

CRIMINAL LAW: Justice Courts have no jurisdiction to sentence defendants on graded felonies, but Prosecuting Attorney may file a lesser charge on his own information and belief.

August 17, 1938

Honorable G. Logan Marr
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Versailles, Missouri

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Dear Sir:

This is to acknowledge receipt of your request for an opinion under date of August 13, 1938, which is as follows:

"The justice of the peace has been making affidavits charging defendants with felonies in driving cars while intoxicated or writing bogus check with no money in the bank. This enables a warrant to be issued, and served, and the party held in custody until the case can be heard on a preliminary hearing. At those hearings in which I am generally present, the defendant waives the same and desires to plead guilty and either pay a fine or go to jail. It has been my practice to file a misdemeanor information cutting the original felony charge down to a misdemeanor by just ignoring the affidavit, and fixing a punishment of either a fine or jail sentence. In this way the matter is disposed of and the docket of the circuit clerk is not cluttered up. Many of these parties are non-resident traveling salesmen or tourists who must be on their way from Morgan County. For instance, if a party is charged with driving a car while intoxicated, and the preliminary hearing is waived and the party desires to plead guilty, I file an information, charging the party with driving a car while in-

intoxicated, in the justice court and the punishment is generally \$25.00 fine and the costs and six months in jail, with the understanding that if the fine and costs are paid, the justice will grant a stay of execution for six months, provided they enter into a personal recognizance for six months to guarantee their appearance. Many of them are non-residents and we never see them again. These crimes are graduated offenses in which the punishment might be anything from a fine up to a prison sentence.

"The circuit court meets here only three times a year and it is a very convenient way to dispose of much criminal business. When I file an information charging a defendant with driving while intoxicated, in a justice court, and they plead guilty and are punished, their driver's license are revoked. For that reason the question has been raised whether as prosecuting attorney, I can ignore the affidavit, and on my own information and belief file an information charging the defendant with a misdemeanor so the justice of the peace can handle the case, and thereby reducing the charge from a felony to a misdemeanor in punishment. I would like to have an opinion on this procedure."

Section 3504, R. S. Mo. 1929, reads as follows:

" * * * the verification by the prosecuting attorney may be upon information and belief. * * *"

Section 3446, R. S. Mo. 1929, reads as follows:

"All proceedings upon the trial of misdemeanors before justices of the peace shall be governed by the practice in criminal cases in courts of record, so far as the same may be applicable, and in respect to which no provision is made by statute."

Section 3415, R. S. Mo. 1929, reads as follows:

" * * * and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

Under the above sections, the prosecuting attorney can file an information in the justice court upon his own information and belief.

In the case of State v. Ransberger, 106 Mo. 135, l. c. 145, the court in holding that a prosecuting attorney may file an information in the justice court upon his own information and belief, said:

"If the prosecuting attorney must have actual knowledge of the commission of an offense before he can file an information, he would necessarily be a competent witness, and we would thus inaugurate the practice of the same person preferring the charge as an officer and then going on the witness stand to prove it. This is another practice that would and could not be tolerated for a moment. Experience proves that the less actual knowledge of an offense the prosecuting attorney has, the more he is disposed to be impartial, and stand indifferent between the accused and the state, and the more he personally knows about the crime, the more he is disposed to inject into the prosecution his personality, his feelings and his spite."

Also, in the same case, the court said:

"It is not imperative on the prosecuting attorney to file an information on the mere filing of a complaint with him by one having knowledge that an offense has been committed, but in such case, as in others, he should have knowledge, that is, be reasonably convinced, not only that an offense has been committed, but that the accused committed it."

In the case of State v. Crider, 184 Mo. App. 77, 1. c. 80, the court said:

"Appellant also challenges the information because, as he says, it is 'not based upon the knowledge, information or belief of the prosecuting attorney as contemplated by law.' But the statute does not require that the source of the prosecuting attorney's information be made to appear. (Sec. 4968, Rev. Stat. 1909). The information is not faulty on this ground. (See State v. Ransberger, 106 Mo. 146, 17 S. W. 290.)"

In the case of State v. Rotter, 193 Mo. App. 110, 1. c. 113, the court said:

"It is argued the court should have quashed the information on defendant's motion, for the reason it failed to disclose that it was founded upon the affidavit of defendant's wife, the prosecuting witness, and is not verified by her; but obviously this argument is without merit, for it appears the prosecuting attorney verified the information under his oath in accordance with the statute. It is true Lillian Rotter, defendant's wife, lodged an affidavit with the prosecuting attorney, charging defendant with the offense of wife abandonment, and it is true, too, that this affidavit is not mentioned in the information. But be that as it may,

the information is in all respects sufficient, in that its verification conforms to the statute.

"The statute (section 5057, R. S. 1909) provides:

"'All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief.'

* * * * *

"The only purpose of the statutes in requiring the information to be supported by affidavit of some persons other than the prosecuting attorney is to afford a guaranty of the good faith of the prosecution. The affidavit, when filed, it is said, is not parcel of the information, but is separate and apart from it, or in addition thereto. (See State v. Brown, 181 Mo. 192, 79 S. W. 1111.) Manifestly, after the affidavit of the prosecuting witness was lodged with the prosecuting attorney as a guaranty of good faith of the prosecution, it was competent for him to disregard it further and proceed to inform against defendant through the office of an information signed and verified by himself as prosecuting attorney according to his information and belief."

Section 5057, R. S. Mo. 1909, mentioned in the above case, is now Section 3504, R. S. Mo. 1929.

Section 4471, R. S. Mo. 1929, reads as follows:

"The term 'felony,' when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary, and no other."

Justices of the peace have no jurisdiction to impose sentences on an information filed in the justice court upon a graded felony, in view of Section 4471, supra.

In the case of State v. Brown, 267 S. W. 864, the court in holding graded felonies were felonies upon which the county jail sentence would be imposed, said:

"Defendant was convicted in the circuit court of the city of St. Louis of the crime of carrying concealed weapons, and was sentenced upon the verdict of the jury to imprisonment in the workhouse of said city for six months. His appeal was properly lodged here, for the reason that the crime for which he was convicted, as defined by section 3275, R. S. 1919, is punishable by imprisonment in the penitentiary, and is therefore a felony. Section 3712, R. S. 1919."

Appeals from sentences imposed in graded felonies, under the case of State v. Brown, on account of their being considered as felonies only, must be appealed to the supreme court of the state from the circuit court, and not to the court of appeals. Justice courts have jurisdiction in imposing sentences upon misdemeanors only, and not graded felonies. The prosecuting attorney can only file an information on a misdemeanor in the justice court, and not upon graded felonies.

In your request you state that you have filed informations in the justice court charging the defendants with driving while intoxicated, and when they plead guilty they are punished by having their driver's license revoked in addition to the payment of a fine and jail sentence. Under

the above authorities, it would be impossible to file an information in the justice court on the charge of driving while intoxicated or drawing a check upon a bank in which the defendant did not have an account, but, as stated in your request, it would be proper to file an information on a misdemeanor only, such as careless driving or drawing a check with intent to defraud.

Section 18, Session Laws 1937, page 377, reads as follows:

"The commissioner shall forthwith revoke the license of any operator, registered operator or chauffeur upon receiving a record of such operator's, registered operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

"1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;

"2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;

"3. Any felony in the commission of which a motor vehicle is used."

Section 7783, R. S. Mo. 1929, paragraph (g), reads as follows:

"Driving in intoxicated condition:
No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

Section 7786, R. S. Mo. 1929, paragraph (c), reads as follows:

"Any person who violates paragraph (a) of section 7781, paragraph (a) of section 7782 or paragraph (f) or (g) of section 7783 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the peni-

tentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

Under these sections in reference to driving while intoxicated, the charge is specifically classified as a felony, and a justice of the peace would have no jurisdiction to sentence or fine a defendant on such a charge.

CONCLUSION

In view of the above authorities, it is the opinion of this department that an information on a misdemeanor can be filed in the justice court by the prosecuting attorney on his own information and belief. Under the ruling in the case of State v. Rodder, supra, he, in his discretion, may ignore the complaint or affidavit filed on a felony charge in the justice court and on his own information and belief file a misdemeanor information on a charge of a lesser degree which is included in the felony charge. It is also the opinion of this department that an information on a misdemeanor must be filed before the justice of the peace would have jurisdiction to assess a punishment on a lesser charge included in the affidavit or complaint previously filed on the felony charge. Under no circumstances can a justice of the peace assess punishment on a plea of guilty to the complaint or illegal information filed on a graded felony. The prosecuting attorney can ignore the affidavit or he may rely upon the affidavit for his own information and belief in filing the information on the misdemeanor in the justice court.

Honorable G. Logan Marr

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It is also the opinion of this department that it is mandatory to revoke a driver's license for the commission of acts set out in Section 18, Sessions Laws 1937, but under Section 17 a driver's license may be revoked by the commissioner of motor vehicles for some other violations upon recommendation of the justice of the peace.

Respectfully submitted,

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APPROVED By:

J.E. TAYLOR
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