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IN AN OFFENSE PUNISHABLE BY DEATH OR LIFE IMPRISONMENT, A PROSECUTION BY INFORMATION MAY NOT BE USED—IN AN OFFENSE OF BREAKING AND ENTERING AN INHABITED DWELLING, PROSECUTION BY INFORMATION MAY NOT BE USED.

SYLLABUS:

1. Under Section 2941.021, Revised Code, a prosecution by information may not be used if the offense charged is punishable by "death or life imprisonment," and may not be used if the offense charged is punishable by life imprisonment but not by death.

2. The offense of breaking and entering an inhabited dwelling in the night season, Section 2907.09, Revised Code, is punishable by life imprisonment, and such an offense may not be prosecuted by information under Section 2941.021, Revised Code.

Columbus, Ohio, October 31, 1962

Hon. John S. Ballard, Prosecuting Attorney
Summit County Courthouse, Akron, Ohio

Dear Sir:

Your request for my opinion reads:

"The question has arisen in our County, and probably is of interest to many other counties, of a proper interpretation of the language of Section 2941.021, Revised Code, referring to the November 9, 1959 Amendment. This Section recites that, 'Any criminal offense which is not punishable by death or life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney. . .'. The question is whether or not we are dealing with only one class of crime as the exception or whether the exception to permissible use of the information process extends to two classes of crimes.

"For an offense not subject to the information process, must it be punishable by both death or life imprisonment; or for an offense not subject to the information process, may it be punishable by either death or life imprisonment?"

"First degree murder, for example, is punishable by death or life imprisonment depending on whether or not a recommendation of mercy is included.

“Breaking and entering a dwelling in the night season may be punishable by life imprisonment but is not punishable by death.

“Therefore, for example, may the crime of breaking and entering in the night season be processed under Information?” Section 2941.021, Revised Code, reads:

“Any criminal offense which is not punishable by death *or* life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney if the defendant, after he has been advised by the court of the nature of the charge against him and of his rights under the constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court, waives in writing and in open court prosecution by indictment.” (Emphasis added)

The normal or traditional way by which a person charged with the commission of a felony is brought before a court is through the return of an indictment by a grand jury. In this regard, Article I, Section 10 of the Constitution of Ohio reads:

“No person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury.”

The purpose of Section 2941.021, *supra*, is undoubtedly to afford a speedy trial to persons who otherwise might have to wait months before the grand jury procedure could be followed. See “Survey of Ohio Law—1960”, 12 W. Res. L. Rev. 491 (1961).

The constitutionality of Section 2941.021, *supra*, has been upheld by the Supreme Court in *Ex Parte Stephens*, 171 Ohio St. 323, 170 N.E. 2d., 736 (1960), the syllabus of which reads:

“1. Section 10, Article I of the Constitution of Ohio, providing that ‘no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury,’ confers a personal privilege which may be waived by a defendant.

“2. Section 2941.021, Revised Code, providing that a non-capital offense may be prosecuted by an information if a defendant, pursuant to the procedure prescribed therein, assents thereto, is a valid enactment not prohibited by the Constitution of Ohio.”

Section 2941.021, *supra*, was further considered in *Wells v. Sacks*, 115 Ohio App. 219, 20 Ohio Ops. 2d., 304 (1962—August 13, *Ohio Bar*).

Though the question presented there differed from that here considered, the opinion offers some aid to construction; it reads in part (page 223) :

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“A felony information acts as a substitute for an indictment and its validity, is therefore, *essential to the court's jurisdiction of the subject matter*. Under Article I, Section 10 of the Constitution, a felony information is *void* if the accused has not effectively waived his right to indictment. To be an effective waiver under the Constitution, it must be intelligently and understandably given. See *In re Burson* (1949), 152 Ohio St., 375, dealing with the waiver of the constitutional and statutory right to counsel.

“In addition to the constitutional requirement of an intelligent, knowing act, the Legislature may impose additional conditions, upon the obtaining of such a waiver. Under Section 2941.021, Revised Code, these requirements are:

“(1) The accused must be advised by the court of the ‘nature’ of the charge against him.

“(2) He must be advised by the court of his constitutional rights.

“(3) He must be represented by counsel, or affirmatively waive counsel (a) in writing, and (b) in open court.

“(4) *After* the fulfillment of the above steps, he must waive prosecution by indictment (a) in writing, and (b) in open court.

“In view of the nature of the constitutional right and the apparent purpose of the legislation, the statute is to be *strictly construed*. The statutory conditions must be held to be mandatory. Accordingly, in addition to constitutional grounds to void a waiver and felony information, if there is a failure to comply with the mandatory requirements of the statute, the waiver is ineffective and the *information unauthorized and void*.

“* * *

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(Emphasis added)

The specific portion of Section 2941.021, Revised Code, here to be considered, reads:

“Any offense which is not punishable by death *or* life imprisonment may be prosecuted by information * * *”.

(Emphasis added)

As you note, some offenses are punishable by either death or life imprisonment (First degree murder, for example). Others may be punish-

able by life imprisonment but not by death (Breaking and entering in the night season, for example, Section 2907.09, Revised Code). Your question asks whether only those offenses punishable by "either death or life imprisonment" are exempted, and whether a crime punishable by life imprisonment but not death may be processed under information. The problem thus resolves itself as to which of two constructions should be followed as to the language in question. These constructions are as follows:

1. Any offense which is not punishable by death or by life imprisonment may be prosecuted by information.
2. Any offense which is not punishable by "death or life imprisonment" may be prosecuted by information.

To adopt the second construction it would be necessary to construe the word "or" as meaning "and," as construction which admittedly is often found in statutory interpretation. In this regard, Section 1.02, Revised Code, reads in part:

"As used in the Revised Code, unless the context otherwise requires:

* * * * *

“(H) ‘And’ may be read ‘or,’ and ‘or’ may be read ‘and’
if the sense *requires it*.”

* * * * *

(Emphasis added)

Looking at the language in question, however, it is difficult to see why the sense should require that the word "or" be read as "and," and the statute does not become inconsistent, absurd, or ambiguous if such is not done. Also, the mandate of the court in the *Wells* case, *supra*, is for strict construction, and this requires a construction without altering the actual language used. Finally, if there is any doubt, and in the absence of a Supreme Court ruling on the question, such doubt should be resolved against the possibility of a procedure which might later be held invalid.

I thus conclude that the language in question should be read to preclude prosecution by information if the offense is punishable by (1) death or life imprisonment or if the offense is punishable by (2) life imprisonment but not death. As to the crime of breaking and entering in the night season, therefore (Section 2907.09, Revised Code), it follows that such

an offense may not be prosecuted by information under Section 2941.021, *supra*, as such offense may be punished by life imprisonment.

Accordingly, it is my opinion and you are advised:

1. Under Section 2941.021, Revised Code, a prosecution by information may not be used if the offense charged is punishable by “death or life imprisonment,” and may not be used if the offense charged is punishable by life imprisonment but not by death.

2. The offense of breaking and entering an inhabited dwelling in the night season, Section 2907.09, Revised Code, is punishable by life imprisonment, and such an offense may not be prosecuted by information under Section 2941.021, Revised Code.

Respectfully,

MARK McELROY

Attorney General