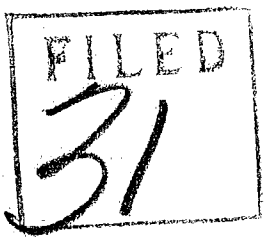
PRELIMINARY EXAMINATIONS:
MAGISTRATES:

The magistrate judge of Benton County is not precluded from holding a preliminary examination, based upon affidavits for state warrants filed in the magistrate court of Benton County, by the fact that previously identical affidavits for state warrants were filed in the magistrate court of Benton County, and that upon a preliminary examination held thereon, same defendant was ordered discharged.



January 13, 1955

Honorable Vernon Frieze
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

> "May I ask your opinion as to the Jurisdiction of Joe Berry, Magistrate, Benton County, Missouri, to hold three Preliminary Hearings against Frank Jessie Knox, under the following facts, to-wit:
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> "Approximately at 7 o'clock, P.M., October 9, 1954, Emill Salley and Eathel Logsdon were walking along Highway 35 from U.S. Highway 65 (Gateway Cafe) to Warsaw, Benton County, Missouri. An automobile operated along said highway in the same direction ran into and against said Emill Salley and Eathel Logsdon, instantly killing said Emill Salley and breaking the femur of Eathel Logsdon's left leg. The driver of said automobile did not stop the automobile but continued along said highway about 100 yards and turned the automobile around and drove back past the scene of collision but did not stop. There was a rumor that Frank Jessie Knox was the driver of said automobile. On the 10th day of October 1954, said Frank Jessie Knox surrendered to the sheriff of Benton County, Missouri, and on the same day an Affidavit for a State Warrant was filed in said Magistrate Court charging said Frank Jessie Knox with 'Manslaughter', and on the 15th day of

> October, 1954, two affidavits for State Warrants was filed in said Magistrate Court, one charging said Frank Jessie Knox with 'Leaving the Scene of an Accident' the other, 'Negligent Wounding with an Automobile'
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> "On October 26, 1954, Motion to disqualify Joe Berry, Magistrate, was filed in said court. E. R. Crouch, Magistrate of Hickory County, Missouri was called by Magistrate Joe Berry to hold said preliminary hearing of said charges, which hearing was had on December 11, 1954. The following entry was made in each case, to-wit:
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> "Defendant waives formal arraignment and pleads not guilty. Defendant ordered discharged'.
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> "On December 29, 1954, identical affidavits for State Warrants were filed in the Magistrate Court of Benton County, Missouri."

Your problem, stated briefly, is: One Knox was charged in the Magistrate Court of Benton County with the commission of a felony; he was given a preliminary examination, and at its conclusion was discharged; may exactly the same charges, based upon exactly the same evidence, be brought against him again and he be put through a second preliminary examination?

In the above, since you did not state the contrary, we have assumed that there is no newly discovered evidence. We have also assumed that the fact that the first preliminary examination was held before a magistrate from an adjoining county, and that the one next proposed will be held before the magistrate of Benton County, does not affect the issue as above stated. The law provides that prior to a preliminary examination, a motion may be filed to disqualify a magistrate, and that a magistrate from an adjoining county may be called by the first magistrate to conduct the preliminary examination, as was done in your case. We advert, then, to your original inquiry as to whether a second [illegible]inary examination can lawfully be held under the circum-[illegible]t forth above.

[illegible]gely, it would seem, Missouri law is silent upon the a discharge at a preliminary examination. Section

544.410, RSMo. 1949, merely states:

> "If upon the examination of the whole matter, it appear to the magistrate either that no offense has been committed by any person, or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner."

Supreme Court Rule 23.08 states, in part: "If upon examination of the whole matter the magistrate shall determine that no felony has been committed by any person, or that there is no probable cause for charging the accused therewith, he shall discharge such accused." We must, therefore, look abroad for guidance in this matter, and in that regard we direct attention to Section 347, p. 507, Vol. 22 C. J. S., which reads:

> "After the preliminary examination has begun, accused has a right to require that it shall be continued to a final determination, and that he shall be either discharged or held. The statutes are mandatory in this respect, except that, under some statutes, the examining magistrate is without authority to discharge one charged with a capital offense. It is the duty of the magistrate before whom a preliminary examination is being held, after an examination of the whole matter, to come to a determination as to whether or not an offense has been committed, and if he is of opinion that there has been, then as to whether there is probable cause to believe accused guilty thereof. If, on such examination, it appears that no offense has been committed, or that there is not probable cause for believing the prisoner guilty, it is the duty of the magistrate to discharge him, as where it affirmatively appears from the evidence, that if a trial were duly had the trial judge would be compelled to direct a verdict of acquittal as a matter of law.
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> "Unless otherwise provided by statute, the discharge of accused by the examining magistrate on the preliminary hearing neither annuls the indictment nor blots out the offense, and is no bar to another examination

> or to a subsequent prosecution for the same offense, and the fact that the examining magistrate dismisses certain counts of the complaint does not preclude the trial court from trying him on such counts. A fortiori is this true where defendant is discharged on the first arrest without any evidence being produced or offered. By statute, however, it may be provided that, after discharge on preliminary examination, no further prosecution of the offense shall be had."

It will be noted that the above states that discharge at a preliminary examination "is no bar to another examination," unless there is a statute which so states. We here note that there is no statute in Missouri which prohibits a second preliminary examination after discharge from a prior preliminary examination, provided that following the first p eliminary examination new charges have been filed. Neither do we feel that such second preliminary examination would be prohibited on the ground that it constitutes "double jeopardy." In order to so hold, we would have to first find that a preliminary examination constituted "jeopardy." We do not believe that it does. On this point we direct attention to Section 251, p. 387, Vol. 22, C. J. S., which states in part:

> "Jeopardy does not attach where the question submitted for the consideration of the court or jury is one which is merely preliminary or collateral to the trial of the question of the guilt or the innocence of accused. * * "

In the case of State v. McCombs, 188 P. (2d) 922, at l. c. 924, the Supreme Court of Kansas stated:

> "That appellant was within its rights in seeking another preliminary examination before a judge of the district court cannot be denied. Under our statute a judge of the district court is a magistrate authorized to conduct such an examination, G. S. 1935, 62-201, 62-601. We have expressly so held. Hancock v. Nye, 118 Kan. 384, 388, 234 P. 945. Moreover, it is settled law in this jurisdiction that the discharge on a preliminary hearing of a person charged with a felony is no bar to a subsequent preliminary hearing on another complaint charging the

same offense. State v. Townsend, 150 Kan. 496, 95 P. 2d 328; State v. Badders, 141 Kan. 683, 685, 42 P. 2d 943; State v. Curtis, 108 Kan. 537, 196 P. 445; State v. Jones, 16 Kan. 608."

In the case of Ridenour v. State, 231 P. 2d, 395, at l. c. 399, the Criminal Court of Appeals of Oklahoma stated:

"It is, however, evident from the record that the defendant herein was accorded a preliminary examination before a committing magistrate on a complaint duly filed by the county attorney with such committing magistrate, who was not by the defendant claimed to be disqualified to act. A similar complaint had been filed in the County Court covering the identical charge, and that court attempted to transfer the case so filed before him to the magistrate who actually held the preliminary examination. This appears to be of no consequence, in that the county attorney, independent of the action of the county judge acting as a committing magistrate, had the right and authority to file a complaint covering the charge with any other examining magistrate of his county whom he might choose. And for such reason it is not necessary to determine whether the county court of Muskogee County did or did not have authority to transfer the case for preliminary hearing to the City Court. One examining magistrate is not found by the action of another examining magistrate. In fact, one examining magistrate may dismiss a complaint on hearing or the county attorney may dismiss the complaint, but such action does not prevent the county attorney from refiling the complaint before another examining magistrate. This court has further held that until an accused is in jeopardy, a criminal action filed against him can be dismissed and refiled at the discretion of the county attorney, subject to the law governing limitations of time within which prosecution may be instituted. Cornell v. State, Okl. Cr. App., 217 P. 2d 528; Bayne v. State, 48 Okl. Cr. 195, 290 P. 354; Ex

Honorable Vernon Frieze

> parte Oxley, 38 Nev. 379, 149 P. 992; 16 C. J.S., Constitutional Law, Sec. 131, page 334; Hembree v. Howell District Judge, Okl. Cr. App., 214 P. 2d 458."

In the case of State v. Townsend, 95 P. 2d 328, the Supreme Court of Kansas stated:

> "Appellant contends that having been discharged on a preliminary hearing such discharge was a bar to a subsequent preliminary hearing and trial. As the settled law of this state is otherwise, the point is without merit. State v. Jones, 16 Kan. 608; State v. Curtis, 108 Kan. 537, 196 P. 445; State v. Badders, 141 Kan. 683, 42 P. 2d 943.
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> "In State v. Jones, supra, it was held that a preliminary examination does not put the accused in jeopardy within the meaning of section 10 of the bill of rights."

Numerous other cases of the same purport could be cited, but we do not feel that it is necessary to do so, since the above authority clearly establishes the fact that a preliminary examination does not constitute "jeopardy," and that discharge at a preliminary examination, in the absence of a statute so holding, does not preclude a second preliminary examination on the same charge, which is the question you propounded to us.

CONCLUSION

It is the opinion of this department that the magistrate judge of Benton County is not precluded from holding a preliminary examination, based upon affidavits for state warrants filed in the magistrate court of Benton county, by the fact that previously identical affidavits for state warrants were filed in the magistrate court of Benton county, and that upon a preliminary examination held thereon, same defendant was ordered discharged.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

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