

1785

GRAND JURY—POWER OF PROSECUTING ATTORNEY TO
INFORM GRAND JURY OF GAMBLING EVIDENCE AFTER
JURY DISMISSED SUBJECT TO CALL—COURT PROCEDURE.

SYLLABUS:

Power of prosecuting attorney to inform grand jury of gambling evidence after said grand jury has been dismissed subject to call discussed.

Columbus, Ohio, May 24, 1950

Hon. H. K. Bostwick, Prosecuting Attorney
Geauga County, Chardon, Ohio

Dear Sir:

Your request for my opinion is as follows:

“At the beginning of the April term of our Common Pleas Court, the Grand Jury met as usual and considered all the cases on the docket and there being no further evidence at that time to present to them, the court ‘dismissed them subject to call’, as has been our custom for many years.

“Mr. R. came to me the day after the Grand Jury was so dismissed and informed me that he had evidence to present to the Grand Jury on gambling.

“Now my question is, do I as Prosecuting Attorney, have any legal right to recall the Grand Jury or is it the province of the court to order their recall, and if I have the right to recall them and the court can't be present, by reason of other assignments, would it be proper to have the Grand Jury in session having in mind the things the court might be compelled to act on under Sections: 13436-4, 13436-11, 13436-21, 13436-13, and 13436-8?”

The first question to be considered is whether there is any authority to dismiss a grand jury in the manner you present. In 20 Ohio Jurisprudence, 176, there is contained a discussion on “Discharge of the Grand Jury”, and the conclusion seems to be that the court may continue a grand jury throughout the entire term and discharge it only at the end of the term. I am informed that this is the prevailing custom in the larger counties of this state, and I see no objection to such procedure. As I

understand the procedure, the grand jury meets every Monday during the term of court to consider any matter which may properly come before it. If nothing is presented at that time the jury merely recesses until the following Monday. It is obvious that such a procedure is necessary in the larger counties because of the variety of matters occurring which require a grand jury's attention. It is also my understanding that in most cases the court merely charges the jury, generally at the beginning of the term, and the jury is left more or less in the hands of the prosecuting attorney, who presents to it whatever matters he may have on hand. This procedure, as I understand it, has become uniform throughout the state and has never been questioned.

In the case you present, the grand jury was "dismissed subject to call." In a larger county this type of dismissal would merely mean "dismissed until the following Monday." I can see no difference in your case. By the use of these words it was meant that the jury was dismissed until something could be presented to it. At the present time you, as Prosecuting Attorney, have evidence as to gambling. I can see no reason why you cannot inform the various jurors that you have this evidence, and ask them to consider it.

Section 13436-5, General Code, reads as follows:

"After the charge of the court, the grand jury shall retire with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county in and for which it was impaneled and sworn."

Section 13436-7, General Code, reads in part, as follows:

"The prosecuting attorney or assistant prosecuting attorney, except as hereinafter provided, shall be authorized at all times to appear before the grand jury for the purpose of giving information relative to a matter cognizable by it, or advice upon a legal matter when required. Such attorney may interrogate witnesses before such jury when it or he deems it necessary, but no person other than the grand jury shall be permitted to remain in the room with the jury while the jurors are expressing their views or giving their votes on a matter before them. * * *"

The court in its original charge to the jury probably instructed it to proceed to inquire as to all offenses committed within the county. As the jury has not been discharged, it may certainly consider any information

which the prosecuting attorney may present to it relative to offenses committed within the county. If the gambling referred to in your request was committed within your county, it is certainly a matter cognizable by the grand jury. Therefore, I can see no objection to your informing the jury of this evidence.

In your request you state that the court cannot be present, and then cite certain statutes where the court might be compelled to act. Section 13436-4 cited in your request, relates to the charge of the court. In all probability the original charge given to the jury was broad enough to cover a gambling indictment and as the jury has not been discharged it may properly consider evidence pertaining to gambling.

Section 13436-8, General Code, relates to the official shorthand reporter. A reporter was probably shown after the grand jury was sworn. If this is not true, it should prove an easy matter to contact the judge on his other assignment and have this performed.

Section 13436-11, General Code, relates to the procedure to be taken if a witness refuses to testify. If such a situation should arise it would be necessary for the court to determine whether the witness is required to testify. I would suggest that you meet this difficulty when it arises. The same applies to section 13436-13, General Code, relative to the death of a juror.

Section 13436-21, General Code, relates to proceedings after an indictment is returned, and has nothing to do with controlling the jury when it is in session.

A grand jury is an arm of the trial court and the court does have supervision and control over it. However, it is an independent arm of the court, and has the right to inquire into all matters cognizable by it. It has been stated that it may even inquire without the necessity of a previous charge, but that question is not before me. As a general statement, it can be said that the court's power over the grand jury is an inherent power over its own process to prevent abuse.

Most of the Ohio decisions pertaining to grand juries were decided prior to the new statutes on the subject and as a result, cannot in many instances be applied to the new law. However, an able discussion is con-

tained in the case of *State v. Schwab*, 109 O. S., 532, and for a discussion of a federal grand jury see *In Re. National Window Glass Workers, et al.*, 287 F. 219, Dist. Ct. N. Dist. of Ohio, decided November 9, 1922, and especially the discussion on page 224, relative to the power of the District Attorney.

In summary and conclusion, it is therefore my opinion that you, as Prosecuting Attorney, may inform the grand jury of gambling evidence after said jury has been "dismissed subject to call."

Respectfully,

HERBERT S. DUFFY,
Attorney General.