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By Leave of Court First Had

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

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BEFORE turning to the cases dealing with this subject let us examine the statute itself. Its plain purport and meaning is clear. When there has been a preliminary examination and the defendant is bound over the district attorney may file the information without leave of court. This is perfectly proper and does not contravene the constitution because there has already been testimony under oath and a judicial determination by the magistrate that probable cause exists.

However, where no preliminary examination has been had much more is required by section 8. This is clearly for the purpose of complying with section 7 of the Bill of Rights, and the giving of leave by the court is the equivalent of the magistrate's determination of probable cause. This, while easily deducible from the statute, is not mere speculation of the writer, but is the clear and unequivocal holding of the Colorado decisions.

The case of *In re W. S. Dolph,* 17 Colo. 35, decided in 1891, was an original application before the Supreme Court for a writ of habeas corpus. Dolph had been convicted of embezzlement, a felony, on an information filed in the District Court after he had had a preliminary examination and had been bound over to the district court. The court dismissed the writ. The opinion is in part as follows:

"Whether a prosecution for a felony *by information* is to be regarded as 'due process of law', is by no means a new question. The subject has received the consideration of the highest judicial tribunals of several of our sister states and also of the supreme court of the United States. A brief statement of our views respecting due process of law as a fundamental principle of our jurisprudence, together with an examination of our own constitution and legislative enactments applicable to the facts of the present controversy, will suffice for the determination of the first objection above stated.

"No state shall deprive any person of life, liberty or property without due process of law, says the constitution of the United States; and our own constitution contains a like declaration. Due process of law within the meaning of these constitutional provisions undoubtedly includes 'law in its regular

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

course of administration through courts of justice'; it also implies that any individual whose life, liberty or property may be affected by any judicial proceeding shall have timely notice thereof and reasonable opportunity to be heard in defense of his rights; but it does not necessarily include an indictment by a grand jury for a felony, even though such prosecution may deprive the accused of his life or liberty. While ancient forms of procedure are not to be lightly set aside or disregarded, modern judicial utterances as well as modern constitutions and laws evince more regard for substance than for form. *Hurtado v. The People of Cala.,* 110 U. S. 516; *Rowan v. The State,* 30 Wis. 129; *Parrish v. The State,* 18 Neb. 405; *Miller v. The State,* 29 Neb. 437; Cooley Const. Lim., 5th ed., p. 436.

"It is true that the procuring of an indictment through the intervention of a grand jury has been considered an important check upon hasty, ill-advised and malicious criminal prosecutions, and so a corresponding protection to individual rights. But when we consider that the investigation by a grand jury is wholly *ex parte,* and in secret, it may well be doubted whether it affords any better security to the individual than an open accusation followed by a preliminary examination before a magistrate. *In re Losasso,* 15 Colo. 170.

"The proceeding known as a 'preliminary examination' under the laws of this state is well understood. It is a proceeding before a regularly constituted court or judicial magistrate in which the accused has the right to be present and hear all the witnesses, participate in their examination, and be heard also in his own behalf. He is also entitled to a change of venue upon a proper showing without costs. 1 Mills' Ann. Stats., sec. 1484; 2 Id. secs. 2780, 2781.

"The preliminary examination being concluded, the magistrate is required to find and openly certify his decision as to the probable guilt or innocence of the accused. If the finding be against the accused, the law requires that he shall be bound over or committed to appear and answer before the court having jurisdiction to try and determine the offense; and at the next term of such court he may be proceeded against for such offense by information in the same manner as if indicted by a grand jury. Such are the requirements of our law. Such are the safeguards for the protection of persons accused of crime by the provisions of the act under consideration. All these requirements having been observed in the petitioner's case, the objection that he has been deprived of his liberty without due process of law is not, in our judgment, sustained."

In *Lustig et al. v. The People,* 18 Colo. 217, 32 Pac. 275, decided in 1893, the Supreme Court reversed a conviction founded upon an unverified information. No preliminary examination of the defendant had been held. The court held that the procedure followed violated the seventh section of the Bill of Rights. The opinion was written by Mr. Justice Hayt, and is so illuminating that at the risk of unduly pro-

longing this article it is quoted in its entirety. The Court, through Justice Hayt, says:

"Authority to institute the prosecution by information is claimed under section 1 of an act entitled, 'An Act to confer original jurisdiction upon county courts in misdemeanor cases.'

"'Section 1. Original jurisdiction is hereby conferred upon the county courts in each of the several counties of this state, in cases of misdemeanor, and such courts shall hereafter be empowered to try such cases upon information by the district attorney of the district in which such counties are situated.' Session Laws, 1889, p. 101.

"It is claimed that under this provision the information need not necessarily be based upon the oath or affirmation of any person, reduced to writing; that it is sufficient in this respect if signed by the proper prosecuting officer. In support of the position taken by counsel, reference is made to the common law. It is undoubtedly true that under the ancient common law the attorney general might inform against any party for a criminal offense, either upon sufficient evidence, or without any evidence at all.

"But this rule of the common law has been essentially changed in this respect by the seventh section of our Bill of Rights, which provides that 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 wrting.' The language of this section is too plain to admit of misconstruction. An information can serve no practical purpose in the administration of the criminal law, unless a legal warrant can be issued thereon. And to justify a warrant there must be a charge under oath, reduced to writing. The public prosecutor is no longer authorized to institute a criminal prosecution against any person by reason of his official signature merely. To allow him to do so would be contrary to the express provisions of the Bill of Rights quoted. And the 'probable cause supported by oath or affirmation', prescribed by this section, is the oath or affirmation of those parties who depose to the facts, upon which the prosecution is founded. *U. S. v. Tureaud,* 20 Fed. Rep. 621.

"This is now the settled law in the federal courts, under the fourth amendment to the Constitution of the United States, which is substantially the same as the provisions of our Bill of Rights: *U. S. v. Tureaud, supra; U. S. v. Maxwell,* 3 Dillon, 275; *U. S. v. Polite,* 35 Fed. 58; *U. S. v. Smith,* 40 Fed. 755.

"Section 6 of the Bill of Rights of Illinois is almost identical with section 7 above quoted. The provisions of the Illinois constitution came before the supreme court of that state in the case of *Myers v. The People,* 67 Illinois, 503, and it was there held that an affidavit by the public prosecutor is essential to the validity of an information. In that case the information was based upon the oath of a private party, while in this case no oath whatever was required. See also *State v. Montgomery,* 8 Kansas, 351; *State v. Nulf,* 15 Kansas, 404.

"The act with reference to informations to be found in the Session Laws of 1891, commencing at page 240, seems to have been prepared with special reference to the provisions of our Bill of Rights and the decisions of the courts based thereon. If carefully followed, errors like the one committed in this case will in the future be avoided.

"As the information in this case is not supported by the oath or affirmation of any person, the prosecution and conviction thereunder were in violation of the seventh section of our Bill of Rights. The motion to quash should have been sustained.

"Judgment reversed."

The Supreme Court in 1894, again held prosecution by information preceded by a preliminary examination and commitment by a Justice of the Peace, not to be unconstitutional. *Nesbit v. The People,* 19 Colo. 458.

Brown v. The People, 20 Colo. 161, 36 Pac. 1040, was decided in 1894, under the law of 1891. The prosecution therein was commenced by two informations sworn to by the district attorney upon information and belief. A motion to quash the capiases was made by the defendant, which the trial court overruled. The Supreme Court affirmed Brown's conviction on both informations, and held that an information might be verified upon information and belief by the district attorney where a preliminary examination had been had; that the fact of such preliminary examination need not be alleged in the information; that the defendant must show the want of such examination; and that inasmuch as defendant introduced no evidence showing a lack of a preliminary examination, the motion to quash the capiases was properly denied.

In 1893 the Legislature amended the information Act, by Ch. 66 of the Session Laws of that year, and the Act as amended now appears in the Compiled Laws of 1921 at sections 7069 to 7081. This Act changed the form of information to a slight extent, made some regulations to be used as a guide to the sufficiency thereof, and made two important changes. Section 1 is as follows:

"SECTION 1. That section two of an act entitled 'An Act providing for the prosecution and punishment of crimes, misdemeanors and offenses by information', approved April 14th. 1891, be amended to read as follows, to wit; 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 by himself or by his deputy. He shall indorse thereon the names of such witnesses

as are known to him at the time of filing the same, and shall also indorse upon such information the names of such other witnesses as may become known to him before the trial at such time as the court may, by rule or otherwise prescribe; but this shall not preclude the calling of witnesses whose names or the materialty of whose testimony are first learned by the district attorney upon the trial. In all cases in which the defendant has not had or waived a preliminary examination there shall be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of affiant that the offense was committed."

Thus by virtue of section 2 as amended (C. L. 7070) we find that in no case may the district attorney verify the information on information and belief, and an added requirement is specified when the accused has had no preliminary examination, to-wit: There shall be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of the affiant that the offense was committed.

Section 8 of the Act of 1891 as amended by section 3 of the Act of 1893, provides:

"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 court having jurisdiction, or shall have waived his right to such examination; such information shall set forth the crime committed according to the facts. But if a preliminary examination has not been had or when upon such examination the accused has been discharged, or when the affidavit or complaint upon which the examination has been held 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."

Thus it is clear from the act as amended that the information when there has been no preliminary examination had or waived, must be accompanied by an affidavit,

(1) of some credible person verifying the information upon the personal knowledge of the affiant that the offense was committed, and

(2) the affidavit of a person who has knowledge of the commission of the 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; and leave of court must first be had before the information can be filed.

The two requirements with reference to affidavits can, of course, be combined in one affidavit.

In the case of *White v. Peo.,* decided by the Court of Appeals in 1896, and reported in 18 Appeals, 289, the information, although filed under the Act of 1893, contained a verification by the district attorney on information and belief. The record did not disclose whether or not a preliminary examination had been had. The court held the verification superfluous in the event a preliminary examination was held, and affirmed the conviction on the presumption of regularity attendant on judicial proceedings.

In the case of *Taylor v. Peo.,* 1895, 21 Colo., 426, the court held that the defendant by going to trial without in any manner attacking the information, waived his right to raise the question of the absence of a proper affidavit.

In the case of *Ratcliffe v. Peo.,* 1896, 22 Colo. 75, the supreme court held a prosection by unverified information following waiver of preliminary examination, the defendant being bound over to the district court, legal and constitutional.

In 1896, in *Walker v. Peo.,* 22 Colo., 415, 45 Pac. 388, the supreme court reversed a judgment of conviction because no leave of court had been obtained for filing the information. In that case no preliminary examination had been had or waived. The opinion is in part as follows:

"We have deemed it necessary in this case to pass upon these objections in view of a new trial, although the judgment of the county court must be reversed because the information was filed without leave of court. It is urged by the attorney general that the provisions of the statute restricting the filing of informations by the prosecuting officer, in cases where no preliminary examination has been had, to cases in which an affidavit has been filed of a person having knowledge of the commission of the offense, is ample to prevent abuse of his powers. It is a sufficient answer to this argument to say that the legislature did not so regard it. To protect the rights of the citizen and guard him against oppression and malice, the legislature has made it necessary that a judicial order shall be obtained before a charge can be preferred, and the courts have no right to construe away or defeat this statutory provision.

"In the case of *State v. Brett* (Mont.) 40 Pac. Rep. 873, it is said:

"'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.'

"The information in this case having been filed without leave of court, the judgment of the county court must be reversed."

From the quoted portion of the opinion it will be seen that the conviction was reversed because leave of court was not obtained to file the information. If, as is undoubtedly the law by virtue of this decision, leave of court to file the information is so important that no conviction can be had without it where there is no preliminary examination or waiver thereof, the granting or refusing of such leave must be a very important judicial function indeed.

NOTE: This article will be concluded in the next number of Dicta.

BOOKS LOST

The Denver Bar Association Library reports that two books are missing: 30 U. S. and 76 N. W. If the lawyers will kindly glance over their stray volumes, perhaps the lost can be rescued!
