CRIMINAL PROCEDURE - JUSTICES OF THE PEACE - APPEALS:

Justice of the Peace may not quash information. State may not appeal from ruling of Justice of the Peace, but may by writ of certiorari to the Circuit Court have such record quashed.

August 5, 1938

Honorable Donald B. Dawson
Prosecuting Attorney
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Dear Sir:

This is in reply to yours of July 29th wherein you request an official opinion from this department upon the following question:

> "Therefore, I would like your opinion on this proposition: In a misdemeanor case before a Justice of Peace can the State appeal from the order of the Justice sustaining a motion to quash the information? If so, what are the proper steps in perfecting such an appeal?"

Upon the question of the right of the State to appeal from an order of a Justice of the Peace sustaining a motion to quash an information, we find that Sections 3753 and 3755, R. S. Mo. 1929, are the only sections which provide for an appeal in a criminal case by the State. These sections are as follows:

> "Sec. 3753. When any indictment or information is adjudged insufficient upon demurrer or exception, or where judgment thereon is arrested or set aside, the court in which the proceedings were had, either from its own knowledge or from information given by the prosecuting attorney that there is reasonable ground to believe that the defendant can

> be convicted of an offense, if properly charged, may cause the defendant to be committed or recognized to answer a new indictment or information, or if the prosecuting attorney prays an appeal to an appellate court, the court may, in its discretion, grant an appeal."

> "Sec. 3755. If no appeal be taken by or allowed to the state in any case in which an appeal would lie on behalf of the state, the prosecuting attorney may apply for and prosecute a writ of error in the supreme court, in like manner and with like effect as such writ may be prosecuted by the defendant; but in such case the defendant shall not be required to enter into any recognizance to answer further to such offense, but if the judgment of the circuit court shall be reversed, the defendant may be arrested on warrant and brought before the circuit court for judgment, or such other proceedings as the case may require."

It will be noted that these sections only apply to procedure in the Circuit Court. Criminal procedure in Justice Courts does not provide for appeals by the State.

Section 3417, R. S. Mo. 1929, provides as follows:

> "No case shall be dismissed or discontinued by reason of any defect in the information, but the same may be amended at any time before the case is finally submitted to the justice or jury, or, if the case be appealed to the circuit court, or other court having criminal jurisdiction, then the information may be amended in like manner in such court, and no amendment shall cause a delay of the trial, except at the

> instance of the defendant for good cause shown upon oath or by affidavit. If an information shall be lost or destroyed, it shall be the duty of the justice or judge, as the case may be, to require another to be filed, and proceed with the trial."

A Justice of the Peace is only authorized to perform such acts as are prescribed by the statute. The lawmakers evidenced their intention of limiting the powers of a Justice of the Peace by providing in Section 3417, supra, that no case shall be dismissed or discontinued by reason of any defect in the information. Therefore, the Justice of the Peace who attempted to pass upon the information exceeded his jurisdiction. Then your request goes to what recourse the State has in such a case.

As there is no provision in the statute for the State to appeal or sue out a writ of error from a Justice of the Peace judgment, we will look to the Constitution for a solution of this problem.

Section 23 of Article VI of the Constitution provides as follows:

> "The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits."

On this same subject, we find in the case of State v. Landwehr, 71 S. W. (2d) 145, the court said:

> "Now the power of supervisory or superintending control which is vested by the Constitution in the circuit courts over courts and tribunals of inferior jurisdiction is of ancient inception, and relates back to and has its origin in the power exercised by the King's Bench

> in England, which originally comprehended not only supervision and control over all inferior judicial tribunals by the exercise of an appellate jurisdiction, but also the power to issue extraordinary legal writs with a view to compelling such inferior tribunals to act within their jurisdiction, and thus to prohibit them from acting outside of or in excess of their jurisdiction. As such supervisory control came into exercise by the courts of the colonies, the power of review by appeal or error came to be regarded as separate and distinct from the power exercised pursuant to the established extraordinary legal remedies, so that it is now the latter power which is commonly and generally regarded as falling within the contemplation of the constitutional provision for superintending control, the same to be exercised as a discretionary authority, and under extraordinary circumstances when the remedy by appeal or error is inadequate."

In the case of State ex rel. v. Wurdeman, 254 Mo. 561, the court held:

> "Under the general superintending control over all inferior courts conferred by the Constitution upon the Supreme Court the writ of certiorari will issue from said court to review the proceedings in a habeas corpus case pending in the circuit court. At common law the issuance of the writ of certiorari was authorized before the proceedings instituted had culminated in a trial, order or judgment, and was based on the absence or an excess or a usurpation of jurisdiction on the part of the court from which the proceedings were removed; and under Missouri procedure the office of the writ is the same as at

> common law, and courts are authorized to adopt the principles and usages pertaining to it developed under the common law system, if in other respects consistent with existing statutes."

And at page 569 of said case the court said:

> "Where the writ is applied for, as it is here, by the chief law officer of the State, the Attorney-General, it goes as a matter of course (State ex rel. v. Dobson, 135 Mo. 1, 19) in the first instance, provided there is apparent in the application any one of the following requisites: 1st, absence, excess or abuse of jurisdiction (State ex rel. v. Broaddus, 238 Mo. 1. c. 204; State ex rel. v. Reynolds, 190 Mo. 578; State ex rel. Knox v. Selby, 133 Mo. App. 552); 2nd, absence of the right of appeal (State ex rel. v. Broaddus, 245 Mo. 1. c. 135; Ferguson v. Ferguson, 36 Mo. 197; Ex parte Jilz, 64 Mo. 205; Weir v. Marley, 99 Mo. 484, 488); and, 3rd, lack of any other adequate remedy * * *."

All three of these requirements are contained in your case. The court in that case held that the court which had supervision of inferior courts could quash the record of such courts where they had acted beyond their jurisdiction. The same rule would apply to a circuit court in its supervisory powers over a justice of the peace court in its jurisdiction. We find the rule stated at Sec. 617, page 859, Vol. 35 C. J., as follows:

> "The common-law writ of certiorari is strictly a revisory remedy intended for the correction of errors of law apparent on the face of the record, and which go to the jurisdiction of the inferior tribunal. It is not a substitute for an

> appeal, and will not reach mere error or irregularity not affecting jurisdiction. In many jurisdictions writs of certiorari, recordari, and review, issued to review proceedings before justices, are now regulated by statute. But, while neither the common-law nor the statutory writ of certiorari or its equivalent can as a rule take the place of an appeal or writ of error, unless the statute so provides, it nevertheless partakes of their nature, and will lie where an appeal or writ of error does not, or where the right thereto has been denied or lost otherwise than by a party's own default."

And at Sec. 622, page 862, Vol. 35 C. J., we find:

> "Certiorari or recordari is the proper remedy for a review of proceedings before a justice, where he was without jurisdiction or exceeded his jurisdiction, although in some jurisdictions certiorari will not lie in such case if there is an adequate remedy by appeal or otherwise. But certiorari cannot be used to try the question of the justice's right to the office."

And at Sec. 693, page 379, Vol. 16 C. J., the rule is stated as follows:

> "A writ of certiorari to review a summary conviction by a magistrate brings up for review all jurisdictional errors apparent on the face of the record."

CONCLUSION

From the foregoing cases and authorities, it is the opinion of this department that a Justice of the Peace in this State is not authorized to quash and dismiss an information filed before him, that by doing so he acts in excess of his jurisdiction, and in view of the fact that the State has no right to an appeal from such act and that it has no other statutory remedy which is adequate, it may by the Prosecuting Attorney, by a writ of certiorari issued from the Circuit Court having jurisdiction, get the relief it desires for such unauthorized act by having the record of such unauthorized act of the Justice quashed, which would place the case in the same status it was before the Justice of the Peace sustained the motion quashing the information.

Respectfully submitted

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APPROVED:

J. E. TAYLOR
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