BAIL:
CRIMINAL LAW:
CIRCUIT COURT:

Authority of prosecuting attorney and circuit court to relieve sureties on bail bond when defendant fails to appear.

FILED
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March 12, 1948

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Honorable Gordon J. Massey
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

> "Some months ago the Supreme Court affirmed a judgment sentencing a man to the pen. This man never appeared and the bondsmen have been unable to locate him although they has posted a reward and notified all the states west of the Missippi river.
>
> "The bond is for $2500.00. Since it was made one of bondsmen married and an execution was issued. According to the Sheriff of Taney County who has the execution and according to the information I can get they are execution proof but one. They have offered to pay the sum of $600.00, in satisfaction of this matter.
>
> "I think under the circumstances that is as good as can be done. Please advise if I can with the consent of the circuit court, settle for the sum of $600.00. Should this sum so received first be used to pay the costs?"

You inquire if you, as prosecuting attorney, with the approval and consent of the circuit court, may accept $600.00 in lieu of the full amount of the bail bond, $2,500.00 and costs.

We are unable to find any statute giving the prosecuting attorney such authority. Furthermore, a very old decision in this state very decisively holds that the circuit attorney or prosecuting attorney cannot release a surety on a forfeited recognizance. In State vs. Hoeffner, 28 S.W. 5, l.c. 8, the court, in so holding, said:

> "* * * We are clear that, under the law of this state, a forfeiture of a recognizance can only be remitted by the court in which the forfeiture is entered 'upon cause shown,' by its entry of record, and that neither the circuit or prosecuting attorney has authority to bind the state for such a remittitur even by or with consent of the judge of such court, in vacation or at chambers. The statute confers the power upon the court; and the court, being one of record, must speak by its record, and the operation of the entry on the record can only be determined by its own terms. It follows that the court committed no error in refusing to recognize the agreement and payment to Mr. Ashley C. Clover as a satisfaction of the recognizance; and its judgment is affirmed. All concur."

Under Section 3973, R. S. Mo. 1939, it does appear that the circuit court may, for cause shown, remit this forfeiture. Section 3973 reads 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."

Under Section 4189, R. S. Mo. 1939, the Governor is authorized to make a remitter when it is shown that by such forfeiture an injustice or hardship is suffered. Said Section 4189 reads as follows:

> "For any fine imposed by any statute, and for any forfeiture of a recognizance, where the securities are made liable, the governor shall have power to grant a remitter, when it shall be made to appear to him that there is by such fine or forfeiture an injustice

> done, or great hardship suffered by the defendant or defendants, which equity and good conscience would seem to entitle such defendant or defendants to be relieved from. All applications for such relief shall be in writing, signed by the party or parties seeking such remitter, and accompanied by a statement of the facts of the case, signed by the judge or circuit attorney of the county in which such fine or forfeiture is entered, and a certificate of the clerk that all costs have been paid; and the governor shall indorse his decision on each case and file the same in the office of the secretary of state."

The courts have, to some extent, defined "cause" as used in this section, and we are inclined to believe that the reason stated in your request for executing such a settlement does not come within the definition laid down by the Supreme Court of this state. One of the most recent declarations of the court will be found in the case of State vs. Wynne, 204 S.W. (2d) 927, l.c. 929, wherein the court held that the case before it did not involve an abuse of discretion by the circuit court, but a refusal to exercise discretion because the circuit court believed it lacked jurisdiction to do so, and that if that court was wrong in its belief, the case must be remanded, and that is just what the Supreme Court did. The circuit judge made a written statement in which he stated that he did not believe he had the power under the existing statutes, and particularly Section 3973, R. S. Mo. 1939, to discharge sureties in whole or in part, or to set aside the forfeiture, or to make any remitter; that it was his opinion that an application for remission should be addressed to the Governor, under Section 4189, R. S. Mo. 1939. Notwithstanding the above, the Supreme Court did more or less pass upon several grounds that the sureties claimed in support of their contention that the circuit court could grant them relief. One claim was that the recognizance was void because the principal had been declared insane, to which the court replied that the judgment of restoration was rendered two years prior to entering into recognizance, and while there was an appeal, it was dismissed and, therefore, the judgment spoke as of the date of its rendition. The court further held that neither could they sustain a contention that refusal of the Governor of the State of Louisiana to grant extradition exonerated them as a matter of law and of right, and said:

> "Notwithstanding the mandatory wording of the Federal Law, there might be a variety of circumstances which would justify a governor in refusing extradition. The record now before us does not show such a circumstance, but even if it be true that the officials in Louisiana arbitrarily refused to act, yet that does not constitute an act of the law which necessarily excuses the sureties; rather it is a successful effort of the principal in the recognizance to evade the law or the unauthorized acts of strangers to the obligation. While there is an implied covenant on the part of the obligee state that it will, through its officers, render reasonable assistance in returning the fugitive, (Miller v. Commonwealth, 192 Ky. 709, 234 S.W. 307) there is no such implied covenant that another state will render such assistance. Upon her admittance to bail the custody of Mrs. Wynne was transferred to her sureties, the appellants. (6 Am. Jur., p. 85, sec. 93.) They had the right to prevent her from leaving the state, to arrest her within the state without warrant. Yet they must have known that she might return to her residence and business in New Orleans. We cannot hold that they were entitled to assume, as an absolute right, that Mrs. Wynne would not resist extradition or that efforts to extradite her would be successful."

The court further said:

> "The courts generally hold that the sureties are discharged as a matter of law when the return of the defendant is prevented by (1) an act of God; (2) an act of the law; (3) an act of the obligee, the state where the criminal charge is pending. (Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Id., 36 Conn. 242, 4 Am. Rep. 58; 8 C.J.S., Bail, Section 76, p. 147.) An illustration of the first would be the death of the accused; of the second, abolishment of the court in which accused is obligated to appear; of the third, granting extradition by the

governor of the obligee state to send the accused to answer a charge in another state."

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"We think that the last clause in Section 3973, 'unless remitted by the court for cause shown,' relates to the whole section and vests the court with discretion to remit the penalty for cause at any time before final judgment on the recognizance. It clearly means that such discretion may be exercised without the production of the accused, but that the arrest of the accused by peace officers after forfeiture and before final judgment will not entitle the sureties to relief as a matter of right; good cause must still be shown.

"Of course, such discretion is a judicial one and subject to review if arbitrarily and unreasonably exercised either for or against the sureties. Section 4187 vests the governor with power, on ex parte hearing, to grant remitter even though the defendant is never produced and even after final judgment on the recognizance. It it not unreasonable to hold that by Section 3973 the general assembly intended to vest some discretion in the trial court while the matter is pending before it.

"Reading the three sections together, we come to these conclusions: under Section 3970 if the accused voluntarily surrender or is produced by the bailor before final judgment on the recognizance, the bailor, as of right, must be released on payment of the costs; under Section 3973, even though the accused is not produced, or is produced by peace officers and not by the bailor, the court may for cause remit the penalty upon payment of the costs; under Section 4189 the governor may remit with or without the production of the accused and before or after final judgment on the recognizance."

While the court did not exactly define "for cause shown" as used in Section 3973, R. S. Mo. 1939, from the foregoing, we understand the Supreme Court at least by implication indicated the rule to be as follows, that such phrase more or less should follow the grounds which have heretofore been so well established for discharging sureties as a matter of law, such as when the defendant is prevented from appearing (1) by an act of God; (2) by an act of law; (3) by an act of the obligee, the state where the criminal charge is pending; (4) by an act of a public enemy.

Judge Conkling rendered a separate and concurring opinion, which went much further and stated that since the statutes in this case did not define the phrase "for cause shown" that it might include other grounds than those four usually considered as a matter of law as authority for the court to discharge the sureties in whole or in part; that in his opinion, it should be left to the sound judicial discretion or judgment of the trial court; furthermore, that the abuse of which is reviewable on appeal.

Judge Hyde, in a separate, dissenting opinion, held that the defendants could not induce their principal to return, although she was free to do so, and gave his opinion that there is no cause at all for the circuit court to relieve the sureties; that his opinion is that "for cause shown" as used in Section 3973, R. S. Mo. 1939, means such cause as has long been established by the cases to be an excuse for sureties, and mentions the four established grounds for relieving the sureties quoted hereinabove; that such must be true in view of Section 4189, R. S. Mo. 1939, which authorizes a remitter by the Governor when it is shown to him that there is, by such forfeiture, an injustice done, great hardship suffered by the defendant or defendants, which equity and good conscience would seem to entitle such defendant or defendants to be relieve from.

In view of the foregoing decisions, we are inclined to hold that the sureties are liable in this instance, and the mere reason one surety may have to assume the whole burden upon forfeiture, is no valid reason for the prosecuting attorney and the circuit court agreeing to relieve the sureties and entering into a settlement for $600.00, without even the payment of costs. The decisions all hold the sureties, when they make bail bond, are cognizant of the fact that they are responsible for the defendant's appearing at the time and place stated in the bond. Furthermore, they can prevent the defendant from leaving the state at any time that they have knowledge of his preparation for departure, and it is the chance they take when he is released to their sole custody under the bond.

Furthermore, by the enactment of Section 4189, R. S. Mo. 1939, the Legislature, giving the Governor of this state specific authority to make a remitter when it is shown to him that an injustice will be done or great hardships suffered by one or more of the defendants, indicates the same authority was not intended to be vested in the circuit courts. Had the Legislature so intended for the courts to have that authority, that body would certainly have followed the wording of Section 4189, supra.

CONCLUSION

Therefore, it is the opinion of this department that in this instance, the prosecuting attorney is unauthorized to execute a settlement with the sureties on a bail bond for failure of the defendant to appear, in lieu of the full amount of said bond and costs upon forfeiture of said bond. Furthermore, the circuit court may grant relief against sureties only for cause shown as provided in Section 3973, R. S. Mo. 1939, and such cause should be construed more or less along those well established grounds for relief, under which courts generally hold sureties may be discharged when the defendant fails to appear, which are by (1) an act of God; (2) an act of law; (3) an act of obligee; (4) an act of a public enemy.

Respectfully submitted,

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APPROVED:

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ARH:VLM