

OPINION NO. 70-112**Syllabus:**

1. The conviction of a misdemeanor, such as failure to yield or other misdemeanors, in a case where a motor vehicular death occurs does not bar a subsequent prosecution under the provisions of Sections 4511.18 and 4511.181 of the Ohio Revised Code.
2. It is not necessary to first obtain a conviction for the misdemeanor offense to be able to sustain the charge of motor vehicle homicide under Sections 4511.18 and 4511.181 of the Ohio Revised Code.

To: Daniel T. Spitler, Wood County Pros. Atty., Bowling Green, Ohio
By: Paul W. Brown, Attorney General, August 28, 1970

You have requested my opinion on the following questions:

"1. Does the conviction of a misdemeanor such as failure to yield or other misdemeanors in a case where a motor vehicular death occurs bar a subsequent prosecution under the provisions of sections 4511.18 and 4511.181 of the Ohio Revised Code?

"2. Is it necessary to first obtain a conviction for the misdemeanor offense in the above case to be able to sustain the charge of motor vehicle homicide under sections 4511.18 and 4511.181 of the Ohio Revised Code?"

Section 4511.18, Revised Code, reads as follows:

"No person shall unlawfully and unintentionally cause the death of another while violating any law of this state applying to the use or regulation of traffic, other than sections 4511.19, 4511.20, 4511.201 [4511.20.1], and 4511.251 [4511.25.1] of the Revised Code. Any person violating this section is guilty of homicide by vehicle in the second degree."

Section 4511.181, Revised Code, reads:

"No person shall unlawfully and unintentionally cause the death of another while violating sections 4511.19, 4511.20, 4511.201 [4511.20.1], or 4511.251 [4511.25.1] of the Revised Code. Any person violating this section is guilty of homicide by vehicle in the first degree.

The fifth amendment to the Constitution of the United States provides in part that no person shall "* * *be subject for the same offense to be twice put in jeopardy of life or limb." That clause was designed to prohibit double jeopardy as well as double punishment and is not properly invoked to bar a second prosecution unless the "same offense" is involved in the first and second trials. United States v. Ewell, 383 U.S. 116, 124 (1966). The double jeopardy clause of the fifth amendment has been incorporated into the due process clause of the fourteenth amendment to the United States Constitution and extended to the states. Benton v. Maryland, 395 U.S. 784 (1969).

Section 10, Article I of the Ohio Constitution, concludes: "No person shall be twice put in jeopardy for the same offense." It has been held that "[t]he words 'same offense' mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation." State v. Ross, 89 Ohio St. 383, 387, 106 N.E. 50 (1914). That case further held:

"It is not enough that some single element of the offense charged may have a single element of some other offense as to which the defendant had theretofore been in jeopardy, but the Constitutional provision requires that it shall be the 'same offense.' The usual test accepted by the text-

writers on criminal law and procedure is this:
If the defendant upon the first charge could have been convicted of the offense in the second, then he has been in jeopardy.

"Some courts have greatly expanded the natural and ordinary meaning of the words 'same offense' to include all lesser degrees that may be fairly included within the major charge. * * * This doctrine, however, has not found favor in the decisions of the supreme court of this state."

A single act may be a violation of more than one statutory provision involving different elements, and a defendant so violating these different elements may be convicted and sentenced for the separate violations. A conviction on one charge may not be a bar to a subsequent conviction and sentence on the other charge unless the evidence required to support the conviction on one would be sufficient to warrant a conviction on the other. Duvall v. State of Ohio, 111 Ohio St. 657, 146 N.E. 90 (1924).

In the case of one convicted of a traffic misdemeanor and later charged with vehicular homicide pursuant to Section 4511.18 or 4511.181, supra, growing out of the same misdemeanor, evidence sufficient to sustain a conviction for the misdemeanor would not necessarily be sufficient to sustain a conviction for vehicular homicide. Vehicular homicide requires that one unlawfully and unintentionally cause the death of another. A misdemeanor, for example, failure to yield, does not contain this additional element. Thus, the two statutory provisions are distinct even though violation of each may arise from a single act. A single act may be a violation of more than one criminal statutory provision involving different elements, and a defendant violating such different elements may be convicted and sentenced for the separate violations. Barker v. State of Ohio, 328 F. 2d 582, 27 Ohio Op. 2d 259 (1964).

Since vehicular homicide constitutes an offense separate and distinct from traffic misdemeanor and since vehicular homicide includes as an element merely proof of conduct which would constitute a traffic misdemeanor, it is not necessary to first obtain a conviction for the misdemeanor offense to be able to sustain the charge of motor vehicle homicide.

Therefore, it is my opinion and you are accordingly advised that the conviction of a misdemeanor, such as failure to yield or other traffic misdemeanors, does not bar a subsequent prosecution under the provisions of Sections 4511.18 and 4511.181, Revised Code. In addition, it is not necessary to first obtain a conviction for the misdemeanor offense to be able to sustain the charge of motor vehicle homicide under the aforementioned sections.