

PRELIMINARY EXAMINATION: Plea of not guilty in a justice court
is not a waiver.

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1-28



Dear Sir:

We have your request of January 10th for an opinion as to whether or not a plea of not guilty entered in the justice court to a complaint charging a felony constitutes a waiver of a preliminary hearing.

The duty of a justice at a preliminary hearing is to determine two things; first, whether a felony has been committed, and second, whether there is probable cause to believe the defendant guilty thereof. Section 3483 R. S. Mo. 1929. In discharging these duties, it is necessary for the justice to ascertain whether or not a felony has been committed. It is now well established in this state that the commission of a felony can not be established solely by a confession of the defendant. State vs. Bowan 294 Mo. 245, 243 S. W. 110. It therefore follows that even a plea of guilty in the justice court to a felony complaint would not be sufficient for the justice to find that a felony had been committed.

A preliminary hearing may be waived by entering a plea of not guilty in the circuit court. State vs. Batson 96 S. W. (2d) 384, State vs. McKinley 111 S. W. (2d) 115. The reason for this rule is that a preliminary hearing goes only to the regularity of the proceedings, which matter is waived when the defendant fails to file motion to quash on that ground and enters a plea of not guilty in the circuit court.

Since our law relating to preliminary examinations does not require a plea of guilty, or not guilty, such a

plea would appear to be surplusage, and of no binding effect on the defendant in the justice court. This is apparent when it is considered that the justice has no authority to determine the guilt of the defendant charged with a felony. When a defendant in justice court is not guilty of the felony charged, his only defense is a plea in the negative-- that there is no probable cause to believe him guilty of the felony charged. It would appear that State vs. Langford 293 Mo. 436, 240 S. W. 167 attempts to lay down the rule that a plea of not guilty in the justice court constituted a waiver of a preliminary hearing. The writer of that opinion failed to distinguish between the duties of a justice at a preliminary hearing, and the duty imposed upon the circuit court in the trial of the case. In the former, the duty of the justice is to determine whether a felony has been committed, and whether there is probable cause to believe the prisoner guilty thereof, while in the circuit court the only pleas authorized by law are one of not guilty, or a plea of guilty, and the principal issue to be determined by the circuit court is the guilt or innocence of the defendant. In the Langford case 240 S. W. 169, Division No. 2 said:

"It is evident from these rulings that the effect of the plea of the general issue is the same whether made before the justice or in the trial court. There is even more reason why this plea may be regarded as more effective before the examining tribunal than before the trial court. Before the former, the determination of the guilt or innocence of the accused not being in question, a plea in regard thereto is not required, and has no proper place in the proceeding, but, if voluntarily entered, it cannot be otherwise construed than as an admission by the accused of the probable grounds for the proceeding for the purpose of the case. It was so held in State v. Ritty, 23 Ohio St. 562, in which one brought before a justice of the

peace for a preliminary examination was held, notwithstanding he pleaded not guilty, to have waived an examination of witnesses to sustain the charge, and to have submitted to be bound over without the examination. This holding was on the ground that a plea of not guilty in a case of this kind is analogous to the plea of nolo contendere at common law, and like a demurrer, admits the charge for the purpose of the case."

It will be noted that the opinion in the Langford case, above quoted, relies principally upon an Ohio decision (State vs. Ritty). Thereafter Division No. 2 of the Supreme Court in an opinion by Ellison, J., in State vs. Nichols 49 S. W. (2d) 14, l.c. 19 had occasion to comment upon the holding in the Ohio case (State vs. Ritty), and said:

"The other decision cited in the concurring opinion in the Flannery Case is State v. Ritty, 23 Ohio St. 562, which is clearly not in point. There, there was a complaint, and the defendants 'pleaded not guilty,' 'waived an examination,' and were bound over to the probate court. In the latter court they moved to quash the information filed because the justice had not 'inquired into the complaint' before bonding them over. The motion was sustained, but the Ohio Supreme Court held this ruling erroneous, which we should say was obviously correct."

It therefore appears that by subsequent decisions, the Supreme Court has repudiated the holding in the Langford case insofar as it relies and is based upon State vs. Ritty.

CONCLUSION

It is, therefore, the opinion of this office that a plea of "not guilty" entered in the justice court to a complaint charging a felony is not a waiver of the preliminary hearing, and that the rule so attempted to be announced in State vs. Mangford to the contrary would not longer be followed by the Supreme Court.

Respectfully submitted,

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