Opinion No. 65-149

August 6, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Mr. Robert B. Salazar, Justice of the Peace, Precinct No. 27, Bernalillo County, Albuquerque, New Mexico

QUESTION

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May the State's request for a preliminary examination be granted where the Defendant has waived the same and objects to the granting of such preliminary examination?

CONCLUSION

Yes.

OPINION

*{*252}* ANALYSIS

Article II, Section 14, New Mexico Constitution grants to all persons the right to have a preliminary examination or to waive the same before being held on Information. See also Section 41-3-1, N.M.S.A., 1953 Compilation.

In **State v. Melendrez,** 49 N.M. 181, 159 P. 2d 768, our court adopted the following definition for "purpose of a preliminary examination" from **State v. Pigg,** 103 P. 121, 80 Kan. 481, (1909)

"'. . . (1) To inquire concerning the commission of crime and the connection of the accused with it, in order that he may be informed of the nature and character of the crime charged against him, and, if there be probable cause for believing him guilty, that the state may take the necessary steps to bring him to trial; (2) **to perpetuate testimony;** (3) to determine the amount *{*253}* of bail which will probably secure the attendance of the accused to answer the charge. **The right of the state to introduce evidence at a preliminary examination cannot be defeated by the accused waiving an examination.'"** (Emphasis supplied)

The **Melendrez** case further contains language at page 191 to the effect that the prosecuting officials of the State are in fact guided by the proceedings in the preliminary examinations in exercising their judgment as to whether an Information should be filed. The Court notes that:

". . . As we have seen, the complaint may have charged even a misdemeanor only and the investigation may disclose that a felony has been committed. If the examining magistrate is not limited in his investigation and subsequent proceedings and decision to the exact charge stated in the complaint, why should the district attorney or attorney general be cramped into such narrow quarters. . . ."

With regard to the specific inquiry, the general rule, set forth in 22 C.J.S. 848, 857, §§ 332 and 333, is in line with the above quoted definitions. The rule is stated to be that:

"The State is not barred from holding a preliminary examination even though the accused waives his right thereto, if the committing magistrate shall deem that the interests of justice require an immediate investigation."

Stated another way it is said that: "The right to a preliminary examination is not confined to the person accused; it exists in the prosecution as well." Sufficient authority exists to support such proposition. In **Van Buren v. United States,** 36 F. 77, D. Ct. D. Indiana (1888), the Court had before it a claim for payment of U.S. Commissioner's fees previously rejected on the ground that the Plaintiff Commissioner had acted without jurisdiction in proceeding to hear testimony after the accused parties had offered to waive examination. The Court found that the applicable statutes called for the examination and further stated at 82:

". . . But, aside from the literal terms of the statutes, there are considerations of public policy upon which, in the absence of express provision to the contrary, it must be held to be in the discretion of the examining officer to suspend the examination or not, upon a waiver by the accused, as he shall deem best for the public interest. If an arrest be made without good ground, an examination will show the fact, and save the expense of an inquiry by the grand jury. The arrested party, sometimes when not guilty, in order to divert suspicion from others, but more frequently when guilty, and in order to aid the escape of confederates in the crime, is quite willing by waiving examination to suppress present inquiry; and oftener still, perhaps, this is done by the accused in the hope of suppressing the evidence against himself, or of gaining some like advantage from delay. An immediate development of the evidence and testimony is sometimes essential to the ends of justice, and it would be strange if the laws are so framed, or the courts disposed so to interpret them as to deny the government this important power. Its exercise, unless wantonly abused, as almost any power may be abused, can harm no one. Ordinarily, I doubt not, an offer of the accused to waive an examination should be accepted; but if the commissioner be convinced that the public interest will be better subserved by an investigation, and especially if the district attorney request it, he may and should *{*254}* proceed to a full hearing. . . ."

There are later cases which support the reasoning of the above in permitting the magistrate to conduct a preliminary examination at the request of the State in spite of waiver thereof by the accused. These are: **State v. Pigg,** supra; **Haley v. State,** 200 P. 1009, 20 Okla. Cr. 145 (1921); **Lyon v. State,** 28 P. 2d 598, 55 Okla. Cr. 226 (1934); **State ex rel. Guion v. Brunot,** 28 So. 996, 104 La. 237 (1900).

Our opinion, therefore, based upon the above analysis, is that the State is entitled to a preliminary examination not withstanding a waiver of the same by the accused. A contrary conclusion would not only defy authority but would seriously hamper law enforcement.