JUSTICES OF THE PEACE--CRIMINAL LAW: A Justice of the Peace in a misdemeanor has no jurisdiction to impose a fine without an information on file. Fine imposed by a Justice of the Peace beyond his jurisdiction does not place the defendant in jeopardy.

June 27, 1935.

Honorable G. R. Breidenstein
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

Your request for an opinion dated June 14, 1935, is as follows:

> "I have an opinion of your office under date of March 19, 1935, to the effect that a Justice of the Peace does not have authority to try a defendant, nor to fine him or commit him to jail without an information having first been previously filed by the Prosecuting Attorney of the County.
>
> "I would like at this time to have your opinion on the following: A man appears at a public gathering in a drunken and intoxicated condition and proceeds to disturb the peace of the gathering by swearing and indecent conversation. Upon becoming sober the next day and realizing his offense he goes before a Justice of the Peace at the suggestion of a deputy sheriff who files a complaint against him. The justice of the peace does not wait for the Prosecuting Attorney to file his Information but the Justice goes ahead and fines the defendant one dollar and costs, remitting the costs. There is an understanding between the defendant, the Justice and the Deputy Sheriff that the costs will not be collected and the defendant pleads guilty to the charge paying the one dollar fine, thinking that the Prosecuting Attorney will be barred from filing

charges against him under the theory that he cannot be punished twice for the same offense. If this view of the law is followed Justice is defeated for the payment of one dollar is not a sufficient punishment for the offense committed.

"I would like to ask if in the opinion of your department the Prosecuting Attorney may go ahead and file his Information charging the defendant with an offense before another Justice and proceed to try the cause, even though the defendant has paid a dollar fine assessed by a justice before whom no Information has been filed. I am of the opinion that he is not barred by such action of the first justice but would like to have the opinion of your department.

"Next I would like to ask what can be done to prevent this justice of the peace from assessing a fine upon a plea of guilty to a complaint where no Information has been filed. Would a "writ of prohibition" lie? If so would it be possible to have this writ issued out of a higher court than the Circuit Court? If the Prosecuting Attorney feels that the Circuit Judge is extremely biased and prejudiced in favor of the Justice of the Peace, could he be disqualified from passing on the application for the writ and another judge act in his stead? If the Circuit Judge upon application refuses to grant the Writ is there an Appeal from his decision?"

It is necessary that an information be filed in the above facts which you present.

In the case of State v. Barrett, 44 S. W. (2d) 76, l. c. 78 the Court said:

"It is necessary for the information to be filed in order to confer jurisdiction of the court over the person of the defendant.

In the case of State v. Stegall, 318 Mo. 643, l. c. 647; 300 S. W. 714, the Court said:

"'There being as a rule no presumption in favor of the jurisdiction of a justice, it should appear affirmatively upon the face of the record of his proceedings that he had jurisdiction of the parties and the subject-matter."

Any Justice of the Peace within the township where the offense was committed can entertain original concurrent jurisdiction with the Circuit Court over Informations charging misdemeanors.

In the case of State v. Alford, 142 Mo. App. 412, l. c. 415; 127 S. W. 109, the Court said:

"We had occasion to pass on this statute in State of Missouri v. Grant Sexton, at the last term of this court, and we there held that in order to give jurisdiction in a misdemeanor prosecuted before a justice of the peace, that the prosecution must be instituted before some justice of the peace in the township where it is claimed the offense was committed. It is a general rule that the justice of the peace has only such jurisdiction as the statute confers upon him, and that the facts giving such jurisdiction must affirmatively appear on the face of the proceeding. * * * * The Legislature has the right to say in what jurisdiction statutory misdemeanors shall be prosecuted, and to make that jurisdiction exclusive."

The only way that a prosecution for a misdemeanor can be legally maintained before a Justice of the Peace is by the filing of an Information by the Prosecuting Attorney, otherwise it is legally maintained by indictment of a Grand Jury returned to the Circuit Court. The Statutory Information is a pleading which the Legislature has provided in addition to the older method of prosecuting on indictment.

Section 3415 R. S. Mo. 1929 provides as follows:

> "Prosecutions before justices of the peace 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 an 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 justice of the peace 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 justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

In the case of State v. Powell 44 Mo. App. 21, l. c. 24, the Court said:

> "When the complaint was filed by Haseltine, the justice had authority to issue a warrant for Powell's arrest (sec. 4332), but he could not be placed on trial, neither could it be said that there was a prosecutinn against him, until there was an information filed by the proper officer."

In the case of State v. Ransberger, 106 Mo. 135, l. c. 137, the Court said:

> "Judge Ellison, after reviewing the law as to the nature and attributes of an information, and the method of its presentation to the court, adds: 'From these considerations, it would be clear to the legal mind that a common-law information is one that is intrusted solely to the discretion of our state attorney to be given or withheld at his will, unhampered by statutory restraint, and, as the case in some respects presents a constitutional question, it becomes, under our conclusion herein, of great public importance, that the opinion of the supreme court should be taken.' "

It is true that a man cannot be put twice in jeopardy for the same offense, and Article II, Section 23, of the Missouri Constitution provides:

> "That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, <u>after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty;</u> but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or,

> if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, <u>nothing herein contained shall prevent a new trial of the prisoner on proper indictment, or according to correct principles of law.</u>

Before a person charged with a crime can be in jeopardy he has to be put on trial on a valid indictment or information, and in State v. Webster, 206 Mo. 558, l. c. 571; 105 S. W. 705 the Court said:

> " 'A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a nolle prosequi entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause.' "

The term "jeopardy" signifies the danger of conviction and punishment for crime under a procedure which the Legislature has provided and and where that danger of conviction is absent in purported Court proceeding, as where a Justice Court exceeding its jurisdiction has made Court orders beyond its constitutional or statutory power, there is a complete absence of any danger of a legal conviction. The Court trying the cause must not only have jurisdiction to try the misdemeanor, but being a Court whose jurisdiction is limited in necessary procedure of trying the cause, said Court cannot exceed its jurisdiction and try the cause under its own self-evolved procedure. As was said in State v. Manning, 68 S. W. 341; 168 Mo. 418, l. c. 427:

> "The term 'jeopardy' signifies the danger of conviction and punishment which the defendant in a criminal prosecution incurs when a valid indictment has been found and a petit jury has been impaneled and sworn to try the case and a true verdict rendered."

50 Corpus Juris, page 672, Section 32 provides in part:

> "The only question involved on an application for a writ of prohibition to restrain a lower court from proceeding with a criminal trial is whether or not the court has jurisdiction to determine the matter before it and of the person of accused."

CONCLUSION.

We are of the opinion that under the facts stated in your request the Trial Justice of the Peace has exceeded his general jurisdiction by going beyond his constitutional and statutory powers. We are of the opinion that the Prosecuting Attorney can enter a "Nolle Prosequi" to the complaint filed in the Justice Court and can start the case anew in any Court having general jurisdiction over said misdemeanor. We are of the opinion that any fine imposed and collected, not supported by the Prosecuting Attorney's Information, would be a void order of the Justice of the Peace, and that a defendant has no constitutional right to claim former jeopardy when legally prosecuted for the crime alleged to have been committed, inasmuch as he has never, as yet, been in jeopardy. Since the Prosecuting Attorney has never filed an Information in the cause, no Court, as yet, has taken legal jurisdiction over the person of this defendant. General jurisdiction to try misdemeanors does not give the Justice of the Peace jurisdiction over the person of this defendant to try him in any other method than by the statutory method.

There can be no question but what "prohibition" will lie to prohibit the Justice of the Peace from making an order fining a defendant in a misdemeanor case where the Justice has no jurisdiction over the person of the defendant. Such a writ is issuable from any superior Court to

any inferior Court. The Supreme Court, the Court of Appeals, or the Circuit Court, in their discretion, could issue such a writ. We will not assume that the Circuit Court is biased and prejudiced, as suggested, in the face of the legal presumption that a public officer will do his duty.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

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