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SENTENCE — DURING TERM OF COURT — PERSON TO SERVE FOUR CONSECUTIVE TERMS IN PENITENTIARY — FOUR TO TWENTY YEARS EACH — COURT THAT IMPOSED SENTENCE MAY NOT AT SUBSEQUENT TERM CHANGE SENTENCE TO PROVIDE FOURTH TERM OF IMPRISONMENT SHALL BE CONCURRENTLY SERVED WITH OTHER TERMS — WHEN SUCH ATTEMPT MADE, PRISON AUTHORITIES MAY DISREGARD ATTEMPTED CHANGE IN SENTENCE.

SYLLABUS:

Where a person is sentenced during a term of court to serve four consecutive terms in the penitentiary of from four to twenty years each, the court imposing such sentence may not at a subsequent term change such sentence so as to provide that the fourth term of imprisonment shall be served concurrently with the other terms of imprisonment, and where such court attempts so to do, the authorities in charge of the prison where such person is confined may disregard such attempted change in the sentence.

Columbus, Ohio, November 21, 1942.

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

Dear Sir:

Your request for my opinion is as follows:

> "One A.R., No. 77685 Ohio Penitentiary, was received at that institution from Cuyahoga County on July 2, 1941 upon conviction of blackmail, Section 13384 G.C., penalty 1 to 5 years, 4 consecutive sentences, 4 to 20 years. Conviction in this case was had during the May 1940 term of court.
>
> On October 30, 1941, a journal entry from the Court of Common Pleas, Cuyahoga County, was received at the Penitentiary ordering that the sentence on the 4th count of the indictment shall run concurrently and not consecutively. A copy of the journal entry is enclosed.
>
> Query: Had the court jurisdiction after conviction and after term to change the sentence, resulting in a change in the penalty or the time which this prisoner must serve? Shall the reduced sentence be accepted as the penalty which the prisoner shall serve, namely, 3 to 15 years instead of the original sentence of 4 to 20 years?"

With your request, you have enclosed a copy of a journal entry of the

Court of Common Pleas of Cuyahoga County, Ohio, entered under date of September 24, 1941, during the September term of 1941, which reads:

> "This cause came on this day to be heard on a Motion in Mitigation, and the Court after full consideration of the combined judgment of the Prosecuting Attorney, the Safety Director of the City of Cleveland, and the judgment of the Court, grants the same. In pursuance thereto, the sentence imposed in relation to the fourth count contained in the indictment, it is ordered and adjudged by the Court, that the sentence imposed therein be and hereby is made to run concurrently and not consecutively with the sentences imposed on counts One, Two and Three. This mitigation is granted only on condition that the proceedings in error now pending in the Cuyahoga County Court of Appeals be dismissed by the defendant."

Your specific question involves the validity and effect of this journal entry. As long ago as the time of Lord Coke, it was determined that a judgment could not be modified or altered by the court rendering it, after the term. Thus, in Lee v. State, 32 O.S., 113, 114, it was said:

> "It is said by Lord Coke (Co. Litt. 260a) that, 'during the term wherein any judical act is done, the record remaineth in the breasts of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct; but when that term is past, then the record is in the roll, and admitteth of no alteration, averment or proof to the contrary.' "

In 12 O.Jur., 714, it is said:

> "But after the term at which judgment was entered the court of common pleas has no power or authority to modify its judgment except in such manner as is pointed out by statute."

These authorities are dispositive of your question as to the power of the court to make the order.

You also desire my opinion as to whether you should "accept the reduced sentence as the penalty which the prisoner shall serve" rather than the sentence originally imposed. This office is always reluctant to advise any of the administrative departments to disregard an order made by a court, but when a court assumes to act beyond the powers conferred upon it by law and transcends its jurisdiction, its proceedings are absolutely null and void and may be disregarded. Thus, in Sheldon's Lessee v. Newton, 3 O.S., 494, 498, it was said by Ranney, J.:

> "A settled axiom of the law furnishes the governing principles by which these proceedings are to be tested. If the court had jurisdiction of the subject matter, and the parties, it is altogether immaterial how grossly irregular, or manifestly erroneous, its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct, and precisely certain, in point of form, its record may appear; its judgment is void to every intent, and for every purpose, and must be so declared by every court in which it is presented. In the one case, the court is invested with the power to determine the rights of the parties, and no irregularity or error in the execution of the power, can prevent its judgment, while it stands unreversed, from disposing of such rights as fall within the legitimate scope of its adjudication; while in the other, its authority is wholly usurped, and its judgments and orders the exercise of arbitrary power under the forms, but without the sanction of law."

Since the order of the court in question was in excess of the jurisdiction of the court, it was absolutely void and may be disregarded by you.

Respectfully,

THOMAS J. HERBERT
Attorney General.