county, Okl., why the said Jess Hollins should not be discharged from his custody, and on the day and dated aforesaid, return to said rule to show cause having been made in open court, the court finds, upon due consideration of the petition and evidence in support thereof and in opposition thereto, that the rule to show cause should be discharged, and the sheriff of Creek county, Okl., is ordered and directed to hold the said Jess Hollins in his custody for trial on the charge of rape by force, now pending against him on change of venue to the district court of Okmulgee county, Okl., from the district court of Creek county, Okl.

And it appearing to this court that the district court of Okmulgee county, Okl., on the 27th day of February, 1933, sustained a demurrer to the information and gave leave to file an amended information against this defendant, charging said crime, and it further appearing to this court that the county attorney of Creek county has filed a new information charging said offense in the district court of Creek county.

It is ordered, adjudged, and the court clerk of Creek county is hereby directed to certify and transmit immediately upon receipt of this order to the district court of Okmulgee county, Okl., the said information and all other papers in his possession on file in the district court of Creek county, Okl., of whatever number the same may bear in Creek county, in the case wherein the state of Oklahoma is plaintiff and Jess Hollins is defendant, charged with rape by force, and the district court of Okmulgee county is directed to proceed with the hearing and trial of said cause in manner and form as prescribed by law.

HOLLINS v. STATE.

No. A-8789.

Criminal Court of Appeals of Oklahoma.
Nov. 16, 1934.

1. Criminal law ⇐177

When demurrer is sustained to indictment or information, direction of court is sufficient to prevent judgment bar arising if language used in order fairly warrants inference that court intended that case should be resubmitted or that new information should be filed (St. 1931, §§ 2952, 2953, 2954).

2. Criminal law ⇐160

When court sustaining demurrer to felony information permits new information to be filed and new information is filed in obedience to permission of court, prosecution is continuous and relates back to time of filing of defective information (St. 1931, §§ 2952, 2953, 2954).

3. Criminal law ⇐142

Court in county to which venue is transferred has jurisdiction of case for all purposes.

4. Criminal law ⇐142

If demurrer is sustained to information after change of venue, information may be amended on order or permission of court without remanding case back to county from which it was transferred (St. 1931, §§ 2830, 2910, 2952, 2953, 2954).

5. Criminal law ⇐648

Questions determined in habeas corpus proceeding pending trial *held* res judicata, precluding defendant from urging such questions on appeal from judgment of conviction.

6. Jury ⇐121

Where accused Negro challenges panel on ground that commissioners who selected jury and sheriff who summoned them had excluded all persons of African descent, solely on account of race and color and offers evidence to sustain challenge, it is trial court's duty to hear evidence.

7. Jury ⇐121

Burden is on defendant to establish that Negroes were actually excluded from jury panel solely because of race and color.

8. Jury ⇐57

Substantial compliance with forms prescribed by law for drawing and serving jurors is sufficient.

9. Criminal law ⇐517(1)

Confession, freely and voluntarily made without coercion, promise or hope of reward, may be used as evidence against defendant.

Syllabus by the Court.

1. Under sections 2612, 2613 and 2614, C. O. S. 1921 (St. 1931, §§ 2952, 2953, 2954), if a demurrer to an indictment or information is sustained and the court is of the opinion that the objection to the demurrer may be avoided by a new information, the direction of the court is sufficient to prevent a judgment bar

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

arising from sustaining the demurrer, if, from the language used in the order, it may be fairly inferred that the court intended that the case be resubmitted, or that a new information be filed.

2. When a demurrer is sustained to an information for a felony, and the court at the time of sustaining it directs or permits a new information to be filed, and a new information is filed in obedience to the direction or permission of the court, the prosecution is continuous and relates back to the time of the filing of the defective information.

3. When a change of venue is had from one county to another, the court in the county to which the case is transferred has jurisdiction of the case for all purposes. If a demurrer is sustained to the information, the same may be amended upon order or permission of the court without remanding the case back to the county from which it came. Holcomb v. State, 16 Okl. Cr. 1, 166 P. 755, holding to the contrary, is expressly overruled.

4. Where, pending trial in the county to which the venue had been changed, defendant applied to this court for a writ of habeas corpus, alleging that because the court sustained a demurrer to the information and permitted an amended information to be filed in the county from which the case came, and alleging that because the county attorney moved to dismiss and the court entered an order dismissing the proceedings in the county to which the case had been transferred and directed the court clerk of that county to certify and transfer to the court clerk of the other county the amended information and all other papers in the case, and directed the court of the county to which the case had been transferred to proceed with the trial thereof, these questions raised in the petition for habeas corpus became res adjudicata.

5. When a Negro is charged with violation of the criminal laws of the state and when under oath he challenges the panel of the jury upon the ground that the commissioners who selected such jury and the sheriff who summoned them had excluded from the jury all persons of African descent, solely on account of their race and color, and offered evidence to sustain this ground of challenge, the trial court should hear it. The burden is on defendant to show by competent evidence that Negroes were actually excluded from the jury panel solely because they were Negroes, and where the evidence fails to sustain this allegation it is not error for the trial court to overrule the challenge to the panel for such cause.

6. A substantial compliance with the forms provided for by law for drawing and serving jurors is sufficient.

7. Where a confession is freely and voluntarily made, without coercion, promise, or hope of reward, such confession may be used as evidence against the defendant.

Appeal from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Jess Hollins was convicted of the crime of rape by force, and he appeals.

Affirmed.

Redwine & Hill, of McAlester, for plaintiff in error.

J. Berry King, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Sebe Christian, Co. Atty., of Sapulpa, for the State.

CHAPPELL, Judge.

Plaintiff in error, hereinafter called defendant, was convicted in the district court of Okmulgee county of the crime of rape by force, and his punishment fixed by the jury at death.

This offense was committed on the 26th day of December, 1931. On the 30th day of December, 1931, defendant entered his plea of guilty to the charge, and his punishment was fixed by the court at death. On the 12th day of August, 1932, defendant filed his petition in this court for a writ of habeas corpus. After a full hearing and careful consideration of the questions raised, the writ was granted and defendant remanded to the custody of the sheriff of Creek county for further proceedings according to law. Ex parte Hollins (Okl. Cr. App.) 14 P.(2d) 243.

Thereafter defendant applied for a change of venue, which was granted and the case transferred to Okmulgee county. Defendant there demurred to the information, which was sustained by the court. The county attorney asked leave to amend the information; leave was granted by the court and the case set for trial on the 4th day of April, 1934. Because of the holding of this court in Holcomb v. State, 16 Okl. Cr. 1, 166 P. 755, that an amended information could not be filed in the county to which the case had been transferred but must be sent back to the county from which it came, the county attorney filed an amended information in Creek county and the case was dismissed in Okmulgee county. After the amended information had been filed, defendant applied to this court for a writ of habeas corpus, alleging that because the court had sustained a demurrer to the information

and had not ordered an amended information filed and because the county attorney had moved to dismiss the proceedings in Okmulgee county and the court had so ordered, the sustaining of the demurrer was a bar to further prosecution and the Okmulgee court was without jurisdiction to proceed any further. Upon a hearing, this court denied the writ and directed the court clerk of Creek county to transmit the amended information and all other papers and records in his custody to the court clerk of Okmulgee county and directed the district court of Okmulgee county to proceed with the trial of the case in accordance with the court's order in that case. Ex parte Hollins (Okl. Cr. App.) 38 P.(2d) 35.

When the case was called for trial in Okmulgee county, defendant raised the same questions that had been raised in the second habeas corpus proceeding, but in accordance with the order of this court the objections were denied and the case proceeded to trial. The jury found the defendant guilty and fixed his punishment at death. To review that conviction and judgment defendant has appealed to this court.

[1] It is first contended that when the court sustained the demurrer to the information it did not direct the county attorney to file a new information, and that therefore the prosecution was barred.

Section 2612, C. O. S. 1921 (St. 1931, § 2952), provides: "If the demurrer is sustained, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of opinion that the objection on which the demurrer is sustained may be avoided in a new indictment or information, direct the case to be re-submitted to the same or another grand jury, or that a new information be filed."

In Davenport v. State, 20 Okl. Cr. 253, 202 P. 18, this court said: "Under sections 5794 to 5797, inclusive, Revised Laws 1910, if a demurrer to an indictment or information is sustained and the court is of the opinion that the objection to the demurrer may be avoided by a new indictment or information, the direction of the court to hold the defendant for further prosecution is sufficient to prevent a judgment bar arising from sustaining the demurrer; if, from the language used in the order, it may be fairly inferred that the court intended that the case be resubmitted to a grand jury or that a new information be filed."

In the case at bar it appears from the record that at the time the demurrer was sustained the state asked leave to file an amended information, which leave was by the court granted, and the case set for trial on the 4th day of April, 1934. It is not necessary to set out all that was said by the court and counsel. While the language of the court is informal and not as complete as it might have been, yet it may be fairly inferred from such language that the court directed the filing of a new information.

[2-4] It is next contended the amended information must be filed in the county where the case originated, and that the county attorney is without authority to file an amended information in the court to which the change of venue was granted.

The case of Holcomb v. State, 16 Okl. Cr. 1, 166 P. 755, holds that an information amended under such circumstances has to be filed in the court from which the change of venue was taken. We have reached the conclusion that this holding is incorrect. It is based upon a Missouri decision which argues that because under the Constitution of that state prosecutions by indictment and by information for felonies are concurrent remedies, and since an indictment could not be amended in the county to which the change was taken, it follows that an information may not be amended in that county. The decision overlooked the fact that an indictment could not be amended in either county. It required a new indictment to be returned, and of course under the Constitution only a grand jury of the county in which the offense was committed would have jurisdiction to return such an indictment. But that is not true as to an information under the Constitution and laws of this state. The county attorney, who is an officer of the court, and who is always in court, has authority to amend an information by leave of the court, and under our statute this may be done without leave of court at any time before the defendant pleads. Section 2830, O. S. 1931, provides how and when an information may be amended either in matter of substance or of form. Section 2910, O. S. 1931, among other things, provides: "The court to which the action is removed must proceed to trial and judgment therein the same in all respects as if the action had been commenced in such court."

Certainly then the court to which the change is taken has the same jurisdiction in respect to the trial of an information charging a felony as the court from which the

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tainly then the court to which the e is taken has the same jurisdiction in t to the trial of an information charg- felony as the court from which the change was taken would have had had no change been taken. Therefore, the court to which the change was taken would have authority under our statute to permit the amendment of the information within the provisions of section 2830, supra.

In State v. Lyts et al., 25 Wash. 347, 65 P. 530, that court said: "Under 2 Ballinger's Ann. Codes & St. § 4860, declaring that the court to which a proceeding is transferred on change of venue shall exercise over the same a like jurisdiction as if it had originally commenced therein, the allowance of an amendment to the information by the court to which a criminal prosecution has been transferred does not operate to dismiss the proceeding."

In 1 Bishop, New Criminal Proc. § 714, it is said: "An information differs from an indictment. Since the prosecuting officer, unlike the grand jury, is always present in court, he may, on leave, amend it to any extent not interfering with the due order of judicial proceedings."

To the same effect is State v. Kusel, 29 Wyo. 287, 213 P. 367. In the Kusel Case the court took occasion to examine thoroughly all the cases upon the subject, including the Missouri case and the Holcomb Case therein referred to, and, after digesting all the authorities, in the body of the opinion said: "Notwithstanding the constitutional guaranty to defendant of the right to be tried by a jury of his peers in the county in which the crime is committed, he has no fundamental right to have the pleadings settled in the county where the action was commenced."

The very purpose of a change of venue is to divest the court from which the case is transferred from any further jurisdiction in the case, and since this is true it would follow that such court would have no jurisdiction to entertain the filing of another information in that particular prosecution.

[5] There is another reason why defendant cannot now urge these questions. In Ex parte Hollins (Okl. Cr. App.) 38 P.(2d) 35, defendant raised these questions in his petition for a writ of habeas corpus. The adverse judgment rendered against defendant in that case makes these questions res adjudicata.

[6, 7] It is next contended the court erred in overruling defendant's challenge to the jury panel because no Negroes were on the jury panel, defendant alleging that they were excluded solely and exclusively on account of their race and color.

The Supreme Court of the United States has held that such a motion should be sustained where the evidence discloses that Negroes, on account of their race and color, were purposely excluded from serving on a petit jury in a criminal prosecution against a Negro; that such action does constitute unlawful discrimination and is in violation of the Fourteenth Amendment to the Constitution of the United States. Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075.

This court has held to the same effect. Smith v. State, 4 Okl. Cr. 328, 111 P. 960, 140 Am. St. Rep. 688.

The court heard evidence on this motion and overruled the same. The burden is on defendant to prove that Negroes were excluded from the jury panel solely on account of their race and color. A careful examination of the record discloses no such evidence. Having failed to offer any proof on this question, it was not error for the court to overrule the challenge.

[8] In connection with this error it is also alleged that the jury commissioners failed to comply with the law in the selection of the names to be placed in the jury box, and that the sheriff failed to comply with the law in the summoning of the jury.

In Maddox v. State, 12 Okl. Cr. 462, 158 P. 883, this court said:

"A substantial compliance with the forms provided for by law for drawing and serving jurors is sufficient.

"A challenge to the panel of jurors can be founded only on a material departure from the forms of law providing for drawing and summoning jurors, or the intentional omission of the sheriff to summon one or more of the jurors drawn; and, to entitle a defendant to successfully challenge a panel of jurors, the burden is upon the defendant to show that the illegality or wrong which is the basis of such challenge is such as to have caused the defendant to suffer material prejudice."

To the same effect is Buxton v. State, 11 Okl. Cr. 85, 143 P. 58.

Numerous other cases of this court might also be cited.

There is nothing in the record to show failure of the officers to perform their duty, nor material prejudice to the defendant.

[9] It is next contended the court erred in admitting in evidence the signed statement of defendant made a few days after the offense was committed.

The statement itself recites that no threats, or force, or coercion, or intimidation, or promise of reward were used or made, and no evidence was offered by the defendant that in any wise tended to show that the statement was not made fully, freely, and voluntarily, without promise or hope of reward. Under this record, the statement was clearly admissible in evidence.

It is next contended the assistant county attorney was guilty of misconduct in his argument to the jury.

The argument of the county attorney was sane, conservative, and free from anything objectionable. As much cannot be said for the argument of the assistant county attorney. The principal objection to his argument is this statement: "What are you going to do? I don't want life imprisonment in this case because that is too uncertain—would rather you would turn him loose. I think probably somebody might take care of him. I don't know."

Defendant's counsel made prompt objection to this argument, which was overruled by the court and exception saved by defendant. This argument was improper, but in view of the undoubted guilt of the defendant and the enormity and wantonness of the offense, the jury could not have been prejudiced against defendant by such argument.

For a full discussion and citation of authorities on misconduct of counsel, see Oglesby v. State (Okl. Cr. App.) 38 P.(2d) 32, not yet reported [in State report].

Other questions are raised and argued by defendant in his brief, but are not considered of sufficient importance to require a separate discussion in this opinion. It is sufficient to say that none of them are fundamental and none would require a reversal of the case.

From a careful consideration of the record by each member of the court, we are satisfied defendant had a fair trial; that the verdict is just and the death penalty fully warranted. The cause is therefore affirmed.

The original time for the execution having passed, owing to the pendency of this appeal, it is considered, ordered, and adjudged by this court that the judgment and sentence of the district court of Okmulgee county be carried out by the electrocution of defendant on the 4th day of January, 1935.

EDWARDS, P. J., and DAVENPORT, J., concur.

MOUNTAIN VIEW RURAL TELEPHONE CO. v. INTERSTATE UTILITIES CO. et al.

No. 6208.

Supreme Court of Idaho.
Nov. 22, 1934.

1. Public service commissions ⇐27

On application for stay of order of Public Utilities Commission, pending determination of appeal from order, that utility failed to serve moving papers on which it relied at time it served notice of application *held* not to preclude Supreme Court from considering application, where failure of service did not prejudice commission (Code 1932, §§ 12-403, 59-632, 59-633).

2. Public service commissions ⇐27

Hearing before Supreme Court on application to stay order of Public Utilities Commission must be had upon transcript of proceedings had before commission, including evidence, and not upon affidavits or showing made which are not part of such record, and decision of court must be based on evidence and record before commission (Code 1932, §§ 12-403, 59-633).

3. Telegraphs and telephones ⇐33(1)

That order of Public Utilities Commission lowering phone rentals required telephone utility to change its system of accounts and billing to users did not show irreparable damage so as to stay order of commission pending determination of appeal, where statute provided that separate accounts must be kept in event order lowering rentals was stayed (Code 1932, §§ 59-633, 59-636, 59-638).

4. Telegraphs and telephones ⇐33(1)

That strained relations between telephone utility and users would result in event appeal from order of Public Utilities Commission lowering phone rentals should result in higher rates than that established by commission did not show irreparable damage so as to stay order of commission pending determination of appeal where relations were already strained (Code 1932, §§ 59-633, 59-635, 59-636).

5. Telegraphs and telephones ⇐33(1)

That telephone utility, in event appeal from order of Public Utilities Commission lowering phone rentals should result in higher rates than that established by commission, might not be able to collect some increased rentals, *held* to show irreparable damage so as to stay order pending determination of appeal (Code 1932, §§ 59-633, 59-635, 59-636).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

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Chas. P. Lund, of S
Richards & Haga, of Bo

Bert H. Miller, Atty.
Crowley, Asst. Atty. G
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Hawkins & Hawkins,
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WERNETTE, Justice.

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⇐For other cases see