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December 2, 1983

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ATTORNEY GENERAL OPINION NO. 83-178

The Honorable Kenneth D. David  
Administrative District Judge  
Fourteenth Judicial District  
Coffeyville, Kansas 67337

Re:      Criminal Procedure -- Code; Procedure After Arrest --  
                Venue in Multi-County Judicial District.

Synopsis: Criminal pretrial proceedings must be conducted in the county of venue unless the governing statute specifically permits the proceeding to be conducted in another county. A pretrial proceeding conducted in a county other than the county of venue, without specific statutory authorization therefor, unless waived, is void for lack of jurisdiction. Cited herein: K.S.A. 22-2901, K.S.A. 22-2902, Kan. Const., Bill of Rights §10.

\*             \*             \*

Dear Judge David:

As the Administrative Judge for the Fourteenth Judicial District, you have requested our opinion as to whether pretrial proceedings arising in a criminal case filed in the District Court of Chautauqua County can be conducted in the District Court of Montgomery County. Your inquiry arises due to the practice of housing Chautauqua County defendants in the Montgomery County jail.

As a preliminary matter we do not believe it is material to your inquiry that both Montgomery and Chautauqua counties are within the same judicial district. The issue you raise involves proper venue, and proper venue is not established merely because the same judicial officer has authority to preside in the District Courts of both Montgomery and Chautauqua Counties.

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The term "district" as used in §10 of the Kansas Bill of Rights, is not synonymous with "judicial district." In re Oberst, 133 Kan. 364 (1931). Cf. State v. Ruth, 21 Kan. 583 (1879).

Oberst involved the propriety of trial in a county other than where the crime was allegedly committed in a case where both counties (Butler and Elk) were within the same judicial district. The Court concluded:

"The precise portion of territory over which the district court of Butler county may exercise power at any particular sitting is Butler county, and when the judge of the thirteenth judicial district moves over into Elk county any jurisdiction that he has is as the judge of the district court of Elk county. While court is sitting in Elk county it has no power to reach over into Butler county and take any judicial action." In re Oberst at page 370.

Venue in Kansas is jurisdictional, and any prosecution conducted without proper venue or waiver is void. Addington v. State, 199 Kan. 554, 568 (1967). And this requirement of proper venue is not limited to trial. Pretrial proceedings must also be conducted in accordance with venue principles. Id.

Venue for pretrial proceedings, unlike trial venue, is dictated by statute. For example, K.S.A. 22-2901 provides that a defendant can be brought before a magistrate of a county other than the situs of the crime under certain conditions [including the request of the defendant], while K.S.A. 22-2902(2) requires the preliminary examination to be before "a magistrate of a county" in which venue lies.

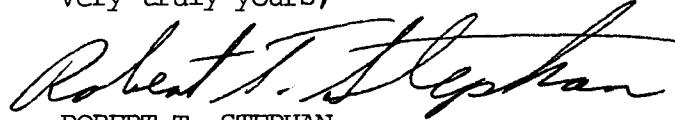
In light of the limits of a judge's power, as stated in Oberst, it is our opinion that the language "a magistrate of the county," requires the preliminary examination to be conducted in the county of venue and that it is not merely a description of the presiding judicial officer.

Finally, we note that pretrial proceedings can be waived. State v. McCollum, 209 Kan. 498 (1972); State v. Smith, 225 Kan. 796 (1979).

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In conclusion, we are of the opinion that criminal pretrial proceedings must be conducted in the county of venue unless the governing statute specifically permits the proceeding to be conducted in another county. A pretrial proceeding conducted in a county other than the county of venue, without specific statutory authorization therefor, unless waived, is void for lack of jurisdiction.

Very truly yours,

  
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