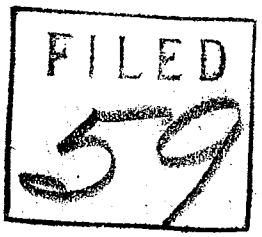
WAIVERS OF PRELIMINARY HEARINGS:
WAIVERS OF WRITTEN RECORD OF WITNESSES' TESTIMONY:
WAIVER OF WITNESSES' SIGNATURES:

(1) A defendant may waive his right to a preliminary hearing under Sec. 544.250 RSMo 1949, and Supreme Court Rule 23.02 RSMo 1955, in any criminal proceeding.
(2) A defendant may waive the written record and signatures referred to in Sec. 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.



March 19, 1956.

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

> "The local magistrate and myself would very much appreciate a speedy opinion on the following question:
>
> "May a defendant in a homicide (or capital) case waive his preliminary hearing? (reference is made to Sec. 544.250, RSMo 1949, and Sup. Ct. Rule 23.02, RSMo 1955).
>
> "Also:
>
> "May a defendant waive the written record and signatures required by Sec. 544.370, RSMo 1949 and Sup. Ct. Rule 23.12, RSMo 1955?
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> "This problem has arisen in the past and has never been satisfactorily resolved. Further, we have a case currently pending here that is affected by this problem. Your prompt opinion would be most invaluable."

You ask, first, if a defendant may waive his right to a preliminary hearing in a homicide (or capital) case. The opinion of this office is that he may.

Section 544.250 RSMo 1949 is as follows:

> "No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some magistrate in the county where the offense is alleged to have been committed in accordance with this chapter. And if upon such hearing the magistrate shall determine that the alleged offense is bailable, such person or persons shall thereupon be admitted to bail conditioned for their appearance on the first day of the next regular term and from day to day and term to term thereafter, of the circuit court or the court having criminal jurisdiction in such county, to answer such charges as may be preferred against them, abide sentence and judgment therein, and not to depart said court without leave; provided, a preliminary examination shall in no case be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 545.300 RSMo 1949."

Supreme Court Rule 23.02 RSMo 1955, is as follows:

> "No information charging the commission of a felony shall be filed against any person unless the accused shall first have been accorded the right of a preliminary examination before a magistrate in the county where the offense is alleged to have been committed. The accused may waive a preliminary examination after consultation, or after being accorded the right of consultation, with his counsel. A record entry of such waiver shall be made and the magistrate shall hold the accused to answer in the court having jurisdiction of the offense of which he stands accused. If the offense is bailable and the accused has not previously been admitted to bail, he shall be admitted to bail as provided in these Rules. No preliminary examination shall be required where an information has been substituted for an indictment."

There seems to be an unwavering line of authority in this state that a defendant may waive his right to a preliminary hearing. See State v. Ferguson, 278 Mo. 119, 212 S.W. 339, where the defendant was charged with first degree murder and convicted of second degree murder. The court said at l.c. 341:

> "* * * We have held affirmatively in a number of cases that a preliminary examination may be waived not only before the examining tribunal, but at the time the defendant is required to plead to the information in the trial court, and that if he pleads the general issue of not guilty, as was done here, he will be held to have waived such examination.* * *"

See also the case of State v. Thomas, 353 Mo. 345, 182 SW2d 534, where the defendant was charged with forcible rape. The evidence tends to show that the preliminary hearing was not held before the magistrate issuing the warrant. The court in affirming the conviction of the trial court assumed that the preliminary hearing before the magistrate was void, and that the waiver before this magistrate was therefore void. The court said:

> "But that does not dispose of the whole matter. The appellant not only waived, or attempted to waive, preliminary examination before Justice Erickson. The record brought up from the circuit court further shows that after the prosecuting attorney filed his information, the appellant went to trial without objection, gambled on the verdict, and did not attempt to raise the point now urged until after his conviction, by a motion to dismiss the suit and a motion for new trial, both filed on March 9, 1943, twenty-seven days after the verdict. In the meantime present counsel had entered his appearance in the case on February 19 and obtained a further extension of time within which to file a motion for new trial. In these circumstances it is obvious that appellant cannot complain unless he can establish his contention that the failure to accord him a valid preliminary examination in a magistrate's court deprived the circuit court of jurisdiction over the subject matter of the criminal case; and that appellant could not waive that omission.
>
> "We are constrained to hold against this contention. Present counsel raised it in this court en banc by habeas corpus and his view was rejected on May 4, 1943, less than a month after the motion had been overruled by the circuit court. Conceding the justice of the peace court had no jurisdiction, yet when appellant was brought into the circuit court, waived formal arraignment, entered a plea of not guilty, announced ready for trial, and went to (538) trial, he was before a tribunal which did have jurisdiction both of the subject matter and his person. The circuit court's

jurisdiction was not derivative, as it would have been on an appeal from a justice of the peace court, the probate court or other lower court. Under the express provisions of Sec. 3891 it had exclusive original jurisdiction to hear and determine the case with the aid of a jury. The preliminary hearing before the justice of the peace was for a wholly different purpose. It was to determine whether a crime had been committed, and whether there was probable cause for charging the accused therewith. If that was found, it was the duty of the justice to bind him over for trial, either under recognizance, if the offense was bailable, or by committing him to jail.

"Now while it is true that Sec. 3893, supra, provides no prosecuting attorney shall file an information charging any person with a felony until such person shall first have been accorded the right of a preliminary examination, yet that does not mean the circuit court has no jurisdiction over the subject matter of the cause in the broad and commonly accepted sense. It rather means the court in those circumstances cannot exercise its jurisdiction; or, stated another way, the court conditionally lacks jurisdiction to try the particular case because of the prohibition in the statute, the condition being whether or not the defendant has waived preliminary examination - for the statute also contains the aforesaid proviso that such examination shall not be required if he does waive it.

" *

"Under a line of cases reaching back to the time when Sec. 3893 was first enacted in 1905, the defendant will waive not only defects in the proceedings but even the complete absence of a preliminary examination, by pleading the general issue and going to trial. This was recognized in the McCutchan case cited in the second preceding paragraph, where there had been no preliminary hearing at all, the opinion carefully pointing out that a preliminary examination had not been waived. The question had been duly presented there by plea in abatement. The same was true in the Nichols case, cited in the last paragraph. In the McKinley case a motion to quash the information was treated as a plea in abatement. The

> cases just cited in marginal note 5 further hold that the preliminary examination of itself is not a part of the trial of the accused, though it is conditionally an essential antecedent step in the procedure; and that the burden is on the accused to raise the point and make any necessary showing if he would avail himself of it. He may waive the examination either at the preliminary hearing or when called on to plead, but he (539) cannot do so after he has submitted himself to trial. Since Sec. 3893 expressly says he may waive it, he cannot complain on that ground after he has waived it. It is a matter of personal privilege with him."

Note that Sec. 3893, referred to by the court, is now Sec. 544.250 RSMo 1949.

The above cases, and others too numerous to cite, sustain the position that a defendant may waive his right to a preliminary hearing in a homicide (or capital) case.

Supreme Court Rule 23.02 RSMo 1955, is similar to Sec. 544.250 RSMo 1949, except that the Supreme Court Rule provides that a record entry of such waiver shall be made. This would not seem to change the decisions of the cases deciding that a preliminary hearing may be waived. This provision is only concerned with an entry after a waiver has been made; it has no bearing on whether or not a defendant may waive his right to a preliminary hearing.

Secondly, you ask whether or not a defendant may waive the written record and signatures required by Sec. 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.

Section 544.370 RSMo 1949, is as follows:

> "In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

Supreme Court Rule 23.12 RSMo 1955, is as follows:

> "In all cases of homicide, the evidence given by the witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

It is the opinion of this office that a defendant may waive the written record and signatures as required by the above statutes.

There seems to be no conflict in the cases decided by the courts of Missouri on this question. See the case of State v. Lloyd, 337 Mo. 990, 87 SW(2) 418, where defendant had appealed from the conviction of second degree murder. Though the judgment of the trial court was reversed on other grounds, as to the issue concerning waivers, the court had this to say:

" *

"From the justice's transcript of the preliminary hearing, it appears that the affidavit for a state warrant charged appellant and his companions, McDaniel and Boston, with the offense. During the course of the preliminary hearing, the state dismissed the charges as to McDaniel and Boston; and, according to the evidence adduced in connection with the offer of the transcript, at the close of the preliminary hearing, after some discussion, as some of the witnesses lived outside the state, it was agreed that the signatures of both the state's and appellant's witnesses were waived by the state and the appellant. Section 3480, R.S. 1929, Mo. St. Ann. § 3480, p. 3115, provides, 'In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively.' The transcript of the testimony of witnesses Grimmett and Lindsay was not signed. If the signatures were not waived, the transcripts were inadmissible. * * * However, we have repeatedly held a defendant may waive his statutory rights. For instance, he may waive his right to a preliminary hearing [State v. Miller, 331 Mo. 675, 678(1), 56 S.W.(2d) 92, 94(1); State v. Ferguson, 278 Mo. 119, 129(2), 212 S.W. 339, 341(3),* * *] where a plea of not guilty in a murder case was held to waive the requirements that the evidence at the preliminary hearing be reduced to writing, signed by the witnesses certified by the magistrate, and delivered to the clerk of the court having cognizance of the offense; or his constitutional right, Mo. Const. art.2, § 22, 'to meet the witnesses against him face to face.' State v. Wagner, 78 Mo. 644, 648, 47 Am. Rep. 131, holding, where accused insisted on trial upon the state seeking a continuance on account of the absence of witnesses, his consent to the reading of a written statement of the absent witnesses to the jury waived this constitutional right, State v. Williford, 111 Mo. App. 668, 671, 86 S.W. 570, 572, and cases infra.

> The signing of the transcript of his testimony by a witness is but an incident to the preliminary hearing. The signature or lack of one does not go to the merits of the preliminary or the trial, or affect the truth of the testimony thus adduced. Undoubtedly, appellant and the state had the right to waive this statutory provision.* * *"

Section 3480 RSMo 1929, referred to in the above case, and Section 3870 RSMo 1939, are exactly the same as Section 544.370 RSMo 1949.

See also the case of State v. Ferguson (cited by the court in State v. Lloyd), supra, wherein the court said:

> "It is urged that the information filed by the prosecuting attorney conferred no jurisdiction on the trial court because the testimony taken at the preliminary examination was not reduced to writing, signed by the witnesses, certified by the magistrate taking same, and by him delivered to the clerk of the court having cognizance of the offense, as required by sections 5033, 5042, R.S. 1909. The contention as to the absence of jurisdiction is not tenable. The criminal court of Greene County is clothed with exclusive original jurisdiction of all criminal cases in said county (section 4200, R.S. 1909). Thus panoplied, the consideration by it of an information filed therein by the prosecuting attorney is within the limits of its general jurisdiction, and not such a special or exceptional exercise of same as to require that all of the preliminary steps leading up to such filing be shown on the face of the information. We have held affirmatively in a number of cases that a preliminary examination may be waived not only before the examining tribunal, but at the time the defendant is required to plead to the information in the trial court, and that if he pleads the general issue of not guilty, as was done here, he will be held to have waived such examination. * * *"

No cases have been found which would indicate that the courts have taken or will take an opposite view from that expressed in the cases cited. From the authority of the cases cited there seems to be sufficient reason to hold that a defendant may waive the requirements of Section 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.

Honorable Roy W. McGhee, Jr.

CONCLUSION

It is therefore the opinion of this office that: (1) a defendant may waive his right to a preliminary hearing under Section 544.250 RSMo 1949, and Supreme Court Rule 23.02 RSMo 1955, in any criminal proceeding; (2) a defendant may waive the written record of a witness's testimony and the signature of the witness thereto as required in Section 544.370 RSMo 1949, and Supreme Court Rule 23.12 RSMo 1955.

Very truly yours,

John M. Dalton
Attorney General

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