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The Pretrial Probable Cause Hearing in Minnesota

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Comment: The Pretrial Probable Cause Hearing in Minnesota

Rule 11 of the recently adopted Minnesota Rules of Criminal Procedure[1] provides an omnibus hearing in felony and gross misdemeanor cases for a defendant who does not plead guilty at his initial appearance before the district court. The omnibus hearing combines the Rasmussen hearing,[2] the hearing on pretrial motions of the defense and prosecution,[3] and the hearing on other pretrial issues raised by the court.[4] The greatest controversy over the consolidated proceedings has concerned what procedures the courts should employ in ruling on a defendant's pretrial motion to dismiss the complaint for lack of probable cause.[5] Prosecutors have argued that the rule should be interpreted to require the court to review only the complaint and its attachments, such as police reports, and to do so without adversary presentations.[6] Defense counsel, on the other hand, have argued that protection of the defendant from the burdens of an unjustified trial requires that the probable cause hearing include the "full panoply of adversary safeguards," including counsel, confrontation, cross-examination, and compulsory process for witnesses.[7] Before the

1. *See* In re Proposed Rules of Criminal Procedure, Order of the Supreme Court of Minnesota, 299 Minn. (unnumbered page) (1974).

2. MINN. R. CRIM. P. 11.02. The Rasmussen hearing, named for the case in which it was initiated, State *ex rel.* Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965), provided for pretrial disposition of constitutional challenges to the admissibility of evidence.

3. MINN. R. CRIM. P. 11.03.

4. *Id.* 11.04. This rule provides:

> The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose.

5. Rule 11.03 provides:

> The court shall hear and determine all motions made by the defendant or prosecution, including a motion that there is an insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint, and receive such evidence as may be offered in support or opposition. Each party may cross-examine any witnesses produced by the other. A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part. Evidence considered on the issue of probable cause shall be subject to the requirements of Rule 18.06, subd. 1.

6. *See* State v. Jarvis, No. 27694 (Minn. Ramsey Cty. Dist. Ct. 1975); State v. Franek, No. 27695 (Minn. Ramsey Cty. Dist. Ct. 1975).

7. *Cf.* State v. Florence, 239 N.W.2d 892, 896-900 (Minn. 1976).

rules were adopted, the Supreme Court of Minnesota required that probable cause be determined at "a hearing in a substantial sense,"[8] a position approximating that advocated by defense counsel. But in a recent interpretation of rule 11, the court affirmed a district court's denial of a felony defendant's motion to dismiss for lack of probable cause, *holding* that where the defendant fails at the omnibus hearing to produce witnesses who, if believed, would exonerate him, a court may find there is probable cause to bind him over for trial without conducting an adversary proceeding. *State v. Florence*, 239 N.W.2d 892 (Minn. 1976).

The preliminary hearing is a judicial proceeding held shortly after the accused is arrested to determine whether the prosecutor's case against him is sufficient to justify his further detention.[9] The modern functions of this proceeding have been to protect the defendant from the humiliation and anxiety of an unjustified public prosecution, to save the state and the defendant unnecessary expense, and to enable the defense to discover the prosecution's case.[10] All states and the federal government employ the preliminary hearing in some form, although the jurisdictions vary in their treatment of the evidentiary burden the prosecutor must sustain in order to have the accused bound over for trial and the rules of evidence with which the prosecutor must comply; the extent to which the defendant may introduce his own witnesses or confront and cross-examine those testifying against him; and the role of the presiding magistrate in evaluating the credibility of witnesses and weighing the evidence.[11] The variations turn upon the extent to which the preliminary hearing must serve the function of providing the defendant with

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8. *Id.* at 895-98.

9. The modern preliminary hearing differs substantially from its historical counterpart. Originally, this proceeding was established for the benefit of the prosecution, the two primary functions being "inquisition and prevention of indiscriminate releasing of prisoners." Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?* 35 Mo. L. REV. 281, 284 (1970). The hearing developed relatively recently into a procedure to protect the accused from illegal detention. *Id.* at 285. *See also* Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1365-70 (1969); Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974).

10. Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922); *see* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 957 (4th ed. 1974) [hereinafter cited as MODERN CRIMINAL PROCEDURE].

11. MODERN CRIMINAL PROCEDURE, *supra* note 10, at 958.

information necessary to his defense.[12] Thus, courts have held that where the defendant is entitled to extensive discovery before trial, those aspects of the pretrial hearing that do no more than provide him this same information need not be duplicated.[13]

Before adoption of the Minnesota Rules of Criminal Procedure, the accused enjoyed extensive participation in the preliminary probable cause hearing. The statute governing this proceeding provided that the defendant, assisted by counsel, could examine his own witnesses and cross-examine those testifying for the prosecution, and that the magistrate was to examine the prosecution's complaint and witnesses in the presence of the accused.[14] The statute did not specify the evidentiary burden the prosecutor must sustain to have the accused bound over for trial or the rules governing the production of the state's evidence. In *Hastings v. Bailey*[15] the Minnesota supreme court held that the state did not have to disclose all of its evidence relating to the commission of the offense at the preliminary hearing.[16] The court defined the probable cause standard as "evidence worthy of consideration, in any aspect for the judicial mind to act upon, bring[ing] the charge against the prisoner within reasonable probability."[17] In many cases, however, despite reci-

12. *Id.* at 958-60. *See also* F. MILLER, PROSECUTION 45-149 (1969); Note, *supra* note 9, at 773 n.7.

13. *See, e.g.*, Coleman v. Burnett, 477 F.2d 1187, 1199 (D.C. Cir. 1973).

14. Minn. Rev. Laws 1905, § 5244 (codified as MINN. STAT. § 629.50 (1974)) provided:

> The magistrate before whom any person shall be brought upon a charge of having committed an offense shall, as soon as may be, examine the complainant and the witnesses in support of the prosecution, on oath, in the presence of the party charged, in relation to any pertinent matter connected with such charge, after which the witnesses for the prisoner, if he has any, shall be sworn and examined, and he may be assisted by counsel in such examination, and also in the cross-examination of the witnesses in support of the prosecution.

15. 263 Minn. 261, 116 N.W.2d 548 (1962).

16. *Id.* at 266, 116 N.W.2d at 551.

17. *Id.* (citing State *ex rel* Wojtycski v. Hanley, 248 Wis. 108, 111, 20 N.W.2d 719, 720 (1945)). In State v. Clark, 270 Minn. 538, 558, 134 N.W.2d 857, 871 (1965), the court held that "[a]ll that is required at a preliminary hearing is sufficient evidence to establish probable cause; that is, that a crime has been committed and that defendant probably has committed it." And in State *ex rel.* Jeffrey v. Tessmer, 211 Minn. 55, 56, 300 N.W. 7, 8 (1941), the court held that a finding of probable cause could be based on the uncorroborated testimony of an accomplice, although such evidence alone would not support a conviction. *See* MINN. STAT. § 634.04 (1974) (not superseded by the rules):

> A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to con-

tations of this lower standard for evaluating the evidence offered to bind over a defendant for trial, the same evidence presented at trial to prove guilt beyond a reasonable doubt had been used at the preliminary hearing to establish probable cause.[18] Since the statute governing preliminary hearings permitted the accused to cross-examine the witnesses testifying against him,[19] the production of evidence similar to that to be used at trial provided the defendant an opportunity to conduct rigorous cross-examination by which he could thoroughly test the strength of the prosecution's case.

Rule 11.03 superseded the statute previously governing the preliminary hearing. Consistent with the consolidation of pretrial motions and other pretrial proceedings, this rule replaces the preliminary hearing with a motion to dismiss the complaint for lack of probable cause at the omnibus hearing.[20] Rule 11.03 permits "[e]ach party [t]o cross-examine any witnesses produced by the other," and, by reference to rule 18.06(1), requires the determination of probable cause to be "based on substantial evidence that would be admissible at trial"—a standard apparently at least as strict as that read into the predecessor statute by the Minnesota supreme court.[21] Nonetheless in *State v. Florence*

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vict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

18. Hastings v. Bailey, 263 Minn. 261, 116 N.W.2d 598 (1962), frequently cited for the proposition that "any evidence worthy of consideration" is acceptable to establish probable cause, involved the purchase of cattle with a forged check. The evidence used at the preliminary hearing to prove felonious intent included testimony by the former owner of the cattle, and evidence that the cattle were immediately resold after the purchase. The same evidence was used to convict the defendant at trial. This parity in the level of proof was also present in State *ex rel.* Krinkie v. Felix, 171 Minn. 140, 213 N.W. 556 (1927) (testimony of a minor to whom intoxicating beverages were illegally sold); and in *In re* Snell, 31 Minn. 110, 16 N.W. 692 (1883) (testimony of all witnesses heard at trial identical to their written statements introduced at the preliminary hearing).

19. *See* note 14 *supra.*

20. In its syllabus, the supreme court in State v. Florence, 239 N.W.2d 892, 894 (Minn. 1976), stated that "[t]he preliminary hearing previously required by Minn. St. 629.50 became obsolete when the Minnesota Rules of Criminal Procedure were adopted." Of course, the only obsolete characteristic of the old procedure is the manner in which it was instituted; whereas under the old procedure the defendant filed a request for a hearing, under the new procedure the defendant moves to dismiss for lack of probable cause. The consequences of winning or losing—discharge or bindover for trial—are the same.

21. *See* note 17 *supra* and accompanying text. Rule 11.03, *quoted in* note 5 *supra*, states that evidence considered on the issue of prob-

the court interpreted rule 11.03 as lowering the burden of proof imposed by the statute and dispensing with cross-examination in most cases. The court held that where the defendant does not produce a witness, "who, if believed, would exonerate him" the "entire record" need only include "[a] carefully drawn and sufficiently detailed complaint made by an investigating officer and incorporating reliable hearsay."[22] Only in the "rare case"[23] where the defendant produces witnesses in support of his motion to dismiss may adversary proceedings, including cross-examination, be conducted. The judge must then base his decision on evidence adequate to support denial of a motion for a directed verdict of acquittal.[24]

As its principal rationale for avoiding adversary proceedings in most cases, the court observed that the probable cause hearing is no longer needed as a discovery device: "The broad discovery permitted under the rules as adopted should make it possible in most cases to achieve the discovery functions of a formal preliminary hearing without exhausting appearances of witnesses prior to trial and extensive pretrial adversary proceedings before a judge."[25] The Minnesota rules, however, contain no provisions for discovering the prosecution's case by cross-examining its witnesses. Rule 9 provides for discovery by the defendant of the names and addresses of witnesses for the prosecution[26] and any statements previously made by them concerning the

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able cause is subject to rule 18.06(1), which provides, in relevant part, that "[a]n indictment shall be based on substantial evidence that would be admissible at trial." The rule excepts six categories of evidence from the exclusionary rules employed at trial: hearsay evidence offered only to lay the foundation for otherwise admissible evidence; reports by experts concerning the results of examinations or tests used in the investigation; unauthenticated copies of official records; written sworn statements of persons claiming ownership in property or attesting to its value; written sworn statements of unavailable witnesses; and oral or written summaries made by investigating officers of the contents of documents examined but not produced at the hearing. MINN. R. CRIM. P. 18.06(1).

The supreme court in *Florence* held that "substantial evidence admissible at trial," in the few cases where this standard applies, *see* text accompanying note 24 *infra*, constitutes "evidence adequate to support denial of a motion for a directed verdict of acquittal." 239 N.W.2d at 902 n.21.

22. 239 N.W.2d at 902.

23. *Id.* at 900.

24. *Id.* at 902 n.21.

25. *Id.* at 899-900. The court noted that it was rejecting a trend in some jurisdictions to use the preliminary hearing as an independent means to discover the prosecution's case. *Id.* at 897-98.

26. MINN R. CRIM. P. 9.01(1)(1).

case.[27] Rule 21 governs depositions, the closest equivalent to the opportunity for cross-examination that would otherwise be available in a formal preliminary hearing. Under this rule, parties may depose witnesses only where there is a "reasonable probability" that their testimony will be used at a hearing or trial and then only where the witness is or will be unavailable at trial.[28] Where the witness is within the jurisdiction of the court and free from physical or mental affliction, as is undoubtedly true in the overwhelming majority of cases, depositions are not permitted.[29] Both the separation of this provision from the discovery procedures in rule 9 and the strict conditions limiting its use indicate that deposition was intended to preserve testimony, rather than to discover the strength of the prosecution's case through cross-examination.[30] By prohibiting cross-examination in the preliminary hearing for all but those defendants who produce exonerating witnesses, *Florence* appears to have eliminated this discovery tool entirely, rather than merely relegating its use to earlier procedures, as the court seems to have intended.[31]

Even were courts to broadly construe the discovery provisions of rule 9 and the apparently narrow deposition procedure of rule 21 to permit vigorous cross-examination of the prosecution's witnesses before the omnibus hearing, tactical considerations militate against using these discovery tools to test the strength of the prosecution's case.[32] In cross-examining opposing witnesses for discovery purposes, the defendant seeks to collect as much information as possible so that he can intelligently prepare his case.[33] He also seeks to test the prosecution's case against him, so that he can plead intelligently. Commentators have observed, however, that these two goals are often incompatible, for if at the discovery stage the defendant attempts to test the prosecution's case through vigorous questioning, the

27. *Id.*
28. *Id.* 21.01.
29. *See id.* 21.01, .06(1).
30. The comment to rule 9 supports this conclusion. The first sentence outlines the "comprehensive method of discovery" provided by the new rules. While this outline contains references to several other rules, it contains none to rule 21. Most states provide criminal depositions solely for preservation of testimony (as opposed to discovery) purposes. ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 84 (Approved Draft, 1970).
31. 239 N.W.2d at 900.
32. *See Hearings on S. 34745.945, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 89th Cong., 2d Sess., 90th Cong., 1st Sess. (1967) at 133.
33. *Id.*

witness is likely to respond reluctantly and sparingly.[34] In that event, the defendant would be left without sufficient information to prepare his defense. If, on the other hand, the defendant were able to thoroughly cross-examine the prosecution's witnesses after discovery at a preliminary hearing, he could reserve vigorous questioning for the latter proceeding and thus achieve both of his objectives. *Florence* represents an attempt to eliminate the duplication of procedures that would result if a defendant were afforded both discovery and a preliminary hearing. Although preservation of both proceedings requires the prosecution's witnesses to testify twice before trial, discovery alone is ill suited to accomplishing the defendant's pretrial objectives. Thus, by eliminating the pretrial hearing in most cases, the court has forced the defendant to a difficult choice. He must either pose questions designed to elicit the most cooperation from witnesses, in the hope that by so doing he will build his case, or thoroughly examine them and risk their recalcitrance in order to reach an informed pleading decision. While the *Florence* court correctly recognized the importance to defendants of thoroughly testing the evidence against them, the court mistakenly concluded that this could be effectively accomplished in discovery proceedings.

One approach to preserving at least some opportunity for pretrial cross-examination might be to broadly construe the court's definition of witnesses "who, if believed, would exonerate the defendant."[35] According to the court, presentation of such witnesses by the defendant in support of his motion to dismiss entitles him to adversary procedures in the probable cause hearing.[36] Conceivably, if the testimony of a witness for the prosecu-

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34. A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 139 (3d ed. 1974). Professor Amsterdam states:

> Frequently counsel may find that he is working at cross-purposes in seeking to discover and to lay a foundation for impeachment simultaneously. . . . If he vigorously cross-examines the witness, in an effort to get a contradiction or concession on record, the witness will normally dig in and give a minimum of information in an effort to save his testimonial position . . . .

Id. at 1-124.

35. 239 N.W.2d at 902.

36. *Id.* While this position seems to assume that the defendant will be unable to call prosecution witnesses, neither the court nor rule 11.03 explicitly restricts the defendant in this way. The technique of calling adverse witnesses in a preliminary hearing was approved in Coleman v. Burnett, 477 F.2d 1187, 1205 (D.C. Cir. 1973), and Washington v. Clemmer, 339 F.2d 725, 727 (D.C. Cir. 1964). It is recommended in certain circumstances by Professor Amsterdam. A. AMSTERDAM, TRIAL MANUAL

tion constituted an indispensable element of the state's case, the defendant could "exonerate" himself by impugning the reliability of this testimony through vigorous cross-examination.[37] Neither the supreme court in *Florence* nor any other precedent expressly forecloses this strategy in the preliminary hearing;[38] moreover, this approach is consistent with the well-settled principle allowing the defendant to call adverse witnesses at trial.[39] However, this construction of the class of witnesses that will trigger adversary proceedings unfortunately appears inconsistent with the holding in *Florence*. Witnesses who, if *believed*, would exonerate the defendant will seldom include witnesses for the state, since the defendant in most cases can avoid culpability only by *challenging* the credibility of their testimony. Thus the court appears to have contemplated an adversary hearing only where the defendant produces his own witness, such as a witness who places the defendant at a place other than the scene of the crime or a witness who identifies a person other than the defendant as the perpetrator of the offense.[40] Although cross-examination of the prosecution's witnesses might reveal such information, allowing an adversary proceeding to be held solely on the basis of such a possibility could justify questioning witnesses who testify in *any* capacity. This appears inconsistent with the express purpose of the supreme court to avoid cross-examination in "most cases."[41]

The *Florence* court also reasoned that simplifying the probable cause determination would reduce the expenditure of judicial time.[42] But this rationale is unpersuasive as well. Reduc-

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FOR THE DEFENSE OF CRIMINAL CASES § 141 (3d ed. 1974). *See also* CRIMINAL DEFENSE TECHNIQUES 8-8 (R. Cipes ed. 1969).

37. The court stated that the function of the judge at the omnibus hearing "does not extend to an assessment of the relative credibility of conflicting testimony." 239 N.W.2d at 903. It is unclear whether the court intended to preclude the judge from making any credibility determinations, or only from resolving conflicts of testimony between witnesses. If it intended to preclude only the latter, cross-examination of a witness whose testimony was essential to the state's case would arguably be available, inasmuch as it could "exonerate" the defendant. If, on the other hand, the court intended to preclude credibility determinations altogether, the omnibus hearing would invite governmental manipulations. Defendants could be subjected to public trial on the basis of testimony by but one vindictive witness.

38. *See* note 36 *supra*.

39. State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956).

40. 239 N.W.2d at 903. The court provided another example of a witness who might exonerate the defendant: a witness to the offense who describes it in terms demonstrating the absence of an essential element of the crime charged. *Id.*

41. *Id.* at 899-900.

42. *See id.*

ing the defendant's opportunity to assess the strength of the case against him may discourage guilty pleas and result in more public trials, thereby *increasing* the burden on the courts. Experience in several jurisdictions demonstrates that genuinely contested preliminary hearings result in more guilty pleas than uncontested ones because defendants tend to become pessimistic when actually faced with the case against them.[43]

Because resort to discovery proceedings to accomplish effective cross-examination of the prosecution's witnesses is foreclosed both by the absence of liberal deposition provisions and the incompatibility of vigorous pretrial questioning with the development of the defendant's case, the *Florence* court has deprived defendants of the opportunity to test the strength of the evidence against them prior to public trial. By limiting the probable cause

43. Note, *supra* note 9, at 794-95. The court also justified diminishing the role of the probable cause determination by drawing an analogy to the federal procedure established in Gerstein v. Pugh, 420 U.S. 103 (1975). In that case, the United States Supreme Court held that while the fourth amendment requires a timely judicial determination of probable cause as a prerequisite for *detention*, it does not require an adversary hearing with confrontation and cross-examination. *Id.* at 120.

But *Gerstein* involved a hearing to determine whether a defendant could be detained after arrest, not a hearing to determine whether a defendant should be bound over for trial. While the *Florence* court conceded that a distinction could be drawn between a hearing to test the right to detain after arrest and a hearing to determine whether a defendant should stand trial, it asserted that the difference was one of degree only. 239 N.W.2d at 902. This reasoning fails to address, indeed it merely restates, the question whether the distinction is sufficient to justify greater protection for the defendant in the later proceeding. Had the court, in calculating the significance of this "degree," considered the fact that the hearing to detain for arrest evaluated in *Gerstein* has traditionally been held *ex parte* and often informally to meet the exigencies of law enforcement, it may have concluded that *Gerstein* was not useful authority. The hearing to determine whether the accused should be bound over for trial has traditionally served entirely different purposes, never requiring rapid disposition. In *Gerstein* the Supreme Court itself distinguished the hearing to detain from the later hearing to determine whether the defendant should be bound over for trial:

> Once the suspect is in custody . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention [*e.g.*, from the date of the omnibus hearing to the date set for trial] may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.

420 U.S. at 114.

determination to an *ex parte* examination of the complaint and its attachments and by denying the accused any opportunity to call attention to weaknesses in the prosecution's case, the court has precluded the probable cause hearing from accomplishing the objectives that the court implied are still valid.[44] Without ample opportunity to thoroughly test the case against him with the use of adversary procedures, including confrontation of witnesses against him, the defendant may not, in most cases, have the opportunity to avoid the humiliation and anxiety of an unjustified public prosecution. Moreover, both the defendant and the state may undertake the expense of public trials needlessly. In the absence of an alternative procedure to screen groundless charges, conditioning the right to cross-examination on the fortuity of producing a witness who, if believed, would exonerate the defendant is entirely arbitrary. Without sufficient evidence to support the assertion by the court that eliminating adversary proceedings in most cases will result in a savings of judicial time and expense, such arbitrariness is without justification. And even were such evidence forthcoming, it is by no means clear that judicial economy should displace the avoidance of public prosecutions for improperly charged defendants as the paramount objective of pretrial criminal procedure.

44. 239 N.W.2d at 896. Of the functions the supreme court listed that may be served by the probable cause hearing—including securing the release of a person illegally detained, avoiding the expense and ignominy of prosecution, uncovering groundless prosecutions, assessing the credibility of prosecution witnesses, compelling witnesses to appear to be recorded, and enabling the defendant to engage in a form of discovery—it discounted only discovery as capable of accomplishment outside of the hearing. *Id.* at 898; *see* note 25 *supra* and accompanying text.