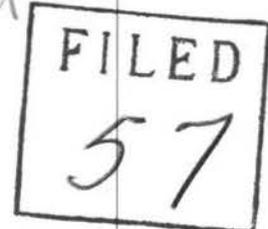


CRIMINAL LAW: Prosecuting Attorney may introduce evidence,  
even when defendant waives preliminary.

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October 12, 1942

Hon. G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri



Dear Sir:

Your request for an opinion in reference to the holding of preliminary examination, has been received.

Your main question is whether or not there is any law that forbids the holding of a preliminary examination by the State, even though the defendant waives such examination.

The section applicable to your question is Section 3893 R. S. Missouri, 1939, which reads 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. And if upon such hearing the justice shall determine that the alleged offense is bailable, such person or persons shall thereupon be admitted to bail conditioned for their appearance on the first day of the next regular term and from day to day and term to term thereafter, of the circuit court or the court having criminal jurisdiction in such county, to answer such charges as may be preferred against them, abide sentence and judgment therein, and not to depart said court without leave: Provided, a preliminary examination shall in no case

be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 3953."

There is nothing in the above section that would prohibit the prosecuting attorney from introducing his evidence before the justice of the peace where the defendant, or defendants, have waived preliminary examination.

In some states, such as Texas, the statute expressly authorizes an examining magistrate to proceed with the preliminary examination, although accused waives his right to such examination. (Porch v. State, 51 Tex. Cr. 7, 99 SW 1122.)

In 16 C. J. p. 317, it is stated:

" \* \* \* The state is not barred from holding a preliminary examination even though defendant waives his right thereto, \* \* \* \* \* ."  
(State v. Brunot, 104 La. 237, 28 S. 996; Quinton v. State, 10 Okl. Cr. 520, 139 P. 705; Ponosky v. State, 8 Okl. Cr. 116, 126 P. 451.)

The Federal Court, in the case of Van Buren v. U. S., 36 Fed. 77, 82, held:

"There are considerations of public policy upon which, in the absence of express provision to the contrary, it must be held to be in the discretion of the examining officer to suspend the examination or not, upon a waiver by

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the accused, as he shall deem best for the public interest. If an arrest be made without good ground, an examination will show the fact, and save the expense of an inquiry by the grand jury. The arrested party, sometimes when not guilty, in order to divert suspicion from others, but more frequently when guilty, and in order to aid the escape of confederates in the crime, is quite willing by waiving examination to suppress present inquiry, and oftener still, perhaps, this is done by the accused in the hope of suppressing the evidence against himself, or of gaining some like advantage from delay. An immediate development of the evidence and testimony is sometimes essential to the ends of justice, and it would be strange indeed if the laws are so framed, or the courts disposed so to interpret them as to deny the government this important power. Its exercise, unless wantonly abused, as almost any power may be abused, can harm no one. Ordinarily, I doubt not, an offer of the accused to waive an examination should be accepted; but if the commissioner be convinced that the public interest will be better subserved by an investigation, and especially if the district attorney request it, he may and should proceed to a full hearing."

CONCLUSION

It is, therefore, the opinion of this department that you may proceed to introduce evidence in the preliminary, even though the defendants at the time waived preliminary examination.

Respectfully submitted

APPROVED:

W. J. BURKE  
Assistant Attorney General

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ROY McKITTRICK  
Attorney General of Missouri

WJB:RW