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1. MISDEMEANOR, PROSECUTION FOR — CAN BE COMMENCED IN COMMON PLEAS COURT BY FILING AFFIDAVIT ONLY WHEN ESPECIALLY PROVIDED BY STATUTE.
2. DRIVER'S LICENSE LAW — PROSECUTIONS PROVIDED BY STATUTE—ANY PERSON FILING AFFIDAVITS MAY COMMENCE PROSECUTIONS IN COMMON PLEAS COURT —SECTIONS 12630-1 TO 12630-3 G. C.
3. EXAMINING MAGISTRATE — WHERE HE RECOGNIZES DEFENDANT TO APPEAR IN COMMON PLEAS COURT TO ANSWER CHARGE MADE AGAINST HIM — WHERE DEFENDANT COMMITTED TO JAIL IN DEFAULT OF RECOGNIZANCE — DEFENDANT CANNOT BE PUT TO TRIAL IN COMMON PLEAS COURT UPON COMPLAINT MADE BEFORE SUCH MAGISTRATE—DEFENDANT TRIED IN COMMON PLEAS COURT—FELONY—INDICTMENT BY GRAND JURY — MISDEMEANOR — INDICTMENT BY GRAND JURY ON TRIAL UPON INFORMATION BY PROSECUTING ATTORNEY.

SYLLABUS:

1. A prosecution for a misdemeanor can be commenced in the common pleas court by the filing of an affidavit only when especially provided by statute.

2. Since it is so especially provided by statute with respect to prosecutions under the Driver's License Law and the act codified as Sections 12630-1 to 12630-3, inclusive, General Code, such prosecutions may be commenced in the common pleas court by any person by filing affidavits.

3. In cases where an examining magistrate recognizes a defendant to appear in common pleas court to answer the charge made against him or commits him to jail in default of recognizance, such defendant may be tried in such common pleas court only, in the case of a felony, upon indictment by the grand jury, and, in the case of a misdemeanor, either upon indictment by the grand jury or upon information by the prosecuting attorney, and such defendant cannot in any event be put to trial in the common pleas court upon the complaint made before such magistrate.

Columbus, Ohio, April 7, 1943.

Hon. J. Dale McNamar, Prosecuting Attorney,
Newark, Ohio.

Dear Sir:

You have requested my opinion as follows:

"I am submitting to you the following questions:

1. Under Section 6296-16 of the General Code can a traffic officer, peace officer, other officer or any other person commence originally a criminal case, for the violation of any law or ordinance relating to the operation of a motor vehicle, by filing an affidavit in the Court of Common Pleas, sworn to before the Clerk of Courts or his deputy, charging such violation?

2. Can a justice of the peace, mayor, police court judge, municipal court judge or other magistrate, in a criminal case relating to the operation of a motor vehicle or in any other criminal case, bind the defendant directly over to the Court of Common Pleas for trial instead of binding such defendant over to the Grand Jury?

The above questions do not seem to be especially related, and it has occurred to me that you may wish to render separate opinions.

Concerning the first question Section 6296-16 of the General Code uses the language:

'Such action shall be commenced by the filing of an affidavit.'

Does this mean that any person can come right into the Common Pleas Court and bring a criminal action for violation of any law or ordinance relating to the operation of motor vehicles?

Ordinarily any criminal case for a misdemeanor can be instituted only by information by the Prosecuting Attorney according to my understanding. If criminal cases for traffic violations can be commenced by any person filing an affidavit, then this would apply also to second degree manslaughter which can be either a felony or a misdemeanor, it would seem.

With relation to the second question, I have had justices of the peace and highway patrolmen stating to me from time to time that a magistrate has the right in a traffic case to bind a defendant directly over to the Court of Common Pleas for trial. It is dif-

ficult for me to believe this, and I can find no authority for it. Also I never heard of this being done except in bastardy, which is not a strictly criminal proceeding.”

As indicated by you, these questions are not at all closely related, but I have nevertheless decided to consider them in the same opinion.

1. Section 6296-16, General Code, to which you refer in your letter, provides:

“The judge of any court of record shall upon plea of guilty or conviction of any person for the violation of any law or ordinance relating to the operation of a motor vehicle, except as to parking a motor vehicle, cause such fact to be noted upon the operator’s or chauffeur’s license of the person convicted or pleading guilty, and at the end of the court day cause the clerk to inform the registrar in writing of such conviction. The clerk shall also include in such report all bond forfeitures that have occurred during the day where like offenses had been charged and the defendant had deposited bail or collateral to secure his appearance in court and said forfeiture had not been vacated. For the purpose of enforcing the provisions of this act, any court of record now having criminal jurisdiction shall have county-wide jurisdiction within the county in which it is located to hear and finally determine cases arising under the provisions of this act. Such actions shall be commenced by the filing of an affidavit and the right of trial by jury as provided by law shall be preserved, but indictments shall not be required in misdemeanor cases arising hereunder. The registrar shall prepare and furnish blanks for the use of said court in making reports of said convictions and bond forfeitures.”

This section is part of what is known as the Driver’s License Law of Ohio which is codified as Sections 6296-1 to 6296-38, inclusive, General Code. In brief, the act provides for the licensing of operators and chauffeurs of motor vehicles. It also provides for the revocation and suspension of licenses. Sections 6296-24 to 6296-30, inclusive, General Code, make certain acts unlawful and provide penalties therefor.

It will be noted that Section 6296-16, General Code, *supra*, does not purport to give any court of record having criminal jurisdiction, county-wide jurisdiction to hear and determine any criminal case for the violation of any law or ordinance relating to the operation of a motor vehicle, but is limited to cases arising under the Driver’s License Law. By express reference in Section 12630-3, General Code, the portion of Section 6296-16, General Code, here under consideration, is made applicable also to prosecutions for offenses arising under the act codified as Sections 12630-1 to 12630-3, inclusive, General Code.

Clearly, therefore, the section is inapplicable to offenses other than those enumerated and defined in the Driver's License Law and in said Sections 12630-1 to 12630-3, inclusive, General Code, and it would not authorize a traffic officer, peace officer or any other person to commence a criminal action in the common pleas court for the violation of other laws or ordinances generally relating to the operation of a motor vehicle, by filing an affidavit in such court charging such violation.

Section 13437-34, General Code, hereinafter quoted, provides that criminal prosecutions for misdemeanors may be commenced in the common pleas court by informations, or by affidavits in cases where specific provision is made therefor by law. In the absence of such specific provision, prosecutions for misdemeanors cannot be commenced in the common pleas court by the filing of affidavits. *Rogers v. State*, 87 O. S., 308.

In case of a felony, there must, of course, be an indictment by the grand jury. Section 10, Article I, Constitution of Ohio. In passing, it should be noted that, since the punishment for second degree manslaughter *may* be imprisonment in the penitentiary, such crime is a felony. See Section 12372, General Code, and *McKelvey v. State*, 87 O. S., 1, 7.

I shall now discuss the question as to whether a traffic officer, peace officer or any other person may commence a criminal action in the court of common pleas for the violation of any of the penal provisions of the Driver's License Law, by filing an affidavit in such court charging such violation.

Ordinarily, in the absence of indictment by the grand jury, a prosecution in the common pleas court for a misdemeanor is instituted by an information filed by the prosecuting attorney of the county. Section 13437-34, General Code, provides:

"In prosecutions for misdemeanor in the court of common pleas, indictment by the grand jury shall not be necessary, but such prosecution may be upon information filed and verified by the prosecuting attorney of the county, or by affidavit when such method is by statute especially provided. The provisions of law as to form and sufficiency, amendments, objections and exceptions to indictments and as to the service thereof shall apply to such informations."

This section, you will note, authorizes a criminal prosecution for misdemeanor to be commenced in the court of common pleas by affidavit "when such method is by statute especially provided." Since it is "especially provided" in Section 6296-16, General Code, *supra*, that criminal prosecutions for the violation of the provisions of the Driver's License Law,

all of which are misdemeanors, may be commenced in any court of record having criminal jurisdiction in the county, by the filing of affidavits, I am of the opinion that such prosecutions may be commenced in the court of common pleas of the proper county by the filing of affidavits by a traffic officer, peace officer or any other person. This is, of course, also true with respect to offenses arising under Sections 12630-1 to 12630-3, inclusive, General Code.

You are therefore advised that a prosecution for a misdemeanor can be commenced in the common pleas court by the filing of an affidavit only when especially provided by statute and, since it is so especially provided by statute with respect to prosecutions under the Driver's License Law and the act codified as Sections 12630-1 to 12630-3, inclusive, General Code, such prosecutions may be commenced in the common pleas court by any person by filing affidavits.

2. Section 13433-10, General Code, which is part of the chapter of the Code of Criminal Procedure relating to preliminary examination, reads:

"When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed, and there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance with good and sufficient surety, in such amount as he deems reasonable, for his appearance at a proper time and before the proper court, otherwise, he shall discharge him from custody. If the offense charged is a misdemeanor, and the accused in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

This section provides that if the examining magistrate finds there is probable cause to believe the accused guilty of the complaint, he shall order him to enter into a recognizance for his appearance at a proper time and before the proper court.

Section 13435-11, General Code, which is part of the chapter relating to bail, provides:

"If the accused is held to answer and offers sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court of common pleas, forthwith, or from day to day, or on the first day of the next term thereof, and not depart without leave. A recognizance requiring the accused to appear at the next term of such court, shall not be invalid by the fact that the court is in session."

Neither of these sections contemplates that the defendant against whom the complaint is filed be bound "over to the grand jury." The language of the statute, as well as the form of recognizance generally used in this state, is that such defendant appear before the court of common pleas either forthwith or from day to day or on the first day of the next term thereof, and not depart without leave.

Ordinarily, when defendants in criminal actions are required to enter into a recognizance to appear before the common pleas court or are committed to jail in default thereof, no proceedings are had in common pleas court in the absence of an indictment by the grand jury and, in fact, no such proceedings could be had unless the grand jury indicted or an information was filed by the prosecuting attorney. In other words, if an examining magistrate require the defendant in a criminal cause to enter into a recognizance for his appearance in the court of common pleas, such court could not try the defendant on the complaint made before the magistrate, but a new accusation either by indictment or information would have to be made in the court of common pleas.

While there are no reported cases in this state treating the question of the right of a prosecuting attorney to file an information in the common pleas court in cases where the defendant has been required by an examining magistrate to enter into a recognizance to appear before such court or has been committed to jail in default of such recognizance, I believe that our statutes authorize such procedure.

Section 13437-1, General Code, provides:

"All provisions of the law applying to prosecutions upon indictments, the process thereon and the issuing and service thereof, to commitments, bails, motions, pleadings, trials, appeals and punishments, or the execution of any sentence and all other proceedings in cases of indictments whether in the court of original or appellate jurisdiction, shall, so far as applicable, be applied to informations and all prosecutions and proceedings thereon."

A grand jury, of course, has authority to inquire of and present all offenses committed within the county. Section 13436-5, General Code. A list of the names of all persons committed or bailed for an offense must be furnished to the foreman of the grand jury. Section 13436-1, General Code. Since the law contemplates that offenses alleged to have been committed by persons who are recognized to appear in common pleas court or committed to jail in default of recognizance, may be the subject of inquiry and indictment by the grand jury, and since Section 13437-1, General Code, *supra*, makes the provisions of law with respect to indictments

applicable to informations, I am of the opinion that the prosecuting attorney may file an information against any person so recognized or bailed without waiting for action by the grand jury. There is, however, no law authorizing a defendant so recognized or bailed to be put upon trial in the common pleas court without information or indictment, and the court would have no jurisdiction to try such person in the absence thereof. *Rogers v. State*, 87 O. S., 308, supra.

I am therefore of the opinion, in specific answer to the questions you propound, that :

1. A prosecution for a misdemeanor can be commenced in the common pleas court by the filing of an affidavit only when especially provided by statute.

2. Since it is so especially provided by statute with respect to prosecutions under the Driver's License Law and the act codified as Sections 12630-1 to 12630-3, inclusive, General Code, such prosecutions may be commenced in the common pleas court by any person by filing affidavits.

3. In cases where an examining magistrate recognizes a defendant to appear in common pleas court to answer the charge made against him or commits him to jail in default of recognizance, such defendant may be tried in such common pleas court only, in the case of a felony, upon indictment by the grand jury, and, in the case of a misdemeanor, either upon indictment by the grand jury or upon information by the prosecuting attorney, and such defendant cannot in any event be put to trial in the common pleas court upon the complaint made before such magistrate.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

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