

Opinion No. 253.

Highway Patrol—Complaint—Summons—County Attorney, Duties—Justice of Peace, Disqualification—Court Costs.

HELD: 1. In all highway patrol prosecutions, a formal sworn complaint must be filed with Justice Court. The summons issued by patrolman at time of arrest is insufficient.

2. County Attorney is required to prepare complaint, if requested to do so. The final duty to determine if offense is to be prosecuted, devolves upon County Attorney.

3. Justices of Peace in highway patrol offenses are subject to disqualification in the manner provided by statute, the same as in other criminal cases.

4. Where two Justices act in one case, by reason of disqualification of one Justice, only one fee is allowed, the amount of which depends upon the facts in each case, such as where trial is had, or plea of guilty entered.

February 28, 1938.

Montana State Highway Patrol
The Capitol Building
Helena, Montana

Gentlemen:

You have submitted the following questions:

1 and 2. In substance you have inquired whether or not it is necessary, when the patrolman arrests an offender, to issue a sworn complaint in addition to that form of summons directed to be delivered to the offender under the provisions of Chapter 182, Session Laws of 1937? And, if a complaint is required, what is the duty of the county attorney in respect thereto?

Section 1741.10 provides that the patrolman upon making an arrest shall either deliver the offender to the nearest justice of the peace, or in lieu thereof deliver to the offender a form of complaint describing the nature of the offense, with instructions thereon for the offender to report to the nearest justice of the peace, with a notation of the proper bail justifiable for the offense. This section has been amended by Section 8 of Chapter 182, Laws of 1937, which reads as follows:

"Patrolmen, upon making an arrest, shall either deliver the offender to the nearest justice of the peace during office hours, or to the county jail, or in lieu thereof, deliver to the offender a form of summons describing the nature of the offense with instructions thereon for the offender to report to the nearest justice of the peace, or in lieu of reporting to the nearest justice of the peace, the patrolman has the right to set and accept a deposit for appearance justifiable for the offense charged."

It will be noted that the above amendment uses the language "form of summons" rather than the words "form of complaint."

Section 8 of Article III of the Montana Constitution, in reference to complaints, provides:

"Criminal offenses of which justice's courts and municipal and other courts, inferior to the district courts, have jurisdiction, shall, in all courts inferior to the district court, be prosecuted by complaint. * * *

Section 27 of Article VIII of the Constitution provides:

"The style of all process shall be 'The State of Montana,' and all prosecutions shall be conducted in the name and by the authority of the same."

Section 12303, Revised Codes of Montana, 1935, provides:

"All proceedings and actions before a justice's or police court for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property, as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. A city or town ordinance may be referred to by its title and section, and the number thereof."

While Section 1741.10 uses the language "form of complaint," and Chapter 182, supra, uses the language "form of summons," yet such an instrument as the patrolman may deliver to the offender, in lieu of taking him before a justice of the peace, does not constitute a complaint as required by the Constitution and Section 12303. The complaint required by law is the complaint under oath, which the summons lacks, and said complaint must set forth the offense charged, with the particulars of time, place, person, and property, so as to enable the defendant to distinctly understand the character of the offense complained of. After the patrolman has delivered to the offender a form of summons, as provided by Chapter 182, it is still necessary for a complaint to be sworn to and filed against said offender in accordance with the provisions of Section 12303.

Section 4819 makes it the duty of the county attorney to represent the State and prosecute criminal actions in which it is a party. Under this requirement it would be the duty of the county attorney to prepare, if requested, and the facts justified, said complaint, and as a condition precedent to the filing of the complaint it is proper and desirable for the patrolman to submit the facts of the case to the

county attorney of the county wherein the alleged offense was committed for that official's advice, and so he may prepare the complaint and prosecute the offense. In order to commence the action, the complaint must be filed with the justice of the peace, and to do so it may be necessary for the patrolman to appear directly before the justice of the peace, or he may cause the complaint to be filed, having taken the matter through the office of the county attorney. Although, by reason of the duties imposed upon, and the experience possessed by, the county attorney, orderly procedure makes it advisable for the patrolman to consult with the county attorney prior to the filing of the action.

3. "How may a justice of the peace be legally disqualified from hearing a criminal action?"

Section 12307 provides:

"Change of venue, when granted. If the action or proceeding is in a justice's court, a change of the place of trial may be had at any time before the trial commences—

1. When it appears from the affidavit of the defendant that he has good reason to believe, and does believe, that he cannot have a fair and impartial trial before the justice about to try the case, by reason of the prejudice or bias of such justice, the cause must be transferred to another justice of the same or adjoining township;

2. When it appears from affidavit that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the township, the cause must be transferred to a justice of the township where the same prejudice does not exist. In each case the defendant must state the facts upon which his belief is founded."

No ambiguity is found in the provisions of the above quoted section. The justice of the peace can be disqualified in the manner provided for therein.

4. "When a justice of the peace has been legally disqualified, and a change of venue to another justice court has resulted, to what fees and court costs are each of the two justices of the

peace entitled in a criminal case of this nature?"

I understand that your inquiry applies to a situation where the case has been tried. The total fee allowed where two justices have had jurisdiction of a case shall not exceed that fee prescribed by statute for the trying of the case by one justice of the peace. In other words, double fees are prohibited. Amount of the fee which each justice shall receive shall depend upon the facts in each particular case. If a trial is had, and the \$5.00 fee is allowable, as provided by law, then the justice who was first disqualified should receive \$2.50 and the balance, amounting to \$2.50, would be paid to the justice who tried the case. In other words, the justice where the complaint was filed should receive the same amount as though the defendant had pleaded guilty, or as though the action had been dismissed.