CRIMINAL LAW: Magistrate judge must hear and determine careless
PROSECUTING and reckless driving cases, a misdemeanor brought by
ATTORNEY: information filed by the prosecuting attorney even though the evidence tends to show the defendant might have been charged with the felony of driving while intoxicated.

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FILED
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Honorable Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

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

"This office respectfully requests an opinion concerning the discretion and power of the Magistrate Judge under Section 543.280 which section is entitled:

"'Offense not cognizable before magistrate--procedure.--'

"and which reads as follows:

"'If, in the progress of any trial before a Magistrate, under the provisions of this chapter, it shall appear that the accused ought to be put upon his trial for an offense not cognizable before a magistrate, the magistrate shall immediately stop all further proceedings before him, and proceed as in other criminal cases exclusively cognizable before the Circuit Court, or other court in the county having jurisdiction thereof.'

"The facts pertaining to the controversy are as follows: A complaining affidavit for information was filed by a State Patrolman with the Assistant Prosecuting Attorney of Ray County, Missouri. The charge set out in the affidavit was as follows:

"'Defendant did then and there wilfully and unlawfully drive and operate a motor vehicle, to-wit: a 1941 Chevrolet Pick-Up, in and upon the public Highways of Ray County, Missouri, in a careless, reckless and

imprudent manner, in that he did weave the said motor vehicle from one side to another, against the peace and dignity of the State.'

"This affidavit was a complaint of careless and reckless driving.

"The information filed by the Assistant Prosecuting Attorney read as follows:

"'Defendant did then and there wilfully and unlawfully drive and operate a certain motor vehicle to-wit: a 1941 Chevrolet Pick-up in and on the public highways of Ray County, Missouri, in a careless, reckless and imprudent manner, and did fail to exercise the highest degree of care of the said motor vehicle, in that he did weave said motor vehicle from one side of the highway to the other, so as to endanger the life, limb and property of others, contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State.'

"This information charged the defendant with careless and reckless driving.

"At the hearing before the Magistrate Court of Ray County, Missouri, the patrolman, who was also the arresting officer and complaining witness testified that the defendant had been drinking and in his opinion, the defendant was drunk. Thereupon, the Magistrate Judge, stopped the proceedings and informed the Assistant Prosecuting Attorney, who was representing the State, that the Magistrate Court of Ray County, Missouri had no jurisdiction over this case, because the Assistant Prosecuting Attorney should have filed an information against the defendant, charging him with driving while intoxicated, which is a felony.

"It is the position of the Prosecuting Attorney's Office of Ray County, Missouri, that the Prosecuting Attorney does have the discretionary power to determine whether he

> should file an information charging a particular defendant with a misdemeanor or felony. It is also the position of the Prosecuting Attorney's Office of Ray County, Missouri, that under Section 543.080, the magistrate is under a statutory duty to hear cases in which defendants are charged with misdemeanors, where such cases are filed in Magistrate Court."

Section 543.280, RSMo 1949, has never been construed by our appellate courts, but it is our opinion that the purpose of this section is to prevent a defendant from escaping trial for a felony when he has been charged and is being tried for a misdemeanor, and was not intended to give a magistrate judge the power to determine with what offense a defendant should be charged. This power, or discretion, is one vested in the prosecuting attorney as will be shown later in this opinion. This section is from the Revised Statutes of Missouri, 1835, and was in relation to the office of justice of the peace, who was not required to be a lawyer. It could hardly be said that such a discretion as to legal questions would have been delegated to a layman by the Legislature.

It is also our opinion that this section only applies to cases or offenses which have different degrees, of which the misdemeanor is one. In support of this conclusion, we cite a similar statute applicable to trials for misdemeanors in circuit courts. Section 556.210, RSMo 1949, provides:

> "If, upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterward prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

The court, in construing this section, said in the case of State v. Martin, 76 Mo. 337, l.c. 340:

> "It is claimed by counsel that the plea in bar was effectual as to both offenses under section 1653, Revised Statutes, which provides, 'that if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence, amount in law to a felony, such person by reason thereof shall not be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable afterward to be prosecuted for felony on the same facts, unless the court shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for a felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.'
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> "This section has no reference to an independent offense which may be disclosed by the evidence relating to the misdemeanor charged, and for which a party is on trial, but has application to that class of offenses, of which there are different degrees or grades, and of which grades or degrees the misdemeanor charged is one. The present case affords an illustration of its meaning. There are two grades of larceny, one grand and the other petit larceny, one a felony and the other a misdemeanor. Defendant was tried by the justice on a charge of petit larceny, the evidence adduced in support of the charge showed that the larceny being committed at the same time a burglary was committed, was grand larceny, and, therefore, a felony. The justice might, under the statute, have discharged the jury and bound the defendant over to answer an indictment to be preferred for the higher offense. This he did not do, but tried and sentenced him for the misdemeanor, and thereby exempted him from further prosecution for the higher grade of larceny charged by the indictment. * * * "

The question, or rather the offenses involved in your request, namely, careless and reckless driving, a misdemeanor, and driving while intoxicated, a felony, are not degrees of the same offense, but each is a separate statutory offense and not covered by these statutes.

It is the duty and power of the office of prosecuting attorney to determine when, how and against whom criminal proceedings shall be initiated. As a matter of course, this discretion must be exercised in good faith. In the case of State v. Wallach, 182 S.W. (2d) 313, l.c. 318, the Supreme Court of Missouri clearly defined the powers and duties of the prosecuting attorney. They said:

> "'The duty of a prosecuting officer necessarily requires that he investigate, i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other; that his duties further require that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate. Such duties of necessity involve a good faith exercise of the sound discretion of the prosecuting attorney. "Discretion" in that sense means power or right conferred by law upon the prosecuting officer of acting officially in such circumstances, and upon each separate case, according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person. Such discretion must be exercised in accordance with established principles of law, fairly, wisely, and with skill and reason. It includes the right to choose a course of action or non-action, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. Discretion denotes the absence of a hard and fast rule or a mandatory procedure regardless of varying circumstances. That discretion may, in good faith (but not arbitrarily), be exercised with respect to when,

> how and against whom to initiate criminal proceedings. Watts v. Gerking, 111 Or. 641, 228 P. 135, 34 A.L.R. 1489. Such discretion so vested by law in the prosecuting officer is both official and personal. Engle v. Chipman, 51 Mich. 524, 16 N.W. 886. Such discretion exercised in good faith authorizes the prosecuting officer to personally determine, in conference and in collaboration with peace officers and liquor enforcement officers, that a certain plan of action or a certain policy of enforcement will be best productive of law enforcement, and will best result in general law observance. * * * * * * * "

Under Section 543.080, RSMo 1949, it is the duty of the magistrate to hear cases brought before him on information filed by the prosecuting attorney. This duty, as imposed by this section, is mandatory in its direction. Section 543.080 is as follows:

> "When the defendant shall be brought before the magistrate, or shall be held in custody, charged by information with any misdemeanor, it shall be the duty of the magistrate, unless a continuance be granted, forthwith to hear the case as herein provided."

CONCLUSION

It is the opinion of this department that the magistrate judge has no power or authority to refuse to hear and decide a case in which a defendant is charged by an information filed by the prosecuting attorney with the misdemeanor of careless and reckless driving, even though the evidence tends to show the defendant might be charged with the felony of driving while intoxicated.

Respectfully submitted,

APPROVED:

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