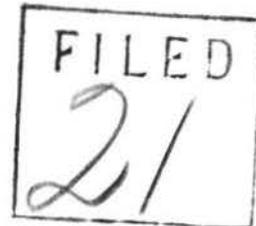


CRIMINAL PROCEDURE - COMPLAINING WITNESS:

Any person who is competent to testify as a witness against the defendant may sign a complaint upon which an information may be filed.

August 10, 1938

Honorable Donald B. Dawson  
Prosecuting Attorney  
Butler, Missouri



Dear Sir:

This is in reply to yours of August 8th wherein you request an opinion from this department upon the following question:

"Where a small child of six years of age is assaulted is it proper for the mother of the child to file the affidavit for a State warrant even though the mother did not witness the trouble and is competent to testify against the defendant only as to the injuries her child had at the time he came home to report the trouble? In this case, a man of thirty-five disturbed the peace and struck a small boy of six years of age. The mother of the child was not present and did not know anything of the trouble until he came home with his face bruised and clothing torn to report what had happened. The Justice of the Peace informed the mother that she would have to sign the affidavit since her son was too young to realize the sacred character of an oath. Thereupon, the mother signed the affidavit for the warrant and the defendant was arrested and I filed information upon that affidavit. The defendant's attorney filed a motion to quash the information and affidavit for the sole reason that the mother was not competent to sign or make an affidavit charging the defendant with

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disturbing the peace and assaulting her child of six years of age, and for the further reason that inasmuch as the mother was not a witness to the trouble she was not competent to testify concerning it and was therefore not a witness in the meaning of the statutes pertaining to the making and filing of an affidavit for a state warrant, and that she did not have personal knowledge of the charge she made affidavit concerning.

"The Justice of the Peace, in sustaining the motion to quash, evidently agreed with the defendant although I argued that a six year old child was too young to make oath and that the mother was the natural guardian and protector of her minor child and was legally qualified and capable of swearing out an affidavit charging the defendant with disturbing the peace and assaulting her minor son. I would like your opinion on that question of the right of this mother or any parent to swear out an affidavit charging that some crime had been committed against a minor son or daughter too young to realize the sacred character of an oath or affidavit."

Under Criminal Procedure, as it applies to proceedings before Justices of the Peace, Section 3415, R. S. Mo. 1929, pertaining to informations and complaints upon which such informations are filed, provides as follows:

"Prosecutions before justices of the peace for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: Provided, that if the name of any such person is unknown, such fact may be stated in the information, and he may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted

by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the justice of the peace having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

From this section, a prosecution before a Justice of the Peace may be instituted by the Prosecuting Attorney filing an information either based upon a verified complaint of some person who has actual knowledge of the offense, or it may be based upon the knowledge, information or belief of the Prosecuting Attorney. There is no question but that the Prosecuting Attorney may file the information on his own knowledge, information or belief regardless of whether or not a complaint is filed.

It seems to be the rule in this state that a conviction cannot be had on an information which is based upon a complaint that is made by a person who has no knowledge of the commission of the offense for which such person is charged. This rule is stated in the case of *State v. Meadows*, 106 Mo. App. 604, 606, as follows:

"It has been several times ruled by us that when a prosecuting attorney files an information before a justice of the peace based on the complaint of a private citizen filed therewith, the defendant can not be convicted of an offense of which the person making the complaint had no actual knowledge."

As to what is actual knowledge, the lawmakers have not declared themselves unless by Sections 3416 and 3418, R. S. Mo. 1929, they meant any person competent to testify against the defendant was one who had actual knowledge of the offense.

Section 3416 provides in part as follows:

"Provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any justice of the peace."

And Section 3418 touches this question in the following language:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it shall be his duty to forthwith forward such complaint to the prosecuting attorney."

The term "actual knowledge" is defined in Words and Phrases, 4th Ed., Vol. 1, page 86, as follows:

"Means of knowledge are equivalent to knowledge, and, where it appears notice or information of circumstances which would put one on inquiry, which, if followed, would lead to knowledge, or that facts were presumptively within knowledge, he will be deemed to have had 'actual knowledge' of these facts."

In the case which you have submitted it appears that the mother of the child knew that it had been injured, and from the statement of the child she learned who had committed the assault. There is no doubt that she would be a competent witness to testify as to the condition of the child and the

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injuries it received, and there is no question but that this testimony would be against the accused.

Said Section 3415 does not limit nor state the manner in which such complainant may obtain actual knowledge of the assault. By reading Sections 3416 and 3418 in connection with said Section 3415, we are convinced that the lawmakers intended that any person who is competent to testify against the accused, has sufficient actual knowledge of the offense to authorize such person to sign the complaint upon which an information may be based as is provided by said Section 3415.

#### CONCLUSION

From the foregoing, this office is of the opinion that the parent or guardian of a minor child who is too young to make an oath may sign a complaint against one accused of injuring such child, provided that such parent or guardian is a competent witness to testify against the accused. We are further of the opinion that if such parent knows of the injuries to the child, then such testimony is competent in the trial against the accused, which fact would qualify the parent as a complaining witness who had actual knowledge of the offense.

Respectfully submitted

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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