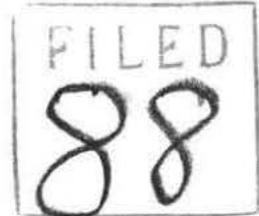


CRIMINAL LAW:  
PRIOR CONVICTIONS:  
SELF-INCRIMINATION:  
TRIAL:  
CRIMINAL PROCEDURE:  
CONSTITUTION:

Under procedure established by Section 556.280, RSMo 1959, a defendant cannot be forced by the prosecution to testify as to his own prior convictions. To do so would be in violation of the immunity from self-incrimination granted to said defendant under Article I, Section 19, Missouri Constitution of 1945. However, said immunity may be waived by defendant voluntarily testifying to said prior convictions.

March 22, 1961



Honorable Stewart E. Tatum  
Prosecuting Attorney  
Jasper County  
Courthouse  
Joplin, Missouri

Dear Mr. Tatum:

This is in reply to your letter of February 24, 1961, wherein you request an opinion from this office as follows:

"I wish to propose a set of facts under Section 556.280, 1949 V.A.M.S., as amended by S.B. #177, Laws of 1959.

"Defendant is charged with a felony in the Circuit Court, and under the Habitual Criminal Act, which alleges three prior crimes, etc., in accordance with the Habitual Criminal Allegation, these crimes being in other states.

"My question has to do with proof of these prior convictions under the Habitual Criminal Act. Assume the trial having been commenced and the state having produced it's evidence in chief on the crime being prosecuted, and is up to the point to where it proves the prior offenses, etc., to the judge under this new law. Further assume that there has not been time to get the records of the respective courts properly setting out the prior convictions, commitments, and discharges, or in the alternative, the question of identity of the defendant is substantial. What would be the prohibitions against calling the defendant himself to take the stand, at this stage, before the court only and out of the presence of the

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jury, for the sole purpose of interrogation on the prior offenses and establishing identity of this defendant as being one and the same person as the person convicted of the prior offenses? It appears to this writer that there is no question of guilt or innocence of the crime under prosecution being involved, and if this is so, it may follow that the defendant's constitutional privileges would not be violated by such procedure, as well as greatly expediting the state's proof of these prior offenses."

Section 556.280, V.A.M.S., as amended by S. B. #177, Laws of 1959, merely provided a new procedure under which a defendant could be tried under the "Habitual Criminal Act" and did not affect any of his substantive rights. This position was declared by the Supreme Court in *State v. Morton*, 338 S.W. 2d 858, loc. cit. 863:

"It was procedural in nature and did not create a new crime, increase the punishment for robbery, or come within the terms of any of the classifications specified in the definition heretofore quoted. The act provided that the trial judge, rather than the jury, would determine the punishment."

Although the amendment was procedural only, no one will argue that the attempt to prove a defendant's prior convictions when pleaded by the prosecution is an integral part of the trial, affecting his substantive rights.

Article I, Section 19 of Missouri Constitution, 1945, states:

"\*\*That no person shall be compelled to testify against himself in a criminal cause \*\*\*."

Unquestionably, the courts of this state have consistently held that a defendant cannot be compelled to incriminate himself in regard to any of his substantive rights during a criminal trial.

This position was stated in *State v. Simmons Hardware Co.*, 18 S. W. 1125, loc. cit. 1127:

"It has been said that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can

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be insured, and this position is abundantly sustained by authority.'"

This position was reaffirmed by the Court in *State v. Topel*, 322 S. W. 2d 160, loc. cit. 162:

"Missouri Courts have long held that the immunity from self-incrimination is available before any tribunal in any proceeding."

In this respect, the Court's position would seem to be that this Constitutional immunity from self-incrimination applies in all phases of criminal procedure from preliminary hearing to final trial, inclusive.

Furthermore, the Court has held that although this Constitutional immunity from self-incrimination may be waived by a defendant, his testifying alone is not conclusive proof of such a waiver. For the true test to be applied is that of voluntariness on the part of the defendant. As stated in *State v. Burnett*, 206 S. W. 2d. 345:

"In the case of *State v. McDaniel*, 336 Mo. 656, 80 S. W. 2d. 185, we ruled the testimony given by the accused at a coroner's inquest, if given voluntarily, could be used against him at his trial for the reason that he could waive his constitutional right to immunity. We also ruled that where a defendant was subpoenaed as a witness and appeared at a coroner's inquest and testified, that fact alone did not make his testimony inadmissible. The test as to the admissibility of this character of testimony is no longer whether it was made in a judicial proceeding under oath but: was it voluntary? If so, then it is admissible, otherwise not."

So sacred to jurists and so deeply ingrained in their thinking is this Constitutional immunity from self-incrimination, that they have declined to allow this right to be tampered with or ignored by the prosecution merely because said immunity is an inconvenient barrier to the prosecution of a defendant.

*State v. Faulkner*, 75 S.W. 116, loc. cit. 135:

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"In Missouri it forms one of the sections of our Bill of Rights and organic law. 'No person can be compelled to testify against himself in a criminal cause.' In every state of the Union a similar provision is found in its Constitution. It is firmly embodied in the Constitution of the United States. The Courts have jealously enforced it in all cases in which it was properly invoked. Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. loc. cit. 631, 6 Sup. Ct. 524, 29 L. Ed. 746, voiced the sentiments of all American Courts and lawyers when he said: 'Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime or to forfeit his property is contrary to the principles of free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.' In our own jurisprudence, from the first volume of our Reports down to the last, the same principle has been fearlessly announced and adhered to. It is not to be abandoned to subserve the exigencies of any particular prosecution."

It therefore follows that although the amendments by S. B. #177, Laws of 1959, to Section 556.280, V.A.M.S., are deemed merely procedural in scope and not in abrogation of any of a defendant's substantive rights, this factor does not serve as a justification for a prosecutor's violating a defendant's Constitutional immunity from self-incrimination pursuant to Article I, Section 19, Missouri Constitution, 1945, by causing a defendant to involuntarily testify as to his own prior convictions.

#### CONCLUSION

Under procedure established by Section 556.280, RSMo 1959, a defendant cannot be forced by the prosecution to testify as to his own prior convictions. To do so would be in violation of the immunity from self-incrimination granted to said defendant under Article I, Section 19, Missouri Constitution of 1945.

However, said immunity may be waived by defendant voluntarily testifying to said prior convictions.

Honorable Stewart E. Tatum

The foregoing opinion, which I hereby approve, was prepared by my Assistant, George W. Draper, II.

Very truly yours,

---

THOMAS F. EAGLETON  
Attorney General

GWD:vm