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CRIMES—HABITUAL CRIMINAL ACT, §2961.11 *et seq.*, R.C.—  
VIOLATION OF DYER ACT, 18 U. S. C. §2312, DOES NOT CON-  
STITUTE “STEALING A MOTOR VEHICLE”, §2961.11 R.C.

## SYLLABUS:

1. The interstate transportation of a stolen motor vehicle in violation of the Dyer Act, 18, U. S. C., Section 2312, does not constitute “stealing a motor vehicle” within the meaning of Section 2961.11, Revised Code.

2. A federal conviction for the interstate transportation of a stolen motor vehicle in violation of the Dyer Act may not be charged as a previous conviction in an indictment under the habitual criminal act, Section 2961.11, *et seq.*, Revised Code.

Columbus, Ohio, July 2, 1958

Hon. Fred E. Jones, Prosecuting Attorney  
Warren County, Lebanon, Ohio

Dear Sir:

Your request for my opinion is as follows:

“The last Warren County Grand Jury indicted one Charles Elrod as an Habitual Criminal under Section 2961.11 Ohio Revised Code. The indictment alleges three separate offenses as follows:

“1. On July 29, 1958 in the District Court of the United States for the Middle District of Tennessee said defendant pleaded guilty to two counts of a violation of the Dyer Act (Inter-State transportation of stolen motor vehicles.)

“2. On June 22, 1953, in the District Court of the United States at Dayton, Ohio, said defendant pleaded guilty on five separate counts of violations of the Dyer Act (Inter-State transportation of stolen motor vehicles).

“3. On April 9, 1958, in Warren County Common Pleas Court at Lebanon, Ohio, said defendant was convicted by a jury of Burglary In An Uninhabited Building.

“Among the crimes enumerated under 2961.11 R.C. is ‘stealing a motor vehicle.’ I would like your opinion, informal or otherwise, as to whether or not ‘Inter-State transportation of a stolen motor vehicle’ constitutes ‘stealing a motor vehicle’ as set forth in 2961.11.”

The offenses which may form the basis for a prosecution as an habitual criminal are set forth in Section 2961.11, Revised Code, which reads in part as follows :

“A person convicted of arson ; burning property to defraud an insurer ; robbery ; pickpocketing ; burglary of an inhabited dwelling ; murder in the second degree ; voluntary manslaughter ; assault with intent to kill, rob, or rape ; cutting, stabbing, or shooting with intent to kill or wound ; forcible rape or rape of a child under twelve years of age ; incest ; forgery ; grand larceny ; stealing a motor vehicle ; receiving stolen goods of the value of more than thirty-five dollars ; perjury ; kidnapping ; child-stealing ; who has been two times previously convicted of any of these felonies separately prosecuted and tried therefor, either in this state or elsewhere, shall be adjudged an habitual criminal. \* \* \*.”

The process of indicting a person under the habitual criminal statutes is set forth in Section 2961.13, Revised Code, which provides in pertinent part as follows :

“If at any time either before or after sentence, it appears that a person convicted of *one of the felonies enumerated in section 2961.11 of the Revised Code*, has previously been convicted of *any of said felonies*, the prosecuting attorney of the county in which such last conviction was had shall cause an indictment to be returned charging such person with such previous convictions.”  
(Emphasis added.)

Although your request does not refer to Section 2961.13, Revised Code, I infer from the context that the indictment against Charles Elrod was returned pursuant to the provisions of that section. You will note that it specifically provides that the felonies which may be used in charging a person with being an habitual criminal are those enumerated in section 2961.11, Revised Code. This enumeration may not be extended by implication to include related offenses not listed, since it is a well established principle of law, recognized by statute in Ohio, Section 1.11, Revised Code, that penal laws must be strictly construed against the state and liberally in favor of the accused. 15 Ohio Jurisprudence 2d, Criminal Law, Section 20 and cases therein cited.

In the indictment returned by the grand jury of your county against Elrod under the habitual criminal statutes, the conviction of April 9, 1958, for burglary of an uninhabited dwelling is one of those enumerated in Section 2961.11, Revised Code. The two previous convictions in federal

courts for violation of the Dyer Act, *i.e.* interstate transportation of stolen motor vehicles, are for an offense not so enumerated. The closest related offense which is listed is "stealing a motor vehicle."

It is only in event that the elements of the two offenses are identical that these convictions may be used in a prosecution under the habitual criminal laws. Mere similarity will not suffice as this would violate the rule of strict construction.

The elements of the offense of stealing a motor vehicle are:

1. An unlawful taking of a motor vehicle without the consent of the owner.
2. An intent to permanently deprive the owner of the motor vehicle of its possession.
3. An asportation of the stolen vehicle.

The elements of an offense under the Dyer Act, 18, U. S. C. §2312, are:

1. The transportation in interstate or foreign commerce of a motor vehicle.
2. Knowledge that the motor vehicle so transported was stolen.

A comparison of the elements of these offenses clearly shows that they are not identical. In fact, it is not necessary under the Dyer Act that the accused steal the motor vehicle. It has been held that a person who buys an automobile knowing it to have been stolen and transports it to another state is guilty under the Dyer Act, *Kelley v. United States*, 277 Fed., 405.

It is, therefore, my opinion and you are advised that:

1. The interstate transportation of a stolen motor vehicle in violation of the Dyer Act, 18, U. S. C., Section 2312, does not constitute "stealing a motor vehicle" within the meaning of Section 2961.11, Revised Code.

2. A federal conviction for the interstate transportation of a stolen motor vehicle in violation of the Dyer Act may not be charged as a previous conviction in an indictment under the habitual criminal act, Section 2961.11, *et seq.*, Revised Code.

Respectfully,  
WILLIAM Saxe  
Attorney General