

CRIMINAL LAW:

MAGISTRATES:

When several defendants jointly charged with a felony and one defendant disqualifies the magistrate at a preliminary hearing, that magistrate shall continue to examine other defendants. If, on a trial before a magistrate for a misdemeanor; it appear from evidence defendant should be put on trial for a felony, it is the duty of magistrate to dismiss the misdemeanor charge and proceed to have defendant charged with a felony in conformity with the statutes.

March 12, 1948

Honorable Arthur U. Goodman, Jr.
Magistrate
Dunklin County
Kennett, Missouri

2-22



Dear Judge Goodman:

This will acknowledge receipt of your request for an opinion, which reads:

"Please let me have your official opinion on the following matters at your earliest convenience:

"(1) When two or more persons are charged with a felony in Magistrate Court and prior to commencement of the preliminary examination one defendant files his affidavit disqualifying the Magistrate, does this disqualify the Magistrate from proceeding with the preliminary as to all defendants, or is a severance in effect brought about by the disqualification, so that preliminary will be held by the new Magistrate as to one defendant and as to all others by the original Magistrate before whom complaint was filed?

"(2) When a defendant is being tried in Magistrate Court for misdemeanor and the evidence shows that he should be put on trial for a felony, cognizable in the Circuit Court, exactly what procedure is followed, and is a sworn complaint charging the felony required to be filed?"

Under Sections 3864a and 3864b, page 843, Laws of Missouri 1945, there can be no question but that any defendant may be entitled to disqualify a magistrate for any of the grounds set out for disqualification under said act. Sections 3864a and 3864b, supra, under certain conditions provide that a magistrate may be disqualified to conduct an examination of any person

accused of a felony, upon said defendant's filing an affidavit, and further, prescribe a procedure for calling in another magistrate, however, there is no specific direction as to which magistrate shall hear the other defendants who may be jointly charged with the defendant that disqualifies the magistrate. Sections 3864a and 3864b read as follows:

"Section 3864a. Disqualification of magistrate. --A magistrate shall be disqualified to conduct an examination of any person accused of felony as provided in this article if an affidavit is filed in his office by the accused, the prosecuting attorney, or the complainant, before the commencement of such examination, stating that the magistrate is near of kin to the accused by blood or marriage; or that the offense charged is alleged to have been committed against the person or property of such magistrate; or against some person near of kin to him by blood or marriage; or that the magistrate is in anywise interested or prejudiced, or shall have been counsel in the matter, as the affiant verily believes.

"Section 3864b. Proceedings in case of disqualification.--If the magistrate is disqualified as provided in the next preceding section, he shall set the examination down for hearing on some date within ten days after the affidavit is filed, and shall notify and request some other magistrate in the county, if there be one, or if not, some magistrate in an adjoining county, to conduct the examination at the office of the magistrate where the complaint is filed; and it shall be the duty of the magistrate so requested to appear at the time and place appointed for said examination, and he shall proceed with the same in like manner as if the complaint had originally been brought before him; provided however, that no judge of the circuit court nor any of the appellate courts of this state shall be requested to conduct such examination. When a magistrate appears and conducts an examination as herein provided, his actual traveling expenses at a rate not to exceed five cents per mile and his actual subsistence expense at a rate not to exceed five dollars per day shall be allowed him and shall

be taxed as costs in the case and shall be paid as other costs incurred on behalf of the state."

However, we can see no particular reason why the magistrate presiding at the hearing should not continue with the preliminary hearing and examine the other defendants who did not file affidavits to disqualify the magistrate. In the absence of any law disqualifying him, it is his legal duty to examine the defendants as required by law.

The following decision is somewhat analogous in *State v. Wetherford*, 25 Mo. 439, l.c. 442, in that the court held that where two are jointly indicted and only one applies for a change of venue, an order removing the cause will be effectual only as to the one applying for a change of venue. In so holding the court said:

"The venue in this case, so far as regards the defendant Clemsey Wetherford, was improperly changed from Morgan circuit court to the Benton county circuit court. Clemsey Wetherford did not petition for the change--took no steps to have it ordered, and the circuit court of Benton county had no jurisdiction over the case, so far as it relates to her."

Section 4036, R.S. Mo. 1939, provides that where there are several defendants in any indictment or criminal prosecution and cause for removal exists only as to part, the other defendant shall be tried in all proceedings had against them, in the county in which the case is pending, in all respects as if no order of removal had been made as to any defendant. In *ex parte Bedard*, 106 Mo. 616, l.c. 626, the court, after a lengthy discussion defining "criminal prosecutions," concluded that a preliminary examination is a criminal prosecution. In so holding, the court said:

"Having concluded that a preliminary examination is a 'criminal prosecution' within the meaning of section 4174, supra, and that said court is a criminal court within the meaning of the same section, it follows that

the judge of that court had no jurisdiction to hear and determine the issue raised, after the filing of the affidavits against him by the accused, and the subsequent trial and issuance of the writ of commitment were coram non iudice and void. The affidavits rendered him incompetent to hear and try the cause. The only jurisdiction that remained in him after the filing of the affidavits was to make an order for the election of a special judge, or the calling in of another regular judge to dispose of the case. State v. Bulling, 105 Mo. 204, and cases cited."

While the foregoing provision may not be applicable to preliminary hearings before the magistrate, we think it advisable, under the circumstances and foregoing decision, in the absence of any law to the contrary, to follow the same procedure. Section 4050, R.S. Mo. 1939, further provides that when two or more defendants are jointly indicted for any felony, before announcing himself ready for any trial at any term of court, if he require it, he shall be tried separately, and in all other cases it shall be within the discretion of the court. The foregoing law refers solely to indictments, and, therefore, apparently is not applicable to preliminary hearings before a magistrate, since no preliminary examination is necessary when charged under an indictment returned by a grand jury.

Section 101, page 795, Laws of Missouri 1945, requires that the proceedings upon a trial of suits before magistrates with respect to the examination of witnesses, the submission of evidence and argument, and the order and conduct of the trial, shall, where no other provision is made by law, be governed by the usage and practice in the circuit court, so far as the same may be applicable.

In view of the foregoing statutes dealing with preliminary hearings before magistrates when charged by information of a felony and as to the procedure applicable to defendants charged jointly of a felony after one defendant only has disqualified the circuit judge, we believe that, when several defendants are charged jointly with having committed a felony and one defendant disqualifies the magistrate at a preliminary hearing, that magistrate should continue to examine the other defendants just as if no affidavit had been filed by one defendant to disqualify him.

You next inquire as to what procedure should be followed when a defendant is being tried in a magistrate court for having committed an offense punishable as a misdemeanor and the evidence shows that he should have been charged with a felony. Section 28, page 757, Laws of Missouri 1945, provides that if, in the progress of any trial before a magistrate, under the provisions of this act, it shall appear that the accused ought to be put upon his trial for an offense not cognizable before a magistrate, the magistrate shall immediately stop all further proceedings before him, and proceed as in other cases exclusively cognizable before the circuit court, or other court in the county having jurisdiction thereof. The foregoing provision is ample authority for dismissing a misdemeanor and charging the defendant with a felony. Section 1206, Kelley's Criminal Law and Procedure, Fourth Edition, reads:

"If, in the progress of any trial before a justice of the peace for a misdemeanor, it shall appear that the accused ought to be put upon his trial for an offense not cognizable before a justice of the peace, the justice must immediately stop all further proceedings before him, and proceed as in other criminal cases exclusively cognizable before the circuit court, or other court in the county having jurisdiction thereof.

"The justice has no jurisdiction to punish a case of felony; therefore, if the evidence on the trial develops a felony, the justice must stop the trial and discharge the jury, if there be one, and let a new complaint be filed, charging the felony, and proceed with the preliminary examination, as in other cases of felony."

Section 3894, R.S. Mo. 1939, further prescribes the method of charging one with having committed a felony, and reads:

"Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having jurisdiction of the offense specified therein. All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information;

the verification by the prosecuting attorney may be upon information and belief. The names of the witnesses for the prosecution must be indorsed on the information, in like manner and subject to the same restrictions as required in case of indictments."

Section 3895, R.S. Mo. 1939, further authorizes any person having knowledge of the commission of crime to make an affidavit and file it with the clerk of the court having jurisdiction, and reads:

"When any person has knowledge of the commission of a crime, he may make his affidavit before any person authorized to administer oaths, setting forth the offense and the person or persons charged therewith, and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney, or deposit it with the prosecuting attorney, furnishing also the names of the witnesses for the prosecution; and it shall be the duty of the prosecuting attorney to file an information, as soon as practicable, upon said affidavit, as directed in the next preceding section."

It is well established that one cannot be tried for a felony until he be charged by information of the prosecuting attorney or indictment returned by the grand jury. See Section 17, Article I, Constitution of Missouri 1945.

In view of the foregoing provision, when a magistrate is of the opinion from evidence adduced in a misdemeanor that the defendant should be charged with a felony, he should dismiss all proceedings and have the proper proceedings instituted to charge the defendant with a felony. This may be done by any person, having knowledge of the commission of the crime, making an affidavit, acknowledged by someone authorized to administer oaths, and filing same with the clerk of the magistrate court. The court will then proceed with the preliminary hearing.

CONCLUSION

Therefore, it is the opinion of this department:

(1) That when two or more persons are jointly charged in an information as having committed a felony, and one defendant

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files an affidavit in the magistrate court conducting the preliminary hearing to disqualify said magistrate from examining him, this does not prevent the magistrate from continuing the examination of all other defendants who did not file an affidavit to disqualify him, and it is his lawful duty to do so.

(2) When a defendant charged with a misdemeanor is being tried before a magistrate and the evidence adduced is of such a nature that the defendant could have been charged with having committed a felony, it is mandatory that the magistrate stop all proceedings and have proceedings instituted to charge said defendant with a felony. This may be done, in accordance with the statutes prescribing the procedure for charging one with a felony, by any person having knowledge of the commission of the crime making an affidavit, properly acknowledged by someone authorized to administer oaths, and filing same with the clerk of the magistrate court, whereupon, the magistrate will proceed with the preliminary hearing.

Respectfully submitted,

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APPROVED:

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