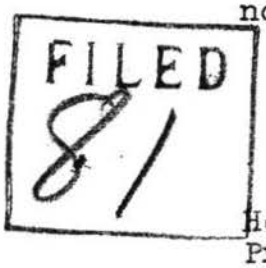
EXTRADITION: (1) Rule 21.08 of the rules of criminal procedure is valid and should be followed.

(2) The sheriff, the prosecuting attorney or other officers can sign a complaint on the basis of information obtained in the course of investigation. Such complaint justifies the issuance of a warrant for the arrest of the accused.

(3) An affidavit based on information and belief only is not a sufficient basis for extradition.



August 31, 1953

Hon. W. D. Settle
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Mr. Settle:

We have before us your letter in which you request an opinion of this department. Your letter is as follows:

> "I hereby request an official opinion from your office to clarify a situation which recently arose.
>
> "By letter dated March 20, 1953, your office refused to approve extradition papers submitted to Governor Donnelly by which this County sought to return John Hayes from the State of Louisiana.
>
> "The reason given was that the affidavit (a copy of which is enclosed) was 'not sufficient to charge the person sought to be extradited with a crime in the State of Missouri, for the reason that there is language in said affidavit which indicated that it is made on "information and belief".' Your letter further stated that an affidavit must be by one who had personal knowledge of the facts that constitute probable cause for believing that the crime was committed and by the person charged.
>
> "In this connection I would call your attention to Rule 21.08 of the Rules of Criminal Procedure adopted by the Supreme Court of Missouri, April 14, 1952. As you will note, this rule specifically provides for a complaint on 'information and belief' and such complaint is sufficient to charge a felony and is sufficient basis for issuing a warrant.

> "I am unable to see how this results in any 'qualification or limitation' of the charge. I further see no language in the quoted federal statute that requires any different procedure than that required by the laws of the state seeking to extradite.
>
> "In view of the above I respectfully request an opinion whether your office believes Rule 21.08 is invalid and should not be followed. I also would like an answer on whether the sheriff, prosecuting attorney, or other officer can sign a complaint when such officer is not a witness with personal knowledge but is acting on his investigation of the alleged crime, both where extradition is sought and where the defendant is arrested within the state."

You refer in said letter to our refusal to approve the papers submitted in support of your petition for the extradition of John Hayes, from the State of Louisiana, which refusal as your letter states was based upon the proposition that the affidavit submitted was not sufficient to charge the person sought to be extradited with the commission of a crime in the State of Missouri, for the reason that the said affidavit was made on information and belief.

You state in your letter that you are unable to see how the recital in the affidavit, to the effect that the accused to the best of affiant's knowledge and belief did the things charged, results in any qualification or limitation of the charge.

You also cite Rule 21.08 of the "Rules of Criminal Procedure" which rule we quote as follows:

> "Whenever complaint shall be made in writing, verified by oath or affirmation (including an oath or affirmation on information and belief by a prosecuting attorney) and filed in any court having original jurisdiction to try criminal offenses, charging that a felony has been committed by a named accused, or if his name is unknown, by any name or description from which he can be identified with reasonable certainty, it shall be the duty of the judge or magistrate thereof, and, upon complaint made by the prosecuting attorney, it shall also be the duty of the clerk thereof to issue a warrant

> reciting the accusations and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such judge or magistrate to be dealt with according to law. If such warrant is issued under the hand of the judge or magistrate, it need not be sealed but if it is issued under the hand of the clerk of the court, the seal of the court shall be attached thereto."

You accurately comment that said rule specifically provides for a complaint "on information and belief" and that such complaint is sufficient to charge a felony and is sufficient for issuing a warrant.

You desire our opinion as to the validity of said Rule 21.08. ART. V, Section 5 of the Constitution of Missouri is as follows:

> "The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Rule 21.08 is quoted above. It is apparent from a mere reading of the aforesaid section of the constitution that the Supreme Court may establish rules of practice and procedure for all courts subject to the provision however, that such rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury or the right of appeal. An examination of the above quoted rule reveals that there is nothing therein that is violative of any of the limitations on the rule making power of the court. In view of this fact and in view of the fact that the court has promulgated the rule pursuant to the authority vested in it by ART. V, Section 5, of the Constitution of Missouri, we are of the opinion that said rule is absolutely valid.

We desire to suggest the fact, however, that while the aforesaid rule authorizes the inclusion in the complaint of an oath or affirmation on information and belief by a prosecuting attorney, it does not provide that there must be such an oath or affirmation stating that the complaint is made on information and belief. We are, therefore, of the further opinion that a complaint not made on information and belief may be in entire compliance with the provisions of said rule.

We shall next discuss the question as to whether or not a prosecuting attorney or other officer has authority to execute a complaint when he is acting on the basis of his investigation and not on the basis of direct personal knowledge. We are of the opinion that the above quoted rule plainly authorizes the following of such a course by a prosecuting attorney or other officer by reason of the fact that said rule starts with the all inclusive word "Whenever" and says that, "Whenever complaint shall be made in writing * * * * verified by oath or affirmation or filed in any court having original jurisdiction to try offenses charging that a felony has been committed by a named accused, * * * * it shall be the duty of the judge or magistrate thereof * * * *, to issue a warrant * * * *."

While it is true that in some jurisdictions the complaint or affidavit must state facts on complainant's positive knowledge and that where a statement is made upon hearsay or upon information and belief a warrant cannot be issued, such is not the law in Missouri.

We suggest the fact that the above quoted language of the rule does not limit the authority of any officer or any person to file a complaint charging a felony and makes no provision prohibiting the practice of making and filing a complaint based upon investigation rather than on first hand knowledge.

In this connection we quote Section 544.020, RSMo 1949 as follows:

> "Whenever complaint shall be made, in writing and upon oath, to any magistrate setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding

> the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

This section provides substantially the same procedure as is provided by the Rule 21.08 above quoted except that said rule specifically includes among the complaints pursuant to which a warrant may be issued, an oath or affirmation made on information and belief by a prosecuting attorney, and except that said rule makes provisions as to when and under what circumstances the seal of the court shall be attached to the warrant and as to when and under what circumstances the seal of the court need not be attached which said last mentioned provisions are not contained in the statute.

The question as to whether a complaint may be made based on hearsay only and whether such complaint is a proper basis for the issuance of a warrant is discussed in the case of State v. Layton, 58 S.W. (2d) 454, 332 Mo. 216, 221 in the following language which comprises a paragraph of the court's opinion (S.W. (2d) l. c. 457):

> "(3) As to the complaint's being based on hearsay evidence, Mr. Chalender admitted he had no first-hand knowledge of the facts attending the assault; and that he obtained the information on which he filed the complaint from parties present thereat. But the complaint is not expressed to be verified on information and belief; it contains a positive recital of the facts, unconditionally sworn to. We know of no reason why this is not entirely sufficient to meet the requirements of section 3467, R.S. Mo. 1929 (Mo. St. Ann. Sec. 3467). See 16 C.J. Sec. 504, p. 292; State v. Carey, 56 Kan. 84, 42 P. 371."

We are of the opinion that the decision of the Supreme Court of Missouri in the above quoted paragraph clearly establishes the proposition that a complaint based upon findings made in an investigation and not on personal knowledge can be a proper basis for the issuance of a warrant. This proposition was again upheld in State v. Frazier, 98 S.W. (2d) 707, 339 Mo. 966, l. c. 974:

In the last mentioned case the complaint was made by the Sheriff of Madison County who had no knowledge of the crime except such as he had obtained by hearsay. The following is a quotation from the Court:

> "This assignment is without merit. The affidavit was unconditionally sworn to, not simply verified on information and belief; and this was held to be sufficient in State v. Layton, 332 Mo. 216, 221, 58 S. W. (2d) 454. The statute, Section 3467, Revised Statutes 1929 (Mo. Stat. Ann., p. 3110), merely provides that 'whenever complaint shall be made, in writing and upon oath, . . .' the preliminary hearing shall be held. Appellant refers us to 16 corpus juris, section 504 page 292, which says: 'In some jurisdictions the complaint or affidavit must state the facts on complainant's positive knowledge; where it states them upon hearsay or upon information and belief, a warrant cannot be issued;' and among the cases cited in support of the text are State v. Hayward, 83 Mo. 299, and State v. Downing, 22 Mo. App. 504. However, an examination of these decisions will show they dealt with a different statute, Section 1762. Revised Statutes 1879, now Section 3504, Revised Statutes 1929 (Mo. Stat. Ann., p. 3126), prescribing requirements for the making and verification of informations filed for the prosecution of offenses in the trial court. That statute does say the information shall be verified by the oath of the prosecuting attorney, 'or by the oath of some person competent to testify as a witness in the case.' But the verified complaint to be filed under Section 3467, the statute here involved, does not constitute the formal charge for a prosecution. It merely launches the preliminary examination held to determine whether the accused shall be bound over or committed for trial, and the statute does not

> require that kind of complaint to be made by a person having first-hand knowledge."

It is quite apparent from the above quoted opinions of the Supreme Court of Missouri that a prosecuting attorney or other officer has authority to make a complaint based upon the results of his investigation rather than on direct personal knowledge.

Nevertheless, neither this rule nor Section 544.020, RSMo 1949 purport to define the characteristics and essential features of an affidavit sufficient to form the basis of an extradition proceeding and since the process of interstate extradition is based on ART. IV, Section 2 of the Constitution of the United States, and, since that constitutional provision is not self-executing, we must, when considering the question of the sufficiency of an affidavit, for extradition purposes, look to the legislation enacted by Congress pursuant thereto, which is embodied in Section 3182, Title 18, USCA., and to the court decisions construing said section.

Said section is here quoted as follows:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

This brings us to the consideration of the question as to whether or not an affidavit made on information and belief only comes within the meaning of the affidavit provided for in the alternative in said section as an essential document in the course of an extradition proceeding, and in this connection we call attention to certain court decisions which hold such affidavits insufficient to form the basis for extradition and we shall quote from some of them.

In the case of Ex parte Cheatham, 95 SW 1077, l. c. 1080, the following language appears in the opinion of the court:

> "Now, the question is made as to this: First, that it was made on information and belief, and not directly predicated upon facts within the knowledge of the affiant, Robert L. Hubbard. An inspection of the paper shows such to be the case; that is, that the affidavit was made on information and belief only. We hold that this was not sufficient. Ex parte Rowland, 35 Tex. Cr. R. 108, 31 S.W. 651; Ex parte Morgan (D.C.) 20 Fed. 307; Ex parte Hart, 63 Fed. 259, 11 C.C.A. 165, 28 L.R.A. 801. In the latter case, this question was thoroughly discussed, and we quote from that opinion, as follows: 'By requiring such an affidavit, the liberty of the citizen is to a great extent protected, and the executive upon whom the demand is made is thereby enabled to determine if there is cause to believe that a crime has been committed. To authorize the removal of a citizen of Maryland to the state of Washington for trial on a charge of crime, something more than the oath of a party, unfamiliar with the facts, that he believes the allegations of an information to be true, should be required and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subject to their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest and imprisonment and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact.' * * *."

In Ex parte Morgan, 20 Fed. 298, l.c. 307 and 308 the following language occurs:

> "* * * In the affidavit in this case the affiant says 'that he has reason to believe, and does believe, from information received, that one Frank Morgan did commit the crime of wilful murder.' This is a charge upon suspicion, and the constitution of the United States and the law of congress are not satisfied with such a charge. The affiant, Patten, swears to his belief. Suspicion does not warrant the arrest of a party that he may be sent from a state where he may be found to another, and it may be a distant state. All legal intendments in a case of this kind are to avail the prisoner. Ex parte Smith, 3 McLean, 126."

In Ex parte Rowland, 31 SW 651, l.c. 652, the following is a quotation from the court's opinion:

> "It will be seen by an inspection of the complaint that H. M. Carr, who swore to same, does not pretend to have personal knowledge of the facts or charge contained in the complaint. He is informed and believes that relator has committed acts therein named, --namely, 'guilty of fraudulent breach of trust, or larceny'; informed and believes that 'he secured the use of the name of G. B. Carr in order that he might be able to buy said hogs on a credit, and convert the proceeds to his own use.' The contention of the relator is correct, the rule being that 'the affidavit required in such cases shall set forth the facts and circumstances relied on to prove the crime, under oath or affirmation of some person familiar with them whose knowledge relative thereto justifies the testimony as to their truthfulness, and should not be the verification of a person who makes no claim to personal information as to the subject matter of the same.' See, for an exhaustive discussion of this matter, Ex parte Hart, 11 C.C.A. 165, 63 Fed. 249. See also, Ex parte Smith, 3 McLean, 121 Fed. Cas. No. 12,968. The judgment below is reversed, and relator ordered discharged."

CONCLUSION

We are accordingly of the opinion, first, that Rule 21.08, is valid and should be followed. Second, a sheriff, prosecuting

attorney or other officer can sign a complaint when such officer is not a witness with personal knowledge, but is acting on facts derived as a result of his investigation of the alleged crime. Third, an affidavit which recites that the elements of the offense charged are true according to the information and belief of the affiant is inadequate for the purpose of extradition and does not meet the requirements of Section 3182, Title 18, USCA, supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Samuel M. Watson.

Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

SMW:A