a copy of a request directed to the Governor, the Warden of the Ohio Penitentiary, and the undersigned, concerning J. C. E. a prisoner at the Ohio Penitentiary who is under sentence to be executed. He was originally sentenced to be executed on March 5, 1951. The Court of Common Pleas of S. County has indefinitely postponed the execution of its order.

“In connection with this matter, I desire your opinion on the following:

“1. May the Department order a prisoner, confined in the Ohio Penitentiary under sentence to be executed, transferred to the Lima State Hospital without an order of the Court vacating or modifying its judgment?

“2. Does the Department of Public Welfare have any duty to perform under Sections 13,451-19 to 13,451-23 of the General Code after a prisoner has been sentenced?”

Your request is somewhat vague as to the exact question you are raising, and appears to be based upon some misconception of the law. I have gathered some additional facts from the file in the office of the Governor and find that the following is the situation which gave rise to the present problem:

The prisoner in question was admitted to the Ohio Penitentiary on November 11, 1950 under sentence to be executed on March 5, 1951. Shortly before the execution date he was granted a reprieve until April 5 by the Governor, and a clemency hearing before the pardon and parole commission was set for March 26.

On March 12, 1951 the Court of Common Pleas from which the prisoner was sentenced entered a purported stay of execution. The effectiveness of this so-called stay appears to me to be doubtful in view of the specific language of Section 13456-4, General Code, which provides that:

“Unless a suspension of execution be ordered by the court or two judges thereof, *in which the cause is pending on error*, the warden * * * shall proceed * * * to cause the prisoner * * * to be electrocuted * * *.”
(Emphasis supplied.)

Almost simultaneously an attorney for the prisoner filed a demand with the Governor and the pardon and parole commission that they comply with the provisions of law “in regard to a psychopathic offender.” Apparently these two acts gave rise to your request for my opinion, since this demand was attached to your letter.

In order to clarify the entire problem, certain events which transpired subsequent to your request should be set out. First, an appeal of the conviction was taken to the Court of Appeals, and that court issued a stay of execution until a fixed date. Thereupon the clemency hearing originally scheduled for March 26 was cancelled. Later an appeal was taken to the Supreme Court which granted an indefinite stay and the matter is still pending in that court. The prisoner is still confined in the Ohio Penitentiary under sentence to be executed.

Returning now to your questions, both of them apparently stem from the demand made that the prisoner be dealt with as a psychopathic offender. The demand apparently referred to Sections 13451-19 to 13451-23, General Code, which sections comprise an act set out in 118

Ohio Laws 686. The original sections have subsequently been amended. In essence the act provides as follows:

Section 13451-19 announces the purpose of the act "to establish * * * proceedings to be administered by the criminal courts dealing with mentally deficient * * * and psychopathic offenders." Section 13451-20 provides for psychopathic examination of certain prisoners after conviction and before sentence; for an examiner's report; for a court hearing on the report; for the commitment of prisoners found to be psychopathic to the department of public welfare; and for the department to send them to appropriate institutions. This section specifically provides in part that:

"* * * The court, in its discretion and prior to sentence may refer for such examination, any person who has been convicted of any other felony *except murder in the first degree where mercy has not been recommended* * * *." (Emphasis supplied.)

Section 13451-21 deals with misdemeanants, Section 13451-22 deals with committed convicts who have recovered, and Section 13451-22a deals with applications for release. Section 13451-23 provides as follows:

"Nothing in this act shall be construed as repealing, or limiting the applicability or effect of any existing statute relating to pleas of insanity in criminal causes, insane prisoners or other insane persons."

So here we have an act which by its very language specifically excepts from its operations the prisoner involved in your request. Further, the act specifically announces that it does not affect existing statutes. In this connection, Sections 13456-8, 13456-9, and 13456-10, General Code, which were in effect prior to the act referred to above, provide as follows:

Section 13456-8:

"If a convict sentenced to death appears to be insane, the warden, if the convict be in the penitentiary, or the sheriff if the convict be in the county jail, shall give notice thereof to a judge of the court of common pleas of the county in which the prisoner is confined, who shall inquire into such insanity at a time and place to be fixed by said judge, or impanel a jury for that purpose and give immediate notice thereof to the prosecuting attorney of the county in which the prisoner was convicted."

Section 13456-9:

"The judge, clerk of the court and prosecuting attorney shall attend the inquiry in addition to the warden or sheriff. Witnesses

may be produced and examined before the judge or jury, as the case may be, and all findings shall be in writing duly signed by them. If it be found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receives a warrant from the Governor directing such execution. The finding of such judge or jury and order of such judge, certified by him, shall be entered on the journal of the court by the clerk."

Section 13456-10:

"The warden or sheriff shall forthwith transmit a copy of such finding to the governor, who, when convinced that the convict is of sound mind, shall issue a warrant appointing a time for his execution."

It can be seen that these sections provide for an inquiry into the sanity of a convict sentenced to death, by a special proceeding before the court of common pleas of the county *in which the prisoner is confined*. In most cases this will be Franklin County, the situs of the Ohio Penitentiary. It is my opinion that this procedure alone governs in the situation which you have presented. This, I believe, specifically answers your second question as to the duty of the department under Sections 13451-19 to 13451-23, General Code, in the case of a prisoner sentenced to be executed.

You have also asked if the *department* may order a prisoner under sentence to be executed transferred to another institution "without an order of the court vacating or modifying its judgment." Without attempting to define the powers of the court which originally sentenced the prisoner, this question must be answered in the negative. As pointed out above it is my opinion that the department has no authority to order any disposition of a person after his conviction for murder without recommendation of mercy, unless that person has been committed to the custody of the department by a court having jurisdiction of the convict after such court has found him to be insane.

Respectfully,

C. WILLIAM O'NEILL

Attorney General