

I have noted the extension of time granted to the contractor by Hon. Geo. F. Schlesinger, Director of Highways and Public Works, a copy of which is attached to each of these contracts, to March 1st, 1927, which makes it possible in each case for the contractor to complete the work within the time specified after the signing of the contract.

With these contracts you have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. There has further been submitted a contract bond for each of said contracts upon which the Aetna Casualty and Surety Company appears as surety, sufficient to cover the amount set forth in each of said contracts respectively. You have also obtained consent of said Aetna Casualty and Surety Company to the continuing into effect of each of said bonds during the extension of time given to the contractors by authority of the Director of Highways and Public Works.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law, and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contracts and bonds in proper legal form, I have this day noted my approval thereon and return the same herewith to you together with all other data submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General.

30.

APPROVAL, FINAL RESOLUTION, SECTION H.—BRIDGE—I. C. H. NO. 387, MONROE COUNTY, OHIO.

COLUMBUS, OHIO, January 31, 1927.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

31.

VIOLETION OF SECTIONS 6212-13 TO 6212-20 G. C.—PROSECUTION FOR "THIRD OFFENSE" CANNOT BE INSTITUTED AND MAINTAINED AGAINST DEFENDANT WHERE "SECOND OFFENSE" INVOLVED—ERROR PROCEEDING IN HIGHER COURT.

SYLLABUS:

A prosecution for a third offense for violation of Sections 6212-13 to 6212-20 of the General Code, cannot be instituted and maintained against a defendant where the case involving the second offense has not been finally determined but is pending in a higher court on error proceedings.

Where there has been two or more prior convictions for violations of Sections 6212-13 to 6212-20 of the General Code, it is not essential that there be a record of a

conviction for a "second offense" as such, in order to enable the state to institute and maintain a prosecution for a third offense for violation of said sections.

COLUMBUS, OHIO, January 31, 1927.

HON. JAMES E. PATRICK, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 15th, 1927, requesting my opinion upon the following:

"One, Mike Popovich, of this county, has been many times prosecuted for various offenses under the Crabbe Act, each one being taken as a first offense until we filed a charge in our Probate Court, November, 1926, as the second offense. He was tried, found guilty, and fined \$2,000.00, prosecuted error to the Court of Common Pleas, the error proceedings being heard on January 10, 1927, but the court having reserved his decision. On January 8th, the sheriff raided his home, the title to which is held in his wife's name, and found there a small quantity of whiskey and a large amount of wine.

The question is whether or not this second offense is in condition to be used as a basis for a third offense, which is founded on the finding of the liquor in his home on January 8th?"

The questions that you desire to have answered are:

1. Can a prosecution for a third offense for violation of Sections 6212-13 to 6212-20 of the General Code be instituted and maintained against a defendant where the case involving a second offense has not been finally determined but is pending in a higher court on error proceedings?

2. Can a prosecution for a third offense be instituted and maintained against a defendant when two or more convictions under Sections 6212-13 to 6212-20 of the General Code already appear of record but where no conviction appears of record for a "second offense" as such?

The first question must be answered in the negative.

Vol. 16, Corpus Juris, page, 1341, Section 3151, reads:

"Since the word 'conviction' when made the ground of some disability or special penalty, means a final adjudication by judgment, in a jurisdiction where it is necessary for a conviction to precede the commission of the second or subsequent offense, in order to inflict the enhanced penalty for a second conviction, it has been held that sentence must be pronounced on the former conviction and that the judgment thereon must become final."

Vol. 16, Corpus Juris, page 1343, Section 3161, reads:

"Where an appeal from a former conviction is pending, the record of such conviction is not admissible in evidence for the purpose of showing the defendant is guilty of a second offense."

In the case of *Datesh et al vs. State*, 23 O. N. P. (N. S.) 273, which case was decided in the Common Pleas Court of Stark county in the May term 1920, and was affirmed by the Court of Appeals September term 1920, without written opinion, but on the grounds and for the reasons contained in the opinion of Judge Day (case not taken to Supreme Court) the fifth syllabus reads:

"A second offense cannot be charged and maintained against one who has been convicted of one offense, where the case involving the first offense has not been finally determined, but is pending in a higher court on error."

The context of your letter indicates that you desire to prosecute Mike Popovich for a third offense. If, as you state, Mike Popovich has been successfully prosecuted many times for various offenses under Sections 6212-13 to 6212-20 of the General Code, and there are available records showing such prior convictions, your problem is a simple one.

If two or more convictions which have been finally adjudicated, appear of record prior to the offense alleged to have been committed on January 8th, and exclusive of the offense committed in November in which error proceedings are now pending, you can institute a prosecution for a third offense violation.

It is not essential in order to institute a prosecution for a third offense violation of Sections 6212-13 to 6212-20 of the General Code that a record of conviction appear for a "second offense" as such.

Section 6212-17 of the General Code provides :

"Except as herein provided, any person who violates the provisions of this act (General Code Sections 6212-13 to 6212-20) for a first offense shall be fined not less than one hundred dollars, nor more than one thousand dollars; for a second offense he shall be fined not less than three hundred dollars nor more than two thousand dollars; for a third and each subsequent offense, he shall be fined not less than five hundred dollars, nor more than two thousand dollars, and be imprisoned in the state penitentiary not less than one year nor more than five years. * * *"

This section as above quoted provides one penalty for the first offense, one penalty for the second offense and one penalty for a third offense. It is clear that the legislature meant that when a person had once been convicted for a violation of Sections 6212-13 to 6212-20, and after that conviction again violated such sections, a more severe penalty should be imposed, and that when he had twice been convicted of a violation of the sections in question and again violated the law, he should receive a still more severe penalty and it is immaterial, as stated above, whether the record of the second conviction in and of itself shows that it was a conviction for a second offense. The object of the legislature was to prevent repeated violations of the law by requiring a severe penalty to be imposed upon one who had before been convicted and punished, and persisted in continuing his unlawful conduct.

Your attention is called to the case of *Sissea vs. The State of Ohio*, Case No. 1630 in the Court of Appeals of Licking County, wherein this question was decided in accordance with the views expressed herein. In this case a motion for leave to file a petition in error in the Supreme Court of Ohio was overruled December 18, 1923.

It is not essential that a conviction for a "second offense" as such, for violation of Sections 6212-13 to 6212-20 of the General Code appear of record, in order to enable the state to institute a prosecution for a third offense violation of said sections. A prosecution for a third offense for violation of Sections 6212-13 to 6212-20 of the General Code, may be instituted and maintained against a defendant where two or more convictions, which have been finally adjudicated, already appear of record against said defendant, whether said prior conviction be for sale or possession of intoxicating liquor or for possession of property designed for the manufacture of intoxicating liquor.

Respectfully,
EDWARD C. TURNER,
Attorney General.