

CRIMINAL LAW:
PRELIMINARY EXAMINATION:

If defendant is discharged by justice
at the preliminary examination
prosecuting attorney may file complaint
before any other justice in the county.

July 22, 1938

773



Mr. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This is in reply to yours of July 20th requesting
an official opinion from this department based upon the
following letter:

"Will you kindly give me your opinion
on the following question:

A man is charged with a felony and at
the preliminary hearing the Justice
dismissed the charge. Can the same
charge be filed before some other
Justice in the County and again pro-
ceeded on?

For your further information, I had
the above experience, I also am of
the opinion that the defendant is
guilty and that the State proved all
the facts necessary to bind the de-
fendant over to the circuit court
and firmly believe that various
Justices would have bound the defend-
ant over on the testimony submitted.

Kindly let me have this opinion at the
earliest possible date."

July 22, 1938

Your request goes to the question of whether or not the filing of a second complaint against a defendant who has been discharged by a justice at a preliminary examination is double jeopardy. Under the provisions of Section 23 of Article II of the Constitution the person may be placed in jeopardy only one time for the commission of an offense. Volume 8 R. C. L. page 137, section 117, we find that the rule is stated as follows:

"* * * The discharge of a defendant by a magistrate on a preliminary examination is not such an adjudication in his favor as will bar a subsequent prosecution for the offense."

A defendant's right of preliminary examination is set out in Section 3503, page 203, Laws of Missouri, 1931, which is as follows:

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. * * * * *"

In the case of State ex rel. McCutchan v. Cooley, 12 S.W. (2d) 466, l.c. 468, the court said:

"While it is not expressly provided in section 3848 that an information cannot be filed until the magistrate has found 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof,' such is the clear intent of the statute. Otherwise the according of an examination

before a magistrate is a useless preliminary step and affords no protection to the accused. The lawmakers are guilty of no such absurdity. The examination by a magistrate before an information can be filed by the prosecuting attorney takes the place of an examination by a grand jury before the return of an indictment and prevents an abuse of power by the prosecuting attorney. On a discharge of the accused a complaint may be filed before another magistrate, or the charge may be investigated by a grand jury."

In the same opinion the court, in discussing the case of State v. Pritchett, 219 Mo. 696 quoted from that case as follows: (l.c. 468)

"Although the justice might, after a preliminary examination, discharge the prisoner, such action would in no way operate as a bar to an indictment, or to an information by the prosecuting attorney for the same offense, and whatever the justice might do in the case is from a legal standpoint merely preliminary."

And the court in further discussing the opinion of the Pritchett case said:

"This statement was unnecessary to a decision of the case. If the learned judge intended to rule that on the discharge of an accused by a magistrate the prosecuting attorney was thereby authorized to file an information for the same offense, we do not agree with him. Such a ruling is contrary to all the authorities, and should not be followed. If he intended

July 22, 1938

to rule that a discharge is not a bar to the filing of a complaint with another magistrate, he is in harmony with all the authorities and should be followed."

While it was not necessary to rule upon this point in the said case of State v. Cooley, supra, yet the court has by no uncertain terms stated its views in this matter and we are following those views in arriving at our conclusions in this opinion.

CONCLUSION

This office is, therefore, of the opinion that if a man is charged with a felony and at the preliminary examination the justice of the peace dismisses the charge and refuses to bind the defendant over to the circuit court, then the prosecuting attorney may file a complaint setting up the same charge before any other justice of the peace in the county before whom another preliminary examination may be had.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:DA