

GRAND JURY:  
CRIMINAL LAW:  
EVIDENCE:  
CIRCUIT COURT:

Authority of member of a grand jury to testify in trial on an indictment as to a confession made before said grand jury by the defendant. Official court reporter who took testimony before grand jury unauthorized to testify at the trial on an indictment returned by the grand jury.

JOHN M. DALTON  
XXXXXX

March 5, 1953

J. C. JOHNSON  
XXXXXX

Honorable Frank D. Connett, Jr.  
Assistant Prosecuting Attorney  
Buchanan County  
St. Joseph, Missouri



Dear Sir:

This will acknowledge receipt of your recent request for an official opinion, which reads:

"We would like to have your opinion as to the law on the following set of facts:

"A certain defendant appeared before the Buchanan County Grand Jury and voluntarily confessed to having committed certain crimes. Present at that time was an official reporter of the Circuit Court, pursuant to Section 540.105, R.S.Mo., 1949. The Grand Jury presented an indictment charging said defendant with having committed the crime confessed to before them.

"Our questions are these:

"During the trial of this defendant, on the said indictment, may the State put into evidence the confession of the defendant by (1) putting on a Grand Juror and having him testify as to what he heard the defendant say while before him, (Section 540.300 R.S.Mo., 1949 seems to permit this, (2) if one (1) above is permissible, then may the witness refresh his memory from a transcript made by the court reporter present at the time of the confession,

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(3) may the official court reporter take her transcript and testify as to what the defendant stated before the Grand Jury?"

You state that a defendant appeared before a grand jury in Buchanan County, Missouri, and confessed to having committed a crime and that the confession was made in the presence of the official Circuit Court reporter, who, we assume for the sake of this opinion, was directed by the judge of the Circuit Court to take down and transcribe testimony for the use of the prosecuting attorney as provided by law.

You first inquire if the state may put into evidence the confession of the defendant by putting on a grand juror and having him testify as to what he heard the defendant say while testifying before the grand jury.

Section 540.300, RSMo 1949, is the only statutory authority permitting a member of any grand jury to testify, and it reads:

"Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offense."

Under the foregoing statute, it is provided that members of a grand jury can testify in only two instances. First, when required to testify by a court and then only as to whether testimony given by a certain witness appearing before a grand jury was consistent with or different from the evidence given by same witness in the court, and also a grand juror may be required to disclose testimony given before them by any person upon a complaint against such person for perjury or upon such person's trial for such offense.

As stated in *Conway v. Quinn*, 168 S.W. 2d 445, the old common law rule preserving the secrecy of a grand jury proceedings has been modified only to the extent that may be allowed by an act of the legislature. In so holding, the court said, l.c. 446:

"The law is further stated as follows:

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'All of its proceedings should be legally sealed against divulgence. The policy is to inspire the jurors with a confidence of security in the discharge of their responsible duties, so that they may deliberate and decide without apprehension of any detriment from an accused or any other person; \* \* to prevent perjury and subornation of perjury by withholding the knowledge of facts testified to before the grand jury, which, if known, would be for the interest of the accused or his confederates to attempt to disprove by procuring false testimony; and also to save the citizen the trouble, expense, and disgrace of being arraigned and tried in public on a criminal charge, unless there is sufficient cause for it.' 24 Am. Jur. 865, Sec. 47."

The oath of the members of the grand jury requires secrecy of the proceedings by said jury. See Section 540.080, RSMo 1949.

In State v. McDonald, 119 S.W.2d 286, 1.c. 288, 342 Mo. 998, the court had this to say about the secrecy required of a grand jury proceedings and the only time when such proceedings may be revealed:

"Impeachment of witnesses for variations in testimony before a grand jury and at the trial is usually accomplished through some member of the grand jury or other person lawfully in attendance thereon, and not from the minutes kept by said body. Consult State v. Thomas, 99 Mo. 235, 258 (IV), 12 S.W. 643, 650(4); State v. Whelehon, 102 Mo. 17, 23, 14 S.W. 730, 731. Sec. 3522, R.S. 1929, Mo.St. Ann. Sec. 3522, p. 3138, provides for the appointment of one of the grand jurors as clerk to preserve minutes of the proceedings and of the evidence given before them, and for the delivery of said minutes to the prosecuting official. Sec. 3516, R.S. 1929, Mo.St. Ann. Sec. 3516, p. 3136, gives a form of oath for grand jurors, embracing secrecy. Sec. 3535, R.S. 1929, Mo.St. Ann. Sec. 3535, p. 3142,

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prohibits grand jurors disclosing any evidence adduced before the grand jury, 'except when lawfully required to testify as a witness in relation thereto \* \* \*.' Section 3533, R.S. 1929, Mo.St. Ann. Sec. 3533, p. 3141, in so far as material authorizes grand jurors to testify 'whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court \* \* \* .' So far as here involved the common law rule preserving the secrecy of grand jury proceedings has been modified by statute in this state only to the extent indicated. \* \* \* "

A primary rule of construction of statutes is to ascertain and give effect to the lawmakers' intent. State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785, 360 Mo. 490. Another well established rule of statutory construction is that statutes applicable to the subject involved must be read and construed together and, if possible, be harmonized. State v. Taylor, 40 S.W.2d 1074, 328 Mo. 335.

Section 540.310, RSMo 1949, provides that no member of any grand jury shall be obligated or allowed to testify or declare in what manner he or other members voted on any question before them. Section 540.320, RSMo 1949, further provides that no grand juror shall disclose any evidence given before the grand jury except when required to lawfully testify as a witness in relation thereto and as shown above, Section 540.300 is an exception to this statute.

In none of the cases which have been decided in Missouri has this identical question presented by the prosecutor been passed upon. The case of Tindle v. Nichols, 20 Mo. 326, appears to be the case in which the idea has arisen that a member of a grand jury is not permitted to testify concerning statements made to the grand jury except in cases provided under what is now known as Section 540.300, RSMo 1949. In that case the action was for slander and one of the witnesses called by the defendant was a member of the grand jury who was called for the purpose of testifying to what the plaintiff's wife had testified to before said grand jury. The court held that such testimony of the grand juror was inadmissible. In so holding the court said:

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"The only question for our consideration arises upon the ruling of the court below, in regard to the admissibility of the grand jurors as witnesses. This is a grave question, and it has had the serious consideration of the court; and we are of the opinion that these witnesses should not have been required or permitted to disclose the evidence given before them as grand jurors; that the court below erred in this matter and its judgment must be reversed.

\* \* \* \* \*

"Thus stands the statute law. In what cases, then, can a grand juror be lawfully required to testify as a witness in relation thereto? Such as are embraced in the fifteenth section cited above, and such only. This fifteenth section specifies these cases, and the bare specification excludes all other cases not enumerated. These cases are, first, 'Whether the testimony of a witness examined before such grand jury is consistent with or different from the evidence given by such witness before such court; and, secondly, may be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for perjury.'

"These are the cases where a grand juror may be lawfully required to testify in relation thereto.

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" \* \* \* From all that is said on this subject in the books, it may be laid down that grand jurors are not permitted or required to testify to what has been given in evidence before them, unless it be in the cases similar to those pointed out in the provisions of our statute above cited. Applying this doctrine to the acts of the Circuit Court in this case, and it will

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be seen that its judgment cannot stand. I do not find any error in the refusal to give the second instruction asked for by the plaintiff."

The general rule does appear to be that such confessions may be testified to by a member of the grand jury. See: Annotation 27, A.L.R. 151, Whitmore on Evidence, Sec. 2363. In the last mentioned work, the Missouri rule as represented by the Tindle case, holding that members of a grand jury cannot testify as to statements made to said grand jury, except as those provided for under Section 540.300, supra, is severely criticized.

In view of the foregoing statutes and decisions, we must conclude that you may not have a grand juror testify as to what he heard the defendant testify to relative to his confession before said grand jury. However, said grand juror may be required by the court to testify after said defendant has testified in the Circuit Court; however, then only as to whether the testimony of said defendant before said grand jury is consistent with or different from the evidence of said witness at the trial.

Your second inquiry, if a grand juror is permitted to testify, then may said grand juror refresh his memory from a transcript prepared by a court reporter containing testimony before such grand jury?

We find very little authority on this question, however, we find State v. Thomas, 99 Mo. 235, l.c. 261, wherein the Supreme Court did at least indicate that the minutes of the proceedings of a grand jury as prepared by one of the members of said grand jury, duly appointed by said grand jury, as provided by statute, might perhaps be used to refresh a grand juror's memory. In so holding the court said:

"The minutes of the evidence kept by one of their number, unsanctioned by the oath of anybody, cannot be made a substitute for this fair, just and orderly way of getting at the evidence that was actually given before the grand jury.

"While the statute permits every grand jury to appoint one of their number to be clerk thereof, to preserve minutes of their proceedings and of the evidence given before them, which minutes shall

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be given to the prosecuting attorney' (sec. 1780, supra), it has nowhere authorized the admission of these minutes as evidence, anywhere, or for any purpose. They are not required to be signed, and are not sworn to by anybody. They are not the statement, deposition or affidavit of the witness, but simply a memorandum, by which, perhaps, a grand juror's memory might be refreshed, but upon which could not be shifted the responsibility of the juror's oath as to what the witness did actually testify. \* \* \* "

The general rule is that for a witness to refresh his memory it does not ordinarily have to be from a writing of his own but it may be anything that he would recognize as having heard or seen. Especially is this true where he is shown an exact transcript of the evidence, as in this case where of his own knowledge the testimony was taken down and transcribed by a court reporter as required by law. Furthermore, this comes within the discretion of the trial court. See: *Voiles v. Columbia Terminals Co.*, 233 S.W.2d 870; *State v. Henson*, 234 S.W. 832; and *State v. Patton*, 164 S.W. 233, 255 Mo. 245.

In view of the above holding that a member of the grand jury may testify under certain conditions as provided in Section 540.300, supra, and further that the court in *State v. Thomas*, supra, strongly indicated that even the minutes of the proceedings and evidence before a grand jury preserved by a member of the grand jury might be used to refresh the memory of a grand juror so testifying, and certainly the evidence before the grand jury preserved as provided by law by a court reporter could be used to refresh the memory of a grand juror, we are of the opinion that only that part of the transcript relative to the matter that said juror is allowed to testify to may be used to refresh his memory.

You further inquire if the court reporter may take her transcript of the testimony of the defendant before the grand jury and testify before the Circuit Court as to what defendant said before the grand jury.

There is no statutory authority for the official court reporter to testify at the trial from her transcript of notes taken before the grand jury as to what the defendant said before said grand jury. Section 540.105, RSMo 1949, provides that before a said court reporter shall take down any evidence before a grand

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jury that said reporter must be sworn that he shall not divulge any of the proceedings or testimony before said grand jury except to the prosecuting attorney of the county or anyone assisting said prosecuting attorney in the prosecution of an indictment brought by said grand jury.

Therefore, in the absence of statutory authority for said court reporter testifying, we must conclude that it would be violating the secrecy of the grand jury to allow said reporter to testify at the trial as to what the defendant stated before said grand jury.

#### CONCLUSION

Therefore, it is the opinion of this department that a member of a grand jury cannot testify as to what he heard a defendant say before the grand jury relative to his confession, but a member of the grand jury may testify at the trial on the indictment returned by the grand jury after the defendant at the trial who made the confession before the grand jury has testified, as to whether the testimony given by said defendant before the grand jury was consistent with or different from the evidence given by said defendant at his trial on the indictment.

Furthermore, that only that part of a transcript relative to the matter that a grand juror is allowed under the law to testify to, as provided in Section 540.300, supra, may be used to refresh his memory.

Also, in the absence of statutory authority, an official court reporter may not take her transcript of the hearing before the grand jury and testify as to what the defendant stated before said grand jury.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Sincerely yours,

JOHN M. DALTON  
Attorney General

ARH:lrt