

EXTRADITION: Information on felony filed directly in the criminal court is not a sufficient affidavit before a magistrate for extradition purposes.

March 9, 1943



Mr. Donald W. Bunker,
Director
Probation and Parole
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of March 5, 1943, which reads as follows:

"This department would like to have an opinion from your office regarding the following proposition:

"Apparently some of the prosecuting attorney's in the State insist that it is not necessary for them to secure any affidavit from anyone before he files a case directly in the circuit court, and that this satisfies all the requirements for extradition. Other prosecuting attorneys seem to have the idea that extradition can be obtained where cases are filed directly by the prosecuting attorney in the circuit court without first having a sworn statement from the complaining witness. In other words, we are wondering what the requirements are concerning the right of the prosecuting attorney to institute criminal actions upon his own information and without the affidavit of the complaining witness, so far as it involves the right of extradition in Missouri."

Mr. Donald W. Bunker

(2)

March 9, 1943

Your main inquiry is whether or not a prosecuting attorney may institute criminal actions upon his own information, and without the affidavit of the complaining witness, where the right of extradition is involved.

Title 18, U. S. C. A., Section 662, page 284, reads as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

Mr. Donald W. Bunker

(3)

March 9, 1943

This section appears in the Revised Statutes of Missouri, 1939, Volume 2, at page 3988, where some of the United States Laws are set out in our statutes. It applies to felonies and misdemeanors for the reason it states "or other crimes." We are assuming that your inquiry only has reference to felonies and not misdemeanors.

Section 3893 R. S. Missouri, 1939, reads as follows:

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. And if upon such hearing the justice shall determine that the alleged offense is bailable, such person or persons shall thereupon be admitted to bail conditioned for their appearance on the first day of the next regular term and from day to day and term to term thereafter, of the circuit court or the court having criminal jurisdiction in such county, to answer such charges as may be preferred against them, abide sentence and judgment therein, and not to depart said court without leave: Provided, a preliminary examination shall in no case be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 3953."

Under this section no information shall be filed without first granting the defendant a preliminary hearing. It was so held in *State v. McKinley*, 111 S. W. (2d) 115. The defendant may waive preliminary and in that case a preliminary is unnecessary. (*State v. Nichols*, 49 S. W. (2d) 14.)

It is necessary in order that a preliminary may be had that a complaint must be filed before a justice of the peace, by someone who is competent to act as a witness, and it need not be the complaining witness.

Section 3857 R. S. Missouri, 1939, reads as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

Under this section the affidavit must be made before a justice of the peace. Such an affidavit would be sufficient to come within Title 18, Section 662, U. S. C. A., supra.

Extradition as between several states is governed by the Federal Constitution, Federal statutes and Federal decisions. (*Keeton v. Gaiser*, 55 S. W. (2d) 302.)

The validity of a warrant of rendition issued by the governor of the surrendering state, in interstate extradition proceedings, must be determined by Title 18, U. S. C. A., Section 662, supra, which requires the

governor of the surrendering state to arrest the fugitive, upon demand of the executive authority of the demanding state, upon the production of a copy of the indictment found, or an affidavit made before a magistrate. (Ex parte Hagan, 245 S. W. 336).

Under Title 18, U. S. C. A., Section 662, supra, where there is no indictment, there must be an affidavit before a magistrate and it has been held that before a magistrate means an affidavit made in the presence of the magistrate and not that he must actually administer the oath. (Ex parte Davis, 62 S. W. (2d) 1086).

The United States affidavit statute in extradition proceedings, requires an affidavit stating facts of affiant's own knowledge, which would be admissible as evidence and sufficient to warrant finding of probable cause. (Rafferty ex rel. Huie Fong v. Bligh, 55 F. (2d) 189).

The affidavit certified as basis for extradition proceedings must contain facts from which the governor of the asylum state may determine that there is probable cause that accused committed the crime charged, and should state facts sufficient to satisfy a magistrate that probable cause exists. (United States ex rel. McCline v. Meyering, 75 F. (2d) 716).

CONCLUSION

It is, therefore, the opinion of this department, that the information filed by a prosecuting attorney, direct in the circuit court, on a felony, in which case there has been no preliminary hearing, is not sufficient for the purpose of extradition, for the reason that such information is invalid.

It is further the opinion of this department, that it is unnecessary for the complaining witness to make the affidavit for the complaint in the justice court on a

Mr. Donald W. Bunker

(6)

March 9, 1943

felony, for the reason that the complaint may be filed by a person who has positive knowledge of the facts in the case, and who would be a competent witness.

It is also the opinion of this department, that the proper procedure to follow in an extradition matter is by way of the justice court on a proper complaint being filed before a justice of the peace which would be sufficient as "an affidavit before a magistrate", as set out in Title 18, U. S. C. A., Section 662.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW