INDICTMENT & INFORMATION--Counts for felony and misdemeanor may not be joined.

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FILED 6

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

We have your request for an opinion of this office reading as follows:

> "I very often have complaints against persons for operating a motor vehicle while in an intoxicated condition, in violation of Section 7783 of the Revised Statutes of Missouri, 1929.
>
> In these cases it is often difficult to prove beyond a reasonable doubt that the defendant is intoxicated. Would it be possible to include a second count in such an information charging careless driving, which, of course, is a plain misdemeanor? If this could be done it would greatly expedite matters as the evidence in such cases will almost always show careless driving, even if it does fail to prove beyond a reasonable doubt that the defendant was intoxicated."

The right to charge a defendant with several crimes in one information has been looked upon with disfavor in this state save and except certain specific instances wherein some specific rule of law makes a provision therefor. This is particularly true in the case of burglary and larceny wherein the same is specifically provided for by statute. In State vs. Kurtz (1927) 295 S. W. 747, l. c. 749, the Supreme Court said:

> "Under our practice it is error to join counts in the same indictment or information charging a felony and misdemeanor. Storrs vs. State, 3 Mo. 9; Hilderbrand vs. State, 5 Mo. 548. It may be taken advantage of either by demurrer or motion in arrest, and, as defendant complains of the joinder in his motion for a new trial which has been substituted for the motion in arrest (Laws 1925, Sec. 4080, p. 198), the question is preserved. The joinder constituted error."

The Kurtz case supra was expressly approved and followed in State vs. England (1928), 11 S. W. (2d) 1024.

It is apparent from a careful examination of Article I, Chapter 41 relating to motor vehicles, R.S. Missouri 1929, that it was the clear intent of the law makers to make the violation of the many regulations contained therein a criminal offense. Section 7770 relates to number plates. A violation thereof may be a misdemeanor. State vs. Hass, 82 S. W. (2d) 621. Section 7777 relates to the rules on the road and traffic regulations. A person may be prosecuted for a violation thereof (Section (k)), State vs. Nece, 255 S.W. 1075. Sections 7782(a) and 7786(c) makes it a felony to tamper with a motor vehicle, or to drive the same without the owners permission, State vs. Wahlers, 56 S. W. (2) 26. Section 7788 prescribes the regulations as to weight of trucks or motor vehicles upon the highways. The violation of this section is a misdemeanor. State vs. Schwartzman Service, 40 S. W. (2) 479. Sections 7783 (f) and 7786 (c) make it a felony to leave the scene of an accident without stopping and giving your name and certain other information. State vs. Hudson, 285 S.W. 733. These sections are all a part of Article I, Chapter 41, R.S. Missouri 1929. Section 7786(d) makes it a misdemeanor to violate any of the provisions of this Article (except those specifically designated therein) and it would appear that driving a car in violation of the rules of the road as laid down in Section 7775 R. S. Missouri 1929, and being a part of Article I, Chapter 41, is included therein.

The cases heretofore cited conclusively show that the violation of various sections of Article I is a criminal offense.

Careless driving is therefore a misdemeanor, 7775, 7786(d), R.S. Missouri 1929, while driving a car intoxicated is declared to be a felony, 7786(c), 7783(g). The evidence of either offense is not necessarily germane to the other, and for that reason neither offense is essentially a part of the other, but are totally independent of each other. A person does not have to be intoxicated to drive a car in a careless and reckless manner; neither does a person charged with driving an automobile while intoxicated have to drive the same in a careless and reckless manner. A careless driver may or may not be intoxicated; a drunken driver may or may not drive the car in a careless and reckless manner. An acquittal of one would not necessarily be a bar to a prosecution for the other. Concentrated offenses may be joined only when they arise out of the same transaction, and are so cognate than an acquittal or conviction for one would be a bar to a trial for the other. This is the test laid down in State vs. Christian, 253 Mo. 382, State vs. Young, 266 Mo. 723, and State vs. Kurtz, supra.

Under the circumstances outlined in your letter, we would recommend that in cases where the defendant is acquitted of driving a car intoxicated, that you also file a charge of careless driving against the defendant and try him on that charge. As a matter of practice it may expedite matters to file both charges separately in the beginning.

It is therefore the opinion of this office that counts for careless driving and driving a car while intoxicated may not be joined in the same information.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

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