

Appeal from Justice to District Court, Defective Complaint.

After appeal from a justice court to a district court from a judgment in a criminal action over which the justice court has original jurisdiction, the complaint, if found defective, cannot be amended nor a new one permitted to be filed.

Helena, Montana, Oct. 26, 1905.

C. B. Calkins, Esq., County Attorney, Hamilton, Montana.

Dear Sir:—I am in receipt fo your favor of the 16th instant, making request upon my office for an opinion with reference to the law governing appeals in criminal cases from a justice court to the district court.

The facts which you present, upon whcih you ask our opinion, are as follows:

After conviction of the defendant for a misdemeanor in the justice court and appeal to the district court, where it is found that the complaint is so defective that it does not state facts sufficient to constitute an offense, can it be amended or a new complaint filed in the district court and the trial of the case proceed *de novo*, or must the appeal be dismissed and commenced over in the justice court?

This is a question which has in the past been very difficult for decision by most county attorneys in the State. After thorough consideration of the question, and reference had to be controlling provisions of our constitution and statute, I am of the opinion, upon the facts presented, that it is necessary for the prosecution to either confess the error or permit judgment of dismissal to be entered for want of prosecution and than commence proceedings upon the charge anew in the justice court.

Jurisdiction is conferred by our constitution in criminal cases upon district court and justice courts as follows:

DISTRICT COURTS:

“The district court shall have original jurisdiction * * * in all criminal cases amounting to a felony; and in all cases of misdemeanor not otherwise provided for.” (Art. 8, Sec. 9.)

JUSTICE COURTS:

“Criminal cases in said courts” shall not be “prosecuted by indictment, but said courts shall have jurisdiction in criminal matters, not of the grade of felony, as may be provided by law.” (Art. 8, Sec. 21.)

These provisions of the constitution were well and thoroughly considered and construed in the case of *State v. Meyers*, 11 Mont. 365.

And Section 1400 Penal Code, provides by law the jurisdiction of justice courts in accordance with constitutional authority as follows: "Justice courts shall have jurisdiction of the following public offenses committed within their respective counties in which said courts are established: First: Petty larceny; second, assault in the third degree, as specified in Section 402 of this code ;third, breaches of the peace, riots, routs, affrays, committing willful injury to property, and all misdemeanors punishable by fine not exceeding \$500 or imprisonment not exceeding six months, or both such fine and imprisonment ,and to act as examining and committing magistrates, as provided in this code."

And Section 2717, Penal Code, provides that "all cases on appeal from justice or police courts must be tried anew in the district court."

From the constitutional and statutory provisions above referred to, it seems to me perfectly clear that in case of an appeal from a judgment rendered by a justice court in a criminal case of which it has original jurisdiction, if it be found that the complaint does not state facts sufficient to constitute an offense, amendment of the complaint cannot be made, nor the filing of a new complaint permitted, as this would in effect be the commencement of the proceeding originally in the district court in a case in which exclusive original jurisdiction of the offense is conferred upon the justice court, and all prosecutions for violation of the criminal law in the district court must be prosecuted by indictment or information, and not by complaint, except upon appeal. If the complaint in an action in which appeal is taken does not state a cause of action, the defendant has not been placed in jeopardy, because he has not been charged with the commission of a crime; therefore there could be no objection to filing a complaint anew in the justice court.

Section 205, Code of Civil Procedure, to which you make reference, in my judgment, has no bearing upon the question, and at any rate cannot be construed to authorize the filing of a new or amended complaint in the district court.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.