Denver Law Review

Volume 8 | Issue 7 Article 3

January 1931

# By Leave of Court First Had

Horace N. Hawkins Jr.

# "BY LEAVE OF COURT FIRST HAD, * * *"

*By Horace N. Hawkins, Jr., of the Denver Bar*

IN the State of Colorado, and especially in its more populous counties, more criminal prosecutions for serious offenses are initiated by direct information filed by the district attorney, than by any other method. Incarceration of the defendant, if he does not post the required bail, or if bail be denied him, follows the filing of the information as a matter of course. The defendant named in the information may not be deprived of his liberty without due process of law, and the district attorney is not invested by law with any judicial authority the exercise of which renders imprisonment pursuant to his judgment a legal imprisonment. How then, is the deprivation of the liberty of the individual upon the filing of an information by the district attorney justifiable? It is the purpose of this article to discuss this question, (although with no pretense of exhaustive research, let it be here confessed), and the interrogatory corallary thereto as to what attack, if any, may a defendant imprisoned after the filing of such an information make upon his further detention, and upon what, if any, grounds should he be released therefrom.

Section 3 of Article II of the Constitution of the State of Colorado is as follows:

"That all persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

Section 7 of Article II is in the following language:

"That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

Section 8 of Article II provides:

"That until otherwise provided by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases, offenses shall be prosecuted criminally by indictment or information."

And finally,

Section 21 of the same article, known as the "Bill of Rights," guarantees

"That no person shall be deprived of life, liberty, or property, without due process of law."

These provisions of our fundamental law, together with the first clause of the 14th Amendment to the Constitution of the United States, constitute the basis on which the argument herein is built.

Pursuant to the section 8 of Article II of the Colorado Constitution, for many years the only method for prosecuting one charged with the commission of a felony was by indictment. In the year 1891 the legislature enacted the first statute giving the district attorney the right to file an information in a felony case. It is to this enactment, which appears on pages 240-243 of the session laws of 1891, and to the decisions of our courts thereunder, to which attention is now directed. The pertinent sections of that act are as follows:

"Section 1. The several courts of this State shall have, and may exercise the same power and jurisdiction to hear, try and determine prosecutions, upon information for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as in cases of like prosecution under indictment.

"Sec. 2. All informations shall be filed in term time, in the court having jurisdiction of the offenses specified therein, by the district attorney of the proper county as informant, and his name shall be subscribed thereto, either by himself or by his deputy, and the names of the witnesses shall be endorsed thereon. All informations shall be verified by the oath of the district attorney, or his deputy, or by the oath of some person competent to testify as a witness in the case; the verification by the district attorney or his deputy may be upon information and belief. The district attorney shall also indorse upon said information the names of such other witnesses as may afterwards become known to him, at such time, before the trial, as the court may, by rule or otherwise prescribe."

It will be noted that under the last section the following five requirements are prescribed for an information:

1. It shall be filed in term time,
2. by the district attorney as informant,
3. the district attorney's name shall be subscribed thereto per se or by deputy,

4. It shall be verified by
   a. the district attorney or his deputy who may do so on information and belief, or
   b. by the oath of some person competent to testify as a witness in the case.
5. The names of the witnesses for the prosecution must be endorsed thereon.

"Sec. 3. The offense charged in any information shall be stated in plain, concise language, without prolixity or unnecessary repetition. Different offenses, and the different degrees of the same offense, may be joined in one information in all cases where the same might be joined by different counts in one indictment; and in all cases the defendant shall have the same rights as to all proceedings therein, as he would have if prosecuted for the same offense under indictment."

Section 4 prescribes a form of information and forms of verification to be used by the district attorney and by a person competent to testify as a witness in the case.

"Sec. 5. All provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the passing or execution of any sentence, and to all other proceedings in cases of indictment, whether in court of original or appellate jurisdiction, shall to the same extent and in the same manner as near as may be, apply to informations and to all prosecutions and proceedings thereon."

This last section is important because it authorizes the issuance of a capias by the clerk on the filing of the information.

"Sec. 6. Any person who may according to law, be committed to jail or become recognized or held to bail, with sureties for his appearance in court, to answer to any indictment, may in like manner, be so committed to jail or become recognized and held to bail for his appearance to answer to any information or indictment as the case may be."

Section 7 provides for the inquiry by the district attorney into all cases of preliminary examination, and for the filing by him of his reasons in the event that he determines that an information ought not to be filed.

"Sec. 8. An information may be filed against any person for any offense when such person has had a preliminary examination as provided by law before a justice of the peace or other examining magistrate or officer and has been bound over to appear at the next term of the court having juris-

diction or shall have waived his right to such examination. But if a preliminary examination has not been had or when upon such examination the accused has been discharged or when in the opinion of the district attorney the affidavit or complaint upon which examination has been held is defective or when such affidavit or complaint has not been delivered to the clerk of the proper court the district attorney may upon affidavit of any person who has knowledge of the commission of an offense and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof upon being furnished with the names of the witnesses for the prosecution by leave of court first had, file an information, and process shall forthwith issue thereon."

From the last section, it is clear that in a case where no preliminary examination has been had, the information, in addition to complying with the five requirements specified by section 3 of the act must meet the following additional requirements:

6. There must be an affidavit of a person
    a. who has knowledge of the commission of the offense,
    b. such affiant must be a competent witness to testify in the case.
    c. such affidavit must set forth the offense and the name of the person charged with the commission thereof.
7. The district attorney must be furnished with the names of the witnesses for the prosecution,
8. The district attorney must first obtain leave of court to file the information.

---

NOTE: This article will be continued in the June number of DICTA.