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PRISONER COMMITTED TO OHIO STATE REFORMATORY BY COURT HAVING GENERAL JURISDICTION TO TRY FELONIES — SUPERINTENDENT — NO RIGHT TO REFUSE TO RECEIVE SUCH PERSON EVEN THOUGH UNDER EIGHTEEN YEARS OF AGE AT TIME OF ARRAIGNMENT AND CONVICTION — PRISONER DID NOT RECEIVE BENEFIT OF PROCEEDINGS UNDER SECTIONS 1639-29 AND 1639-32 G. C.

SYLLABUS:

The Superintendent of the Ohio State Reformatory has no right to refuse to receive a person committed to that institution by a court having general jurisdiction to try felonies even though he has reason to believe that the person committed was under eighteen years of age at the time of his arraignment and conviction and had not had the benefit of proceedings under Sections 1639-29 and 1639-32, General Code.

Columbus, Ohio, April 10, 1944

Hon. Herbert R. Mooney, Director
Department of Public Welfare, Columbus, Ohio

Dear Sir:

Your communication requesting my opinion reads in part, as follows:

"We are giving you a copy of a letter received from Mr. Arthur L. Glattke, Superintendent of the Ohio State Reformatory,

ccncerning the commitment to that institution on February 29, 1944, by the Court of Common Pleas of Lawrence County, of Lonnie Collins, white, born February 28, 1927.

You will note that at the time of this boy's arraignment and conviction, he was under 18 years of age and that he had not appeared before the juvenile court on this charge as required by Sections 1639-29 and 1639-32, G. C. * * *

Section 13455-1 G. C. prescribes that 'in the case of a minor under the age of 18 years which was certified to the court of common pleas by the juvenile court a copy of the certification shall be attached to the copy of the indictment'. No such certificate accompanied the prisoner's sentence to the Reformatory.

In cases in which prisoners received at the Ohio State Reformatory are known to have been under 18 years of age at the time of sentence and it is known that the legal procedure in the handling of juveniles accused of felonies as prescribed by Section 1639-29 and 1639-32 has not been followed, we consider it advisable to return such boys to the committing courts as having been erroneously committed.

Although it has been held in several decisions in such cases that habeas corpus does not lie and that remedy is through proceedings in error, in a recent action in habeas corpus the court ordered the prisoner's release and the case has been carried to the court of appeals (Allen Booss, No. 40167 Ohio State Reformatory).

Will you please advise us whether the superintendent of the Ohio State Reformatory may refuse to keep commitments made by the criminal courts of offenders under 18 years of age who have not had the benefit of proceedings under Sections 1639-29 and 1639-32 G. C.

As the laws are plain on this subject, we do not think it fair to the accused to retain him in the Reformatory with the only remedy action in trial in error or perhaps habeas corpus which are not always available to the prisoner."

I quote the following from the letter of the Superintendent:

"The above mentioned was received at this Institution on February 29th, 1944, from Lawrence County, for the crime of grand larency, sentenced from 1 to 7 years. When he arrived at this Institution he gave his birth date as February 28th, 1927 which would have made him 16 years of age at the time he was sentenced and 17 years and one day when he was received at this Institution.

> As is our custom we notified the Prosecutor of Lawrence County, Mr. L. F. Sheridan that the above was under age and that it would have been necessary for him to have been sentenced from the Juvenile Court unless he was certified by that Court in accordance with the Juvenile Code. Mr. Sheridan replied to the effect that when he was arraigned he gave his age as being over 18 and we presumed that he was not certified because the Prosecutor did not indicate to that effect in his reply.
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> We wrote to Logan County, West Virginia, and received a certified birth certificate to the effect that a Collins child was born on February 28th, 1927 and since there were no male siblings who were born approximately at that date we feel that the birth certificate is for the above mentioned. * * *".

It appears from the correspondence attached to your letter that the boy in question when arraigned gave his age as being over eighteen years, but that when received at the Reformatory on February 29, 1944, he gave his age as sixteen at the time when he was sentenced and seventeen years and one day when he was received. It further appears that the Superintendent of the Reformatory procured a birth certificate from Logan County, West Virginia, to the effect that "a Collins child was born on February 28th, 1927 and since there were no male siblings who were born approximately at that date," the Superintendent was satisfied that the birth certificate referred to the boy in question.

It will be seen from these statements that the actual date of birth of the boy is not positively established but is a matter on which evidence might be adduced and which would manifestly require the judgment of a court for determination.

Section 1639-29 of the General Code, being part of the Juvenile Court Act, provides as follows:

> "When a child is arrested on and under any charge, complaint, affidavit, or indictment, whether for a felony or a misdemeanor, such child shall be taken directly before the juvenile judge; if the child is taken before a justice of the peace, judge of the police or municipal court or court of common pleas other than a juvenile court, it shall be the duty of such justice of the peace or such judge of the police or municipal court or court of common pleas to transfer the case to the court exercising the powers and jurisdiction herein provided. The officers having such child in charge shall take it before the judge

> of such court, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before such judge in the first instance. Upon such transfer or taking of such child before such judge, all further proceedings upon or under the charge, complaint, information or indictment shall be discontinued in the court of said justice of the peace, police or municipal judge or judge of the court of common pleas other than a court exercising the powers and jurisdiction herein conferred, and the case against or relating to such child shall thenceforth be within the exclusive jurisdiction of such court and shall be deemed to be upon complaint filed in such court as fully as if the appearance of such child had been upon a complaint filed in and a citation or warrant of arrest originally issued out of and by such court.".

Section 1639-32, General Code reads:

> "In any case involving a delinquent child under the provisions of this chapter who has committed an act which would be a felony if committed by an adult, the judge after full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person or persons, qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in this chapter in disposing of such case."

"Child", as defined by Section 1639-1 for the purpose of the Juvenile Court Code, means any child under eighteen years of age.

In an opinion which I rendered on June 9, 1939, found in Opinions of the Attorney General for 1939, p. 910, it was held:

> "Under the authority of the Juvenile Court Code, a juvenile court has exclusive jurisdiction of all persons under the age of eighteen years who are charged with a violation of the crime of arson or other burnings as contained in sections 12433 to 12436, inclusive, General Code."

"Arson" as defined by the sections referred to in that syllabus is one of the crimes punishable by imprisonment in the penitentiary and is therefore a felony. In that opinion reliance was placed on the case of State v. Joiner, et al., 20 O. N. P. (N. S.) 313, where it was held:

> "The juvenile court has exclusive jurisdiction over minors who are under eighteen years of age and charged with crime, whether misdemeanor or felony."

This case arose upon a plea in abatement interposed by the defendant, who claimed to be a minor under the age of eighteen years when the alleged act for which he was indicted was committed. The court discussing the statutes then in force, which are quite similar to the present provisions which I have quoted, said:

> "It is clear to this court that our Legislature with one stroke conferred upon the juvenile court, where established, exclusive jurisdiction of minors under eighteen years of age, who may be charged with the violation of a law of this state, or a city or village ordinance."

The court held the indictment to be void and ordered the defendant "transferred into the custody of the juvenile court, there to be dealt with as provided by law".

However, where a minor under eighteen years of age has been arrested, arraigned, tried and convicted of a felony without having passed through the hands of the juvenile court as provided in the sections which I have quoted, the courts have held that such judgment of conviction, while erroneous, is not absolutely void and can not be collaterally attacked. In the case of Ex parte Pharr, 10 Oh. App., 395, it was held:

> "1. Proceedings in habeas corpus will not be allowed to take the place of proceedings in error. If a judgment in a criminal case is erroneous, but not absolutely void, it can not be collaterally attacked.
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> 2. Habeas corpus will not lie to secure the discharge of a minor who was indicted for a felony and convicted in the court of common pleas, but did not challenge the jurisdiction of the court until motion for new trial, or prosecute error, on the ground that he was under eighteen years of age and should have been first taken before the juvenile court, in accordance with the provisions of Section 1659, General Code."

Section 1659 of the General Code referred to in this case was quite similar to Section 1639-29, General Code, and read as follows:

> "When a minor under the age of eighteen years is arrested,

> such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer, the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance."

It appeared in the case of Ex parte Pharr, supra, that when the petitioner was arrested he gave his age as eighteen, but in his action, which was for a writ of habeas corpus, he maintained that he was only seventeen. The court quoted from Henry v. Henkel, 235 U. S., 219, where the court, referring to disputed questions of fact that might arise challenging the jurisdiction of a trial court held that a proceeding in habeas corpus cannot be allowed to take the place of error proceedings, using the following language:

> "Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the change is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted he will be discharged. If they are overruled and he is convicted, he has his right of review."

The court in its opinion in the Pharr case, at page 399, said:

> "Habeas corpus proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the promises. In re Frederich, 149 U. S., 70, 76.
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> If after a defendant has been convicted in the court of common pleas, this court were to entertain petitions for habeas corpus, to determine whether or not the petitioner was of legal age, it might be used as a substitute for the functions of the trial court. Such controverted matters of fact can best be determined there."

The court referred to the case of State of Ohio v. Joiner, supra, and

without criticizing that decision said that at page 400 of the opinion:

> "If the defendant in the original criminal case had followed the procedure of counsel for defendant in the Joiner case, the court might have dismissed him and ordered him sent to the juvenile court."

A like holding was made in the case of In re Evans, a minor, 67 Oh., App., 66, where it was held:

> "1. A writ of habeas corpus will not be granted to release from the state reformatory a minor who, upon being arrested and taken before the Municipal Court, stated his age to be 19 years, when in fact he was but 17 years of age, and thereafter was indicted, pleaded guilty and was convicted in the Common Pleas Court on a criminal charge.
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> 2. The Juvenile Court Code, Section 1639-1 et seq., General Code, does not make the jurisdiction of the Juvenile Court exclusive throughout. It vests jurisdiction over the infant, not the crime.
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> 3. Jurisdiction over the person may always be waived, and waived even by a minor."

The court, in the course of its opinion cites State vs. Klingenberger, 113 Ohio St., 418, where it was held in the first paragraph of the syllabus:

> "A minor charged with felony waives his right to object to the jurisdiction of the Common Pleas Court on the ground of his minority, by not filing a plea in abatement to an indictment in the Common Pleas Court."

See also, Scopilliti v. State, 41 Oh. App., 221.

The court of common pleas is a court of record having general jurisdiction, including the trial of persons charged with felony. As such, it is competent to decide its own jurisdiction and exercise it to final judgment. 11 Oh. Juris., 706; Sheldon v. Newton, 3 O. S., 494. If a court has erred, appeal is the proper remedy. Yutze v. Copelan, 17 Oh. App., 461, 463.

You have directed my attention to the case of State ex rel. Allen Booss v. Glattke, Supt., in which, as you state, a writ of habeas corpus was allowed under circumstances somewhat similar to the one here

under consideration. I have examined the decision rendered in that case which was by the Common Pleas Court of Richland County. It there appears that the relator had at all times asserted that he was only seventeen years of age, and that his mother had so informed the prosecuting attorney and the court at the time of his trial. The court found that relator had at all times, beginning with his arrest, and until and after his commitment, protested and claimed his minority. Based on these conclusions, the court held that no element of waiver or estoppel against the relator was raised by his conduct and that the case was to be distinguished from In re Evans (supra), which had been decided by the Court of Appeals of the same county. It is only necessary to add that the Booss case is now pending in the Court of Appeals.

In view of the authorities above noted, and of the further fact that there is a dispute and uncertainty as to the real age of the person who is the subject of your letter, it is my opinion that the Superintendent of the Ohio State Reformatory would have no right to assume to decide that disputed question and to disregard a commitment made by a court of the state. Questions relating to the jurisdiction of the court are proper for the court's determination, and methods are provided by law whereby an erroneous judgment on the part of the court may be corrected by judicial proceedings either in that court or in a court of appeal, and until it is so corrected no one may treat it as a nullity.

Specifically answering your question, therefore, it is my opinion that the Superintendent of the Ohio State Reformatory would have no right to refuse to receive a person committed to that institution by a court having general jurisdiction to try felonies even though he had reason to believe that the person committed was under eighteen years of age at the time of his arraignment and conviction and had not had the benefit of proceedings under Sections 1639-29 and 1639-32, General Code.

Respectfully,

THOMAS J. HERBERT

Attorney General