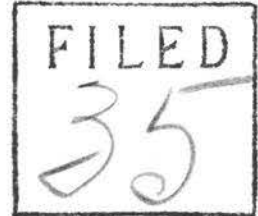


PROSECUTING ATTORNEYS: In interest of justice of Prosecuting Attorneys may proceed to prosecute by way of information, even when indictment be pending.

February 10, 1937.

2-11



Honorable Joseph L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

We acknowledge your request for an opinion dated January 16th, which reads as follows:

"During the August Term of Circuit Court for Clark County the Grand Jury returned an indictment of 2nd degree murder against Guy Greger, who was at that time a constable of Lincoln Township, he having shot and killed a man in a road house in another township while under the influence of liquor. At the December term of said Court my predecessor, who was and is a good friend of the defendant, refused to contest an application for change of venue filed by defendant against the inhabitants of Clark Co., and so refused after the judge in open Court stated that the application was not good. Also against the wishes of the father and mother and brothers of the deceased and against the wishes of their private attorney he recommended that the case be sent to Scotland County where the father of the prosecutor there is defending the defendant. My Predecessor refused to recognize their private attorney in Court and he would not consider my desires as his successor and the one to try the case, in the matter at all. It is considered by everyone who knows about the case

that the state is at a great disadvantage in Scotland County.

"My question is this: Can I file an information before a justice of peace in this county (Clark) and have him re-arrested here and then dismiss the indictment now pending on a change of venue against him in Scotland County upon the same offense. Then after a preliminary hearing is held and is sent to Circuit Court, I can have the say as to where the case shall go upon a change of venue. In other words, can the state have an indictment and an information pending against the defendant at the same time after a change of venue has been granted to another county upon the indictment as stated above, and then the prosecutor dismiss the indictment at the next meeting of the Circuit Court in Scotland County and proceed upon his information back in the original jurisdiction--Clark County?"

Section 3502 R. S. Mo. 1929, provides how felonies are to be prosecuted in Missouri and reads in part as follows:

"All felonies shall be prosecuted by indictment or information,* * *. But that mode of procedure which shall be first instituted by the filing of the indictment or information for any offense shall be pursued to the exclusion of the other, so long as the same shall be pending and undetermined; and the court in which the prosecution shall be first commenced by the filing therein of the indictment or information, and the issuing of a warrant thereon, shall retain jurisdiction and control of the cause to the exclusion of any other court so long as the same shall be pending and undisposed of:* * *."

Section 3550, R. S. Mo. 1929, provides:

"If there be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment, and shall be quashed."

It has been held that a second indictment, after a change of venue on the first, can be returned by the Grand Jury of the county where the offense was committed.

In State v. Goddard, 62 S. W. 697; 162 Mo. 198, l. c. 221, the Court said:

"After the reversal of this cause on the former appeal, a change of venue was awarded to Cass county, and while the cause was pending in the circuit court of that county, a new indictment was preferred by the grand jury of Jackson county in the criminal court of Jackson county, and thereupon a nolle prosequi was entered by the prosecuting attorney of Cass county, and the defendant discharged from his recognizance in the circuit court of said county. It is insisted by defendant that the dismissal of the case pending the first indictment in Cass county was and is a complete bar to any other or further prosecution of defendant for the crime therein charged. This point is much belabored, but is clearly untenable, either upon principles of the common law or any provision of our Constitution or statutes."

It has been held that a second indictment suspends the first, and in State v. Vincent, 4 S. W. 436; 91 Mo. 662, l. c. 665, the Court said:

"It may, however, be stated that the statute recognizes the right of the state to file a new indictment for the same offence, and declares that the one first found shall be deemed to be suspended by the second, and shall be quashed. R. S., sec. 1808. It is a matter of no consequence, in proceedings upon the second indictment, whether the first be in fact quashed or not."

Section 11316, R. S. Mo. 1929, provides for the duties of Prosecuting Attorneys in criminal cases, and reads in part:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, * * * * and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend as the case may be, * * * *."

The statutes make it a misdemeanor for the prosecuting attorney to corruptly dismiss an indictment, but we find no statutory prohibition against dismissing an indictment absent corruption. See Section 3851, R. S. Mo. 1929.

In the case of *Ex parte Donaldson*, 44 Mo. 149, 1. c. 154, the Court held that to dismiss a case it is sufficient that the prosecuting attorney have leave of the Court before proceeding into trial, and the Court said:

"Then, before any further steps were taken by the court, the circuit attorney entered a nolle prosequi. This he had a right to do, with assent of the court, at any time before the prisoner was

put upon his trial. The prisoner never had any judgment of discharge entered in his favor; he was never put in jeopardy, and we can see nothing to prevent his being further held amenable."

In the case of State v. Taylor, 171 Mo. 465, l. c. 473, the court said:

"By section 2522, Revised Statutes 1899, it is provided that a new indictment may be found against the same party for the same offense against whom there is an indictment pending at the time, and, as indictment and information are now concurrent remedies (State v. Kyle, 166 Mo. 287), the same rule applies to them. But in the case at bar the information was dismissed before the indictment was presented by the grand jury, and as its dismissal was no bar to the finding of an indictment there is no merit in the plea in bar."

CONCLUSION.

According to Sections 3502 and 3550, supra, felonies in Missouri are prosecuted either by indictment or information, but the Legislature has expressly provided that the mode of procedure first instituted shall be pursued so long as the cause be pending and undetermined.

According to Section 11316, supra, the prosecuting attorney is duly bound to prosecute criminal cases, and it is his duty to follow and prosecute criminal cases where changes of venue have been taken.

This department is of the opinion that Legislature, in giving the prosecuting attorney the power to prosecute criminal cases, intended that the prosecuting attorney do what is necessary and proper to bring a criminal to trial, and that the prosecuting attorney

conduct the progress of the case in a fair and impartial way. To that end we interpret the statutes, and where a pending and undetermined criminal indictment should be dismissed in the interest of honest government, fair play and justice to both the State and defendant, then under his statutory power the prosecuting attorney should so act, and dismiss same, and in such a case where in the interest of honest government, fair play and justice, the prosecuting attorney, by information starts the prosecution all over again, he is perfectly within the law.

In such a case we are of the opinion that filing a second information suspends the necessity for further proceeding to try the cause under the first indictment, even in the jurisdiction of the changed venue, and the prosecuting attorney may dismiss the first indictment, on leave of the court, in the exercise of his duties to prosecute criminal causes.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

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