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REGARDING ELIGIBILITY FOR PAROLE WHEN SENTENCES ARE EXECUTED CUMULATIVELY IN OHIO PENITENTIARY —CHAPTER 2965., R.C.—§§5145.01, 2965.31, 2965.01, 2941.43, 2965.35, R.C.—OAG NO. 2791 FOR 1930 P. 1924 APPROVED AND FOLLOWED.

SYLLABUS:

1. Where an individual is under two or more sentences of imprisonment in the Ohio Penitentiary, whether imposed at one time, or at different times, and whether or not one or more of such sentences be imposed upon conviction of an offense committed while such individual was constructively serving a prior term of imprisonment in the penitentiary in a parole status as provided in Chapter 2965., Revised Code, such sentences are to be executed cumulatively unless, as to any of them, the court shall have directed it to be executed concurrently with one or more other sentences.

2. Under the provisions of Section 5145.01, Revised Code, where in any of the situations described in paragraph 1, above, sentences are required to be executed cumulatively in the Ohio Penitentiary, the prisoner concerned is deemed to be serving "one continuous term of imprisonment." In such case such prisoner is eligible for parole under the provisions of Chapter 2965., Revised Code, when he has served the aggregate of the minimum terms of such sentences, diminished as provided in Section 2965.31, Revised Code. (Opinion No. 2791, Opinions of the Attorney General for 1930, page 1924, (January 2, 1931), approved and followed). In the cast of a prisoner who has been convicted and sentenced to a term of imprisonment in the Ohio Penitentiary while on parole from that institution, no part of the time served on such earlier term can be counted so as to diminish the minimum term actually to be served under such subsequent sentence in the determination of such prisoner's eligibility for parole.

3. The term "parole" is defined in Section 2965.01, Revised Code, to signify actual "release from confinement," and because the power of the pardon and parole commission to terminate a particular term of imprisonment by a "final release" as provided in Section 2965.17, Revised Code, is conditioned upon (1) such actual release on parole, and (2) the parolee's satisfactory conduct for at least one year in such parole status, the commission is without authority under such section, as to a convict sentenced under the provisions of Section 2941.43, Revised Code, to give a "final release" as to his earlier term so as to permit him to begin serving in the term to which he was subsequently sentenced, the special situation described in Section 2941.43, Revised Code, being an exception to the general provisions of Section 5145.01, Revised Code.

4. Under the provisions of Section 2965.35, Revised Code, a convict serving consecutive sentences, whether one or more of them be to imprisonment in a reformatory or a penitentiary or both, when the "court specifies" that any such sentence is to begin at the completion of another, is eligible for parole upon the expiration of the aggregate of the minimum terms of such sentences, diminished as provided in Section 2965.31, Revised Code. Such "specification" by the court may be either (1) by an express provision to that effect in the sentence, or (2) by necessary implication, under the rule stated in *Anderson v. Brown,* 117 Ohio St., 393 (1937), by failing to specify that any such sentence should be served concurrently with any other.

Columbus, Ohio, May 6, 1960

Hon. Joseph E. Doneghy, Chairman
Ohio Pardon and Parole Commission, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Where a prisoner in the Ohio Penitentiary or Reformatory is serving two or more sentences the Commission frequently is confronted with the question of whether the prisoner is to be treated as if he is serving the sentences concurrently or consecutively. The resolution of this problem is complicated by apparent inconsistencies in the law and practices of former Commissions. Accordingly, your advice is sought as to how lawfully to resolve this issue in a number of typical situations:

"(1) Where the sentencing court is aware of prior convictions, e.g., where a person is convicted on several counts of an indictment, the court generally specifies whether the sentences are to be served concurrently or consecutively. Should the court fail to so specify, it is believed that under the doctrine of *Anderson v. Brown,* 117 Ohio St., 393 (1927), the sentences should be treated as consecutive. This is accomplished by adding the maximums and the minimum provided by law for such crimes as the prisoner stands convicted. Thus, if a court fails to indicate how a prisoner convicted of three 'bad check' charges is to serve the sentences therefor, he would be deemed to be serving a sentence of three to nine years.

"(2) Where a convict serving a sentence in the penitentiary or state reformatory is removed under the provisions of sections 2941.29-2941.42 R.C. and is sentenced to a term of years a problem arises as to how the sentences are to be served. Section 2941.43 R.C. provides that the latter sentence shal begin at the expiration of the term for which the convict was in prison at the time of his removal. On some occasions, at least, former Commissions have considered that a subsequent sentence to life imprisonment has commenced immediately upon the convict's return to the penal institution. Under the statute must the earlier sentence expire by reason of service of the maximum term or may it expire by reason of administrative actions taken by the Commission?

"(3) Under the doctrine of *Henderson v. James,* 52 Ohio St. 242 (1895), it would appear that where a convict serving a sentence in the penitentiary or the state reformatory escapes and while an escapee is sentenced in Ohio for another felony the Commission *may,* after he has served out the latter sentence, require him to serve the remainder of the earlier sentence. The Com-

mission is concerned as to whether it may lawfully consider both sentences as running concurrently from the date of the convict's return to the institution on the latter sentence.

"(4) A variation of the third case arises where a convict serving a sentence in the penitentiary escapes and while an escapee is imprisoned in another state for an offense in that state before being returned to the Ohio Penitentiary. Acting under the terms of section 2949.07, R.C., and *In Re Pullins,* 94 Ohio App. 364, it generally has been the practice to ignore the conviction in the other state. We assume this practice is lawful. A question may arise, here, however, under the provisions of section 2965.21 R.C. if the prisoner is apprehended in Ohio and with knowledge of his escape is subsequently turned over to the other state for trial and sentence.

"(5) Where a convict on parole from the penitentiary or state reformatory commits another felony in Ohio is duly convicted and sentenced to the penitentiary or reformatory for a term of years, it sometimes happens that the sentencing judge is either unaware of the former unfinished sentence or fails to make reference to the same. In such case does the convict, (1) continue to serve his prior sentence until expiration or final release before beginning his latter sentence, (2) serve his latter sentence until expiration or final release before completing his prior sentence, or (3) serve the two sentences concurrently upon his return to the penitentiary?

"The foregoing problem is exemplified by the case of prisoner No. 108705 OP. In 1953 he was received at the reformatory to serve a sentence of 10-25 years for armed robbery and was assigned No. 51783. In June 1956 he was paroled. While on such parole in 1959 he was convicted of breaking and entering in the night season and grand larceny in the Summit County Court and sentenced to serve a term of 1 to 15 years in the penitentiary. The Summit County Court made no reference to the previous conviction and sentence to the reformatory. Upon his admission to the penitentiary on November 7, 1959 he was assigned No. 108705. As a result of this conviction on November 24, 1959 the Commission declared him to be a parole violator under No. 51783 and carry him as such while he is serving his last sentence. The next step normally will be for the prisoner to be scheduled for a parole violation hearing before this Commission. At that time may the Commission acting under the provisions of Section 2965.21 R.C. lawfully restore him to parole on the earlier sentence but continue him in prison under the latter sentence?

"This question is raised because of the possible effect of the enactment of section 2935.35 R. C. upon the decision in *Anderson v. Brown, supra.* We also find it difficult to reconcile the following opinions of previous Attorneys General relating to this prob-

lem: 1933 O.A.G. No. 1402; 1936 O.A.G. No. 5745; 1956 O.A.G. No. 7463."

In *Anderson v. Brown,* 117 Ohio St., 393 (1927), the syllabus reads in part:

> "2. Where the record is silent as to whether two or more sentences of imprisonment or fines on the same individual are to be executed cumulatively, the presumption obtains that the sentencing court intended that the prisoner should serve the full aggregate of all imprisonments or pay the full aggregate amount of all fines, or that the same should be covered by the credit allowance thereon, as provided in Section 13717, General Code. (*Williams v. State,* 18 Ohio St., 46., approved and followed.)"

In the opinion in that case, Kinkade, J., said:

> "The situation presents a physical impossibility which is not relieved at all by the statement of the sentencing court that the sentences are to be served concurrently. It is quite immaterial how long or how general such practices have obtained on the part of the courts. Such a course amounts only to saying that the accused shall pay a penalty—and it may be a minimum fixed by statute—for crime No. 1, *but that the provisions of law as to the other crimes shall stand as waived in favor of the accused.* If such be the intention of the court, adn the court has the power so to do, it is quite pertinent to ask why any of the other three sentences were imposed at all. When the record is silent on the subject, why should a reviewing court assume that the trial court intended to undertake a manifest impossibility; that is to say, that several imprisonment sentences for several separate crimes should be served concurrently, when, as a matter of fact, they can only be all served cumulatively?" (Emphasis added)

The rule thus stated appears not to have been disturbed by subsequent decisions and I regard it as currently applicable to the cases you describe, absent some special statutory provision by which it is modified.

One such special statutory provision was pointed out in Opinion No. 1402, Opinions of the Attorney General for 1933, page 1273, where it was noted that Section 2211-9, General Code, did not *require* the revocation of a parole upon the commisison of an offense by a parolee. The author concluded that where the board of parole elected *not* so to revoke, then a subsequent sentence imposed on such parolee might run concurrently with that first imposed, this because the status of parole does not stop such sentence from running. The language of existing Sections 2965.01 (E), and 2965.21, Revised Code, is virtually identical in pertinent

part of the statute there under consideration, but in view of the mandatory expression "shall" in Section 2961.21, *supra,* it would appear that the commission could only in the most unusual case refrain from declaring an individual to be a parole violator where he had been convicted, in parole status, of another felony. Ordinarily, we may suppose such action by the commission would amount to an abuse of discretion.

In Section 5145.01, Revised Code, it is provided:

> "If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all felonies for which he was sentenced and, for the purposes of sections 5145.01 to 5145.31, inclusive, of the Revised Code, he shall be held to be serving one continuous term of imprisonment."

If a prisoner in the Ohio Penitentiary in such case is deemed to be serving "one continuous term" then it would seem that his "minimum" sentence, within the meaning of Section 2965.31, Revised Code, would be the sum of the minimum terms of all sentences so imposed. Such was in fact the conclusion stated in Opinion No. 2791, Opinions of the Attorney General for 1930, (January 2, 1931), page 1924. With that conclusion I agree.

Your second question concerns Section 2941.43, Revised Code, a special statute relating to a convict who is tried for an offense in the circumstances stated in Section 2941.40, Revised Code, which reads:

> "A convict in the penitentiary or a state reformatory, who escaped or forfeited his recognizance before receiving sentence for a felony, or against whom an indictment or information for felony is pending, may be removed to the county in which such conviction was had or such indictment or information was pending, for sentence or trial, upon the warrant of the court of common pleas of such county.
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> "This section does not extend to the removal of a convict sentenced to be imprisoned for life, unless the sentence to be imposed or the indictment or information pending against him is for murder in the first degree."

Section 2941.43, Revised Code, provides:

> "If the convict referred to in section 2941.40 of the Revised Code is acquitted, he shall be forthwith returned by the sheriff to the penitentiary to serve out the remainder of his sentence. If he is sentenced to imprisonment in the penitentiary, he shall

be returned thereto by the sheriff and the term of his imprisonment *shall begin at the expiration of the term for which he was in prison at the time of his removal.* If he is sentenced to death, such sentence shall be executed as if he were not under sentence of imprisonment in the penitentiary." (Emphasis added)

These statutes plainly require that the "remainder" of the original sentence must first "expire" before the new term may begin. In referring to two similar statutes, in existence at that time, namely Sections 7234 and 7238, Revised Statutes, the court in *Henderson v. James,* 52 Ohio St., 242 (1895) at page 257, stated:

> "These two sections clearly show the legislative intent, that convicts shall serve out one sentence for each offense of which they are convicted and sentenced."

The first paragraph of the syllabus of *Henderson, supra,* reads:

> "1. An escaped convict who is convicted and sentenced to the penitentiary for another crime, may, at the expiration of the latter sentence, be held to serve out the remainder of his first sentence."

That being a habeas corpus case the issues was whether the warden *had the authority* to hold the prisoner to serve out the remainder of his *first* sentence (having been tried and sentenced under an alias for his offense during his escape). The court held the warden did have such authority, and this probably accounts for the use of the word "may" in the syllabus. There is nothing in the reported decision to suggest that the warden was given any discretion in the matter.

The *Henderson case, supra,* of course, differs from the issue raised in your second question in that the convict in that case was not removed from the penitentiary for trial or sentence. Clearly, however, the court recognized that if the convict had been so removed, his term under the second sentence could not have started until the expiration of the first term.

In any event, it is my view that Sections 2941.39 to 2941.43, inclusive, Revised Code, constitute special legislation to which the general provisions of Section 5145.01, Revised Code, do not apply. Hence, following the rationale of the *Henderson case, supra,* and the plain terms of Section 2941.43, Revised Code, service under the second sentence cannot begin until the "expiration" of the first, either by service of the maximum, or

by some other means provided by law. One such means is executive pardon. See 41 Ohio Jurisdprudence, 282, Section 14.

It is within the commission's power to terminate a sentence "administratively" by giving a "final release" as provided in Section 2965.17, Revised Code. This, however, involves releasing a prisoner from actual confinement in order to place him "on parole." "Parole" is defined in Section 2965.01, Revised Code, as follows:

> "(E) 'Parole' means the *release from confinement* in any state penal or reformatory institution, by the pardon and parole commission upon such terms as the commission prescribes. A prisoner on parole is in the legal custody of the department of mental hygiene and correction, and under the control of the commission." (Emphasis added)

Now it is obvious that where a prisoner has a second term to serve after termination of the first, the commission will not be in a position to give him a "release from confinement," and hence, in such case, could not effectively release such prisoner prior to the termination of his maximum sentence.

In Opinion No. 7463, Opinions of the Attorney General for 1956, page 859, the syllabus reads in part:

> "(4) A prisoner sentenced to two or more consecutive terms of imprisonment in the Ohio Penitentiary at Columbus or the Ohio State Reformatory at Mansfield cannot begin to serve on the subsequent term or terms of imprisonment until he has been granted final release from his prior term of imprisonment, or that prior term of imprisonment has expired."

At pages 864 and 865 it is stated:

> "It is my opinion that a prisoner must be granted final release from a sentence before he may begin serving a subsequent sentence. A prisoner on parole is not discharged from the legal consequences of his crime; during the period of his parole he continues to be a prisoner, subject to the custody of the Department of Mental Hygiene and Correction. Opinion No. 1987, Opinions of the Attorney General for 1940, page 257. Phrased another way the execution of a sentence of imprisonment is not interrupted or suspended by parole. Thus, if a prisoner were permitted to serve on a subsequent sentence of imprisonment while on parole from a prior sentence of imprisonment, he would be serving the two sentences concurrently, even though they might have been imposed as consecutive sentences."

It will be noted that in the 1956 opinion, *supra,* the writer concluded that a term in the penitentiary could not begin until one in the reformatory, earlier imposed, had been terminated; and he intimated (fourth paragraph of the syllabus) that this could be done by a "final release." Presumably, the writer had in mind a release under authority of Section 2965.17, Revised Code.

Such a release, however, as pointed out above, involves (1) an actual freedom from confinement and (2) a period of supervision on parole, conditions obviously impossible to meet if the prisoner is to begin immediately to serve another sentence. I thus conclude that the commission *in such case, i.e.,* a prisoner sentenced under Section 2941.43, Revised Code, is without power to terminate an earlier term by its own "administrative actions" as you suggest.

I note, incidentally, that the original prototype of existing Section 2941.43, Revised Code, was enacted in 1866 (63 Ohio Laws, 20) at which time all sentences were determinate, i.e., for a particular period of years. This statute seems out of harmony with the present system of indeterminate sentences and the present system of parole, and it could well be thought to merit legislative attention to bring the treatment of these special cases into harmony with those systems.

As to your third question, I have already commented on *Henderson v. James,* 52 Ohio St., 242, and have indicated that the decision provided no basis for permitting the treatment of sentences as running concurrently. Further, under the rule of *Anderson v. Brown, supra,* where the orders do not specifically state, the presumption is that the penalities are cumulative and served consecutively.

As to your fourth query, I agree with your interpretation of Section 2949.07, Revised Code, and with your view that the decision *In re Pullins,* 94 Ohio App., 364, is controlling. You add, however, a query on the case where the Ohio authorities have aprehended an escapee from the Ohio Penitentiary and, with knowledge of his escape from that institution, turn him over to the authorities of a sister state for trial and sentence.

If this be done by local police officials I see no reason why the rule in the *Pullins, case, supra,* should not apply. If the prisoner be actually returned to the Ohio Penitentiary, however, and if his release to the sister state is approved by your commission by placing the prisoner on parole for such purpose, and if during such period of imprisonment in such sister

state your commission saw fit *not* to revoke such parole (see Opinion No. 1402, *supra*), then I should suppose that he should be credited for the time so served.

As to your fifth question, we may first consider the case of a convict on parole from the penitentiary who has been again sentenced to that institution for an offense committee while on parole.

Such a prisoner has quite clearly been "sentenced for two or more separate felonies" within the meaning of Section 5145.01, Revised Code, and is deemed to be serving "one continuous term," for I do not consider the provisions of that section to require that such sentences be imposed following conviction *in one trial* for two or more offenses. If there were doubt of the matter, a liberal construction of the statute is in order to promote the humane objects of the statute is in order to promote the humane objects of the enactment. 37 Ohio Jurisprudence, 737, Section 415.

Such prisoner's eligibility for parole would thus be determined as indicated in Opinion No. 2791, *supra,* by ascertaining when he has served the aggregate of the minimum terms. Further in this regard, Section 2965.35, Revised Code, provides that a person serving several indeterminate sentences consecutively shall become eligible for parole upon the expiration of the aggregate of the minimum terms of his several sentences less the diminution of minimum sentence provided for in Section 2965.31, Revised Code. In this connection, it is to be noted that until the prisoner's second sentence has been imposed, the provisions of Section 5145.01, Revised Code, and of Section 2965.35, *supra,* do not apply, and hence no part of his time served under the earlier term could be credited against the minimum term under the later sentence. Thus, the minimum term under the second sentence would have to be served before the convict would be eligible for parole.

Coming now to the question of prisoner No. 108705, O.P., whose first sentence was to the *reformatory,* the provisions of Section 5145.01, Revised Code, do not apply for the reasons pointed out in Opinion No. 7463, Opinions of the Attorney General for 1956, page 859 (864). The question is, then, whether Section 2965.35, Revised Code, has any application. This section applies the rule stated in Opinion No. 2791, *supra,* to consecutive sentences whether they be in the penitentiary or the reformatory. Being enacted effective May 24, 1957, we may well surmise that it was the legislative intent to provide a solution for the problem noted in the 1956

opinion, *supra,* wherein it was pointed out that the benefits of Section 5145.01, Revised Code, do not apply to reformatory sentences. Said Section 2965.35 reads as follows:

> "A person serving several indeterminate sentences consecutively shall become eligible for parole upon the expiration of the aggregate of the minimum terms of his several sentences less the diminution of minimium sentence provided for in section 2965.31 of the Revised Code. Where the aggregate of the minimum terms is longer than fifteen years, eligibility for parole shall be determined in accordance with section 2965.23 of the Revised Code. For the purpose of this section, a person is serving consecutive sentences whenever a court specifies that any sentence begin at the completion of another sentence, whether or not any such sentences are (is) to be served in a reformatory or a penitentiary or both."

In passing, I may say that I see no reason why this statute should not apply to all cases coming to the commission for consideration following its enactment where eligibility for parole is to be determined. Apropos this point is the following language in *State, ex rel. Bouse v. Cickelli,* et al., 165 Ohio St., 191 (192):

> "The statute in question provides for disqualification of party candidates at primary elections on and after January 1, 1956, and does not violate any constitutional provision with reference to retroactive legislation. It is not retroactive simply because the test involves a time factor extending prior to the effective date of the amendment. *The test is to be applied to future cases,* i.e., cases after its effective date." (Emphasis added)

In our own case, as in the *Bouse case, supra,* we are considering the application of a *test of eligibility to be applied in the futuure.* In the *Bouse case, supra,* the question was eligibility for candidacy; in the present case, it is eligibility for parole. In neither case is there any suggestion of a "pending proceeding" within the meaning of Section 1.20, Revised Code.

This statute contains, however, a seeming limitation of those cases where "a court specifies that any sentence begin at the completion of another sentence."

As we have noted in the *Anderson case, supra,* (117 Ohio St., 393) the court may so specify either by *express* language, or, just as effectively, by *mere silence* on the point. It seems improbable that the General Assembly intended to provide the benefit of this section in the one case and not in the other, and again having in mind the propriety of a liberal con-

struction of the statute where legislation aimed at humane objectives is concerned, I conclude that Section 2965.35, Revised Code, is applicable in all cases of consecutive sentences whether so imposed in express terms or necessarily so imposed by mere silence on the point. This statute would, therefore, apply in the case of Prisoner No. 180705, O.P.

To consider your specific question regarding this prisoner, it has already been concluded that Sections 2965.35 and 5145.01, Revised Code, and Opinion No. 2791, Opinions of the Attorney General for 1930 (January 2, 1931), page 1924, apply to *all* prisoners serving consecutive sentences whether imposed at one time or at different times, and there is thus no necessity to consider whether the commission can parole this prisoner under an earlier sentence and continue him in prison to serve under a later one. All such prisoners (except escapees, etc., again convicted and sentenced under Section 2941.43, Revised Code) are deemed to be serving one continuous sentence, and they become eligible for parole (as defined in Section 2965.01 (E), Revised Code) from *that one* sentence when the aggregate minimum terms under them, diminished as provided in Section 2965.31, Revised Code, have been served.

In sum, it is my opinion and you are advised:

1. Where an individual is under two or more sentences of imprisonment in the Ohio Penitentiary, whether imposed at one time, or at different times, and whether or not one or more of such sentences be imposed upon conviction of an offense committed while such individual was constructively serving a prior term of imprisonment in the penitentiary in a parole status as provided in Chapter 2965., Revised Code, such sentences are to be executed cumulatively unless, as to any of them, the court shall have directed it to be executed concurrently with one or more other sentences.

2. Under the provisions of Section 5145.01, Revised Code, where in any of the situations described in paragraph 1, above, sentences are required to be executed cumulatively in the Ohio Penitentiary, the prisoner concerned is deemed to be serving "one continuous term of imprisonment." In such case such prisoner is eligible for parole under the provisions of Chapter 2965., Revised Code, when he has served the aggregate of the minimum terms of such sentences, diminished as provided in Section 2965.31, Revised Code. (Opinion No. 2791, Opinions of the Attorney General for 1930, page 1924, (January 2, 1931), approved and followed).

In the case of a prisoner who has been convicted and sentenced to a term of imprisonment in the Ohio Penitentiary while on parole from that institution, no part of the time served on such earlier term can be counted so as to diminish the minimum term actually to be served under such subsequent sentence in the determination of such prisoner's eligibility for parole.

3. The term "parole" is defined in Section 2965.01, Revised Code, to signify actual "release from confinement," and because the power of the pardon and parole commission to terminate a particular term of imprisonment by a "final release" as provided in section 2965.17, Revised Code, is conditioned upon (1) such actual release on parole, and (2) the parolee's satisfactory conduct for at least one year in such parole status, the commission is without authority under such section, as to a convict sentenced under the provisions of Section 2941.43, Revised Code, to give a "final release" as to his earlier term so as to permit him to begin serving in the term to which he was subsequently sentenced, the special situation described in Section 2941.43, Revised Code, being an exception to the general provisions of Section 5145.01, Revised Code.

4. Under the provisions of Section 2965.35, Revised Code, a convict serving consecutive sentences, whether one or more of them be to imprisonment in a reformatory or a penitentiary or both, when the "court specifies" that any such sentence is to begin at the completion of another, is eligible for parole upon the expiration of the aggregate of the minimum terms of such sentences, diminished as provided in Section 2965.31, Revised Code. Such "specification" by the court may be either (1) by an express provision to that effect in the sentence, or (2) by necessary implication, under the rule stated in *Anderson v. Brown,* 117 Ohio St., 393 (1927), by failing to specify that any such sentence should be served concurrently with any other.

Respectfully,

MARK MCELROY

Attorney General