

CRIMINAL PROCEDURE - DEPOSITIONS:

Depositions can only be taken after a criminal proceeding has been filed.

November 25, 1942

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

11-30



Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

"I want to know when the issues are joined in a criminal case under section 4010, 1939, so that the defendant can take a deposition.

"In one case, the complaint in a rape case had been filed, but the preliminary hearing had not been heard. The defendant served notice to take the deposition of a witness who was just about to be inducted into the army, and leave the county for parts unknown. That deposition was then filed in the case.

"In the last case, the victim was shot in a felonious wounding and is and has been at the point of death. The party doing the shooting came up and gave himself up to the sheriff and confessed that he shot the man with a shot gun. Then and as now, no charges had been filed waiting to see whether the victim died or not. Then the attorney for the defendant served notice to take the deposition of a witness for the defendant who was being taken in-

to the army and was leaving the county. No charges had been filed, and was the issues made up in this case?

"I have a rape case, in which, several attempts have been made to take the depositions of witnesses who will testify to specific acts of misconduct with third parties on the part of the girl complaining of a rape. These hearings, are for the purpose of intimidating the complaining witnesses, and in bluffing her into withdrawing her charges, on the theory that she will be attacked for alleged other acts of sexual intercourse. She denies to me and to her parents any such acts of sexual intercourse with other third parties. It is not my job to suppress evidence, or conceal facts, or prevent justice, but this taking of deposition racket, seems like going too far. It seems to me that this kind of evidence is not admissible for any purpose or any cause, and it is running up costs, for which there is not reason. Can I object that the issues are not made up, and the depositions are not admissible as being taken prematurely?"

Section 4010 R. S. Missouri, 1939, reads as follows:

"When any issue of fact is joined in any criminal case, and any material witness for the defendant resides out of the state, or residing within the

state, is enciente, sick or infirm, or is bound on a voyage or is about to leave this state, or is confined in prison under sentence for a felony, such defendant may apply to the court, or judge thereof, in which the cause is pending, for a commission to examine such witness upon interrogatories there- to annexed, and such court may grant the same upon the like proof and on the like terms as provided by law in civil cases. The court, or judge thereof, granting such commission, may permit the officer prosecuting for the state to join in such commission. The deposition of any witness confined in prison under sen- tence for a felony shall be taken where such witness is confined."(Underscoring ours.)

The above section, which is the criminal section allowing the taking of depositions, specifically states that the taking of depositions in a criminal case shall be under the same terms and same proof as provided by law in civil cases for the taking of depositions.

This section also provides:

"When any issue of fact is joined in any criminal case, * * * * ."

In a criminal case the issue of fact is joined upon the filing of a complaint, for the reason that it is unnecessary for the defendant to answer the complaint, information or indictment in writing, except as to certain procedure which would be an attack upon the pleading itself. In

a criminal action the cause is pending when the complaint, information or indictment is filed. The civil section, in reference to the taking of depositions is Section 1917 R. S. Missouri, 1939, which reads as follows:

"Any party to a suit pending in any court in this state may obtain the deposition of any witness, to be used in such suit, conditionally."

This section merely states, "suit pending", which is the same as the filing of a complaint, information or indictment in a criminal matter.

In the first question in your request you refer to a rape case which has been filed, but the preliminary hearing has not been had. Since a complaint has been filed the defendant has a right to take depositions of witnesses who may testify against him. It was so held in the case of *Ex parte Welborn v. R. L. Faulconer*, 237 Mo. 297, 1. c. 302, where the court said:

"The commission was not invalid because issued on an oral instead of written and verified application. The right to take depositions in criminal cases is statutory and the statute required no affidavit or written application. Since the defendant may have witnesses examined, conditionally, in his behalf exactly as in civil cases (Sec. 5173, R. S. 1909), save that a commission must issue, and since in civil cases a party to a pending suit 'may obtain the deposition of any witness, to be used in such suit, conditionally,' (Sec. 6384, R. S. 1909), the commission under section 5173 issues on demand as a matter of right without any preliminary showing.

"The deposition of any, consequently every, witness may be taken, and the sole prerequisite to the issuance of a commission under section 5173 is that defendant desires one and asks for it. An affidavit or written application setting forth such desire could serve no useful purpose. The Legislature saw no reason for it and neither do we. When it deemed them necessary, that body expressly required petitions and affidavits preliminary to the issuance of commissions (Secs. 6398, 6420), and the omission to make such requirements in section 5173 was clearly deliberate.

"Decisions in cases arising in connection with the taking of depositions under statutes and rules of court in which a limitation is fixed upon the taking of the deposition are not in point. Not the taking but the use of depositions taken under section 5173 is limited, and the fallacy of the argument to the contrary, based upon the word 'conditionally' in the section mentioned was long since accurately pointed out. * * * * *" (Underscoring ours.)

In the above opinion the court held that depositions could be taken even on an oral application, and the defendant should not be required to make a written application for the taking of depositions. The criminal procedure of this State follows the civil procedure, except where, under the criminal procedure, a special procedure is set out for criminal cases. The courts of this State in allowing the taking of depositions, both in civil and criminal cases do not refer to the state of the pleadings in the case, but only look into whether or not the

case has been regularly instituted. It was so held in the case of Bennett v. Strodtman, 42 S. W. (2d) 43, where the court said:

" * * * We say this for the reason that the germane issues of the cause are not definitely or unalterably fixed by the state of the pleadings at a given time in the course of the taking of depositions; that, in fact, the taking of depositions has no necessary reference to the state of the pleadings at the time of the taking; that it is rather a provision against contingencies for the possible condition of the cause at the trial thereof; that, as a general proposition, it is not even essential that there be any issues, provided only that the case has been regularly instituted, and is not finally disposed of; and that consequently the subjects of proper inquiry are those that pertain generally to the subject-matter of the action, and not merely those that are encompassed within the limits of the pleadings at the time. Ex parte Munford, supra; State ex rel. v. Shot, 304 Mo. 523, 531, 263 S. W. 804; Ex parte Alexander, supra." (Underscoring ours.)

The defendant, or parties to a civil action, may take depositions when a suit is pending. This is the only prerequisite condition made in the statute. It was so held in State v. Killoren, 229 S. W. 1097, 1. c. 1098, where the court said:

"Relatrix's suit, to set aside the said judgment and decree of divorce, was commenced when the petition therein was filed with the clerk of said circuit court. After the filing of said petition the suit was pending. The right to take depositions is given when a suit is pending, this is the only prerequisite condition made in the statute."

In the second question in your request, you refer to a case of felonious wounding, in which no complaint has been filed, for the reason that the victim is in a dangerous condition, and may die, which would necessitate the filing of a murder charge. Under the above authorities, since there is no case pending, depositions cannot be taken by the defendant at this time. The taking of such depositions may be prohibited by way of a writ of prohibition, or upon the refusal of the witness to testify before the officer taking the depositions. It was so held in the case of *Bennett v. Strodtman*, supra, par. 2, where the court said:

"Of course there is the exception that, if the testimony desired could in no possible or conceivable event or contingency be read as evidence at the trial, or that if it be made clearly to appear that the testimony is sought to perpetrate a wrong, or to abuse the process of the court of the officer, or for what is obviously an unjustifiable purpose, then the witness may lawfully be protected in his refusal to answer, and the officer will not be sustained in his order of commitment for contempt."

Also, that prohibition would lie was held in the case of State v. Killoren, supra.

In answer to your third question in your request, in which you refer to the attempt to take depositions of witnesses who will testify to specific acts, will say that in view of the authorities above set out, and since the case is pending, the defendant should be allowed to take depositions.

Section 4012 R. S. Missouri, 1939, further provides for the taking of depositions and reads as follows:

"The defendant in any criminal cause may also have witnesses examined on his behalf, conditionally, upon a commission issued by the clerk of the court in which the cause is pending, in the same cases and upon the like notice to the prosecuting attorney, with the like effect and in all respects as is provided by law in civil suits: Provided, that the notice in such case to the prosecuting attorney shall state the name or names of the witness or witnesses whose depositions are desired or will be taken."

It will be noticed in the above section that the word "conditionally" is used. This means that the depositions may be taken, but that if proper objections are made to the evidence submitted in the depositions, or if the depositions were unlawfully taken, then they cannot be used as evidence in the case.

Since we have held that the issues are made up at the time the complaint, information or indictment is filed, the depositions cannot be objected to on the ground that the issues have not been made up in this particular case.

Hon. G. Logan Marr

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CONCLUSION

It is, therefore, the opinion of this department that when a complaint, information or indictment is filed, any defendant may take depositions of witnesses which depositions, if properly taken may be submitted as evidence in the trial of the case.

It is further the opinion of this department, that if no proceeding has been instituted, where a crime has been committed, then there is no defendant, and depositions of prospective witnesses cannot be taken.

Respectfully submitted

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APPROVED:

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