CRIMINAL PROCEDURE: Defendant in preliminary examination is entitled to have process for witnesses outside county where examination is held.

May 14, 1942.

5-25

Honorable G. Logan Marr
Prosecuting Attorney
Versailles, Missouri

FILE

Dear Sir:

Your request for an opinion addressed to the Attorney-General has been referred to me. This request is as follows:

> "A local justice of the peace has pending before him a felonious complaint, and the date for the preliminary examination is set. The witnesses has requested a subpoena for witnesses in order to make out his defense on the preliminary examination. Some of these witnesses live in Morgan County, some in Miller county, adjoining county, and some in distance counties within the State of Missouri.
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> "The preliminary examination is conducted under sections 3857-3890, R. S. 1939, and nothing is said about process for witnesses. It does say that a warrant for a defendant in another county must be certified, see section 3860 R. S. 1939. Is the subpoena of justice of the peace good outside the county, not being from a court of record?
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> "Suppose the justice issues a subpoena on a witness in Cole county and in Jackson County, counties not adjoining Morgan County. Would they be valid subpoenas? Suppose the sheriff or other officer in Cole county or Jackson county would not serve these subpoenas, what recourse is possible?

> "Suppose the witnesses would not come from such long distances, and the justice court not being a court of record, how could the subpoena be enforced against the witness refusing to come? Ordinarily, an attachment for witnesses who fail to appear is issued by a court of record.
>
> "Would it be legal and would the sheriff of Morgan County, get his mileage for serving a subpoena on a witness in Cole County and in Jackson County?
>
> "What are the bounds of discretion in the costs that might be run up in a preliminary examination by a defendant who would and has attempted to run up immense costs, but subpoenaing witnesses from distance points?"

The principal question embodied in your request is, whether or not a subpoena on the part of an accused, issued by a justice of the peace in a preliminary examination on a felony charge, has any force and effect outside the county in which the justice of the peace is commissioned.

First, I wish to cite Article II, Section 22, of the Constitution of Missouri, which provides as follows:

> "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."

There are certain provisions in the Constitution that are self-enforcing. We will cite you to the following case, State v. Wymore, 119 S. W. (2d) 941, in which the court said:

"The opinion then directed attention to Sec. 4814, R. S. 1909, Mo. St. Ann. sec. 4362, p. 3022, enacted after the adoption of the above constitutional amendment. Under said section the acceptance of a free pass is a misdemeanor and conviction forfeited the the office. In other words, the legislature presumed to amend the constitutional amendment by requiring a conviction before forfeiture. The opinion then eulogized the statutes providing for forfeiture on conviction as being the legislative policy of the state. In doing so it ignored the fact that the people did not approve of such policy, and for that reason adopted the self-enforcing amendment to the constitution prohibiting officeholders from accepting free passes. The rule is stated in State ex inf. Norman v. Ellis, 325 Mo. 154, loc. cit. 160, 28 S. W. 2d. 363, loc. cit. 365, as follows:

"'"It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *

"'"Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed." * * *

"'"A constitutional provision designed to remove an existing mischief should never be construed as dependent for

> its efficacy and operation on the legislative will."' 12 C. J. pp. 729, 730."

We are of the opinion that Article II, Section 22, supra, is one of the "self-enforcing" sections mentioned in the above opinion; further, that it was to go into immediate effect and that ancillary legislation was not necessary.

If this is a self-enforcing provision of the Constitution, then it becomes necessary to determine whether or not a preliminary examination is a "criminal prosecution" within the meaning of Article II, Section 22 of the Constitution of Missouri. In support of our contention that it is a part of a "criminal prosecution" or "criminal proceeding," we will call your attention to Ex Parte Bedard, 106 Mo. 616, l. c. 623. In this case the court said:

> ""'* * * * If the proceedings had before the committing magistrate are not a "prosecution" in the legal sense, where would be the authority for detaining the accused in legal custody, or what would be the legal value of the bond furnished by the accused for his appearance before the criminal court? It is elementary in our jurisprudence that such proceedings are the basis and primary inception of the prosecution, and that the order of the committing magistrate accepting the bond of the accused is a judicial act which is the basis of the judgment of the criminal court in case of a forfeiture of the bond.'
>
> "That the preliminary examination before the committing magistrate is a criminal prosecution is conceded, without argument, by this court, in the opinion of the majority of the court, and the dissenting opinion of Judge Ryland in the case of State v. McO'Blenis, 24 Mo. 402. * * * *"

As can be seen by reading the above, a preliminary examination is held to be a criminal prosecution. In such hearing, the defendant or accused is not placed in jeopary,

it is true. However, he is detained; he is forced to sign a recognizance, and his failure to file a satisfactory bond will deprive him of his liberty as he will be placed and held in custody until his preliminary examination. In case he does post a good and sufficient bond, but fails to appear at his preliminary examination, such bond can be forfeited and the sureties forced to pay the amount on the face of the bond. Can we say that these acts are acts which might come under "civil procedure?" We think not. It is our opinion that when a warrant for arrest is issued by a justice of the peace, that such act is a part of a criminal prosecution and that the preliminary examination is another step in a proceeding which eventually places a defendant in jeopardy in a court of record.

The preliminary hearing was conceived for the benefit of the accused. In State v. Langford, 240 S. W. 167, l. c. 168, Pars. 4-6, the court said:

> "This court has recently, in State v. Flannery, 263 Mo. 579, 173 S. W. loc. cit. 1055, in harmony with earlier cases, defined the object and purpose of a preliminary examination as intended to obviate the possibility of groundless or vindictive prosecutions which might otherwise occur where informations are authorized to be filed and the deliberations of a grand jury dispensed with; * * * * * * * * * * *"

If such is true the accused would not gain very much, if the law was that he could not secure his witnesses in a preliminary examination. In this day and age, many crimes happen on the highways of the State, and many witnesses who are material to both an accused and the State, live in counties other than that where the crime is committed. If the defendant were not permitted to secure these witnesses, if needed, the preliminary examination would avail him nothing, in spite of the provisions of Article II, Section 22, of the Constitution.

The process of a justice of the peace in felony cases is recognized outside of his own county in the case of a warrant for arrest. Section 3860, R. S. Mo. 1939, provides as follows:

> "If the person against whom any warrant granted by a judge of the county court, justice of the peace, mayor or chief officer of a city or town shall be issued, escape or be in any other county, it shall be the duty of any magistrate authorized to issue a warrant in the county in which such offender may be or is suspected to be, on proof of the handwriting of the magistrate issuing the warrant to indorse his name thereon, and thereupon the offender may be arrested in such county by the officer bringing such warrant, or any officer within the county within which the warrant is so indorsed; and any such warrant may be executed in any county within this state by the officer to whom it is directed, if the clerk of the county court of the county in which the warrant was issued shall indorse upon or annex to the warrant his certificate, with the seal of said court affixed thereto, that the officer who issued such warrant was at the time an acting officer fully authorized to issue the same, and that his signature thereto is genuine."

If a warrant for arrest is to be recognized outside of the justice of the peace county, we feel that the subpoenas for the defendant's witnesses in preliminary examinations should also be recognized, especially where there is a constitutional provision such as we have here which is self-enforcing.

Although there are no specific statutes which deal with this matter, there are several statutes which deal with the power of a justice of the peace to issue subpoenas in civil cases. However, in this question, there is involved the question of criminal prosecutions. The legislators, although never dealing with it specifically, have inferred that the defendant should be given the right to secure his witnesses. Section 4007, R. S. Mo. 1939, follows Article II, Section 22, of the Constitution, and reads as follows:

> "Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for

> witnesses in his behalf; and whenever any convict, confined in the penitentiary, shall be considered an important witness in behalf of the state, upon any criminal prosecution against any other convict, by the attorney-general or prosecuting attorney conducting the same, it shall be the duty of the court, or judge thereof in vacation, in which the prosecution is pending, to grant, upon the affidavit of such attorney-general or prosecuting attorney, a writ of habeas corpus, for the purpose of bringing such person before the proper court to testify upon such prosecution; such convict may be examined, and shall be considered a competent witness against any fellow convict for any offense actually committed whilst in prison, and whilst the witness shall have been confined in the penitentiary."

Although this section has reference to a trial in a court of record, it is helpful in showing the intention of the legislature to give the defendant every chance to prove himself guiltless. We feel that such intention should be construed in favor of the defendant in preliminary examinations as well as in courts of record. In fact, Section 3869, R. S. Mo. 1939, provides that the order of conducting the preliminary examination with reference to examining witnesses should conform to the rules in courts of record. Such section is as follows:

> "The order of conducting the trial or hearing, with respect to the introduction of the evidence and the examination of witnesses, shall be the same as govern in the trial of causes in courts of record, as far as practicable."

Two other sections which we might cite, which tend to reflect the intention of the legislators in this matter, are as follows: Section 3864, R. S. Mo. 1939 provides:

> "A magistrate may adjourn an examination of a prisoner pending before himself, from time to time as occasion requires, not exceeding ten days at one time, and to

> the same or any different place in the county, as he deems necessary; and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by said prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner. In the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized, in a sum and with sureties to the satisfaction of the magistrate, for his appearance for such further examination, and not to depart without leave of said court, and for want of such recognizance he shall be committed."

Also Section 3871, R. S. Mo. 1939, providing,

> "After the examination of the complainant and the witnesses on the part of the prosecution, the witnesses for the accused may be sworn and examined, and the prisoner may, at his request, be sworn and examined as a witness in his behalf, under the restrictions applicable to the examination of defendants in the trial of criminal cases."

In view of the decisions above, the fact that the counties where witnesses were to be served, did not adjoin the county wherein the crime was committed and the subpoena issued, would make no difference. If the accused is entitled to have subpoenas issued for witnesses in an adjoining county, then he would be entitled to them in any county in the State.

As to your question of the refusal of the witnesses to answer the subpoena, there is only one way to enforce the attendance of these witnesses. In misdemeanor cases the justice of the peace is empowered to enforce the attendance of witnesses. This is set out in Section 3812, R. S. Mo. 1939, which provides as follows:

> "It shall be the duty of the justice in all cases to summon the injured party as

> a witness, when he is not present and his presence may be procured; and at the request of the defendant or prosecuting attorney, or prosecuting witness, he shall summon all persons as witnesses whose testimony may be deemed material, and enforce their attendance by attachment, if necessary: Provided, that in cases which first have been submitted to the prosecuting attorney before the issuing of a warrant, as provided in section 3808 of this article, if the prosecuting witness shall order subpoenas for witnesses in addition to those ordered by prosecuting attorney, he shall be liable for the costs of all such witnesses not used on a trial of said cause, and it shall be the duty of the justice to tax such prosecuting witnesses with all costs of subpoenaing, serving and attendance of such witness, and the state nor county shall in nowise be liable for any such costs."

Again referring to Article II, Section 22, we find that the accused has the right "to have process to compel the attendance of witnesses in his behalf." It seems that the Constitution gives the accused the right to have his witnesses brought into the preliminary hearing and therefore since the justice of the peace has the power to compel the attendance of witnesses in misdemeanor cases, we think that the constitutional provision above carries with it the power for the justice of the peace to compel the attendance of witnesses by attachment in preliminary examinations. The defendant is also given the right to have compulsory attendance of his witnesses in Section 4007, R. S. Mo. 1939.

You further ask about the sheriff serving the subpoena in another county. Section 1907, R. S. Mo. 1939, provides as follows:

> "Subpoenas shall be directed to the person to be summoned to testify, and may be served by the sheriff, coroner, marshal or any constable in the county in which the witnesses to be summoned reside or may be found, or by any disinterested person

> who would be a competent witness in the cause, and the sheriff, coroner, marshal or constable of any county may serve any subpoena issued out of any court of record of their county, in term time, in any county adjoining that in which the court is being held."

We think that subpoenas for witnesses outside of the county should be sent to an officer in the county where the witness is at the time of trial. This section provides that if the subpoena is from a trial court an officer may serve it in an adjoining county. But in the case of a preliminary examination where the subpoena is not from a trial court, it would have to be sent out as stated aforesaid.

This Department is unable to arrive at any rule that will govern the "bounds of discretion" in the amount of costs which might be "run up" by the defendant in summoning witnesses from distant points. The rule is that, in criminal prosecutions the accused shall have the right to have process to compel the attendance of witnesses in his behalf and the court cannot restrict the number of subpoenas. See State ex rel. v. Gideon, 119 Mo. 94, 24 S. W. 748.

Conclusion

It is, therefore, the opinion of this Department, that in view of Article II, Section 22, of the Constitution of Missouri, which we think self-enforcing, and the fact that we think a preliminary examination is part of a criminal prosecution or proceeding, the subpoenas for witnesses issued by a justice of the peace on the part of the defendant in a preliminary examination, are enforceable in counties other than that where the justice of the peace is commissioned and where the crime was committed.

It is further our opinion that the accused is entitled to witnesses in such hearing from any part of the State and that in view of Article II, Section 22, supra, the justice of the peace shall issue attachment for any witnesses that refuse to answer a subpoena.

Further, that a subpoena issued by a justice of the peace, shall be sent to an officer in the county where the

witness resides or is at the time of the hearing.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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