

CRIMINAL LAW:

MISDEMEANOR CASES IN
MAGISTRATE COURTS:

DISQUALIFICATION OF JUDGE:

In absence of statutory authority magistrate judge may not disqualify himself and certify case to circuit court for trial. Prosecutor may dismiss misdemeanor case any time before defendant is put upon trial, and dismissal will be no bar to subsequent prosecution for same offense in same or any other court having jurisdiction of offense.

April 24, 1950

Mr. W. V. Mayse
Prosecuting Attorney
Harrison County
Bethany, Missouri



4/26/50

Dear Sir:

This is to acknowledge receipt of your letter requesting a legal opinion of this department, said letter reads as follows:

"I would like an opinion on the procedure necessary to avoid having to try a serious misdemeanor before our Magistrate, who is a layman and not a lawyer. Is there any Statute authorizing the Judge, himself, to disqualify himself and certify this case to the Circuit Court for trial?"

"Also, I would like an opinion on whether a Prosecutor can dismiss a misdemeanor in Magistrate Court and refile it in Circuit Court, without prejudice.

"If possible, at all, I would very much appreciate this information before the 20th of April, if you could possibly get it to me by then, Thank you very much."

Sections 1 to 45, pages 750 to 761, inclusive, Laws of 1945, provide for the jurisdiction and procedure for magistrate courts in cases of misdemeanor.

Section 1 of the Act provides that magistrate courts shall have concurrent original jurisdiction with the circuit courts, co-extensive with their respective counties in the trial of all misdemeanors, and reads as follows:

"Magistrates shall have concurrent original jurisdiction with the circuit court, co-extensive with their respective counties in all cases of misdemeanor, except in cities

Mr. W. V. Mayse

having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided by law."

In view of this section, a prosecution for a misdemeanor might be instituted in either a magistrate court or in the circuit court of the county in which the offense was alleged to have been committed. From the facts given in your letter it appears that the misdemeanor prosecution was instituted before the magistrate in your county who is not a lawyer and that you would like to know of any statute which would authorize the court to disqualify himself and certify the case to circuit court for trial.

It appears that Sections 1 to 45, Laws of Missouri, 1945, is complete and all inclusive as to the jurisdiction and procedure of misdemeanor cases in magistrate courts in the various counties of the state except in cities having courts which exercise exclusive jurisdiction in criminal cases or as may be otherwise provided by law.

Upon a careful review of the entire Act we are unable to find provision of this act or of the general statutes providing that a magistrate judge may disqualify himself upon his own motion and to certify a misdemeanor case pending before him to circuit court for trial. Therefore our answer to your first inquiry is that since there are no statutory provisions authorizing such action the magistrate does not have this authority.

Section 29, Laws of Missouri, 1945, p. 757, provides what procedure shall govern in the trial of misdemeanors in magistrate courts, and reads as follows:

"All proceedings upon the trial of misdemeanors before magistrate shall be governed by the practice in criminal cases in circuit courts, so far as the same may be applicable, and in respect to which no provision is made by statute; provided, no instructions or declarations of law shall be given by the magistrate."

It has long been the law in Missouri that a prosecutor may enter a nolle prosequi in a criminal case pending in circuit court at any stage of the proceeding before the defendant has actually been put to trial under a valid indictment or information.

This form of dismissal refers to the dismissal of criminal cases and in effect is a record entry in the case that the prosecutor or plaintiff declares that he will proceed no further. If the dismissal is taken before the defendant has been put upon trial

for the criminal offense charged, and before jeopardy attaches, such dismissal of the case will have the same effect as though the case had not been filed or an indictment had never been returned against the defendant.

While such dismissals in practice are not taken "without prejudice" but if properly and timely taken will not prevent him from being charged with the same offense by a subsequent indictment or information. Since the prosecuting attorney represents the interests of the public and is familiar with the facts, and knows whether a case should be prosecuted or not, the dismissal is allowed by the court upon the prosecutor's motion almost as a matter of course.

In the case of *Ex parte Donaldson*, 44 Missouri, in passing upon the right of the prosecutor to enter a nolle prosequi the court said as l.c. 154:

"* * * Then, before any further steps were taken by the court, the circuit attorney entered a nolle prosequi. This he had a right to do, with assent of the court, at any time before the prisoner was put upon his trial. The prisoner never had any judgment of discharge entered in his favor; he was never put in jeopardy, and we can see nothing to prevent his being further held amenable."

Also see *State ex rel. vs. Primm*, 61 Mo. 166; *State vs. Taylor*, 171 Mo. 465.

In the case of *State vs. Goddard*, 162 Mo. 198, it was held that a dismissal or quashing of a first indictment is no bar to a second prosecution on a second indictment. Where defendant was indicted and was granted a change of venue to another county the entrance of a nolle prosequi there was no bar to a further indictment and prosecution in the county where the crime was committed.

In view of the provisions of Section 29, Laws of Missouri, 1945, the proceedings upon the trial of misdemeanors before magistrate courts shall be governed by the practice in criminal cases before the circuit court and since it has long been the law in Missouri that a prosecutor has for proper reasons the right to enter a nolle prosequi in any criminal case in circuit court, we submit that the prosecutor in a misdemeanor case pending before a magistrate has the same right to dismiss any such criminal proceeding for like reasons, and that if the nolle prosequi is taken

before the defendant is put upon trial for the offense charged and before he had been put in jeopardy, that the dismissal is no bar to a subsequent prosecution of the defendant on the same charge in the same or any other court having jurisdiction of the criminal offense.

CONCLUSION

It is therefore the opinion of this department that a magistrate before whom a criminal prosecution in a misdemeanor case is pending does not have the power to disqualify himself upon his own motion and to certify said case to the circuit court of his county for trial, there being no provisions authorizing such action by the magistrate either under the provisions of Sections 1 to 45, pages 750 to 761, inclusive, Laws of Missouri, 1945, providing for the jurisdiction and procedure of magistrate courts in cases of misdemeanors or under the provisions of the general statutes of the state.

It is the further opinion of this department that a prosecuting attorney may by leave of court enter a nolle prosequi or a dismissal in a misdemeanor case pending before a magistrate court in his county at any time before the defendant has been put upon trial or placed in jeopardy of an offense charged in the indictment or information in said case. That such dismissal will release the defendant from the indictment or information but will not prevent the defendant from being subsequently prosecuted on the same charge in the same or any other court in the county having jurisdiction of such criminal prosecution.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PHC:nm