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Felony Preliminary Hearings in Colorado

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Colorado law provides for a hearing shortly after felony charges are filed in order to test the validity of the accusations. Preliminary hearings are governed by Crim.P. 5 (in county court) and Crim.P. 7 (in district court), as well as CRS § 16-5-301. They are also mandated by constitutional principles,(fn1) and have been held to be a "critical stage" of the criminal process at which the right to counsel attaches.(fn2) This article discusses the purposes for and procedures followed at preliminary hearings.

Persons Entitled to a Preliminary Hearing

Individuals charged with felonies are entitled to a preliminary hearing if the case is filed by information in county court, or if the charge is filed directly in district court.(fn3) There is no right to a preliminary hearing upon indictment(fn4) nor after a juvenile transfer hearing.(fn5) A person is only entitled to a preliminary hearing upon a charged offense, not upon a sentence enhancement provision.(fn6) Current statutes provide that a preliminary hearing may be had even if the defendant is incompetent, but this provision is of questionable constitutionality.(fn7)

Both Crim.P. 5 and 7 provide that a preliminary hearing can be had only upon written demand of either party.(fn8) This request is timely if it is made within ten days of the presentation of charges. The failure to request the hearing within the ten-day period operates as a waiver of the preliminary hearing. The hearing may also be waived by a knowing failure to appear at the hearing.(fn9)

Upon demand, the hearing must be held within thirty days of the setting absent a finding of good cause.(fn10) The sanction for violation of the thirty-day rule is dismissal with prejudice.(fn11)

Purpose of the Preliminary Hearing

The stated purpose of the preliminary hearing is to establish probable cause to believe that a crime was

committed and that it was committed by the defendant. The standard for probable cause

> requires evidence sufficient to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief that the defendant may have committed the crimes charged.(fn12)

In assessing the evidence presented, the court is to view the evidence in the light most favorable to the People, since the preliminary hearing is a screening device, not a trial. All conflicts in testimony must be resolved in their favor as well. A witness' testimony may only be discounted when the court finds the witness to be incredible as a matter of law. Affirmative defenses are not pertinent to the probable cause determination. For this reason, the defense rarely presents evidence at the hearing, and the defendant rarely testifies.(fn13)

These recitations hide the real purpose of the preliminary hearing in modern practice: plea bargaining. Short of the trial itself, the preliminary hearing is the only setting attended by the defendant, defense counsel, prosecutor, detective, victim and witnesses. As such, it mandates the appearance of all the participants in the plea-bargaining process. Perhaps two-thirds of all felonies are resolved at this time.

The courts have often stated that discovery is not a purpose of the preliminary hearing,(fn14) but it is often the purpose of the defense attorney. While current discovery rules make almost all discoverable material available prior to the preliminary hearing,(fn15) ordinarily there are unanswered questions from the viewpoint of defense counsel. The typical preliminary hearing is a sparring match between a defense attorney trying to learn as much as possible about the case and a prosecutor trying to limit the inquiry through objections.

Evidentiary Considerations

The rules of evidence do not apply at a preliminary hearing; thus, hearsay is admissible.(fn16) One court stated:

> The process is best served when at least one witness is called whose direct perception of the criminal episode is subject to evaluation by the judge at the preliminary hearing. Establishing probable cause on the basis of hearsay alone should only be resorted to when the testimony of a perceiving witness

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> is unavailable or when "it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."(fn17)

While this principle is easily stated, it is not so easily applied. The rule seems to be that the court should have sufficient first-hand testimony to render an informed ruling and make cross-examination of the witnesses meaningful, but it does not have to observe strictly the prophylactic evidentiary rules of trial.

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There is a tension between the notion that the bulk of the evidence may be hearsay and the right of the defendant to cross-examine and call witnesses.(fn18) The defendant's witnesses will be of no value unless they "fill in gaps" in the prosecution's case. Where there is a conflict in testimony, the People's witnesses are to be believed unless they are incredible as a matter of law. For this reason, some cases have upheld the preliminary hearing court when the defense was not allowed to call a witness who would add little, if any, direct evidence to the hearsay already adduced at the hearing.(fn19) On the other hand, where the hearsay testimony has been thin on an element of the offense, such as identification, the courts have held it to be an abuse of discretion to refuse to let the witness testify or be cross-examined.(fn20)

One common problem faced by preliminary hearing courts is statements by codefendants. Often these are offered against the declarant as well as the other defendant. It has been stated, in reference to hearsay, that evidence does not have to be admissible at trial in order to be used at the preliminary hearing.(fn21) On the other hand, the assumption regarding such testimony seems to be that it is only admissible at the preliminary hearing because it is *presently* hearsay; that is, direct evidence will be substituted at trial.

The problem with admitting a codefendant's statement at a preliminary hearing is that it may not be admissible against the defendant at trial, nor can the defendant cross-examine a codefendant declarant who would presumably choose the right to remain silent. Thus, the trustworthiness of the statement is untested. Where the defendant is in custody and the finding of probable cause hinges on the contents of the statement, the matter is of no small consequence. The answer to this dilemma has yet to be propounded by the Colorado appellate courts.

Another problem is posed by the identification problems inherent in preliminary hearings. The setting itself is unarguably suggestive.(fn22) The courts have therefore grappled with several alternatives to the defendant sitting next to counsel in a nearly empty courtroom. One court has suggested that the defendant may voluntarily be absent from the proceedings; however, this means the defendant will have to stipulate to identification, the very issue on which defense counsel undoubtedly wants to cross-examine.(fn23)

At the conclusion of the preliminary hearing, the court may bind the case over for trial as charged, bind the case over only on a lesser included offense, or dismiss the charges.(fn24)

Defense Appellate Remedies

The defendant who loses a county court preliminary hearing may not ask the trial judge to review the finding of probable cause.(fn25) The exclusive remedy of the defendant who is aggrieved by an adverse finding of probable cause is an original proceeding pursuant to Colorado Appellate Rules ("C.A.R.") Rule 21.(fn26) If, on the other hand, the defendant complains of a procedural error, such as the denial of the right to call a witness, the appropriate remedy (assuming the preliminary hearing was held in county court) is to commence

a civil action under Colorado Rules of Civil Procedure ("C.R.C.P.") Rule 106.(fn27) A Rule 106 proceeding must be directed against the county court judge who has bound the case over and thereby lost jurisdiction. Thus, it would appear this procedure creates a hollow remedy.(fn28)

In an age when judicial economy is paramount, this is illogical. Perhaps the courts should permit a defendant who complains of a procedural error to move the trial court to review the proceedings. It is arguably wasteful to mandate the filing of an entirely new civil action, which will ultimately be pending concurrently in district court, often before the same judge.

Prosecution Appellate Remedies

If a *district* court fails to bind over a case after a preliminary hearing because of a lack of probable cause, the People may appeal.(fn29) If a case is dismissed because of an abuse of discretion by the *county* court, such as inappropriately refusing to grant the People a continuance, the People's exclusive remedy is to appeal to the district court.(fn30)

If the county court fails to find probable cause after a preliminary hearing, the People may refile the case in district court, but only with the court's permission.(fn31) To prevent defendants from being subject to capricious refiling, the courts have interpreted the wording of Crim.P. 7(c) ("[t]he prosecuting attorney, with consent of the court having trial jurisdiction, may file a direct information. . .") as giving the court discretion to refuse. Hence, they have engrafted a "good cause" requirement onto the rule.(fn32) If the People are allowed to refile, the defendant is entitled to a new preliminary hearing.(fn33)

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Footnotes:

1. *Gerstein v. Pugh,* 429 U.S. 103 (1975); *Lucero v. District Court,* 532 P.2d 955 (Colo. 1975).

2. *Coleman v. Alabama,* 399 U.S. 1 (1970); *Schwader v. District Court,* 474 P.2d 607 (Colo. 1970).

3. *See,* Crim.P. 5(a)(4), 7(h)(1). The statute requiring preliminary hearings for misdemeanors was repealed last year. CRS § 16-5-301. Crim.P. 5(a)(4)(I) and 7(h)(1) have also been amended to conform to the statute, and are published in the May 1988 issue of *The Colorado Lawyer* at p.877.

4. *People v. District Court,* 610 P.2d 490 (Colo. 1980).

5. *People v. Flanigan,* 536 P.2d 41 (Colo. 1975).

6. *Maestas v. District Court,* 541 P.2d 889 (Colo. 1975) (habitual criminal allegation); *Brown v. District Court,* 569 P.2d 1390 (Colo. 1977) (mandatory sentence allegation); *Felts v. County Court,* 725 P.2d 61 (Colo. App. 1986) (special offender pursuant to CRS § 18-18-107).

7. CRS § 16-8-112(4); *see, Schwader, supra,* note 2.

8. Crim.P. 5(a)(4)(I), 7(h)(1). There is some authority for the proposition that a demand made orally on the record is equal to a "written" demand. *People v. Driscoll,* 615 P.2d 696 (Colo. 1980). Effective January 1, 1989, the requirement that the demand be in writing has been deleted.

9. Crim.P. 5(a)(4)(I), 7(h)(1). If charges are filed directly in district court, the request need only precede the plea. Where the defendant failed to make a timely request for a preliminary hearing, the fact that he did so without counsel did not vitiate the waiver. *People v. Boyette,* 635 P.2d 552 (Colo. 1981). *See also, Farina v. District Court,* 522 P.2d 589 (Colo. 1974); *People v. Abbott,* 638 P.2d 781 (Colo. 1981); Crim.P. 43(d).

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10. Crim.P. 5(a)(4)(I), 7(h)(2). Docket congestion has been held to be good cause for exceeding the thirty days. *People v. Hoagland,* 534 P.2d 1298 (Colo. 1975).

11. *Chavez v. District Court,* 648 P.2d 658 (Colo. 1982).

12. *People v. Treat,* 586 P.2d 473, 474-75 (Colo. 1977).

13. *Id.; Hunter v. District Court,* 543 P.2d 1265 (Colo. 1975); *People v. Quinn,* 516 P.2d 420 (Colo. 1973); *Maestas, supra,* note 6; *Johns v. District Court,* 561 P.2d 1 (Colo. 1977).

14. *See, e.g., Rex v. Sullivan,* 575 P.2d 408 (Colo. 1978).

15. Crim.P. 16(I)(b)(1). However, this was not always the case. *See, Quinn, supra,* note 13; *People v. Kingsley,* 530 P.2d 501 (Colo. 1975).

16. C.R.E. 1101(d)(3); Crim.P. 5(a)(4)(II), 7(h)(3).

17. *Maestas, supra,* note 6 at 892, *quoting, U.S. v. Umans,* 368 F.2d 725 (2d Cir. 1966). *See also, Quinn, supra,* note 13.

18. *Quinn, supra,* note 13. Both Crim.P. 5(a)(4)(II) and 7(h)(3) provide that the defendant "may cross-examine the witnesses called to testify against him and may introduce evidence in his own behalf."

19. *Hunter, supra,* note 13. *See, e.g., Blevins v. Tihonovitch,* 728 P.2d 732 (Colo. 1986); *Rex v. Sullivan,* 575 P.2d 408 (Colo. 1978).

20. *McDonald v. District Court,* 576 P.2d 169 (Colo. 1978); *Kuypers v. District Court,* 534 P.2d 1204 (Colo. 1975).

21. *Quinn, supra,* note 13.

22. *Moore v. Illinois,* 434 U.S. 220, n.5 (1977); *People v. Horne,* 619 P.2d 53 (Colo. 1980). *See also, People v. Staten,* 746 P.2d 1362 (Colo.App. 1987).

23. *Farina, supra,* note 9.

24. *People v. Hrapski,* 658 P.2d 1367 (Colo. 1983).

25. *People v. District Court,* 652 P.2d 582 (Colo. 1982).

26. *White v. McFarlane,* 713 P.2d 366 (Colo. 1986).

27. *Zaharia v. County Court,* 673 P.2d 378 (Colo.App. 1983).

28. Since a finding of guilt at a trial moots the issue of probable cause, an appeal after conviction is not permissible. *Kuypers, supra,* note 20; *People v. Martin,* 670 P.2d 22 (Colo.App. 1983).

29. *See, e.g., Treat, supra,* note 12.

30. *People v. Driscoll,* 615 P.2d 696 (Colo. 1980); *Chavez v. District Court,* 648 P.2d 658 (Colo. 1982).

31. Crim.P. 5(a)(4), 7(c)(2); *People v. Frieman,* 657 P.2d 452 (Colo. 1983).

32. *Holmes v. District Court,* 668 P.2d 11 (Colo. 1983) (refiling disallowed since the People made a tactical choice not to call a witness at the county court preliminary hearing and lost); *People v. Elmore,* 652 P.2d 571 (Colo. 1982); *Borg v. District Court,* 686 P.2d 781 (Colo. 1984) (refiling disallowed); *People v. Sabell,* 708 P.2d 463 (Colo. 1985) (trial court's refusal to permit refiling reversed as an abuse of discretion). Crim.P. 5(a)(4)(V) and 7(c), amended effective January 1, 1989, codify the good cause standard.

33. *People v. Burggraf,* 536 P.2d 137 (Colo.App. 1975)
