

OPINION NO. 97-014**Syllabus:**

1. When a juvenile is adjudicated delinquent and committed to the Department of Youth Services for committing an offense of complicity, pursuant to R.C. 2923.03, the juvenile can be considered a "public safety bed" pursuant to R.C. 5139.01(A)(13) if commission of the principal offense would come within the definition of "public safety beds."
2. If the charge of a particular offense would invoke the mandatory bindover provisions of R.C. 2151.26, then the charge of complicity in that offense, pursuant to R.C. 2923.03, would also invoke those mandatory bindover provisions.

To: Geno Natalucci-Persichetti, Director, Ohio Department of Youth Services, Columbus, Ohio

By: Betty D. Montgomery, Attorney General, March 31, 1997

We have received your request for an opinion on two questions involving the offense of complicity. You have asked:

1. When a youth is adjudicated delinquent and committed to the Department of Youth Services for committing an offense of complicity, pursuant to R.C. 2923.03, can that youth be considered a "public safety bed" if commission of the principal offense would come within the definition of "public safety beds"?
2. Can a charge of complicity, pursuant to R.C. 2923.03, invoke the mandatory bindover provisions of R.C. 2151.26?

In order to answer your questions, we must first examine the offense of complicity. Pursuant to R.C. 2923.03, the offense of complicity consists of soliciting or procuring another person to commit an offense, aiding or abetting another person in committing an offense, causing an innocent or irresponsible person to commit an offense, or conspiring with another person to commit an offense in violation of R.C. 2923.01, which defines the offense of conspiracy. A necessary element of the offense of complicity is that the actor have the kind of culpability required for the commission of the principal offense. R.C. 2923.03(A). Except in cases of attempted crimes, an offense must actually be committed before someone can be convicted as an accomplice, but it is not necessary for a principal offender to be convicted before an accomplice can be convicted. R.C. 2923.03(B)-(C); *State v. Graven*, 52 Ohio St. 2d 112, 369 N.E.2d 1205 (1977).

An accomplice can be charged either under the complicity statute or under the primary offense and is liable to prosecution and punishment as if the accomplice were a principal offender. On this point, R.C. 2923.03(F) states:

Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

A juvenile who is charged with delinquency is not subject to prosecution and punishment as a criminal, unless the case is transferred to an adult court for criminal prosecution. See R.C. 2151.01; R.C. 2151.011(B)(1); R.C. 2151.23(H); R.C. 2151.26; R.C. 2151.358(H); *In re T.R.*, 52 Ohio St. 3d 6, 15-16, 556 N.E. 2d 439, 448-49, *cert. denied*, 498 U.S. 958 (1990); R. Juv. Proc. 1(B); R. Juv. Proc. 30; 1996 Op. Att'y Gen. No. 96-061. Nonetheless, a "delinquent child," by definition, includes a child who violates a law "that would be a crime if committed by an adult." R.C. 2151.02(A); see also R.C. 2151.27; *In re Burgess*, 13 Ohio App. 3d 374, 469 N.E.2d 967 (Preble County 1984); R. Juv. Proc. 10. Therefore, for purposes of defining and describing offenses upon which a charge of delinquency may be based, the concept of complicity is relevant to juveniles.

Let us now turn to your first question, which asks whether a youth who is adjudicated delinquent and committed to the Department of Youth Services for committing an offense of complicity, pursuant to R.C. 2923.03, can be considered a public safety bed. The term "public safety bed" is used to determine how the institutionalization of delinquent youth is funded. The Department of Youth Services is responsible for institutionalizing youth who are adjudicated delinquent for committing acts that would be felonies if committed by an adult. See R.C. 2151.355; R.C. 5139.03-.06. The cost of committing a felony delinquent to the Department of Youth Services is paid by the committing county unless the underlying offense would be

considered a public safety bed. *See* R.C. 5139.43. The Department of Youth Services bears the care and custody costs associated with public safety beds. R.C. 5139.43(B)(2)(a); *see also* 16 Ohio Admin. Code 5139-65-08.

In order to determine whether a youth who has been adjudicated delinquent for committing an offense of complicity can be considered a "public safety bed," it is necessary to determine the meaning of that term. The statutory definition of "public safety beds" includes several categories of youth. The first category consists of felony delinquents who have been committed to the Department of Youth Services "for the commission of an act, other than a violation of [R.C. 2911.01 (aggravated robbery) or 2911.11 (aggravated burglary)], that is a category one offense or a category two offense"¹ and who are in an institution or a community corrections facility. R.C. 5139.01(A)(13)(a). The second category consists of felony delinquents who, while committed to the Department and in an institution or community corrections facility, are adjudicated delinquent "for having committed in that institution or community corrections facility an act that if committed by an adult would be a felony or a misdemeanor." R.C. 5139.01(A)(13)(b). The third category consists of children between ages twelve and eighteen who are adjudicated delinquent "for having committed acts that if committed by an adult would be a felony," are in an institution or community corrections facility, and were committed to the Department by the juvenile court of a county that has had one-tenth of one per cent or less of the average statewide adjudications for felony delinquents. R.C. 5139.01(A)(13)(c). The fourth category consists of felony delinquents who, while committed to the Department and in an institution, "commit in that institution an act that if committed by an adult would be a felony," who are serving administrative time under R.C. 5139.04(E) for that act, and who have been institutionalized for the minimum period of time specified in R.C. 2151.355(A)(4) or (5). R.C. 5139.01(A)(13)(d). The fifth category consists of felony delinquents who are serving a three-year period of commitment order imposed by a juvenile court pursuant to R.C. 2151.355(A)(7) "for an act, other than a violation of [R.C. 2911.11 (aggravated burglary)], that would be a category one offense or category two offense if committed by an adult." R.C. 5139.01(A)(13)(e).

Some of the categories of "public safety beds" are defined in terms of commission of an

¹ Relevant statutory definitions of category one and category two offenses, *see* R.C. 5139.01(A)(18), appear in R.C. 2151.26(A), as follows:

- (1) "Category one offense" means any of the following:
 - (a) A violation of section 2903.01 [aggravated murder] or 2903.02 [murder] of the Revised Code;
 - (b) A violation of section 2923.02 [attempt] of the Revised Code involving an attempt to commit aggravated murder or murder.
- (2) "Category two offense" means any of the following:
 - (a) A violation of section 2903.03 [voluntary manslaughter], 2905.01 [kidnapping], 2907.02 [rape], 2909.02 [aggravated arson], 2911.01 [aggravated robbery], or 2911.11 [aggravated burglary] of the Revised Code;
 - (b) A violation of section 2903.04 [involuntary manslaughter] of the Revised Code that is a felony of the first degree;
 - (c) A violation of section 2907.12 [felonious sexual penetration, repealed] of the Revised Code as it existed prior to September 3, 1996.

act that if committed by an adult would be a felony or misdemeanor, *see* R.C. 5139.01(A)(13)(b), (c), (d), and others refer to the commission of an act that is a category one or category two offense, *see* R.C. 5139.01(A)(13)(a), (e). In order to answer your question, it is necessary to determine whether a juvenile who commits an offense of complicity can, in appropriate circumstances, be considered to have committed a category one or category two offense, or an act that if committed by an adult would be a felony or a misdemeanor.

Pursuant to R.C. 2923.03, a charge of complicity may be brought for the act, with the appropriate culpability, of soliciting, procuring, aiding, abetting, conspiring, or causing the commission of an offense. Complicity in itself is not defined as a felony or misdemeanor. Rather, its characterization depends upon the nature of the offense that was solicited, procured, aided, abetted, conspired, or caused.

As discussed above, the statutory definition of complicity states that a person who is guilty of complicity in the commission of an offense "shall be prosecuted and punished as if he were a principal offender." R.C. 2923.03(F). The Ohio Supreme Court has construed this language to mean that an accomplice "is criminally culpable to the same degree as the principal offender and, in fact, may be prosecuted for the principal offense." *State v. Moore*, 16 Ohio St. 3d 30, 33, 476 N.E.2d 355, 357 (1985). Thus, the conviction of an accomplice "is identical in degree and quality to a conviction of a principal offender under the same section." *Id.*; *see also State v. Graven*, 52 Ohio St. 2d at 116, 369 N.E.2d 1205 at 1208 (the crime of one charged as an aider and abettor "is equal in status and punishment" to the offense of the principal).

In the *Moore* case, the court found that an accomplice who did not actually hold a gun was subject to enhancement of sentence under R.C. 2929.71(B) for violations that involved the use of firearms, because the accomplice was convicted of a violation of R.C. 2911.01 (aggravated robbery), which was one of the statutes named in the enhancement statute. A similar conclusion was reached under a later version of R.C. 2929.71. *State v. Chapman*, 21 Ohio St. 3d 41, 487 N.E.2d 566 (1986); *see also State v. Rust*, 14 Ohio App. 3d 314, 471 N.E.2d 179 (Clark County 1984) (finding that R.C. 2929.71 did not exempt aiders and abettors from its coverage and that R.C. 2923.03 was not ambiguous in providing that an aider and abettor shall be prosecuted and punished as if he were a principal offender).

As discussed in the cases cited above, the basic premise of a complicity offense is that an accomplice is considered to be guilty of the principal offense to the same extent as the principal offender and is subject to being punished accordingly. *See, e.g., State v. Coleman*, 37 Ohio St. 3d 286, 525 N.E.2d 792, *cert. denied*, 488 U.S. 900 (1988); *State v. Jackson*, 90 Ohio App. 3d 702, 630 N.E.2d 414 (Lucas County 1993).² By statute, a charge of complicity may be stated

² The prosecution and punishment of a principal offender and an accomplice may vary in some regards, depending upon the actions and history of the individuals involved. For example, the complicity statute does not provide for the criminal record of the principal offender to be attributed to the accomplice. *State v. Jackson*, 90 Ohio App. 3d 702, 630 N.E. 2d 414 (Lucas County 1993). Further, where a statute provides that it applies only to persons who have themselves performed a particular act, the complicity provisions do not operate to expand the statute's scope. *See State v. Taylor*, 66 Ohio St. 3d 295, 612 N.E. 2d 316 (1993) (where statute provided for imposition of death penalty in certain circumstances only if "either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated

either in terms of the complicity statute "or in terms of the principal offense." R.C. 2923.03(F). Because a charge of complicity may be stated in terms of the principal offense, a complicity violation is equivalent to a violation of the statute setting forth the principal offense. Hence, an act of complicity has the same characterization as a felony or misdemeanor that the principal offense has. Further, if violation of a particular statute is a category one offense or a category two offense, then complicity in the violation of that statute is, correspondingly, a category one offense or a category two offense. See R.C. 2151.26(A); see generally, e.g., *State v. Moore*; *State v. Graven*.

As used in the statutory definition of "public safety beds," therefore, references to a misdemeanor or a felony include the offense of complicity in the commission of a misdemeanor or a felony. In addition, references to a category one offense or a category two offense include the offense of complicity in a violation that is defined as a category one offense or a category two offense. See note 1, *supra*.

A juvenile who commits an offense of complicity commits an act that would be a crime if committed by an adult. The offense has the same characterization — as felony, misdemeanor, category one offense, or category two offense — as the principal offense. Consequently, when a juvenile is adjudicated delinquent and committed to the Department of Youth Services for committing an offense of complicity, pursuant to R.C. 2923.03, the juvenile can be considered a "public safety bed" pursuant to R.C. 5139.01(A)(13) if commission of the principal offense would come within the definition of "public safety beds."

Let us now consider your second question, which asks whether a charge of complicity, pursuant to R.C. 2923.03, can invoke the mandatory bindover provisions of R.C. 2151.26. The mandatory bindover provisions of R.C. 2151.26 require that, after a complaint has been filed "alleging that a child is a delinquent child for committing an act that would be an offense if committed by an adult," the court must transfer the case for criminal prosecution of the child if the child was at least fourteen at the time of the act charged, if there is probable cause to believe that the child committed the act charged, and if one or more other specified criteria are satisfied. R.C. 2151.26(B). One of the specified criteria is that a previous case involving the child was transferred for criminal prosecution and the child was convicted of or pleaded guilty to a felony in that case. R.C. 2151.26(B)(1). Another is that the child is domiciled in another state and, if the act charged had been committed in that state, the child would be subject to criminal prosecution as an adult under the law of that state without the need for a transfer of jurisdiction from a noncriminal court. R.C. 2151.26(B)(2). A third criterion is that the act charged is a category one offense, and either the child was at least sixteen or the child previously was adjudicated a delinquent child for committing a category one or category two offense and was committed to the legal custody of the Department of Youth Services upon the basis of that adjudication. R.C. 2151.26(B)(3). The fourth criterion is that the act charged is a category two

murder with prior calculation and design," R.C. 2929.04(A)(7), the complicity statute did not operate to include as the principal offender an accomplice who was not the actual killer, although on proper facts the accomplice could be subject to the death penalty if he was not the principal offender but committed the murder with prior calculation and design); see also *State v. Penix*, 32 Ohio St. 3d 369, 513 N.E.2d 744 (1987).

offense (other than a violation of R.C. 2905.01(kidnapping)), the child was at least sixteen, and either the child previously was adjudicated a delinquent child for committing a category one or category two offense and was committed to the legal custody of the Department upon the basis of that adjudication or the child "is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged." R.C. 2151.26(B)(4).

In order to determine whether a charge of complicity can invoke the mandatory bindover provisions of R.C. 2151.26, it is necessary to determine whether a charge of complicity can come within any of the specified criteria. A charge of complicity is not designated as a category one or category two offense. As discussed above, a charge of complicity may be stated either in terms of R.C. 2923.03 or in terms of the principal offense. Hence, a charge of complicity is equivalent to a charge of the principal offense. A charge of complicity is a category one offense when the principal offense is a category one offense, and it is a category two offense when the principal offense is a category two offense. Therefore, if the charge of a particular offense would invoke the mandatory bindover provisions of R.C. 2151.26, then the charge of complicity in that offense, pursuant to R.C. 2923.03, would also invoke those mandatory bindover provisions.

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. When a juvenile is adjudicated delinquent and committed to the Department of Youth Services for committing an offense of complicity, pursuant to R.C. 2923.03, the juvenile can be considered a "public safety bed" pursuant to R.C. 5139.01(A)(13) if commission of the principal offense would come within the definition of "public safety beds."
2. If the charge of a particular offense would invoke the mandatory bindover provisions of R.C. 2151.26, then the charge of complicity in that offense, pursuant to R.C. 2923.03, would also invoke those mandatory bindover provisions.