

**Note from the Attorney General's Office:**

1949 Op. Att'y Gen. No. 49-801 was overruled by 2012 Op. Att'y Gen. No. 2012-042.

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CRIMINAL PROCEEDINGS BY MEANS OF AN INFORMATION—PROSECUTING ATTORNEY MAY INSTITUTE—SECTION 13437-34 G. C.—PARTY INVOLVED BOUND OVER TO GRAND JURY BY MAGISTRATE ON FELONY CHARGE—INFORMATION MAY BE BASED ON SAME SET OF FACTS THAT MAKE UP FELONY CHARGE.

## SYLLABUS:

A prosecuting attorney may institute criminal proceedings by means of an information under Section 13437-34, General Code, even though the party involved has been bound over to the grand jury by a magistrate on a felony charge, and such information may be based on the same set of facts that make up the felony charge.

Columbus, Ohio, August 1, 1949

Hon. John C. Bacon, Prosecuting Attorney  
Meigs County, Pomeroy, Ohio

Dear Sir:

Your recent request for my opinion reads as follows:

"I am familiar with the opinion of the court in *State v. Cannon*, 70 App. 262, 45 N. E. 2d 895; the opinion of the Attorney General, 1935 O. A. G., No. 4882.

"However, many cases arise where through high feeling of the moment and sometimes through perversity of the complainant a felony charge will be made through affidavit and warrant will issue, and the defendant will be bound over to the grand jury. Investigation of such cases then reveals that the offense committed is a misdemeanor.

"An example would be a case where affidavit was made and warrant issued under the charge of assault with intent to kill, with the facts pointing to assault and battery. Or a case where affidavit was made and warrant issued under the charge of robbery and the fact pointing to assault and battery.

"Under such set of facts, where a felony is charged and the defendant bound over to the grand jury, may the prosecuting attorney institute criminal proceedings in the court of common pleas under Sec. 13437-34 of the General Code of Ohio?

"There appears no limitation upon the authority of the prosecuting attorney to nolle an indictment of a defendant who has been over-indicted and bringing a prosecution upon an informa-

tion, under said section, and the prosecuting attorney in proceeding under the conditions outlined above would be doing no more than arriving at the same result but before indictment by the grand jury instead of after.

“I have found no court decisions upon the matter and therefore solicit your advice in regard to same.”

Your letter refers to the case of *State v. Cannon*, 70 Ohio App. 262. That case is to the effect that a party who is charged before a justice of the peace upon the affidavit of a person, with having committed a misdemeanor, and such party pleads not guilty and is bound over to the lower court pending indictment by the grand jury, may be legally tried upon an information subsequently verified and filed by the prosecuting attorney under authority of Section 13437-34, General Code.

The 1935 opinion of the Attorney General referred to in your request, so far as it relates to the question you present is to the effect that a prosecuting attorney, at his discretion, may institute a misdemeanor case in the court of common pleas by means of a bill of information under Section 13437-34, General Code.

It will be noted that both the Cannon case, *supra*, and the Attorney General's opinion involve misdemeanor charges, whereas in the question you present, the person has been bound over to the grand jury on an affidavit charging a felony, and your question, as I understand it, is whether the action of the magistrate in binding the person over to the grand jury for indictment on a felony charge will preclude you as prosecuting attorney from instituting criminal proceedings by means of an information based on the same set of facts.

It is interesting to note that Judge Phillips, in the Cannon case appears to make no distinction in his holding as to whether a felony or misdemeanor was involved. Thus, the question as determined by the court on page 264, was as follows:

“The sole question then presented by the state's appeal is whether having been bound over to the lower court defendant could be tried legally upon an information subsequently duly verified and filed by the prosecuting attorney or could thereafter be tried legally only upon indictment by the grand jury.”

In answering this question the court cites Section 13437-34, General Code, and continues on page 264, as follows:

“Apparently Section 13437-34, General Code, was enacted for the purpose of obviating the necessity of presenting misdemeanor cases to the lower court by indictment, and expediting and simplifying the trials of those charged therewith, and saving the county the expense attendant upon presentation thereof to the grand jury. Accordingly by the provisions thereof informations are accorded equal dignity with indictments in misdemeanors. 31 Corpus Juris, on Indictments and Informations.

“That section of the Code dispensed with the necessity of indicting defendant and authorized the prosecuting attorney in his discretion to present the instant case to the lower court by indictment or information, but did not expressly or by implication, limit his authority to file such information only if defendant was not previously bound over to the lower court, and in our opinion he could present it either before or after defendant was so bound over. Any other interpretation would disturb the stability and limit the usefulness of that section for in innumerable cases the prosecuting attorney is first informed of the commission of the offense after defendant is bound over to the trial court, and the contrary is not shown by the record submitted to us in this case.”

Section 13437-34 has been amended since the Cannon decision but the amending act would not in my opinion change the decision. Thus, today Section 13437-34 reads as follows :

“Prosecutions for misdemeanor may be instituted by the prosecuting attorney of the county by affidavit or such other method as may be provided by law in such courts as have original jurisdiction in misdemeanors. The provisions of law as to form and sufficiency, amendments, objections and exceptions to indictments and as to the service thereof shall apply to such affidavits and warrants issued thereon.”

Since Judge Phillips, in the Cannon case, makes no distinction between a felony and a misdemeanor, I believe that his reasoning may be cited as authority for permitting the type of action you suggest.

Section 2916, General Code, gives the prosecuting attorney power to inquire into the commission of crimes within his county. It might also be stated as a general proposition that the duty of a prosecuting attorney requires that he inquire into possible violations of law with care and accuracy, to examine available evidence, the law and the facts and the applicability of each to the other, and to weigh intelligently the chances of a successful termination of a prosecution, having in mind the relative

importance to the county he serves and of different prosecutions which he might initiate. See *State ex rel. McKittrick v. Wallach*, 182 S. W. 2d 313, 353 Mo. 312.

It has been stated that the definition of "offenses" is for the legislative authority, and the determination of whether and when to prosecute for more than one offense growing out of the same transaction is a matter of policy for the prosecuting officer and not for the courts. *District of Columbia v. Buckley*, 128 Fed. (2d) 17, 75 U. S. App. D. C. 301, certiorari denied 63 S. Ct. 57, 317 U. S. 658, 87 L. Ed. 529.

In the case of *State v. Tufts*, 56 N. H. 137, it was noted that the prosecuting officer is not required to prosecute an indictment if there is no proof to sustain it, or so little evidence that the chance of convicting is not such as to justify the attempt. See generally, annotations in 155 A. L. R. 10, Ann. Cases, 1912B p. 755.

In the case of *State v. Pealy*, in the Court of Common Pleas of Tuscarawas County, 35 O. O. 549, the issue presented to the court was whether where a person is accused of a crime and bound over to the grand jury, the court of common pleas may upon the suggestion of the prosecuting attorney examine into the question of the sanity or insanity of the defendant, even though the grand jury has not yet convened. Although this case involved the question of jurisdiction of the court and its decision depended upon the construction of a statute, still it is in point to show that such action may be taken by a prosecuting attorney even though the grand jury has not yet indicted.

From the Pealy case, it might be well to point out that under such set of facts as were present in that case, the court considered the action pending in the court of common pleas. Under the illustration presented in your request the case would also be pending.

Summarizing, and in specific answer to your question it is my opinion that where a person has been bound over to the grand jury on an affidavit charging a felony, the action of the magistrate in binding such person over will not preclude you as prosecuting attorney, from instituting criminal proceedings by means of an information based on the same set of facts.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.