CRIMINAL LAW: Nine questions regarding criminal procedure.

July 21, 1954

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Honorable Arkley W. Frieze
Member, Missouri Senate
Carthage, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading in part as follows:

> "I would like to have an opinion from your office upon the following matter.
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> "Several years ago a man who is presently confined in the State Penitentiary under a 99-year sentence was paroled. In June, 1952, this accused was arrested in Joplin on two charges of burglary and larceny, one charge of possession of burglary tools and one grand larceny charge. He was arraigned before the magistrate at Joplin, requested that he be granted a preliminary examination on each of the charges against him, the charges were set down for hearing on June 20, 1952, and the accused was committed to the jail of Jasper County in default of appearance bonds. Shortly thereafter, the Prosecuting Attorney brought to the attention of the State Board of Probation and Parole the charges against the accused. An order was issued by the State Board of Probation and Parole revoking the parole theretofore granted the accused and ordering his recommitment to the State Penitentiary. On June 19, 1952, the Sheriff and Prosecuting Attorney of Jasper County voluntarily surrendered the accused to an agent of the

Warden of the Missouri State Penitentiary, and on that date he was transported to Jefferson City, Missouri, and recommitted to the State Penitentiary, where he is presently held. On June 20, 1953, the docket entries of the Magistrate Court show that the Prosecuting Attorney's office advised the court that the accused was again in the State Penitentiary, and at the request of the Prosecuting Attorney, the charges were continued indefinitely. On June 23, 1952, alias warrants for the arrest of the accused were issued by the magistrate. Approximately the 1st of January, 1953, the accused wrote the magistrate and Prosecuting Attorney, asking that he be given preliminary hearings on these charges. No action was taken and a few weeks ago, motions were filed on behalf of the accused for his discharge because he was not brought to trial within three terms of court and for the failure of the state to prosecute him. The magistrate held, and I believe quite properly, that the statute requiring a defendant to be brought to trial within three terms of court only applied after indictment or information had been filed in the Circuit Court. Thereafter, the accused filed an application for a Writ of Habeas Corpus Ad Testificandum before the magistrate, which the magistrate dismissed upon the ground that he had no authority to issue such a writ that was directed outside of the county. Thereafter, application for Writ of Habeas Corpus Ad Testificandum was applied for in the Circuit Court of Jasper County, Missouri, seeking the return of the accused to the Magistrate Court here in Jasper County. The Circuit Court was of the opinion that he had no authority to issue the writ directing the appearance of the accused in another court, but indicated that in his judgment, mandamus would lie to compel the magistrate to hear and consider the application for habeas corpus. Thereafter, a Writ of Mandamus was issued by the Circuit Court, directed to the Judge of the Magistrate Court, ordering the magistrate to entertain the writ, which has been issued.

> "I forgot to mention that shortly after the denial of the request of the accused for a dismissal of the charges against him for failure to prosecute and because of the passage of more than three terms of court since the filing of the charges, and his incarceration, the magistrate indicated there might be some basis for urging a dismissal for want of prosecution. Within a few days thereafter, the Prosecuting Attorney, of his own volition, dismissed all of the charges and almost immediately refiled them and had the warrants for the arrest of the accused forwarded to the Sheriff of Cole County, Missouri.
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> "The Prosecuting Attorney's position, in short, regarding this matter, may be summarized as follows. He presently contends that the magistrate has no authority to issue a Writ of Habeas Corpus Ad Testificandum for the reason, first, that the defendant is not in court because he has not been arrested on the charges; secondly, that he is under no obligation to prosecute or press the charges against the accused until after his present term of confinement has been completed, in accordance with the law; that although he has the authority under the law to return the accused to Jasper County for trial, he is under no obligation so to do. If this be true, I certainly feel that several changes in our criminal laws are in order.
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> * * * * * * * * * *
>
> "Thanking you in advance for your past favors and your co-operation in this matter, I am,"

We will set out the questions which you have proposed in order.

Your first two questions are grouped for answering in the following manner:

> "1) Under the circumstances as I have outlined them, is the defendant entitled to have the charges dismissed against him for want of prosecution?

> "2) Would the passage of more than three regular terms of the Circuit Court of Jasper County, Missouri, under the circumstances, have the legal effect of entitling the accused to a dismissal of the charges so as to act as a bar to further charges for the same alleged offenses?"

From the facts disclosed in your letter of inquiry it is apparent that no information nor indictment is presently pending against the defendant. The statutes which you undoubtedly have in mind are Sections 545.890 and 545.900, RSMo. 1949, reading as follows:

> "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner, or shall be occasioned by the want of time to try the cause at such second term."

> "If any person indicted for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happened on his application, or be occasioned by the want of time to try such cause at such third term." (Emphasis ours.)

The underscored portions of the statutes quoted clearly indicate that they do not become applicable until an indictment or information has been filed. Therefore in the present case, since no such indictment or information has been filed, we believe that the mere passage of time cannot serve to entitle the defendant to dismissal of the complaint now pending against him.

For convenience we also group your questions three, five, seven and eight, as follows:

> "3) Would the magistrate court before whom the original charges were pending from June, 1952, to September, 1953, have the authority to issue a Writ of Habeas Corpus Ad Testificandum upon the application of the accused, directed to the Warden of the State Penitentiary, commanding him to produce the accused in court in order that the charges could be heard or otherwise disposed of?
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> "5) Does the Magistrate Court, in the opinion of your office, have authority, under the law, to issue a Writ of Habeas Corpus Ad Testificandum upon the application of the accused in order that he may be present and have the charges prosecuted against him?"
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> "7) Is the Prosecuting Attorney, under the conditions as I have heretofore outlined them, charged with the duty of either taking the necessary steps to have the accused returned to this county for trial or to dismiss the charges against him?"
>
> "8) Assuming the truth of the facts as I have heretofore set them forth, what remedies, if any, does the accused have, under the law, under the existing circumstances, either to compel the Prosecuting Attorney to try the charges or to have them dismissed for want of prosecution?"

Section 491.230, RSMo 1949, reads as follows:

> "Courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in any court of record, or public body authorized to examine witnesses, to issue a writ of habeas corpus for the purpose of bringing before such court or public body any person who may be detained in jail or prison, within the state, for any cause, to be examined as a witness in such suit or proceeding, on behalf of the applicant." (Emphasis theirs.)

Under the provisions of the new Constitution, magistrate courts are, of course, courts of record. Such courts therefore have the authority to issue writs of habeas corpus ad testificandum.

At this point it becomes necessary to determine whether or not at such stage of the proceedings is the cause "pending." In this regard your attention is directed to Rule 23.03, Supreme Court of Missouri, which reads as follows:

> "The magistrate before whom an accused is brought shall advise the accused of the charge against him and, if requested, shall read to him the complaint. The accused shall be allowed a reasonable time to advise with his counsel and shall be permitted to send for counsel if he so desires. The magistrate shall proceed, as soon as possible, to examine the complainant and other witnesses produced in support of the prosecution, on oath, and in the presence of the accused, concerning the offense charged. The accused may cross-examine witnesses against him and may introduce evidence in his own behalf. So far as is practicable, the preliminary examination shall be conducted in the same manner as the trial of criminal cases in circuit courts." (Emphasis ours.)

This rule is but in furtherance of the constitutional guaranty of the right to a speedy trial which appears as Article I, Section 18(a), Constitution of 1945, reading as follows:

> "That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county." (Emphasis ours.)

In commenting upon this constitutional provision, the Supreme Court of Missouri said in State v. Gallina, 178 S. W. 2d 433, l.c. 434:

> " * * * Prosecuting attorneys, witnesses, and citizens owe a constitutionally recognized duty to afford an accused a speedy trial. * * * "

Inasmuch as no information charging a felony may lawfully be filed against a defendant until after such defendant has been accorded a preliminary examination, it seems that the constitutional guaranty encompasses all official action leading up to the ultimate trial. We therefore are of the opinion that the cause is "pending" within the meaning of Section 491.230 RSMo 1949, at least from and after the time for such preliminary hearing has been fixed by the magistrate following the filing of the complaint.

The next question, of course, is whether a person incarcerated under a commitment following conviction on one charge may resort to the writ of habeas corpus ad testificandum for the purpose of having his own body produced in trial in order that he may testify as a witness in his own behalf. It is our opinion that he may do so and that such writ is the proper one to employ for such purpose. In this regard, see paragraph 94, page 151, Church on Habeas Corpus, Second Edition, and cases cited therein. We think that this rule is in accord with other constitutional guaranties relating to the right of confrontation of witnesses, for compulsory process for the attendance of witnesses on behalf of defendants, and for the right to know the nature and cause of the accusation in any criminal case.

The fourth question which you have proposed reads as follows:

> "4) Would the Magistrate Court lose jurisdiction over the accused by the long delay from June, 1952, to September, 1953, by reason of an indefinite continuance?"

We find no cases which hold that under the circumstances outlined in your letter of inquiry the magistrate court would lose jurisdiction over the accused during the period of his incarceration in the state penitentiary with respect to a pending complaint on file with such court. We therefore believe that such jurisdiction has not thereby been lost.

The sixth question in your letter of inquiry reads as follows:

> "6) When does the Statute of Limitations commence to run against the accused on the charges and under the circumstances as I have hereinbefore outlined them?"

Honorable Arkley W. Frieze

The general rule is that the statute of limitations with respect to criminal prosecution commences to run upon the completion of the crime charged. In your letter of inquiry you have not indicated the date upon which it is alleged that the defendant committed the two offenses of burglary and larceny--the possession of burglary tools, or the grand larceny. In the absence of such information we, of course, cannot state specifically when the statute of limitations would begin to run other than by reference to the general rule mentioned.

Your ninth question reads as follows:

> "9) Does the guarantee of the accused in criminal prosecution, as contained in Article One, Section 18A, i.e., to a speedy trial in case of criminal prosecution, include the right to have an indictment or information filed speedily?"

Article I, Section 18(a), is quoted supra. We believe that it is the intent by the inclusion of this constitutional guaranty to assure persons accused of crime of a speedy trial. It is, of course, not every delay or postponement of the trial of an accused that will infringe upon this guaranty, as such delays or postponements frequently result from the request of the accused or from causes beyond the control of the enforcement officials. However, we believe it to be the duty of the prosecuting attorney as a matter of common justice to proceed as promptly as possible with all preliminary proceedings looking toward the trial of an accused and to the actual trial itself. We cannot lay down a hard and fast rule saying that delay in itself constitutes an infringement of the constitutional guaranty, but feel that each case must be viewed in the facts attendant thereupon, and an undue delay would no doubt be considered by the court as such an infringement.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

John M. Dalton
Attorney General

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