CRIMINAL LAW; and
PROSECUTING ATTORNEY: Information cannot be filed in Circuit Court where a justice of the peace releases defendant on preliminary.

August 5, 1942

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Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of July 30th, 1942, which reads as follows:

> "The following question has arisen in connection with criminal procedure:
>
> "' Can a prosecutor file his information in Circuit Court, charging a defendant with the same crime with which he was charged before a Justice, and upon the hearing, the Justice discharged the defendant?'
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> "I have been cited to the following: 'Preparation and Presentation of the State's Case by Arthur V. Lashly, Part III of The Missouri Crime Survey, Page 10', reading as follows:
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> "'This is subject to the exception that a felony may be begun by an affidavit of the complaining witness filed before a justice of the peace upon which the warrant issues and a preliminary hearing had, and the theory of the preliminary hearing is that the justice of the peace may hold or release the defendant according to the evidence produced: but practically speaking, the prosecuting attorney controls that too, because he

must produce and present the evidence, and the justice of the peace as a rule is guided by the recommendation of the prosecuting attorney with respect to the sufficiency of the evidence. Regardless of the action of the examining magistrate, discretion still rests with the prosecuting attorney, because if the justice finds the evidence insufficient and discharges the defendant, the prosecutor may, nevertheless, file his information in the circuit court charging the defendant with the same crime with which he was charged in the affidavit and upon which he had a preliminary hearing'.

"I have had a few cases of complaint filed, where a change of venue was taken from one justice, and by disqualifying other justices the complaint was forced before one justice, who, over my recommendation, and advice, released the defendants. I realize these complaints could be presented to a grand jury; that is an expensive procedure.

"Please advise if these criminal cases can be handled as outlined in the Missouri Crime Survey; and your recommendation as to the handling of cases of this nature, where, by forcing these hearings before a certain justice, defendants are released against my advice, and protest."

Section 3893 R. S. Missouri, 1939, reads 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 justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. And if upon such hearing the justice 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 3953."

This section has been passed upon, first, in the case of State v. Cooley, 12 S. W. (2d) 466, l. c. 468, where the court said:

> "'* * * It is a well-established law of this state that the grand jury may investigate and indict one charged with a felony although he has been arrested and held for a preliminary examination, and is not bound to await

the action of the examining court, for the reason that the action of the examining court is no bar to the right of the grand jury to inquire into the case and indict the accused even though he has been discharged on the preliminary examination. State v. Whalen, 148 Mo. 286 (49 S. W. 989). The plea in abatement was properly overruled, as the Act of 1905 (Laws 1905, p. 132), upon which it is based, has no reference whatever to indictments preferred by a grand jury.'

"We also ruled that a purpose of a preliminary examination is 'to safeguard them (the accused) from groundless and vindictive prosecutions.' State v. Tunnell (Mo. Sup.) 296 S. W. loc. cit. 426; State v. Sassaman, 214 Mo. 695, loc. cit. 723, 114 S. W. 590. These pronouncements indicate 'the way the wind blows.'

"While it is not expressly provided in section 3848 that an information cannot be filed until the magistrate has found 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof,' such is the clear intent of the statute. Otherwise the according of an examination before a magistrate is a useless preliminary step and affords no protection to the accused. The lawmakers are guilty of no such absurdity. The examination by a magistrate before an information can be filed by the prosecuting attorney takes the place of an examination

by a grand jury before the return of an indictment and prevents an abuse of power by the prosecuting attorney. On a discharge of the accused a complaint may be filed before another magistrate, or the charge may be investigated by a grand jury.

"It follows from these conclusions the prosecuting attorney is without authority to file an information charging a felony, in the absence of a finding by a magistrate 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof.' Other jurisdictions with similar constitutional or statutory provisions have so ruled. (Cases cited) * * * * * * .

"Respondent directs attention to State v. Pritchett, 219 Mo. 696, loc. cit. 703, 119 S. W. 386. There the defendant complained that he was not accorded a preliminary examination. We ruled the examination was waived, and said:

"'Although the justice might, after a preliminary examination, discharge the prisoner, such action would in no way operate as a bar to an indictment, or to an information by the prosecuting attorney for the same offense, and whatever the justice might do in the case is from a legal standpoint merely preliminary.'

"This statement was unnecessary to a decision of the case. If the learned judge intended to rule that on the discharge of an accused by a magistrate the

> prosecuting attorney was thereby authorized to file an information for the same offense, we do not agree with him. Such a ruling is contrary to all the authorities, and should not be followed. If he intended to rule that a discharge is not a bar to the filing of a complaint with another magistrate, he is in harmony with all the authorities and should be followed."

Also, in the case of State v. McKinley, 111 S. W. (2d) 115, Pars. 1-3, where the court said:

> "The purpose of the statute is to safeguard the accused from groundless and vindictive prosecution, and to prevent an abuse of power by the prosecuting attorney. The latter is without authority to file an information charging a felony until after a preliminary examination has been held and a magistrate has found there is probable cause to believe a felony has been committed, and that the accused is guilty thereof. State ex rel. McCutchan v. Cooley, 321 Mo. 786, 792, 12 S. W. 2d 466, 468. But the failure to accord a preliminary examination is waived by the accused if he does not raise the point before he pleads the general issue to the information. State v. Langford, 293 Mo. 436, 443, 240 S. W. 167, 169; State v. Pipey, 335 Mo. 121, 126 (2), 71 S. W. 2d 719, 721."

Under the above two cases, unless the magistrate has found there is probable cause to believe a felony has been committed, the prosecuting attorney is not authorized to file an information in the criminal court. Also, under

the two above cases, if a magistrate discharges a defendant for the reason that there is not probable cause to believe a felony has been committed, the prosecuting attorney may file another complaint before another magistrate on the same charge.

Under Section 3819 R. S. Missouri, 1939, a defendant shall be granted a change of venue in a case pending before a justice of the peace, upon the filing of an affidavit, either that the justice is prejudice against him, or is of near relation to the injured party or prosecuting witness, stating in what degree they are interested in the subject of the offense; or as a material witness in the case; or that the defendant cannot have a fair trial in the township on account of the bias and prejudice of the inhabitants. After the filing of this affidavit Section 3820 R. S. Missouri, 1939 applies. This section reads as follows:

> "If such affidavit be filed, the change of venue must be allowed, and the justice must immediately transmit all the original papers and a transcript of all his docket entries in the case to the next nearest justice in the township, if there be one, unless the party asking for a change of venue shall, in his affidavit, state that the other justice in the township is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to the injured party or prosecuting witness, stating in what degree, or that he cannot have a fair and impartial trial before such justice in the township, in which case, then to a justice in some other township in the county, or, if the change be allowed on account of the bias or prejudice of the inhabitants of the township, then

> to a justice in some other township in the county; and the justice to whom such case shall be sent shall forthwith proceed with the same in like manner as if said cause had been originally brought before him. No more than one change of venue in the same case shall be allowed."

The above section applies to preliminary examinations, and it was so held in the case of Ex Parte Bedard, 106 Mo. 616, 17 S. W. 693.

Under the facts set out in your request, in reference to the filing of a change of venue which places the case before a magistrate who would be favorable to the defendant, we would advise that the case be filed in some township where such an affidavit would not result in the case being sent to an unfavorable justice. In felony cases a complain may be filed in any place in the county, and before any justice of the peace in the county.

CONCLUSION

In view of the above authorities, it is the opinion of this department that a prosecuting attorney cannot file his information on a felony in the circuit court charging a defendant with the same crime with which he was charged before a justice, and upon the hearing of same the justice discharged the defendant.

It is further the opinion of this department that if a justice of the peace, upon a preliminary, discharges a defendant, the prosecuting attorney is authorized to file another complaint before another justice of the peace in any township in the county.

APPROVED:

Respectfully submitted

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