

1312.

FELONIES—ALL CRIMINAL OFFENSES WHERE PENALTY FOR VIOLATION IS IMPRISONMENT LONGER THAN ONE YEAR—REGARDLESS, WHETHER OR NOT STATUTE DEFINING SUCH OFFENSE APPEARS IN PART FOURTH OF GENERAL CODE OF OHIO.

SYLLABUS:

All criminal offenses, the penalty for the violation of which is a term of imprisonment longer than one year, are felonies, whether the statute defining such offense appears in Part Fourth of the General Code or not

COLUMBUS, OHIO, October 18, 1939.

HONORABLE REX F. BRACY, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR: Acknowledgment is made of the receipt of your request for my opinion, which reads as follows:

“We have had some violations of Section 6290-16 of the General Code and we would appreciate an opinion from your office construing the penal section of that statute which reads as follows:

‘* * * shall upon conviction thereof be fined not more than \$5,000.00 or imprisoned for not less than six months nor more than five years, or both, for each offense.’

Section 12372 reads as follows:

‘Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors.’

Section 12370 reads as follows:

‘In the interpretation of part fourth the word “imprisoned,” where the context does not otherwise require, means imprisoned in the county jail if the maximum term prescribed for the offense is one year, and imprisoned in the penitentiary if the maximum term prescribed for the offense is longer than one year.’

It will be noticed that the definition of the word ‘imprisonment’, as defined in Section 12370, applies to part fourth of the Code. Section 6290-16 is in part third of the Code. Is the penalty clause of Section 6290-16 construed to be in part fourth as a penal clause?

The question is, is violation of Section 6290-16 a felony or a misdemeanor; or, to put it in another way, can prosecutions for violations of Section 6290-16 be by the filing of an affidavit or information, or must it be by a Grand Jury indictment?"

The General Code of Ohio is divided into four main parts:

Part First—Political, comprising Sections 1 to 5319;

Part Second—Civil, comprising Sections 5320 to 10212;

Part Third—Remedial, comprising Sections 10213 to 12367;

Part Fourth—Penal, comprising Sections 12368 to 13767; and the Appendix.

Section 6290-16 of the General Code fixes the penalty for altering or forging certificates of title or making a false claim to ownership of automobiles. You ask whether the location of this section in Part Second can be construed according to statutory definitions of crimes which are found in Part Fourth.

The rule applicable to this situation is found in 14 American Jurisprudence, page 761, paragraph 11:

"Crimes are classified * * * according to the punishment imposed as felonies or misdemeanors. The nature of the offense and the amount of punishment prescribed, *rather than its place in the statutes*, determine whether it is to be placed among serious or petty offenses, among crimes or misdemeanors." (Italics ours.)

To the same effect is the case of *Schick vs. United States*, 195 U. S., 65; 49 L. Ed., at page 101. Justice Brewer said:

"The truth is, the nature of the offense, and the amount of punishment prescribed, rather than its place in the statutes, determine whether it is to be classed among serious or petty offenses—whether crimes or misdemeanors."

The law adopted in Ohio is found in 37 Ohio Jurisprudence, page 385, paragraph 117:

"The fact that a statute is found in one chapter rather than another does not constitute grounds for questioning its validity."

In the case of *Stockum v. State of Ohio*, 106 O. S., 249, the Supreme Court had to consider whether a penal statute, Section 1654 (in Part I), was to be interpreted under the definitions of Section 12372 (in Part IV).

Therefore, the proposition in the Stockum case is almost identical with the problem stated in your letter. In the unanimous opinion the court held at page 255:

“By the definition of Section 12372, General Code, the crime for which Stockum was convicted under Section 1654, General Code, was a misdemeanor. The sentence imposed was authorized by law and does not conflict with any provision of the Federal or State Constitution.”

Therefore, I am of the opinion that Section 6290-16 of the General Code may be applied just as if it were located in Part Fourth.

You inquire further as to whether or not a violation of Section 6290-16 is a felony or a misdemeanor. The majority rule on this question is stated in 95 A. L. R., 1116n:

“When the court or the jury is given the discretion of fixing the punishment for an offense at imprisonment in the penitentiary, or fines, or jail sentence, such an offense in a majority of jurisdictions where the question has been considered is held to be a felony regardless of the penalty actually imposed.”

This principle of law has been adopted in Ohio and is found in 12 O. J., Par. 5, at p. 47:

“The fact that an offense may be punished by fine and imprisonment in the county jail does not make it a misdemeanor only. If the punishment for an offense may be imprisonment in the penitentiary, this fixes its character and makes it a felony notwithstanding the fact that it may also be punished as a misdemeanor.”

The Ohio case frequently cited by the text writers is *Seitz v. Medical Board*, 24 O. App., 154 (motion to certify overruled in the Supreme Court). In this case the sentence was discretionary and the defendant was committed to the county jail for six months. The question then arose whether the defendant had been convicted of a felony. The court stated in the opinion as follows:

“The rule generally is that an offense is a felony if it may be punished by imprisonment in the penitentiary regardless of what penalty is actually imposed. The authorities are well collected in 8 Am. cases, 821, and this state is clearly in line with the current of authority. *State ex rel. v. Hamilton*, 2 Cir. Dec., 6; *McKelvey v. State*, 87 O. S., 1. The trial court must, therefore, have found the defendant guilty of a felony.”

The penalty prescribed by Section 6290-16 reads:

“* * * shall upon conviction thereof be fined not more than five thousand dollars or imprisoned for not less than six months nor more than five years, or both, for each offense.”

Under the provisions of Section 12370 of the General Code, if the maximum term prescribed for the offense is longer than one year, the interpretation of the word “imprisoned” means imprisoned in the penitentiary. Section 12372, General Code, provides that an offense which may be punished by imprisonment in the penitentiary is a felony.

Therefore, under the rule that a crime is classified by the penalty prescribed and not by the sentence imposed, I am of the opinion that the violation of Section 6290-16 of the General Code is a felony.

The last paragraph of your letter also contains an alternative question as to whether or not violation of Section 6290-16 can be prosecuted by filing an affidavit or information, or by a grand jury indictment.

Article 1, paragraph 10, Constitution of Ohio, provides:

“Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; * * *.”

This constitutional provision received the attention of a former Attorney General. In Opinion 969, Opinions of the Attorney General, 1933, Vol. 2, p. 926, the syllabus reads:

“A felony in Ohio cannot be prosecuted by means of an information instead of an indictment.”

This view is approved and stated as the law in 21 O. Jur., par. 5, p. 681:

“All felonies must be prosecuted by indictment.”

Inasmuch as I have concluded that the violation of Section 6290-16 is a felony, it follows that such violation must be prosecuted by an indictment and not by an affidavit or information.

Respectfully,

THOMAS J. HERBERT,
Attorney General.