CRIMINAL LAW: Affidavit sufficient to charge the crime of Grand Larceny under Section 4456 R. S. Mo., 1939 - Larceny and Embezzlement distinguished.

September 10, 1941

19-1

Hon. Charles H. Rehm
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri

FILE

Dear Sir:

We are in receipt of your request for an opinion, under date of August 30th, 1941, which reads as follows:

"I have a question of criminal procedure that I would like to have your opinion concerning.

"An affidavit for a state warrant was issued charging Embezzlement by Bailee and the defendant was arrested for that charge. He was placed under bond and released. For the charge that he was arrested, my county lacked venue for the conversion took place in Illinois. However if it can be proved that he had a wrongful intent at the time he was given possession of the goods the crime is that of Grand Larceny. At the preliminary hearing, (without any other papers being filed), the judge found that there was probable cause for binding him over to the circuit court on a charge of Grand Larceny. His bond read that he was to appear before a justice and answer a charge of Embezzlement by Bailee. Objection was made at the preliminary hearing to our showing that he was guilty of another crime.

"Can I just go ahead and file an information in the Circuit Court charging grand larceny, or must I have a new affidavit signed and have him rearrested and give

him another preliminary hearing? I have been unable to determine this for myself. Both charges arose out of the same set of facts."

We are also in receipt of your supplemental request, under date of September 8, 1941, in which you state:

"The original affidavit filed, charging 'embezzlement by bailee', was as follows:

"'One "A" to the best of affiant's knowledge and belief with specific criminal intent, did then and there willfully, unlawfully and feloniously, did feloniously steal, take and carry away from the possession of one "B", 55 wood ties, all of the aggregate value of over $30.00, the personal property of the said "B" then and there, being, unlawfully and and feloniously did then and there steal, take and carry away with the intent to then and there deprive the owner of the said goods and personal property of the use thereof; and to convert the same to his own use, without the consent of the owner; contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State!

"The authority for this action is Section 4473 of Mo. Revised Statutes, 1939. The authority for an action that I intend to bring now, charging Grand Larceny, is Section 4456.

"I think that under the cases of 'State vs. Scott', 301 Mo. 409; 'State vs. Buck', 186 Mo. L. C. 19; and 'State vs. Mintz', 189 Mo. L. C. 283, the defendant can be convicted, under the facts, of Grand Larceny."

Section 4456 R. S. Mo., 1939, provides as follows:

> "Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property, or valuable thing whatsoever of the value of thirty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, sheep, goat, hog or neat cattle, belonging to another, shall be deemed guilty of grand larceny; and dogs shall for all purposes of this chapter be considered personal property."

Section 4473 R. S. Mo., 1939, provides as follows:

> "If any carrier, bailee or other person shall embezzle or convert to his own use, or make way with or secrete, with intent to embezzle or to convert to his own use, any money, goods, rights in action, property or valuable security or other effects which shall have been delivered to him, or shall have come into his possession or under his care as such bailee, although he shall not break any trunk, package, box, or other thing in which he received them, he shall, on conviction, be punished in the manner prescribed by law for stealing property of the nature or value of the article so embezzled, taken or secreted."

In the case of State v. Flannery, 263 Mo. 579, l. c. 592 the Court had this to say:

"The examining magistrate is not expected, or empowered, to determine the guilt or innocence of the accused, or to nicely or irrevocably determine the precise offense of which he is guilty. The statute says: 'If it appear that a felony has been committed' (not the felony), 'and that there is probable cause to believe the prisoner guilty thereof' (Sec. 5036, R. S. 1909), he may let him to bail if the offense be bailable (Sec. 5039, R. S. 1909), provided the preliminary examination is not to be had when accused sees fit to waive it. (Laws 1913, p. 225, supra.)

"What does he waive? Clearly, I think he waives that which the magistrate was required to find, viz., that a felony had been committed, and that there was probable cause to believe the accused committed it. And by a waiver of such examination accused in effect admits, for all and singular but only for the legal purposes, objects and intents of the preliminary examination, all that such magistrate was required to find, viz., that a crime has been committed and there is probable cause to believe that accused is guilty of its commission. Thereafter it is left to the prosecuting attorney to determine the exact legal name and nature of the offense committed. (State v. Anderson, 252 Mo. 83.) The law then, this view considered, ought not to be, neither do I think it is, that for every small error of a magistrate unlearned in the extreme niceties of the law, prosecutions must be halted after informations are filed and the case sent back for a technically correct preliminary hearing. * * * ." (Secs. 5036 and 5039 R. S. Mo., 1909, mentioned in this case are now Secs. 3873 and 3876 R. S. Mo., '39, respectively.)

In the case of State v. Bauer, 12 S. W. (2d) 57, l. c. 59, the Court, in referring to the Flannery case, supra, had this to say:

> "* * * To hold that a complaint authorized to be filed under such conditions should conform to the rigid rules of criminal procedure would be to destroy the purpose of the statute, which, in addition to the objects stated, provides a way by which the defendant may be legally arrested and, if probable cause is found to exist, detained until an indictment or information may be preferred against him. His legal arrest is, therefore, of equal importance and of more effective force in the administration of the criminal law than the filing of the complaint upon which the warrant of arrest is based. Having accomplished this purpose, the defects and informalities of the complaint, unless it fails utterly to state the substance of the offense with which the accused is charged, should not be held sufficient to invalidate the subsequent proceedings.' (Our italics.)"

In the case of State v. Kennedy, 239 S. W. 869, the Court had this to say:

> "BLAND, J. Defendant was convicted upon an information charging that he 'did * * * unlawfully and feloniously steal, take and carry away' certain electrical goods and material of the aggregate value of $400 belonging to the American Electric Company, a corporation. Upon a trial the jury returned a verdict finding him guilty of petit larceny, and assessed his punishment at six months in the county jail.

* * *

"In order for defendant to have been guilty of the crime of embezzlement it was necessary that he either have actual or constructive possession of the goods, and that his intention to steal them was conceived only after he came into lawful possession of the same. If felonious intent existed at the time of the taking, then he was guilty of larceny. * * * "

In the case of State v. Scott, 256 S. W. 745, l. c. 747, the Court had this to say:

"It is not contended that the evidence in this case would show embezzlement, or that the action of the court in taking that charge away from the jury's consideration was improper. If, after receiving the money, the defendant had conceived the idea of converting it to his own use, it would have been embezzlement. The evidence shows that when he received the money he intended to convert it to his own use."

In the case of State v. Cochran, 80 S. W. (2d)182, l. c. 184, the Court had this to say:

"Embezzlement is an offense created by statute. A fundamental distinction between embezzlement and larceny, universally recognized, is that in embezzlement the money or property is lawfully obtained and unlawfully con-

> verted, while in larceny the taking must always be unlawful. 20 C. J. 410, section 3, and cases there cited. The elements necessary to constitute the crime of embezzlement are stated in 20 C. J., page 413, section 4, as follows: 'To make out a case of embezzlement under the statutes it is necessary to show first, that the thing converted or appropriated is of such a character as to be within the protection of the statute; second, that it belonged to the master or principal, or someone other than accused; third, that it was in the possession of the accused at the time of the conversion, so that no trespass was committed in taking it; fourth, that accused occupied the designated fiduciary relation, and -- that the property came into his possession and was held by him by virtue of his employment or office; fifth, that his dealing with the property constituted a conversion or appropriation of the same; and sixth, that there was a fraudulent intent to deprive the owner of this property.' (Italics ours.)"

It will be noted in reading the affidavit set forth in the opinion request that it follows very closely the wording of Section 4456 R. S. Missouri, 1939, and also the wording used in the information in the case of State v. Kennedy, supra. We think that the above cases clearly hold that the wording of the affidavit would be sufficient to charge the defendant with the crime of grand larceny, as defined in Section 4456, supra. We are of the opinion that this affidavit would not be sufficient to charge the defendant with embezzlement. As said in the case of State v. Kennedy, supra, in order for a defendant to be guilty of the crime of embezzlement, it is necessary that he either have actual or constructive possession of the goods. It will be noticed in the affidavit that

it is directly charged that the ties were taken "away from the possession of one 'B'." Further, in the light of the necessary elements to be proved in a case of embezzlement, as set forth in the case of State v. Cochran, supra, it must be proved that the accused occupied the designed fiduciary relationship, that the property was given into his possession and was held by him by virtue of his employment or office. The affidavit does not charge this, but, on the contrary, specifically charges that "B" possessed the property, thereby making it one of the necessary allegations to sufficiently constitute the crime of larceny, under Section 4556 R. S. Missouri, 1939.

We call your attention to the case of State v. Ancell, 62 S. W. (2d) 443, l. c. 446, where the Court said:

> " * * The justice found that the felonious act charged, in other words a felony charged in the complaint, had been committed. It was not incumbent upon him to determine the precise degree of the crime found to have been committed nor, in our opinion, could his attempted determination thereof preclude the prosecuting attorney from filing an information charging the higher degree."

It will be noted in this case, as well as in reading the cases, supra, that the affidavit can be made by a layman and does not have to be drawn with the precision as does an information or indictment. Further, the Justice before whom the preliminary hearing is held is only charged with the duty to ascertain, first, whether a felony has been committed, and second, whether there is probable cause to believe the accused committed it.

As we understand the facts, from your opinion request, the Justice bound the defendant over to the Circuit Court, after a preliminary hearing held upon the affidavit above set forth. Certainly the defendant was fully informed that he was charged with the crime of

larceny under Section 4456, supra. However, if the evidence before the Justice in no wise followed the affidavit, then it could be said that the defendant, though charged under one Section of the statute was subject to an inquiry under a different set of facts than those alleged in the affidavit, and would, in truth and in fact, have not had a preliminary hearing, should he be charged in the information under a different statute from that about which the witnesses were interrogated. In other words, the defendant is charged with a statutory crime, both in the affidavit and the information and the preliminary hearing accorded him ought to be conducted so that the evidence adduced before the Justice explains and substantiates the charge made against him.

CONCLUSION.

We are of the opinion that the affidavit set forth in your opinion request sufficiently charges the crime of grand larceny under Section 4456 R. S. Missouri, 1939, and the defendant charged in the affidavit was given a preliminary hearing, thereunder, unless the testimony before the Justice in no way followed the charge made in the affidavit and completely proved a different crime other than the one charged under said Section.

Respectfully submitted

APPROVED:

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