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Opinion No. 47

COUNTY ATTORNEYS — Duties, criminal prosecutions, justice courts; JUSTICE COURT — Complaints, county attorney to prosecute. Section 16-3101; section 94-7-401; section 95-208; section 95-1703; section 95-2001.

HELD: 1. A county attorney need not file and prosecute every individual's complaint when there is insufficient evidence to warrant prosecution or when such a prosecution would not be in the interests of justice.

2. A justice of the peace cannot allow a private citizen to prosecute a complaint.

December 30, 1975

Mr. J. Fred Bourdeau
Cascade County Attorney
Cascade County Courthouse
Great Falls, Montana 59401

Dear Mr. Bourdeau:

I am in receipt of your recent letter in which you request my opinion on the following questions:

1. Whether a county attorney must file and prosecute an individual's complaint?

Section 16-3101 provides the general duties of the county attorney. Subsection (2) states as follows:

Institute proceedings before **magistrates** for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that such offenses have been committed, and for that purpose, whenever not otherwise officially engaged, must attend upon

the **magistrate** in cases of arrest, and attend before and give advice to the grand jury, whenever cases are presented to them for their consideration. (Emphasis supplied)

Section 95-208 states that the term "magistrate" includes justices of the peace. Therefore, the county attorney is charged with the responsibility of prosecuting complaints in justice courts.

Section 95-2001 states:

In justice and police courts all criminal prosecutions must be commenced by complaint under oath.

From the above-quoted sections it is clear that a county attorney must prosecute complaints in justice court. All relevant statutory authority as well as case law points to the exclusive authority of the county attorney to prosecute criminal complaints. **State ex rel. Streit v. Justice Court**, 45 Mont. 375, 380, 123 P. 405 (1912); **State ex rel. McGrade v. District Court**, 52 Mont. 371, 373, 157 P. 1157 (1916); **State ex rel. Woodahl v. District Court**, 159 Mont. 112, 495 P.2d 182 (1972).

Since the county attorney is charged with the responsibility for prosecuting criminal complaints in justice court he must also be vested with normal discretion in choosing those cases which will be prosecuted. Therefore he need not file every complaint which he is requested to file where there is insufficient evidence to warrant prosecution or where such a prosecution would not be in the interests of justice.

Adequate remedies do exist for the county attorney's refusal to file a meritorious complaint or his failure to prosecute a complaint which he has filed and has not been dismissed. Section 16-3101(9) provides that the attorney general may order the county attorney to "promptly institute and diligently prosecute in the proper court, and in the name of the state of Montana, any criminal or civil action or special proceeding". A second option is available through a prosecution against the county attorney for official misconduct under section 94-7-401. Specifically, section 94-7-401 (a) makes it a crime for a public servant to:

purposely or negligently fail(s) to perform any mandatory duty as required by law or by a court of competent jurisdiction.

Considering the practical effect of a motion to dismiss filed by the prosecutor pursuant to section 95-1703(1), the remedies provided for a county attorney's failure to prosecute should have very little impact on the prosecutor's performance of his normal duties. Seldom does the case arise which would require resort to those remedies.

It is my conclusion that the public may rely on the professional responsibility of its county attorneys, as well as those safeguards existing at law, to guarantee the responsible exercise of the discretion vested in the various county attorneys of this state.

THEREFORE, IT IS MY OPINION:

1. A county attorney need not file and prosecute every individual's complaint when there is insufficient evidence to warrant prosecution or when such a prosecution would not be in the interests of justice.
2. A justice of the peace cannot allow a private citizen to prosecute a complaint.

Very truly yours,
ROBERT L. WOODAHL
Attorney General