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Horace N. Hawkins Jr.

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

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

THIS raises the query as to what the duty of the court is when the district attorney obtains leave to file on information by presenting the same with a false affidavit, and such fact is made known to the court. Logic and precedent alike lead to the conclusion that whenever it is made known to the court that its order giving permission to file an information was entered because of misrepresentations made when the same was tendered, whether such misrepresentations consist of attaching to the information a false affidavit or of some other act or statement whereby the court is misled and its confidence abused, it is the duty of the court to vacate the order granting leave to file the information and to strike the information from the files. There are no Colorado cases dealing directly with this question. In numerous cases before the Supreme Court convicted defendants have alleged that they were prejudiced in the trial court by reason of the falsity of the affidavit accompanying the information, but in none of them was an attack made upon the order granting leave to file the information. In the consideration of these decisions it must be borne in mind that the affidavit is no part of the information, although the allegations of the information may be incorporated into the affidavit by appropriate reference. In some of the Colorado decisions there is language indicating that the truth of the affidavit attached to the information cannot be questioned by the defendant, but in each such instance such expression is "obiter dictum". A careful analysis of the decisions of our Supreme Court indicates that in none of the cases was the trial court specifically requested to vacate the order granting leave to file the information because of the imposition upon the court through the presentation on a false affidavit accompanying the information. The following is a brief resume of the Colorado decisions.

The fact that affiant was not an eye-witness of the crime does not show that he could not truthfully swear to the facts

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*This article is continued from the June number of Dicta.

stated in the affidavit of his own knowledge. *Holt v. Peo.,* 23 Colo. 1.

Where a motion to quash for insufficiency of the accompanying affidavit is directed to amended information, and the original information is not shown by the record, it will be presumed that at the time of the filing of the amended information the accused was in custody under lawful process issued by virtue of the first information, and the trial court's ruling in denying the motion to quash will not be disturbed by the Supreme Court. *Noble v. Peo.,* 23 Colo. 9.

The information need not allege the obtaining of leave to file the same. *Liggett v. Peo.,* 26 Colo., 364.

Allegations of affidavit accompanying information cannot be attacked by introduction of extraneous evidence on motion to quash the information. *Berghdahl v. Peo.,* 27 Colo. 302.

Where defendant goes to trial without questioning the information or affidavit, he is not entitled to an acquittal when it develops during the trial that the affidavit is in fact false. *Barr v. Peo.,* 30 Colo. 522.

The question of the falsity of the affidavit cannot be considered on demurrer to the information. *Vickers v. Peo.,* 31 Colo. 491.

Motion to quash information, made during the trial when it developed that the party verifying the same had no personal knowledge of the commission of the offense charged, was properly denied. *The Overland Cotton Mill Company v. Peo.,* 32 Colo. 263.

The information cannot be attacked by motion to quash on the grounds that the person who verified the same had no personal knowledge of the commisison of the offense charged. *Wickham v. Peo.,* 41 Colo. 345.

On a motion to quash the information, the accompanying affidavit will not be held insufficient because it does not appear by recital therein that the affiant is a competent witness to testify in the case, his competency being presumed until the contrary is shown. *Walt v. Peo.,* 46 Colo. 136.

In the cases of *Ausmus and Moon v. Peo.,* 47 Colo. 167, *Bosko et al. v. Peo.,* 68 Colo. 57, *Collins v. Peo.,* 69 Colo. 343,

Wilkinson v. Peo., 86 Colo. 406, various forms of affidavit were held to be in compliance with the statute.

These are all the Colorado cases dealing with this phase of the information statute. We find the following conclusions therefrom.

1. The affidavit attached to the information must show probable cause;

2. Leave of court must be obtained for the filing of the information, and it is prejudicial error not to obtain such leave.

We also deduce that the truthfulness of the affidavit cannot be attacked by motion to quash or by demurrer, nor upon the trial.

The Supreme Court has held in effect that the granting of leave to file an information is a determination of the existence of probable cause. When it is obtained *ex parte,* on a false affidavit, is the court powerless to correct its error? May the district attorney impose upon the court, willfully if he choose, and having deluded the court into granting leave, contend that the court is powerless to purge its records of the document filed by such means?

Every sense of decency, of right, and fair dealing compels the conclusion that the court has power under such circumstances to revoke its leave, that the court owes a duty to society at large to repudiate its process when illegally invoked. And as might be expected, the authorities hold that the court has such power.

The State of Montana has a statute very similar to ours. In the case of *State v. Brett,* 1895, 40 Pac. 873, cited with unqualified approval in *Walker v. Peo.,* 22 Colo. 415, the Supreme Court of that state had occasion to say, while affirming a conviction for forgery,

"It appears by the record that the information upon which the defendant was convicted of the crime of forgery was filed by leave of court. Nevertheless, it is argued, a prosecution by information, where there has been no preliminary examination is illegal, and a violation of constitutional rights. Const. art. 3 Sec. 8, expressly provides that 'all criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment, without such examination or commitment, or without leave of court.' It is evident that one of the objects of the constitu-

tion was to do away, to a great extent, with the machinery and expense of a grand jury, by substituting therefor prosecution by information. It is not necessary, in order to vest power in the county attorney, to file an information that there shall be a preliminary examination and commitment. He may act, after leave has been granted by the court, in a case like the one at bar, where there may not have been any charge or information before a committing magistrate. One of two methods of procedure is indispensable where an information is filed—either there must have been an examination and commitment, or there must have been leave of court procured. But both steps are not required. A plain interpretation of the words of the constitution by which every clause of the section quoted shall be effective leads to this conclusion. We think, too, that the rights of a defendant are guarded, no matter what procedure is followed.

"1. Where an investigation into his guilt or innocence is had before a committing magistrate, and a commitment is the result, such a judicial inquiry is sufficient to justify the county attorney in proceeding in the district court without first obtaining leave of that court to file an information, formally charging the defendant with the offense for which he was examined, or any other offense, by the facts disclosed upon such preliminary hearing. The protection rests in the guaranty of a right to a judicial review of the matter by an impartial magistrate.

"2. Where no examination has been had before a magistrate, and no commitment has been made, in such case, to protect the rights of the defendant, and to guard him against oppression or malice, and to prevent abuse of any general power vested in the county attorney, leave of the district court is necessary to be obtained. Thus, again, there is the guaranty that a judicial order will be required before there can even be a charge preferred. It is suggested that obtaining of a leave of the court is a mere perfunctory matter, and is granted of course. This argument, if true, reflects credit upon the several county attorneys of the state for having administered their offices with that high sense of impartial responsibility and power imposed upon them by the constitution, but it loses its entire force if an instance should arise where a prosecuting officer oppressively, maliciously, or otherwise illegally should attempt to unjustly harass any citizen by filing an information charging him with crime. At once, upon proper showing, or doubtless by order of the court of its own motion, where the court should believe that a wrong was about to be done, the leave of the court would be suspended or denied, until an inquiry could be had into the reasons for the official acts of the county attorney in filing the information, and until the court was satisfied by the showing made that the case was one where an information should be filed. Thus, again, the guaranty that judicial leave will be had before instituting a prosecution affords safety to the innocent, quite ample to prevent any abuse of the power of the state, in the hands of a prosecuting attorney. See *State v. Boswell,* 104 Ind. 541, 4 N. E. 675."

The similarity of the statute of Montana to the Colorado statute will be observed from the foregoing quotation from the case of *State v. Brett,* supra.

In 1895, the Supreme Court of Montana decided the case of *State v. Cain,* 41 Pac. 709, an appeal by the state from an order of the district court revoking its leave to file an information and discharging the defendant. The ground of defendant's motion, granted by the district court, was that the grand jury had previously investigated his conduct with reference to the same matters alleged in the information, and no true bill had been found. The opinion of the court is in part as follows:

"This case is within the rule laid down in *State v. Brett,* 16 Mont....., 40 Pac. 873, where it was held that, if an instance should arise where a county attorney oppressively, maliciously, or otherwise illegally should attempt to unjustly harass any citizen by filing an information against him charging him with crime, the court, either of its own motion, or upon proper showing, would suspend or deny its leave to file a charge until an inquiry could be had into the reasons for the official acts of the county attorney in filing the information, and until it satisfactorily appeared by the showing made that the case was one where an information should be filed. The affidavit of W. B. Rodgers was sufficient to have warranted the court in refusing leave to permit an information to be filed against the defendant until some showing was made by the county attorney for charging the defendant with a crime based upon the identical acts into which a grand jury had inquired, but for the doing of which they had failed to find a true bill. The fact that the information was already on file when these facts were brought to the attention of the court cannot affect the right of the court to revoke the leave already granted. If the court, in the exercise of its sound judicial discretion, had a right to withhold its leave to file the information at all until inquiry could be had, under the limitations discussed in the Brett Case, supra, it had a right to revoke its leave, where the defendant, directly after his arrest, and at the first opportunity presented, brought to the notice of the court the fact that his conduct had already been investigated by a grand jury, and no true bill had been found. Such was the effect of the defendant's motion. It brought to the attention of the court matters upon the presentation of which the court, in its discretion, and for apparent good cause, suspended its approval to file the information, by revoking its former leave, and setting aside the subsequent proceedings. The record discloses no request thereafter by the county attorney to file another information, and no attempt on his part to demonstrate to the court that the case was a proper one for further prosecution. The action of the district court being within its discretionary power, and without abuse thereof, the judgment is affirmed."

It is believed the foregoing demonstrates that imprisonment pursuant to the process which issues as a matter of course upon the filing of an information, is constitutional where the accused has neither had nor waived a preliminary examina-

tion because the leave of court required as a condition precedent to such filing is a judicial determination of probable cause to believe the accused guilty of the offense charged against him.

It is also submitted that the propositions and authorities hereinbefore discussed demonstrate with equal force that the court should revoke its leave to file an information upon being advised of any matter which would have caused it to refuse such leave in the first instance, whether such matter be the falsity of the affidavit accompanying the information or any other fact or circumstance which would have induced a judicial determination of lack of probable cause. Any other construction reduces the constitutional guarantees hereinbefore quoted to impotent verbiage.

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