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CONCEALING STOLEN PROPERTY—SECTION 2907.30 RC—CRIME NOT AMONG OFFENSES SPECIFIED IN SECTION 2961.11 RC—HABITUAL CRIMINAL ACT—CRIME NOT BY IMPLICATION OR OTHERWISE INCLUDED IN TERM "RECEIVING STOLEN PROPERTY" AS TERM USED IN SECTION 2961.11 RC.

SYLLABUS:

The crime of "concealing stolen property", Section 2907.30, R. C., is not among the offenses specified in Section 2961.11, Revised Code, The Habitual Criminal Act, nor is such crime included by implication or otherwise within the term "receiving stolen property" as that term is used in Section 2961.11, Revised Code.

Columbus, Ohio, April 4, 1955

Hon. James H. DeWeese, Prosecuting Attorney
Miami County, Troy, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"Revised Code 2961.11, which lists the crimes of which a person must be convicted to be classified as an habitual criminal, includes 'receiving stolen goods of the value of more than $35.00'.

"Revised Code 2907.30, entitled 'Receiving stolen property', includes not only receiving, but also buying or concealing stolen property. I would like your opinion as to whether or not a conviction under R. C. 2907.30 of 'concealing stolen property of the value of more than $35.00', comes within the purview of R. C. 2961.11. In other words, does the listing of the crimes in R. C. 2961.11 conform to the title of the code section, so that in the instant case the title of receiving stolen property also includes concealing stolen property, or does the interpretation of R. C. 2961.11 require that a defendant can be convicted under R. C. 2907.30 for concealing stolen property and not be proceeded against as an habitual criminal if he had two prior convictions which would definitely be included in the crimes listed in R. C. 2961.11."

Section 2961.11, Revised Code, the habitual criminal statute, provides in material part as follows:

"A person convicted of arson; burning property to defraud an insurer; robbery; pickpocketing; burglary, burglary of an inhabited dwelling; murder in the second degree; voluntary manslaughter; assault with intent to kill, rob or rape; cutting, stabbing, or shooting with intent to kill or wound; forcible rape or rape of a child under twelve years of age; incest; forgery; grand larceny; stealing a motor vehicle; *receiving stolen goods of the value of more than thirty-five dollars;* perjury, kidnapping; child-stealing; who has been two times previously convicted of any of these felonies separately prosecuted and tried therefor * * * shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense. * * *" (Emphasis added.)

It will be observed that the foregoing section imposes an added penalty following the third conviction for certain enumerated offenses. Among the many offenses listed is the crime of receiving stolen goods of the value of more than $35.00. The statute makes no direct reference to the offense of "*concealing* stolen property of the value of more than $35.00."

There are, of course, no common law crimes in this state, all crimes in Ohio being statutory. See 12 Ohio Jurisprudence, Criminal Law, Sec. 7, p. 48. The legislature has provided that the act of concealing property, knowing it to have been stolen, is a crime. This is to be found in Section 2907.30, Revised Code, which also refers to *receiving* stolen property. That section provides:

"No person shall buy, receive, or *conceal* anything of value which has been stolen, taken by robbers, embezzled, or obtained

by false pretense, knowing it to have been stolen, taken by robbers, embezzled, or obtained by false pretense.

"Whoever violates this section shall be imprisoned not less than one nor more than seven years if the value of such thing is sixty dollars or more. If the value thereof is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both."

(Emphasis added.)

It appears that your request is prompted in part at least by the fact that in the publications of the Revised Code, the topical references preceding Section 2907.30 read simply:

"Receiving stolen property."

This, of course, is not part of the legislative enactment; it being merely an editorial headnote, placed there in bold type as a means of ready reference. Hence, the topical reference is not to be viewed as establishing a legislative intention whereby everything in the substance of the section is meant to constitute the crime of "receiving stolen property."

If *head-notes* are to be utilized in interpreting the designation of the crime or offense, it might be observed that Section 2907.30, Revised Code, in its General Code form, Section 12450, General Code, was captioned:

"Receiving stolen property, *etc.*"

I do not mean to place reliance upon these topical references in answering your question. The nature of the references is pointed out only to illustrate the fallacy of attaching any significance to the head-note as an aid toward establishing legislative intent.

Returning to the substance of Section 2907.30, Revised Code, and the question of whether the section embraces but one crime or several crimes, the following statement in 34 Ohio Jurisprudence, Receiving Stolen Goods, Sec. 7, p. 1112, is pertinent:

"It is apparent from reading General Code Section 12450, that *concealment* of the property received is not an element of *receiving* stolen goods, but is an alternative act for which the same punishment may be imposed. In other words, *concealing* stolen goods with knowledge that they are such is punishable in the same manner as receiving stolen goods with knowledge that they are stolen.

"Under an earlier form of the statute it was expressly held that concealment was not an element of the crime."

(Emphasis added.)

It would serve no useful purpose to recite the lengthy legislative history of both code sections here under consideration. Suffice it to say that Section 2961.11, Revised Code, Section 13744-1, G. C., was enacted as a part of "An act to provide punishment for habitual felons", passed March 15, 1929, 113 Ohio Laws, 40. At that time the "receiving stolen property" statute read substantially the same as it does now, and the legislature, in passing the habitual criminal act did not see fit to enumerate the offense of "concealing stolen property," which obviously is an offense distinct from "receiving stolen property." The latter offense was *specifically* enumerated in the habitual criminal act.

Your request is based upon a fact situation whereby a felon has been convicted of "concealing stolen property" and it is asked whether that conviction might be considered the legal equivalent of a conviction of "receiving stolen property." It is my opinion that it cannot. It is a fundamental principle of statutory construction that a criminal statute, being penal, must be construed strictly against the state.

A statute imposing punishment upon habitual criminals is treated like other criminal statutes. Thus, it is stated in 25 American Jurisprudence, 260, that:

> The general principles of statutory construction and interpretation are applicable to statutes providing for an increased punishment upon conviction for a subsequent offense. Such a statute is highly penal and must be strictly construed, unless the rule is changed by statute."

Hence, in order to adjudge a defendant an habitual criminal, the test is not whether he shall have been three times convicted of *any* felonies, but whether he shall have been convicted of felonies *enumerated* in the penal code. Although one may deem a case to be within the reach of the statute, or the mischief it is designed to remedy, one may not place it under the provisions of the enactment, unless plainly authorized by its language. It is apparent that the acts of "concealing stolen property" and "receiving stolen property" are not the same offense, though frequently circumstances will reveal that both offenses have been committed by the felon.

Your attention is directed to Opinion No. 2284, Opinions of the Attorney General for 1940, page 498. The then Attorney General had a similar problem to deal with, and the first two branches of the syllabus are as follows:

"1. Section 13744-1, together with cognate sections of the General Code, commonly called the 'Habitual Criminal Act', being highly penal in character, must be strictly construed and the provisions thereof may not be extended in its application to cases which do not, by the strictest construction, come within such provisions.

"2. The crime of 'Breaking and entering in day time' (Section 13442, G.C.) is not among the felonies specified in Section 13744-1, General Code, providing that if any person be convicted of any of the felonies enumerated in such section after having been two times convicted of any of the felonies therein specified, separately prosecuted and tried therefor, either in this state or elsewhere, he shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense, *nor is such crime of 'Breaking and entering in day time' included by implication or otherwise within the terms 'Burglary' or 'Burglary in an inhabited dwelling', or within any other of the felonies specified in said Section 13744-1."* (Emphasis added.)

Accordingly, it is my opinion that the crime of "concealing stolen property," Section 2907.30, R.C., is not among the offenses specified in Section 2961.11 Revised Code, The Habitual Criminal Act, nor is such crime included by implication or otherwise within the term "receiving stolen property" as that term is used in Section 2961.11, Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General