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OPINION	:	No. 80-507
of	:	October 10, 1980
GEORGE DEUKMEJIAN Attorney General	:	
Paul H. Dobson Deputy Attorney General	:	

SUBJECT: DISQUALIFYING JUDGES—If a judge is disqualified by a party pursuant to Code of Civil Procedure section 170.6 from acting as a magistrate in a preliminary examination in a felony case and the defendant is bound over for trial in the superior court the judge so disqualified may not try the case and the party who disqualified the judge at the preliminary examination may not disqualify the trial judge under section 170.6.

The Honorable Douglas V. Mewhinney, District Attorney of Calaveras County, has requested an opinion on questions which have phrased as follows:

If a judge is disqualified by a party pursuant to Code of Civil Procedure section 170.6 from acting as a magistrate at preliminary examination in a felony case and the defendant is bound over for trial in the superior court:

1. May the same judge be assigned to the resulting trial?

2. Is the party who disqualified the judge at the preliminary examination entitled under section 170.6 to disqualify the trial judge?

CONCLUSION

If a judge is disqualified by a party pursuant to Code of Civil Procedure section 170.6 from acting as a magistrate in a preliminary examination in a felony case and the defendant is bound over for trial in the superior court, the judge so disqualified may not try the case and the party who disqualified the judge at the preliminary examination may not disqualify the trial judge under section 170.6.

ANALYSIS

Code of Civil-Procedure section 170.6 provides in relevant part:

> "(1) No judge, court commissioner, or referee of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.
>
> "(2) Any party to or any attorney appearing in any such action or proceeding may establish such prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge, court commissioner, or referee. Where the judge, court commissioner, or referee assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least five days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. In no event shall any judge, court commissioner, or referee entertain such motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there be no such statement, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing (other than the trial of a cause), the motion must be made not later than the commencement of the

hearing. In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may he. The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided.

"(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chairman of the Judicial Council shall assign some other judge, court commissioner, or referee to try such cause or hear such matter as promptly as possible. Under no circumstances shall a party or attorney be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

". . . . . ."

Thus, by its terms,

"Code of Civil Procedure section 170.6 generally provides for the automatic disqualification of any 'judge of any superior, municipal or justice court . . . when it shall be established as [herein] provided that such judge . . . is prejudiced against any party or attorney or the interest of any party or attorney appearing in [any] action or proceeding.' Prejudice is 'established' when an oral or written affidavit is timely filed by a party or an attorney declaring, in 'substantially' the words of the statute, that the party or attorney "cannot or believes he cannot have a fair and impartial trial or hearing before such judge . . . ." (Code Civ. Proc., § 170.6, subds. (2), (5) and (6).) If disqualified, the judge may neither try the case nor 'hear any matter therein which involves a contested issue of law or fact.' However, the judge may participate in any nontrial proceeding that does not involve such an issue. (*Thompson Superior Court* (1962) 206 Cal. App. 2d 702, 708–709.)" (Fn.

omitted.) (*People v. Wilks* (1978) 21 Cal. 3d 460, 466; see also *Mezzetti Superior Court* (1979) 94 Cal. App. 3d 987, 990.)

While section 170.6 does not expressly state it is applicable to a judge who is acting as a magistrate at a preliminary examination[1], the court in *McCauley v. Superior Court* (1961) 190 Cal. App. 2d 562, held that the improper denial of a motion for disqualification of a magistrate at a preliminary examination pursuant to section 170.6 denied the defendant a substantial right and resulted in his illegal commitment. Thus, it is clear that section 170.6 is applicable to a judge sitting as a magistrate at a preliminary examination.[2]

Since a judge who is challenged pursuant to section 170.6 is enjoined from trying the case or hearing any matter involving a disputed issue of law or fact and since by its own terms, section 170.6 allows a party to make only "one such motion in any one action or special proceeding pursuant to this section," to answer the questions presented we must determine whether, for purposes of section 170.6, the preliminary examination is part of the same action as is the trial in superior court which results from the defendant being held to answer at the preliminary examination. In making this determination we are guided by the principle that Code of Civil Procedure section 170.6 is to be liberally construed with the view to effect its object to promote justice. (*Eagle Maintenance &Supply Company v. Superior Court* (1961) 196 Cal. App. 2d 692, 695.)

Penal Code section 683 defines a criminal action: "The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action." The first paragraph of article I, section 14 of the California Constitution provides: "Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information." Penal Code section 738 provides: "Before an information is filed there must be a preliminary examination of the case against the defendant and an order holding him to answer made under section 872. The proceeding for a preliminary examination must be commenced by written complaints

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[1] "A preliminary hearing is not a trial and a magistrate presiding at the hearing does not sit as a judge of the court and exercises none of the powers of the judge in a court proceeding (citation omitted). Furthermore, a judge who sits as a magistrate does not do so as a judge, but rather as one who derives his powers from the provisions of Penal Code sections 807 and 808 (fns. and citations omitted)." (*People v. Municipal Court* (*White*) (1979) 88 Cal. App. 3d 206, 213; see also *People v. Peters* (1978) 21 Cal. 3d 749.)

[2] See also Penal Code section 1538.5, subdivision (h) which provides:

> "When consistent with the procedures set forth in this section and subject to the provisions of section 170 through 170.6 of the Code of Civil Procedure, the motion [to suppress] should first be heard by the magistrate who issued the search warrant if there is a warrant."

as provided elsewhere in this code." (See also Pen. Code, § 806.) The complaint is an "accusatory pleading." (Pen. Code, § 691.)

If a defendant has been examined and held to answer in superior court, it is the duty of the district attorney to file in the superior court within 15 days after the commitment an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed where that offense or those offenses arose out of the same transaction that was the basis of the commitment order. (Pen. Code, § 739; *Jones v. Superior Court* (1971) 4 Cal. 3d 660.)

While preliminary examinations are generally conducted either in a justice court or a municipal court before the judge of that court, the judge does not sit as a judge of that court but as a magistrate. (See fn. 1, *supra*.) The purpose of a preliminary examination is to weed out groundless or unsupported charges and to relieve the defendant of the degradation and expense of a criminal trial. *Jones v. Superior Court*, *supra*, 4 Cal. 3d at p. 668.) In *Hawkins v. Superior Court* (1978) 22 Cal. 3d 584, the state supreme Court held that the defendant was entitled to a preliminary examination on charges contained in the grand jury indictment filed in superior court. Thus, it is clear that a preliminary examination is an essential part of a felony prosecution. (See *People v. Pompa-Ortiz* (1980)Cal. 3d— (filed July 3, 1980 in Crim. 21327).)

We also note that the state supreme court in *People v. Hannon* (1977) 19 Cal. 3d 588, 608 interpreted the clause, "[t]he defendant in a criminal cause has the right to a speedy public trial. . ." in article I, section 15 of the California Constitution to be applicable once a criminal *complaint* is filed. Thus, "criminal cause" within the meaning of that provision includes both the preliminary examination and the trial.

For the above reasons, we conclude that for purposes of Code of Civil Procedure section 170.6 a preliminary examination which results in the defendant being bound over for trial in the superior court is part of the same criminal action as the trial. Accordingly, we further conclude that if a judge is disqualified pursuant to section 170.6 from acting as a magistrate at the preliminary examination, that judge may not be assigned to sit as a judge of a superior court in the trial of the case and that the party who disqualified the judge from acting as a magistrate is not entitled to disqualify the trial judge pursuant to that section.

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