EXTRADITION: Apprehension pending Governor's warrant; arrest on suspicion; affidavit before justice of the peace by competent witness sworn to in Missouri; examination.

May 7, 1941

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FILED

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This is in reply to your request for our opinion by your recent letter which is in the following terms:

> "I respectfully request the opinion of your department to define the procedure by which a person wanted by the authorities enforcing the criminal law of another state can be taken into custody and held for such authorities of such other state in those cases where extradition proceedings through the governors of the respective states has not been instituted.
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> In such opinion will you please specify as to whether or not any judicial authority in Missouri has a legal right to issue a warrant for the arrest of such person upon the receipt of a certified copy of the complaint and warrant signed before, or issued by a Court of original criminal jurisdiction in such foreign state."

Attached to that letter was another one of the same date addressed to this office by you, and a copy of your letter of the same date addressed to Captain William Baxter of the Missouri Highway Patrol. We thoroughly agree with the general propositions stated in your said letter to Captain Baxter.

Frequently officers from other states send to Missouri officers a copy of a warrant issued by an officer of such other state, and ask for the arrest of the fugitive in Missouri on that authority. Interstate rendition presents difficult problems. It calls for close cooperation between the officers of the various states. We are sure that Missouri officers are ready to repay the assistance rendered to Missouri by the officers of other states, to the extent permitted by the law. However, a copy of a warrant issued by an officer of another state is no legal authority for an arrest in Missouri by a Missouri officer. Leading authorities are accurately summarized as follows in 4 American Jurisprudence page 14, Section 19:

> "A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. A warrant may confer authority on a police officer or private individual to make an arrest anywhere within the boundaries of a state, but it has no extraterritorial effect of any kind, and will not justify an arrest made outside the limits of the state." (citing authorities)

To the same effect are authorities collected in an annotation in 61 A.L.R. 380. The courts of the United States have followed the same rule (McLean v. State of Mississippi ex rel Roy (5 C.C.A.) 96 F. (2d) 741, 745, 119 A.L.R. 670, certiorari denied by U. S. Sup. Ct. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 399; and, Kirkes v. Askew, Sheriff, (D. C. Okla.) 32 Fed. Supp. 802, 804 (2) et seq). There is no Missouri statutory authority for arrest on foreign warrants.

Before legal proceedings are instituted to restrain an alleged fugitive from the justice of another state, and before the governor's warrant is issued, a Missouri officer could lawfully make an arrest on suspicion of having committed an offense, without a warrant. In State ex rel

Kaiser v. Miller 289 S. W. 898, l.c. 903, 316 Mo. 372, involving a fugitive from justice, the legal proceeding above mentioned was considered, and the court further said:

> "What is said here is not to be construed as meaning that in every case a warrant must be obtained before an arrest is made of one believed to be a fugitive from justice; but, in such cases, sanction for the detention of such person should be obtained from a magistrate of competent authority for the purpose, and that sanction must rest upon an accusation made against the person to be detained, according to the forms of the law. Harris v. Louisville, etc., R. R. Co. (C. C.) 35 F. 116.
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> Under the provisions of section 3200, R. S. 1919, the person arrested by a peace officer without warrant on suspicion of having committed a criminal offense is required to be discharged from such custody within 20 hours, unless he shall be charged with a criminal offense by the oath of a credible person, and be held by a warrant to answer for such offense. The jurisdiction of the magistrate over such person accrues by the concurrence of a complaint, made as provided by law, and the custody of the person complained against."

Section 3200 R. S. 1919, mentioned in the above quotation, is now R. S. 1939 Section 4346, and under its provisions a person arrested on suspicion without a warrant may be held for twenty hours. Such an arrest properly made requires the exercise of discretion on the part of the officers. We would not undertake to suggest in advance the precise circumstances under which that should be done. In State v. Raines 98 S. W. (2nd) 580, l.c. 584 (3), 339 Mo.

884, the Supreme Court of Missouri said:

> "In State v. Bailey, supra, 320 Mo. 271, 8 S. W. (2d) 57, loc. cit. 59 (4), it is said: 'If the nature of the information and the officer's knowledge of the reliability of his informant cause a reasonable suspicion in his mind that the accused is guilty of felony, he is authorized to make the arrest without a warrant.' * is always justified if an offense has in fact been committed, whether he had reason to believe it or not. If a crime has not been committed then he can only be justified by the existence of reasonable ground to believe that it has been committed."

Where such an arrest can properly be made in the judgment of the Missouri officers, the twenty hour period should afford sufficient time for officers from the demanding state to come here and resort to the legal proceeding authorized in such cases by Article 9, Chapter 30 R. S. Mo. 1939 Sections 3976 to 3998 inclusive. Unless a warrant is issued at the end of the twenty hour period, of course the alleged fugitive would be entitled to be discharged.

As to the proceeding, Section 3985 provides:

> "Whenever any person within this state shall be charged, on the oath or affirmation of any credible witness, before any judge or justice of a court of record, or a justice of the peace, with the commission of any crime in any other state or territory of the United States, and that he fled from justice, it shall be lawful for the judge or justice to issue his warrant for the apprehension of the party charged."

And, Section 3986 provides:

> "If, upon examination, it shall appear to the judge or justice that the person charged is guilty of the crime alleged, he shall commit him to the jail of the county, or, if the offense is bailable, take bail for his appearance at the next term of the court of the county having criminal jurisdiction."

From Section 3985 it is seen that the proceeding must be instituted by the filing of a sworn charge, that is, a written affidavit charging an offense. In order to be competent to make this affidavit a person must have personal knowledge of the facts and be capable of testifying to them. We find no court decision deciding this point in an interstate rendition case. But Section 3987 in part provides that, "The judge or justice shall proceed in the examination in the same manner as is required when a person is brought before such officer, charged with an offense against the laws of this state . . . ." (Italics ours) Assuming the proceeding will be instituted in the Justice of the Peace court, the justice will proceed in the same manner as in preliminary examinations before such justice where a person is charged with committing a felony. Regarding such preliminary examination, Section 3857 requires an affidavit by providing in part; "Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, 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 . . . . ."

The qualifications of the maker of such an affidavit were described as follows in Ex parte Dickinson (Springfield Court of Appeals) 132 S. W. (2nd) 243, l.c. 245:

> "Section 3467, R. S. Mo. 1929, Mo.

> St. Ann. Sec. 3467, p. 3110, defining the duty of a magistrate when complaint is made in writing and upon oath setting forth that a felony has been committed, contemplates that such complaint be made by a party competent to testify, and a warrant should not issue without a proper complaint or affidavit. Monson v. Rouse, 86 Mo. App. 97; State v. Sassaman, 214 Mo. 695, 114 S. W. 590. That the affidavit, or complaint, must be made by a person competent to testify is borne out by the case of State v. Ransberger, 106 Mo. 135, 17 S. W. 290, 293, in which it is stated: 'As a basis for an official information, the affidavit of "a person having knowledge that an offense has been committed" is sufficient, but, when a party is to be arrested without an official charge, the affidavit "of a person competent to testify against the accused" is requisite.'"

Those propositions apply to the fugitive proceeding herein considered, and they preclude the making of the affidavit by the prosecuting attorney in Missouri on information and belief. The proceeding for apprehension of a fugitive is an examination and not a trial; it is governed by rules applicable to preliminary examinations. However, an analogy is found in the affidavit required for trials in Justice of the Peace courts in Missouri for misdemeanors. In this connection Section 3805 provides in part that, " . . . when any person has actual knowledge that an offense has been committed . . . he may make complaint, verified by his oath . . . before any officer authorized to administer oaths . . . and file the same with the justice of the peace . . ." That section would seem to require knowledge and not mere information and belief on the part of the affiant. Under said Section 3805 it has been held that where a complaint (affidavit) is used, "the defendant can not be convicted of an offense of which the person making the complaint had no actual knowledge" (State v. Meadows (K. C. Ct. of Appeals) 106 Mo. App. 604, l.c. 606, 81 S. W. 463).

All of the above cited statutes require that the charge be on oath, that is, that it be sworn to. In State v. Nichols 49 S. W. (2nd) 14, l.c. 19, 330 Mo. 114, the court said:

> "And by plain implication section 3467, R. S. Mo. 1929, makes the filing of a complaint in writing and upon oath the first step in the institution of such a criminal prosecution. * But were it otherwise, the general rule is that a written complaint i s necessary even after an arrest without a warrant. 16 C. J. Sec. 495, p. 288."

Acknowledgments or oaths in Missouri must be made before officers authorized to administer oaths in this state. It is noted that Section 3805 above quoted says, " . . verified by his oath . . before any officer authorized to administer oaths . . " The clear intendment of all of the laws governing proceedings in Missouri courts and requiring oaths, is that such oaths shall be made before officers authorized to administer oaths in Missouri. While we find no decision squarely on the point in an interstate rendition case, we regard the above as the reasonable construction of the statutes.

The statutes governing the proceeding for apprehension of a fugitive were written with knowledge that affidavits sworn to in other states could be used in support of the requisition for the governor's rendition warrant by authority of the Act of Congress (18 USCA Section 662, RSUS Section 5278) referred to in Section 3980 R. S. Mo. 1939. The omission in Missouri statutes to authorize the use of the same affidavits in the proceeding for apprehension is indicative of the intent that they should not be used. Therefore, a judge or justice of the peace of Missouri could not lawfully issue his warrant for the apprehension of an alleged fugitive on the basis of the filing before him of a copy of an affidavit sworn to before an officer authorized

to administer oaths in another state. It is true that in some instances in our law, documents sworn to in other states are recognized as importing verity in our courts. But that is by express statutory authority, as in the case of foreign depositions and interrogatories (Sections 1920, 1924, 1939, R. S. Mo. 1939). Since there is no authority for use of a foreign affidavit in the action for apprehension of a fugitive in Missouri courts, we believe it should not be used.

In practice affidavits for use in preliminary examinations before justices of the peace in Missouri are often sworn to before some other officer authorized to administer oaths in the county of the jurisdiction of such justice. In our opinion an affidavit so made for use in this proceeding would suffice. By way of analogy, in making a charge as a basis for a requisition by a governor of one state upon another, it is not necessary that the affidavit be actually sworn to before the magistrate who issues the warrant. In Gugenhine v. Gerk 31 S. W. (2nd) 1, l.c. 2, 326 Mo. 333, appeal dismissed and certiorari denied 51 Supreme Court 180, 282 U. S. 810, 75 L. Ed. 726, it was said that the requirement of an affidavit made before a magistrate:

> " * * does not mean that the magistrate must write the affidavit or administer the oath to affiant. It means an affidavit must be laid before a magistrate, and that the magistrate acting under said affidavit order a warrant issued for the arrest of the person charged with the crime."

As was seen from the provisions of Section 3985, quoted above, the affidavit must charge the commission of a crime in another state. It will not be sufficient if it merely alleges that the alleged fugitive is charged in another state with committing a crime. It was so ruled in effect in State ex rel Kaiser v. Miller, cited above. In that case, at l.c. 902 of 289 S. W. the Supreme Court

of Missouri quoted with approval the following tests for jurisdiction of the justice of the peace in this proceeding:

> "'It will be readily seen that in order for the magistrate to acquire jurisdiction under the statute just quoted, three things are absolutely essential: 1st, That there is a person within this state. 2nd, That a credible witness before such magistrate, on oath or affirmation, charge such person with the commission of a crime in another state; and 3rd, That such person fled from justice. It is only "whenever" all these essentials concur, that "it shall be lawful for the judge or justice to issue his warrant for the apprehension of the party charged."'"

When such a complaint or affidavit is filed, it is the duty of the justice of the peace to take a bond, according to the provisions of Section 3994:

> "When a complaint shall be made against any person, as provided by sections 3980 to 3998 of this article, the judge or justice shall take from the prosecutor a bond, to the clerk of the court, with sufficient security, to secure the payment of the costs and expenses which may accrue by occasion of the arrest and detention of the party charged, which bond shall be certified and returned, with the examination, to the office of the clerk of the court having criminal jurisdiction."

The term "prosecutor" as used in that section means

not the prosecuting attorney of the county, but the person who signs the affidavit commencing the proceeding. A prosecutor is defined in 34 Words & Phrases (perm. ed.) page 632 as:

> " * * one who instigates a prosecution by making affidavit charging a named person with the commission of a penal offense on which a warrant is issued * * *."

This is the sense in which the word is used in the statute, and is in line with the policy that the demanding state shall pay the expense of the return of a fugitive through the medium of the governor's rendition warrant (Section 3984).

After the warrant is issued and the alleged fugitive is taken into custody, there is no requirement that the hearing or examination be held immediately. Again, Section 3987 provides in effect that the justice shall proceed in this examination in the same manner as in ordinary preliminary examinations. In such a proceeding, by the terms of Section 3864 the justice "may adjourn an examination . . . from time to time as occasion requires, not exceeding ten days at any one time . . . as he deems necessary. . ."

As provided by the above quoted Section 3986, if upon examination it appears to the justice that the person charged is guilty, he shall commit him to the county jail, or, if the offense is bailable, let to bail. The examination shall be reduced to writing and a copy sent to the Governor of the State of Missouri (Section 3987). If he believes there is sufficient evidence to warrant the finding of an indictment, he shall notify the governor of the state in which the crime was committed (Section 3988). In practice, by the time the Governor of Missouri will receive the transcript of the justice of the peace court examination, he already will have received a requisition for the return of the fugitive from the governor of the state where the crime was committed. We believe any further review of the procedure would serve no useful purpose. Regarding one other provision

of the Missouri statute, we would not recommend that any fugitive be surrendered through the medium of the warrant of the Governor of Missouri without the production of a certified copy of an indictment returned or an affidavit made before a magistrate in the demanding state, in accordance with the provisions of the Act of Congress (18 USCA Section 662; R.S.U.S. Section 5278).

CONCLUSION

Pending issuance of the governor's rendition warrant, an alleged fugitive from the justice of another state may be arrested upon suspicion and held for twenty hours without warrant if in the officer's judgment such suspicion is justified. Thereafter, or without such arrest, if there is filed before a justice of the peace an affidavit by a competent witness charging, among other things, that the alleged fugitive committed an offense in another state, such justice may issue his warrant for the apprehension of such fugitive. The affidavit must be sworn to in this state. An examination proceeds as in ordinary preliminary examinations.

Respectfully submitted

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APPROVED:

VANE THURLO
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