

CRIMINAL PROCEDURE:  
TRIAL MAGISTRATE TO AFFORD  
CONSULTATION TIME TO DEFENDANT,  
WHEN:

When defendant is arraigned on  
misdemeanor charge, in magistrate  
court magistrate must, before  
accepting plea afford defendant  
sufficient time and opportunity  
to consult attorney and a friend.  
If necessary, he must continue  
case until defendant is accorded  
such rights. Prosecuting attorney  
who instituted misdemeanor case  
before magistrate, not required by  
statute  
to be present when guilty plea made and sentence entered  
but he is entitled to \$5.00 statutory conviction fee  
whether present or absent.

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May 19, 1953

Honorable E. C. Westhouse  
Probate Judge and Ex-officio  
Magistrate  
Madison County  
Fredericktown, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for  
a legal opinion, which reads as follows:

"What in your opinion does Ex parte  
Stone, 255 S.W. 2d 155 hold and how  
can it be reconciled with the follow-  
ing RSMo 1949 Statutes: Sections  
543.080 and 543.180?

"Does the case hold that the defendant,  
and then only after his arraignment, must  
be 'afforded time and opportunity to con-  
sult with an attorney and a friend' before  
his plea of guilty can be accepted? If  
the case does so hold, would it also apply  
no matter whether a warrant had been issued  
or whether a summons had been given by a  
State Trooper to appear and answer a mis-  
demeanor charge to be filed in Magistrate  
Court?

"Can this case and the statutes quoted  
above be reconciled by saying that the  
Court upon its own motion (RSMo 1949,  
Sec. 543.120) must grant a continuance

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in all cases after arraignment and before any plea of guilty can be accepted? Meaning of course that this Statute, RSMo 1949, Section 558.380, is good ground for a continuance.

"I have another question on a different point. Is it necessary that the Prosecuting Attorney be present in Magistrate Court when the defendant is arraigned and pleads guilty to a misdemeanor charge? If not, should the \$5.00 Prosecuting Attorney fee be taxed as costs against the defendant, no matter if the Prosecuting Attorney is or is not present?

"I would appreciate your opinion on both these questions."

In regard to the first inquiry, and in answer to the first part of same, it is our thought that the very recent case of *Ex Parte Stone*, 255 S. W. (2d) 155, in effect holds that the right of counsel is guaranteed to one accused of crime before he is compelled to plead to a criminal charge, by Supreme Court Rules 21.14 and 29.05, and Sections 544.170 and 558.830, RSMo 1949. That in every criminal case pending before a magistrate, it is the duty of the court to afford the defendant such time or opportunity to consult an attorney and a friend as may be necessary, before a plea of guilty is accepted, and that it should appear of record that such time and opportunity has been afforded the accused, and that unless this procedure has been followed, the rights of the defendant will have been violated.

Section 558.830, RSMo 1949, referred to above, reads as follows:

"Any judge, magistrate or police judge who shall accept of a plea of guilty from any person charged with the violation of any statute or ordinance at any place other than at the place provided by law for holding court by said judge, magistrate or police judge, or who shall accept of any plea of guilty without first giving the person charged with an offense an opportunity and reasonable time to talk with a friend and an attorney, shall be deemed guilty of a

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misdemeanor, and on conviction shall be punished by a fine of not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months, or by such fine and imprisonment; and in addition, shall forfeit his office."

Section 18(a), Article I, Constitution of Missouri, 1945, provides that the accused in a criminal prosecution shall have certain rights, and reads as follows:

"Rights of accused in criminal prosecutions.  
That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county."

Section 543.080, RSMo 1949, referred to in the opinion request reads as follows:

"When the defendant shall be brought before the magistrate, or shall be held in custody, charged by information with any misdemeanor, it shall be the duty of the magistrate, unless a continuance be granted, forthwith to hear the case as herein provided."

Section 543.180, RSMo 1949, is also referred to in said opinion request, and reads as follows:

"The charge made against the defendant shall be distinctly read to him unless he shall waive the reading of the same, and he must plead orally thereto, either guilty or not guilty, which plea the magistrate shall enter on his record; or if the defendant shall fail or refuse to plead, the magistrate shall enter the plea of not guilty on his record. Such plea may be entered on the record in the following form:

"Comes now the said A B, defendant, in person, and having seen and heard

read the information filed in this cause, for plea thereto, says he is guilty (or not guilty, as the case may be), in the manner and form as charged."

The sections of the statute quoted above provide the procedure to be followed when one accused of a misdemeanor is brought before a magistrate, and also when a plea is entered to such a charge by the defendant.

It appears that the above quoted sections merely implement that part of the constitutional provision which guarantees one accused of crime the right to a speedy, public trial, and prevents such one from being denied his liberty indefinitely while being held in custody awaiting trial, or prevents such one from being charged with a criminal offense for an indefinite period of time without being brought to trial on same.

The holding in the case of *Ex Parte Stone*, supra, is not in conflict with above quoted constitutional and statutory provisions, but said opinion is strictly in conformity with same, and is a declaration, or rather a reaffirmation of the rights guaranteed to persons accused of crime by the constitution, and said statutes. The opinion in *Ex Parte Stone*, supra, is to be read and interpreted along with said constitutional and statutory provisions.

In view of the holding in said case, it is believed that when one who is charged with a misdemeanor by information is brought before a magistrate as provided by Section 543.080, supra, it shall be the duty of the magistrate, unless a continuance is granted to hear the case without delay, but that before the trial is commenced the court must ascertain whether or not the defendant has been afforded sufficient time and opportunity to consult with counsel and a friend. In the event the magistrate finds the defendant has not been afforded such rights of consultation, then the magistrate must delay the trial of the case until after the defendant has been given such time and opportunity as may be necessary for that purpose. Unless the defendant requests time to consult counsel and a friend, then the court must of its own motion continue the case until such time as may be necessary to allow defendant the rights to which he is entitled in this respect, and the court record should reflect that this has been done. Absent this procedure having been taken by the magistrate, it is believed that the rights of the defendant will have been violated.

When, under the provisions of Section 543.180, supra, the defendant pleads guilty to the misdemeanor charge stated in the information, it is believed to be the duty of the magistrate, before accepting the plea of guilty to ascertain whether or not the defendant

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has been accorded his rights to consult with counsel and a friend as stated above, then under the holding in Ex Parte Stone, supra, the court must grant sufficient time and opportunity within which said rights of the defendant may be exercised, and that the court should show that such time has been granted to the defendant. Unless this procedure is followed by the magistrate, it is believed that the defendant's rights will have been violated, and that this is true regardless of whether the defendant was arrested under authority of a state warrant or without same by a State Trooper, under the circumstances referred to in the opinion request.

The second inquiry of the opinion request asks whether it is necessary for the prosecuting attorney to be present in magistrate court when the defendant is arraigned and pleads guilty to a misdemeanor charge, and if the \$5.00 conviction fee of the prosecuting attorney should be taxed as costs regardless of whether or not the prosecuting attorney is present at the hearing.

Section 56.060, RSMo 1949, gives the general duties of the prosecuting attorney and reads in part as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, \* \* \*."

We are unable to find any decisions of the appellate courts of Missouri which interpret the meaning intended by the lawmakers to be given this section, especially to the terms "commence and prosecute," as therein used. Since the terms do not appear to have not been given any special meaning by any statutes or court decisions, they are to be given their ordinary or common meaning as they relate to court proceedings.

In the case of State v. Packard, 250 P. 2d, 561, the defendant was convicted of a criminal offense under a Utah statute which provided that the commencing of employment by one with any person, firm or corporation whose employees were out on strike called by a nationally recognized union was a crime unless such person be registered with the Industrial Commission. At, l.c. 562, the court defined the term "commence" as follows:

"\* \* \*The word commence means 'begin' - 'perform the first act of' - 'take the first step' - or 'to start', 7 Words and Phrases, p. 726. In the context of the

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term 'commencing' seems neither vague nor ambiguous. It has a fixed meaning which is commonly understood. It would apply only to persons commencing employment anew, that is, for the first time, while the strike is in progress and would not apply to former employees who merely returned to work and thus continued in employment."

In the case of State v. Bowles, 70 Kansas 821, at l. c. 827, the court quoted the definition of the terms "to prosecute" from American and English Encyclopedia of Law (2d ed.), Vol. 23, page 268, as follows:

"To prosecute is to proceed against judicially. A prosecution is the act of conducting or waging a proceeding in court; the means adopted to bring a supposed offender to justice and punishment by due course of law. It is also defined as the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information."

(Underscoring ours.)

Again in the case of Brown v. Welch, 235 S.W. 997, it was held that the word "prosecute" includes a conviction under a plea of guilty, where the officer performs the preliminary duties in instituting the prosecution and attends the trial for the purpose of prosecution, and at l. c. 997, the Supreme Court of Arkansas said:

"The right of this officer to demand a fee depends upon the construction of the statute applicable to Clay and certain other counties. Section 8308, Crawford & Moses' Digest, provides that the deputy prosecuting attorney shall have authority to file with justices of the peace information charging persons with the commission of 'any offense against the laws of this state,' and section 83.09 reads as follows:

"When any person shall have been arrested under a warrant issued in accordance with the provisions of this act, it shall be the duty of the deputy prosecuting attorney to attend and prosecute such charge on behalf of the state, and he shall in like manner attend and prosecute on behalf of the state in any criminal case pending before any justice of the peace, or in the circuit court of his county, when so requested by any such justice of the peace or the prosecuting attorney of the circuit, and, in the event of a conviction, he shall be allowed the same fees as are now allowed by law to prosecuting attorneys in similar cases in the circuit court. Provided, that two may be appointed for Pulaski county."

"It is clear, we think, that the prosecution of a case by the officer, even where a plea of guilty is interposed before the trial of the cause, entitles him to the fee. The cases cited on the brief of counsel show that the legal definition of the word 'prosecute,' when used in this sense, includes a conviction under a plea of guilty where the officer performs the preliminary duties in instituting the prosecution and attends the trial for the purpose of conducting the prosecution. \* \* \*"

It is believed that the definition of the term "prosecute" given in the last above quoted case is applicable to the situation referred to in the second inquiry of the opinion request, except that the provisions of Section 56.060, supra, do not specifically require the prosecuting attorney or his assistants to attend the trial of every criminal case in his county. However, it is believed that the duties of the prosecuting attorney required by this section to "commence and prosecute all civil and criminal actions," in his county, would necessarily involve the filing of all informations in every criminal case in his county, and the doing of whatever duties that might be required of him under the circumstances and until the case was tried or otherwise disposed of according to law. Such duties of the prosecuting attorney would include the filing of informations in misdemeanor cases pending in the magistrate

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courts of the county (as information is the only method provided by which cases of this nature may be prosecuted in magistrate courts, Section 543.020 RSMo 1949). The prosecuting attorney's duty to file informations charging persons with misdemeanors in magistrate courts is provided by Section 543.030, RSMo 1949, which reads as follows:

"All such informations shall be made by the prosecuting attorney of the county in which the offense may be prosecuted, under his oath of office, and shall be filed with the magistrate as soon as practicable, and before the party or parties accused shall be put upon their trial, or required to answer the charge for which they may be held in custody; provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any magistrate, and if the magistrate be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information."

The information referred to in this section is not the first step of the criminal prosecution in magistrate court, for the affidavit for a state warrant authorized by Section 543.050, RSMo 1949, is the first step or beginning of such criminal prosecution. However, the drawing and filing of the information charging a misdemeanor, based upon the complaint made in writing before the magistrate is the beginning, or first duty of the prosecuting attorney specially provided by statute, in connection with cases of this kind.

Section 543.190, RSMo 1949, provides the procedure that shall be followed by the magistrate when the defendant is arraigned and enters a plea of guilty to a misdemeanor charge and reads as follows:

"If the defendant shall plead guilty, the magistrate shall assess the punishment and enter the proper judgment and in order thereto he may hear evidence touching the nature of the case, or

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otherwise ascertain the facts thereof;  
but in no case shall he accept the plea  
of the defendant and assess his punish-  
ment without giving the injured party  
notice and an opportunity to be heard."

The Arkansas statute quoted in *Brown v. Welch*, supra, required the deputy prosecuting attorney to commence and prosecute all criminal cases in the proper courts of his county when requested by the prosecuting attorney. Upon the conviction of the defendant he was entitled to receive the conviction fee provided by statute, the same as the prosecuting attorney. The definition of the term "prosecute" given in the above case, is fully applicable to the facts given in the opinion request, and would properly include cases in which a plea of guilty was made by the defendant, thereby entitling the prosecuting attorney to a conviction fee. The Arkansas statute required the deputy prosecuting attorney to prosecute and attend the trial of criminal cases in order to be entitled to the conviction fee, although the attendance of the prosecuting attorney or his assistants is not specifically required under any Missouri statutes, consequently this part of the opinion dealing with the attendance of the deputy prosecuting attorney has no application to the facts given in the opinion request.

While it is the official duty of the prosecuting attorney to commence all criminal cases in his county, as provided by Section 56.060, supra, we are unable to find any Missouri statutes which require the prosecuting attorney to be present in magistrate court, when a defendant charged with a misdemeanor pleads guilty, and is sentenced by the court under the provisions of Section 543.190, supra.

Although the prosecuting attorney is not required to be present when the defendant enters a plea of guilty, it is believed that in every case in magistrate court when the defendant is charged with any misdemeanor whenever it is possible for the prosecuting attorney or his assistants to be in attendance that he or they should do so.

In most criminal cases it is not known until trial day, when the defendant is arraigned as to what the plea will be, and it is proper that he attend and perform whatever duties that may be required of him in connection with the case.

In those instances when it is known in advance of the trial that a plea of guilty will be entered, or when it is impossible for the prosecuting attorney to be present at such hearing because he is required to represent the state or county in other proceedings

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on the same day, or for other good cause he is unable to be present when a defendant pleads guilty, his failure to be present does not amount to a dereliction of official duty nor will it in any manner affect the legality of the plea entered in his absence. Under the ruling in the Arkansas case, the prosecuting attorney would be entitled to a conviction fee when the defendant was convicted of a misdemeanor upon his plea of guilty.

We are unable to determine the exact meaning intended to be given the first part of the second inquiry by the writer, therefore, we find it necessary to qualify our answer, rather than to give an affirmative or negative answer to the inquiry as stated.

If the writer intended to inquire if it was the duty of the prosecuting attorney in representing the state to appear at the hearing of every criminal case before the magistrate courts of his county, in which defendants are charged with misdemeanors when pleas of guilty to such charges are made, then the answer would be in the negative, since no statutes require this duty of the prosecuting attorney.

If the prosecuting attorney has commenced and continued the prosecution, has filed the informations in such cases, and has done any or all duties required of him by the statutes in such instances, then it is immaterial whether he is present when pleas of guilty are made, and judgment rendered by the court. In all such cases the prosecuting attorney is entitled to the conviction fee of \$5.00 provided by statute.

#### CONCLUSION

It is the opinion of this department that when one charged by information with a misdemeanor in magistrate court is arraigned, before accepting the defendant's plea, it is the duty of the magistrate to ascertain if the defendant has been afforded sufficient time and opportunity within which to consult with an attorney, and a friend. That in the event it is found that the defendant has not been afforded such time and opportunity, it is the further duty of the magistrate to continue the case for whatever period of time may be reasonably necessary within which the defendant may exercise his said rights.

It is the further opinion of this department that the prosecuting attorney who instituted a criminal prosecution charging one

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with a misdemeanor in magistrate court, is not required by statute to be present when defendant pleads guilty and is sentenced, but whether he is present or absent, the prosecuting attorney is, under these conditions, entitled to the conviction fee of \$5.00, provided by statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON  
Attorney General

PNC:hr