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“BURGLARY OF AN INHABITED DWELLING HOUSE”—TERM USED IN SECTION 2951.04 RC—NO REFERENCE TO OFFENSE OF BREAKING AND ENTERING “A DWELLING HOUSE”—DENOUNCED IN SECTION 2907.15 RC—PERSON CONVICTED OF SUCH OFFENSE NOT INELIGIBLE FOR PROBATION—SECTION 2951.04 RC.

SYLLABUS:

The term “burglary of an inhabited dwelling house” as used in Section 2951.04, Revised Code, has no reference to the offense of breaking and entering “a dwelling house” as denounced in Section 2907.15, Revised Code, and a person convicted of such offense is not ineligible for probation under the provisions of Section 2951.04, Revised Code.

Columbus, Ohio, December 29, 1955

Hon. William Ammer, Prosecuting Attorney
Pickaway County, Circleville, Ohio

Dear Sir:

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

“This is to request your opinion as to the following sets of circumstances:

"H. S. was indicted by the Grand Jury as to the offense of Breaking and Entering of a dwelling house in the daytime under Section 2907.15 of the Revised Code of Ohio. Said defendant at first entered a plea of Guilty to said offense but through counsel later changed his plea on the basis that he was not eligible for consideration of probation as to the offense charged.

"Section 2907.15 of the Revised Code reads in part as follows:

"No person shall, in the daytime, maliciously break and enter a dwelling house, kitchen, shop, store, warehouse, malt house, stillhouse, mill, pottery, watercraft, schoolhouse, church, meeting house, smokehouse, barn, stable, railway car, car factory, depot, station house, poultry house, wagon house, sugarhouse, boathouse, grain house, greenhouse, or other building with intent to steal or to commit a felony. * * *

"Section 2951.04 of the Revised Code reads as follows:

"No person convicted of murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape without consent, assault with intent to rape, or administering poison shall be placed on probation."

"It is to be noted that under Section 2951.04, a person is not eligible for probation where he is convicted of burglary of an inhabited dwelling house. There is no mention made in that statute as to whether this is in the day or night season but I assume this would pertain to either the day or night season. However, it is noted that in Section 2907.15 of the Revised Code, there is no mention made as to an inhabited dwelling house but only as to a dwelling house. In the case in question, the breaking and entering was in an inhabited dwelling house during the daytime.

"I would appreciate your opinion as to whether or not a person who has been indicted under Section 2907.15, Revised Code, as to a breaking and entering of an inhabited dwelling house in the daytime is eligible for consideration of probation under Section 2951.04, Revised Code of Ohio.

"Your attention is directed to an opinion of the Attorney General for the year, 1940, at page 498, No. 2284 wherein it was held that an offense under Section 2907.15, Revised Code, was not one of those which could be included as to offenses under the Habitual Criminal Act.

"I would appreciate receiving your opinion on the same at an early date so that proper procedure can be followed in this matter."

In contrast to the provision quoted in your inquiry from Section 2907.15, Revised Code, relative to breaking and entering "a dwelling house," we find the following provision in Section 2907.09, Revised Code:

"No person shall in the night season maliciously and forcibly break and enter *an inhabited dwelling house* with intent to commit a felony, or with intent to steal property of any value. * * *"
(Emphasis added.)

It is an accepted rule of statutory construction that the use of varying terms is indicative of varying meanings, 37 Ohio Jurisprudence, 570, Section 307. It would appear, therefore, that the offenses denounced in these sections constitute separate and distinct crimes. Such being the case it would seem that the reference in Section 2951.04, Revised Code, to "burglary of an inhabited dwelling house" could not be interpreted as applicable to the offense denounced in Section 2907.15, Revised Code.

This view is supported by the fact that Section 2951.04, Revised Code, is clearly penal in character; and such statutes must be strictly construed against the state and liberally construed in favor of the accused (*State v. Conley*, 147 Ohio St., 351).

Finally it may be noted that the term "dwelling house" is not limited in scope to those houses which are "inhabited," for in Section 2907.10, Revised Code, we find a denunciation of the offense of breaking and entering an *uninhabited* "dwelling house." Moreover, this connotation of the term was clearly recognized by the court in *State v. Mason*, 74 Ohio St., 65 (76, 77).

It is my opinion, therefore, the term "burglary of an inhabited dwelling house" as used in Section 2951.04, Revised Code, has no reference to the offense of breaking and entering "a dwelling house" as denounced in Section 2907.15, Revised Code, and a person convicted of such offense is not ineligible for probation under the provisions of Section 2951.04, Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General