

CRIMINAL LAW:
MISDEMEANOR CASES:
MAGISTRATE COURTS:
PROSECUTING ATTORNEY
NOT REQUIRED TO FILE
INFORMATION:
WHEN:

When complaint of individual alleging commission of misdemeanor is filed in magistrate court in accordance with Sections 543.020 and 543.030 RSMo 1949, if after having fully investigated facts, prosecuting attorney believes same insufficient to sustain conviction of accused, he may, within his discretion, refuse to file information or to proceed further in matter.



March 23, 1956

Honorable Henry Balkenbush
Prosecuting Attorney
Osage County
Linn, Missouri

Dear Mr. Balkenbush:

This department is in receipt of your recent request for our legal opinion and reads as follows:

"This office is desirous of an official opinion on the following question:

"When the prosecuting attorney is approached by a person who intends and demands to file an affidavit for an information that a crime has been committed, and after the prosecuting attorney weighs the facts and circumstances involved and determines that the matter is trivial and at most only a technical violation of a criminal statute has been committed and refuses to prosecute, then, thereafter this person files an affidavit for an information with the Magistrate Court, is the prosecuting attorney required under his oath of office required to file an information and prosecute the person against whom the affidavit has been filed.

"This matter has come up twice within the last two years and will no doubt come up in the future and I wish something in point on this question. I have been of the opinion that the office of prosecuting attorney has discretionary judgment in such matters."

We construe your inquiry to be, that when a private citizen files a complaint with a magistrate court accusing a named person with the commission of a misdemeanor described in the complaint, is it the duty of the prosecuting attorney to file an information based on the complaint, or is it discretionary with the prosecuting attorney as to the filing of an information.

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Section 543.020 RSMo 1949 provides that the prosecution of misdemeanors before magistrates shall be by information and reads as follows:

"Prosecutions before magistrates for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith; provided, that if the name of any such person is unknown such fact may be stated in the information and he may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the magistrate having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a magistrate in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with the magistrate having jurisdiction of the offense, founded upon or accompanied by such complaint."

Section 543.030 RSMo 1949 requires all informations referred to in the preceding section to be filed by the prosecuting attorney and reads as follows:

"All such informations shall be made by the prosecuting attorney of the county in which the offense may be prosecuted under his oath of office, and shall be filed with the magistrate as soon as practicable, and before the party or parties accused shall be put upon their trial, or required to answer the charge for which they may be held in custody; provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any magistrate, and if the magistrate be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information."

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Whenever a complaint of the kind referred to in the two sections of the statutes quoted above is filed with a magistrate, he shall notify the prosecuting attorney of the county and send a copy of the complaint to him together with the facts which can be proven against the accused, and the names and addresses of the witnesses who can testify to such facts. If after an investigation of said facts, the prosecuting attorney is satisfied that an offense has been committed as alleged, and that a case can be made against the accused, he shall immediately file an information based on said complaint with the magistrate.

Upon the filing of the information, the magistrate shall forthwith issue a warrant for the arrest of the defendant upon the criminal charge alleged in the information.

A magistrate is unauthorized, under the provisions of Sections 543.020 and 543.030 supra, to issue a warrant for the arrest of the accused person named in the complaint, until the prosecuting attorney has filed an information against such person, unless the magistrate is satisfied that the accused is about to escape, or has no known place of permanent residence or property within the county likely to restrain him from leaving because of the offense charged against him. In such instances the magistrate may issue a warrant for the arrest of the accused person even though the prosecuting attorney has not yet filed an information against such accused person.

The court commented upon the authority of a justice of the peace to issue a warrant for the arrest of one accused of a crime before an information had been filed, in the case of McCaskey v. Garrett, 91 Mo. App. 354. The statute involved was Section 2750 R. S. Mo. 1899, which is now Section 543.030, supra. At l.c. 359 the court said:

"Section 2750 of the Revised Statutes, supra, under which the affidavit was filed, did not authorize the issuance of the warrant for the plaintiff's arrest, unless the justice with whom the affidavit was filed was satisfied that the said accused was about to escape, or had no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, and the same was therefore an illegal process. The justice issued it, he says, at the insistence of the defendant, who represented to him that the prosecuting attorney, Mr. Blair, wanted it issued."

There can be no prosecution of the accused, without the filing of an indictment of a grand jury or an information by the prosecuting attorney, since the filing of a formal accusation of a criminal offense, and not the filing of the complaint with a magistrate, is the commencement of a criminal prosecution. This principle was held to be the law in the case of City of Pilot Grove v. McCormick, 56 Mo. App. 530, at l.c. 533, 534 the court said:

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"It seems to be conceded, all around, that both proceedings were in all respects regular and that both the police court and the justice had jurisdiction of the offense. Unless the filing of the complaint before the justice was the commencement of a prosecution against the defendant, that commenced by the city was first in point of time. The term 'prosecution' as used in section 2, article 12 of the constitution of this state, has been construed to mean a prosecution instituted by some officer whose duty it is to prosecute criminal offenses, State v. Kelm, 79 Mo. 515; State v. Shortell, 93 Mo. 123; Kansas City v. O'Conner, 36 Mo. App. 594. It is further declared in the above cited cases that an affidavit of a private individual made under the statutory provisions already referred to, was not an information and would not support a prosecution. And in State v. Powell (44 Mo. App. 21), the St. Louis Court of Appeals held that the filing of an information was the commencement of the prosecution, and until that was done there was no prosecution. Applying these rules to the facts of this case, it will be seen that the prosecution of the defendant was not commenced by the state until the filing of the information by the prosecuting attorney which did not take place until two days after the commencement of the prosecution by the city."

The court discussed the duties of the prosecuting attorney generally in criminal cases, and particularly as to the discretion allowed him by law in instituting, or in failing to institute criminal prosecutions, in the case of State v. Smith, 258 S.W. 2d 590, which appears to be the leading Missouri case on the subject. Inasmuch as it is in point with the matter of inquiry we quote a portion of said opinion shown at l.c. 593 as follows:

"When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, (i.e. not merely ministerially) but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. The court has written much upon the broad discretion vested in a public prosecutor.

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State on Inf. of McKittrick v. Wymore, supra;
State on Inf. of McKittrick v. Wallach, 353
Mo. 312, 182 S.W. 2d 313, 318, 319. In this
jurisdiction it is recognized that this public
office is one of consequence and responsibility.
The status of the prosecuting attorney as a public
officer is given dignity and importance by our
statutes. Sections 56.010 to 56.620 RSMo 1949,
V.A.M.S. With every other attorney at law a
prosecuting attorney is, of course, an officer of
the court in a larger sense; but he is not a mere
lackey of the court nor are his conclusions in the
discharge of his official duties and responsibilities,
in anywise subservient to the views of the judge as
to the handling of the State's cases. A public
prosecutor is a responsible officer chosen for his
office by the suffrage of the people. He is account-
able to the law, and to the people. He is 'vested
with personal discretion intrusted to him as a
minister of justice, and not as a mere legal attorney.
He is disqualified from becoming in any way entangled
with private interests or grievances in any way con-
nected with charges of crime. He is expected to be
impartial in abstaining from prosecuting as well as
in prosecuting, and to guard the real interests of
public justice in favor of all concerned.' Engle
v. Chipman, 51 Mich. 524, 16 N.W. 886, 887. 'The
sovereign power of government can only be exercised
through its officers. Consequently, to each officer
is delegated some of the powers and functions of
government. Usually a discretion that is within
the power granted to an officer cannot be controlled
by other officers.' State ex rel. Thrash v. Lamb,
237 Mo. 437, 141 S.W. 665, 669.

"It is clearly the weight of authority that if there
is no statute respecting the right to enter a nolle
prosequi (and there is no such statute in Missouri)
that such right lies within the sole discretion of
the prosecuting attorney. 14 Am. Jur. Criminal Law,
Sec. 296, p. 967, 22 C.J.S. Criminal Law, Sec. 457,
page 707. This court stated that principle in State
on Inf. of McKittrick v. Graves, 346 Mo. 990, 144
S.W. 2d 91, 95, wherein we said: 'Hence they (the
dismissals made by a prosecuting attorney of certain
criminal cases) lay within his discretion under the
power of nolle prosequi which the law vests in the
prosecuting officer in the absence of a statute on
the subject. 14 American Jurisprudence 967.' See
also Ex parte Claunch, 71 Mo. 233."

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In view of the foregoing, it is our thought that it is the duty of the prosecuting attorney under the provisions of the applicable statutes and appellate court decisions of Missouri to institute and prosecute all alleged violations of the criminal laws in his county. However, when he has been notified, furnished with a written complaint of an individual filed in magistrate court accusing one of having committed a misdemeanor, together with the facts, the names and addresses of the witnesses by which such facts can be proven, as provided by said Sections 543.020 and 543.030, it is the duty of the prosecuting attorney to fully investigate the facts alleged in the complaint. If after such investigation the prosecuting attorney is satisfied that a crime has been committed and a case against the accused can be made, he shall immediately file an information charging the accused with the offense alleged in the complaint.

In the event the prosecuting attorney finds that no crime has been committed or that for other reasons no case can be made against the accused, then he may, within his discretion, refuse to file an information or to proceed further in the matter.

In the event he has previously filed an information before discovering the insufficiency of the evidence he may, within his discretion, dismiss said information and refuse to proceed further upon discovery of such facts, as the court held in that part of the opinion of State v. Smith quoted above.

It is our further thought that if no information has been filed but a complaint has been filed in magistrate court by him, he would be authorized to dismiss such complaint in the event he were satisfied no case could be made against the accused. Such was held to be the authority of the prosecuting attorney in an opinion of this department rendered to the Honorable W. C. Whitlow, Prosecuting Attorney of Callaway County on April 19, 1954. A copy of that opinion is enclosed for your consideration.

CONCLUSION

It is therefore the opinion of this department that when the complaint of an individual accusing another of the commission of a criminal offense, which is a misdemeanor, is filed in a magistrate court in accordance with the provisions of Sections 543.020 and 543.030 RSMo 1949, and if after having fully investigated the facts involved in the complaint the prosecuting attorney believes such facts insufficient to sustain a conviction of the accused, he may, within his discretion, refuse to file an information or to proceed further in said matter.

The foregoing opinion which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

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