

CRIMINAL LAW:
CRIMINAL PROCEDURE:
FELONIES:
INFORMATIONS:
TRIAL:
SEPARATE CRIMES:
WAIVER:

A defendant may not properly be charged and convicted at the same trial of two distinct felonies (except as authorized by statute) unless he waives this procedure by not objecting during trial or after trial.

Opinion No. 116

March 27, 1964

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Burrell:

This is in reply to your opinion request in which you ask:

"One man, by the name of, was in the County Jail awaiting trial on the charge of armed robbery; while he was awaiting trial on this charge he took the stand in defense of a man who was with him on the armed robbery and committed perjury. The charge of perjury was then filed against but no warrant was served pending disposition of the armed robbery charge. Now in the attempted escape stabbed his jailor in the throat and I have filed a charge of Felonious Assault against him. Is there any way under the law existing in Missouri where I could charge this man with all three of these crimes and try him on all three of these crimes at the same time?"

The answer to this inquiry is found in the case of State v. Terry, Mo., 325 S.W. 2d 1, in which the defendant was convicted of the two separate felonies of burglary in the first degree and forcible rape, which were pleaded in the same information under separate counts. The jury, pursuant to the trial court's instructions, returned two separate guilty verdicts and assessed defendant's punishment at five years in the penitentiary in each verdict. Neither the information nor the procedure was questioned by defendant's counsel at trial or after trial.

In reaching this decision the court pointed out that although the joinder of separate felonies does not render an indictment or information bad as a matter of law, a defendant may not properly be convicted at the same trial of two separate felonies except where provided for by statute. The court stated, l.c. 4:

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"* * * It is the law that the joinder of distinct felonies does not render the indictment or information in which they are joined bad as a matter of law. State v. Gholson, Mo., 292 S.W. 27, 28 [2-5]. * * *

"* * * The established rule in this state is that a defendant may not properly be convicted at the same trial of two distinct felonies except in those instances specifically provided for by statute. RSMo 1949 § 560.110, V.A.M.S. See also 42 V.A.M.S. Supreme Court Rule 24.04. * * *" (citing cases)

Notwithstanding this rule, however, the court held that the defendant's conviction of two separate felonies in this particular case did not constitute error because defendant's counsel had waived any objection thereto and that such matter could be waived. In this regard the court's language was as follows, l.c. 5:

"Thus, inasmuch as there is no express prohibition against the conviction of a defendant of two distinct felonies at the same trial, and inasmuch as there appears to be no reason for the established rule in Missouri which should prevent a waiver of that rule, and inasmuch, as heretofore noted, an information or indictment in which are joined two distinct felonies is not bad as a matter of law, we are of the view that a defendant's failure to assign as error in his motion for new trial the action or inaction of the trial court which resulted in his conviction of two distinct felonies at the same trial, effects a waiver of his right to rely on the rule in question. In other words, if a defendant prefers that two distinct felonies with which he is to be charged be joined in one information, and if he prefers that he be tried on both those charges at one and the same trial, we perceive no reason why he may not so elect. We hold, therefore, that a defendant's failure to raise any question in his motion for new trial about the fact that or the procedure whereby he was convicted of two distinct felonies at the same trial and separately sentenced for each, should have the same effect as though defendant had specifically elected to be tried on both felonies at the same time."

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CONCLUSION

It is our conclusion, based upon the foregoing authority, that a defendant may not properly be charged and convicted at the same trial of two distinct felonies (except as authorized by statute) unless he waives this procedure by not objecting during trial or after trial.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,



THOMAS F. EAGLETON
Attorney General