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Criminal Law—Written Information

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thereof, constituting or requisite to the consummation of the offense, the jurisdiction is in either county." In the instant case, an information had been filed in the County Court of Kings County, charging the petitioner, the Commissioner of Investigation for the City of New York, with the crimes of neglect and omission of duty.[4] The petitioner was required by law to make an investigation into the police department. It was alleged that he made such investigation in Kings County and failed to report the results thereof. The petitioner, contending that no part of the alleged crimes had occurred in Kings County, sought a writ of prohibition to restrain the County Judge from assuming further jurisdiction of the matter. The Appellate Division denied the writ and rendered the following interpretation of §134 of the Code of Criminal Procedure: If, in order to convict a defendant, the People must prove not only a criminal act in one county, but also an innocent or lawful act committed in another, the venue may be laid in either county.[5] The Court of Appeals, in an opinion by Judge Desmond, unanimously reversed the lower courts, contending that the purpose and meaning of §134 are plain from its title: "When a crime is committed partly in one county and partly in another." In other words, if a crime is to come under this section, it must be divisible into parts. The innocent acts of the petitioner performed in Kings County were not parts of the crime charged in the information, and are not within the contemplation of the statute.

The reason becomes evident when the alleged crime of omission is analyzed. The omission was the failure to perform a required duty. This duty had to be performed in New York County. The petitioner could fail to perform his duty only in that county. The affirmative acts performed in Kings County by petitioner were part of his legal duties in the investigation and do not constitute a crime in themselves, and an act of commission is no part of the crime of omission. The decision adds new light to §134.

Written Information

The Court was very exact in the handling of the issues in the *Murtagh* case, and the decision is solid enough to qualify as good hornbook law. However, a case involving the requirement of a written information in misdemeanor cases was indecisively "settled" by a 3-1-3 decision, so that what vague law there was on the point in issue has now become more obscure. That point was, what is the jurisdictional significance of the lack of a written information

4. N. Y. Penal Law §§ 1841, 1857.

5. 278 App. Div. 512 at 514, 105 N. Y. S. 2d 752 at 754 (1951).

as regards misdemeanors? Innumerable cases conclude that an *insufficient* information can amount to a jurisdictional defect, thus rendering a conviction thereunder a nullity.[6] With this basic premise in mind, it might be concluded that the total *lack* of an information would all the more render a criminal conviction void. In *People v. Jacoby*[7] the Court was faced with this problem.

In the *Jacoby* case, the appellant had voluntarily surrendered to the city court judge. He submitted a vague affidavit admitting that he "lowered his pants down while in his car" and that for a thrill he "approached two girls on the sidewalk and scared them into running away by telling them he was going to hold them up." After consultation with the appellant, his father, his clergyman and the city attorney, it was decided that the appellant should be charged with a violation of §43 of the Penal Law, the misdemeanor catch-all section.[8] Appellant was orally charged by the judge with a violation of §43 and sentenced upon a plea of guilty. The judge's return stated that no information had been filed.

On all fours, the issue before the Court was whether the lower court had jurisdiction, no information having been filed, but a plea of guilty having been entered and an affidavit of questionable sufficiency having been submitted by the appellant. Varied answers came from the Court. Notwithstanding that the judge's return clearly stated that no information had been filed, three judges in an opinion by Judge Conway voted to affirm the conviction on the ground that the vague affidavit submitted by the appellant constituted a sufficient information. Judge Desmond, in a separate opinion, also voted for affirmance, thus creating a majority. His contention, however, was that the plea of guilty had waived the necessity of an information. The dissent, on the other hand, contended that there was no information and that its absence prevented the court from assuming jurisdiction over the subject matter.

Extensive research has not revealed a single case in which the Court has ever decided this issue point blank. Conclusions as to the necessity of a written information in a court of special sessions must be based upon implication and inference. The Code

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6. *People v. Stevens*, 190 Misc. 441, 74 N. Y. S. 2d 346 (Co. Ct. 1947); *People v. Patrick*, 175 Misc. 997, 26 N. Y. S. 2d 183 (Co. Ct. 1941) and *People v. Fuchs*, 71 Misc. 69, 129 N. Y. S. 2d 1012 (Co. Ct. 1911).

7. 304 N. Y. 33, 105 N. E. 2d 613 (1952).

8. "Penalty for acts for which no punishment is expressly prescribed. A person who wilfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this chapter, is guilty of a misdemeanor . . ."

of Criminal Procedure[9] indicates that an information is a jurisdictional requisite for courts of special sessions trying misdemeanors. The affidavit of the defendant may be used as a substitute for a written information where the affidavit completely spells out the offense with which the defendant is charged.[10] If the affidavit fails to spell out a distinct crime, then it cannot, and should not be used as a substitute for the information, since the written information itself, if similarly defective, would be a nullity.[11]

Judge Desmond's contention that a plea of guilty waives the requirement of a written information is novel. The available sources, including the opinions of the other six judges, indicate that a written information or a substitute therefor is a prerequisite to jurisdiction. Judge Desmond would in effect have had the court accept the plea of guilty when it lacked jurisdiction, and then have made such jurisdiction retroactive to a time before the plea was entered.

If an affidavit by a defendant can be used as a substitute for a written information, and the affidavit fails to state a distinct crime, does the jurisdiction of the court fail *in principio* or does the plea of guilty cure the jurisdictional defect? A most interesting case decided by a county court within less than one month after the *Jacoby* decision reveals the dilemma which the lower courts face when the highest court in the state decides an appeal without settling the issue framed. In *People v. Tompkins*,[12] a misdemeanor case, there had been no affidavit of the appellant, nor a written information to which his plea of guilty could have been addressed. The court regarded the *Jacoby* case as controlling, but was uncertain exactly what the 3-1-3 decision held. The county court finally decided that since appellant had made no affidavit stating a distinct crime, the absence of a written information is a jurisdictional defect which cannot be waived by a plea of guilty.

Presumption Statute

The average defendant who finds himself before the bar of justice for the violation of a law of which he was ignorant will usually submit meekly to the court and reflect that everyone is presumed to know the law. However, if he were to be informed

9. §§ 699, 672.

10. *People v. Rosenkrantz*, 123 Misc. 334, 205 N. Y. Supp. 861 (Ct. of Spec. Sess. 1924); *People v. Lindner*, 133 Misc. 728, 234 N. Y. Supp. 89 (Ct. of Spec. Sess. 1929).

11. *People v. Grogan*, 260 N. Y. 138, 142, 183 N. E. 273, 274 (1932).

12. *People v. Tompkins*, ___ Misc. ___, 114 N. Y. S. 2d 297 (Co. Ct. 1952).