

BONDS:

BAIL:

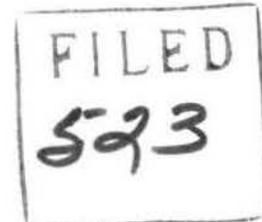
SUPREME COURT RULES:

A bondsman or surety is disqualified from making further bonds when a forfeiture has been entered upon a recogni-

zance to which he is a party, even though motions to set aside such forfeiture may be pending.

OPINION NO. 523

October 8, 1970



Mr. Thomas E. Allen
Assistant Prosecuting Attorney
Office of Prosecuting Attorney
Clay County Court House
Liberty, Missouri 64068

Dear Mr. Allen:

This is in response to your request for an official opinion of this office with respect to the following inquiry:

"Missouri Supreme Court Rule 32.14 designates the qualifications for individual surety on any bail bond, including subparagraph 5 of the Rule, which provides that the individual surety 'shall have no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or of the United States.'

"Missouri Supreme Court Rule 32.12 provides in pertinent part: 'If there is a breach of condition of a bond, the court in which a criminal case or proceeding is then pending shall declare a forfeiture of the bail. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. When a forfeiture has not been set aside, the court shall on a motion enter a judgment of default and execution may issue thereon.'

"It is our opinion that, once a forfeiture is ordered by the appropriate court, the

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individual surety is disqualified from issuing any further bonds until the forfeiture has either been set aside or paid into court. However, as a practical matter, almost every forfeiture results in a motion to set aside the forfeiture, which is taken under advisement by the court for a reasonable period of time to allow the bondsman to produce the defendant or otherwise remedy the breach of the bond's conditions.

"The specific question requested of our office and which we now ask you is whether a forfeiture becomes final for purposes of disqualifying the individual surety at the time the forfeiture is ordered or at the time the motion to set aside the forfeiture is ruled upon."

The qualifications of a surety are defined by Supreme Court Rule 32.1⁴, which provides, as follows:

"An individual shall not be accepted as a surety on any bail bond taken under these Rules unless he possesses the following qualifications:

1. He shall be a reputable person, at least twenty-one years of age and a bona fide resident of the State of Missouri.
2. He shall not have been convicted of any felony under the laws of any state or of the United States.
3. He shall not be an attorney-at-law, a peace officer, a constable or a deputy constable.
4. He shall not be an elected or appointed official or employee of the State of Missouri or any county or other political subdivision thereof.
5. He shall have no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or of the United States. (Emphasis added.)

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The rule provides that a surety is not qualified if there is either an "outstanding forfeiture or unsatisfied judgment" entered on any bail bond to which he is a surety. The rules and statutory provisions contemplate both a forfeiture and a final judgment.

Supreme Court Rule 32.12 defines when a forfeiture shall occur and sets forth the procedure by which the forfeiture shall be reduced to judgment. That rule provides:

"If there is a breach of condition of a bond, the court in which a criminal case or proceeding is then pending shall declare a forfeiture of the bail. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the court in which the defendant is required to appear under the condition thereof and in which a prosecution is or may be pending against the defendant and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses."

The rule clearly contemplates both a forfeiture and a final judgment predicated upon the forfeiture. Similar distinctions are recognized in the statutory provisions concerning bond forfeitures.

Section 543.370, RSMo 1969, provides, as follows:

"If the defendant shall neglect to appear for trial or judgment, or upon any other occasion when his presence may be lawfully required, before a magistrate, according to the condition of his recognizance, the magistrate must enter

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the default upon his record, and the recognizance shall thereupon be adjudged forfeited."

Section 543.380, RSMo 1969, provides, as follows:

"When judgment of forfeiture shall be entered upon any recognizance, as provided in section 543.370, the magistrate shall issue a citation to the defendant and his sureties in the recognizance, reciting therein that default has been made by defendant, and judgement (sic) of forfeiture rendered upon said recognizance, and that unless the defendant and his said sureties appear before such magistrate at a day and time designated in such citation, and show cause to the contrary, judgment will be entered against them for the full amount of said recognizance, with costs, and execution issued therefor. Such citation shall be served on the defendants therein, as a summons is served in civil cases, at least fifteen days before the return day thereof."

Section 543.390, RSMo 1969, provides, as follows:

"When such citation shall have been served upon the defendants therein, or any of them, as directed in section 543.380, the magistrate shall, unless good cause be shown against it, proceed in a summary manner to render judgment against the defendant and his sureties in said recognizance, or such as have been served, for the amount of the same, with costs; or, if any of said defendants have not been served, or not served in time, the magistrate may continue the case to a day certain, and issue another citation to the parties not served, or may dismiss as to those not served, and proceed to final judgment against those served, as herein directed."

Section 543.400, RSMo 1969, provides, as follows:

"Any defendant against whom a judgment may be rendered upon a forfeited recognizance, as herein provided in section

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543.390, may appeal from such judgment, at any time within ten days after the rendition of the judgment, by filing an application stating that he verily believes himself injured and aggrieved by the judgment, and also entering into a recognizance with sufficient sureties, in the form and with the condition required in appeals from magistrates in civil cases; and the prosecuting attorney or prosecuting witness may appeal on behalf of the state, on filing an application therefor, without giving recognizances."

Section 544.640, RSMo 1969, provides, as follows:

"If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be afterward arrested on the original charge, unless remitted by the court for cause shown."

As previously indicated, both the rules and statutory provisions contemplate a forfeiture and a final judgment as separate and distinct stages in bond forfeiture proceedings.

Forfeiture of bail is more in the nature of a decree of forfeiture than a judgment. An order of forfeiture has been held to be interlocutory in nature, the judgment absolute being entered in the proceedings on the forfeited bond or recognizance. The forfeiture itself becomes final, however, when it has been ordered and no timely application for relief is made. State v. Wynne, 181 S.W.2d 781 (Mo. 1944).

The language employed, "outstanding forfeiture," indicates that finality is not necessary. "Outstanding" is defined as "(c) Undischarged; uncollected or unpaid; unsettled; undetermined." Webster's New International Dictionary, Second Edition. Words are to be taken and considered in their plain or ordinary and usual sense. Section 1.040, RSMo 1969.

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The distinction between forfeiture and final judgment is apparent in the decisions of the Supreme Court of Missouri.

In State v. Daigle, 442 S.W.2d 503, 505 (Mo. 1969), the court stated:

"In State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927, this court, in construing what is now § 544.640, RSMo 1959, V.A. M.S., held that after default by a defendant and forfeiture of recognizance, a circuit court, in the proceeding there provided for to obtain final judgment and execution, may 'for cause shown' exercise its judicial discretion, even though the presence of the principal is not obtained. The proceeding for judgment after a declaration of forfeiture of bail is not governed by Supreme Court Rule 32.12, V.A.M.R., and it is there provided that 'The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.' We are of the opinion that the discretion of the court pursuant to this rule is at least as broad as that indicated in State v. Wynne."

In State v. Hammond, 426 S.W.2d 84, 86 (Mo. 1968), the court observed:

". . . If Criminal Rule 32.12 had been followed the court, after declaring the forfeiture, could have directed that the forfeiture be set aside if justice did not require enforcement of the forfeiture. If the forfeiture was not set aside the court, acting under the rule, could have entered judgment of default and issued execution, on motion. . . ."

Thus, we conclude that the procedure relating to forfeiture of bail bonds provide for two distinct stages of such proceeding; first, the forfeiture, and, second, the entry of final judgment upon a forfeited recognizance. A surety is disqualified if there is either an "outstanding forfeiture or unsatisfied judgment" entered on any bail bond to which he is a surety. An "outstanding forfeiture" occurs when there has been a breach of condition of a bond, however, the surety's

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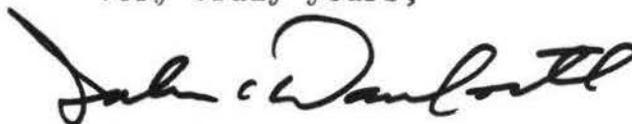
liability for that forfeiture remains unsettled or undetermined, either because of the surety's motion to set aside the forfeiture or because a final judgment upon a forfeited recognizance has not been entered.

CONCLUSION

Therefore, it is the opinion of this office that a bondsman or surety is disqualified from making further bonds when a forfeiture has been entered upon a recognizance to which he is a party, even though motions to set aside such forfeiture may be pending.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gene E. Voigts.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is written in a cursive style with a large, sweeping initial "J".

JOHN C. DANFORTH
Attorney General