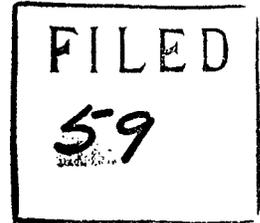


CRIMINAL PROCEDURE: Magistrate or circuit court may receive plea  
PRESENCE OF DEFENDANT: of, try, or pronounce sentence upon defendant  
in misdemeanor cases in absence of such de-  
fendant with consent of such court, and the  
prosecuting attorney.

June 8, 1954

Honorable Roy W. McGhee, Jr.  
Prosecuting Attorney  
Wayne County  
Greenville, Missouri



Dear Sir:

Reference is made to your request for an official opinion of  
this department reading as follows:

"I have been directed by the county court in one  
instance and the magistrate in another to obtain  
your office's opinion on two separate matters,  
as follows:

"2. Supreme Court Rule 27.08 provides, in part,  
as follows:

"' . . . If he (the defendant) has been convicted  
of a misdemeanor, he must be personally present  
when sentence and judgment are pronounced unless  
the court and the prosecuting attorney consent  
to the absence of the defendant. . . .'

"Supreme Court Rule 29.02 provides, in part, as  
follows:

"' . . . nor shall any person be tried for or be  
allowed to enter a plea of guilty of a misdemeanor  
unless he be personally present or the court and  
prosecuting attorney consent to such trial or plea  
in the absence of the defendant.'

"Do these two rules allow the magistrate court to  
accept the plea of and pronounce sentence upon an  
absent defendant whose appearance is entered by  
his attorney? Do they allow a defendant to enter  
a plea by mail? If the answer to either question  
is in the affirmative, should service of the warrant  
be waived, and if so, what return, if any, should  
the sheriff make upon the warrant?" \* \* \*

Honorable Roy W. McGhee, Jr.

With respect to the questions which you have propounded in paragraph number 2 of your letter of inquiry we first direct your attention to Sections 546.550 and 546.560, RSMo 1949, reading as follows:

546.550.

"For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, or imprisonment be assessed as punishment by the jury, the defendant must be personally present; if for a fine only; he must be personally present, or some responsible person must undertake for him to pay the judgment and costs; judgment may then be rendered in his absence.

546.560.

"If the defendant is in custody, he must be brought before the court for judgment; if he is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in the state, as a warrant to arrest in other cases."

Also to the provisions of Section 546.030, RSMo 1949, reading as follows:

"No person indicted for a felony can be tried unless he be personally present, during the trial; nor can any person be tried or be allowed to enter a plea of guilty in any other case unless he be personally present, or the court and prosecuting attorney shall consent to such trial or plea in the absence of the defendant; and every person shall be admitted to make any lawful proof by competent witnesses or other testimony in his defense; provided, that in all cases the verdict of the jury may be received by the court and entered upon the records thereof in the absence of the defendant, when such absence on his part is willful or voluntary, and when so received and entered shall have the same force and effect as if received and entered in the presence of such defendant; and provided further, that when the record in the appellate court shows that the defendant was present at the commencement or any other stage of the trial, it shall be presumed, in the absence of all evidence in the record to the contrary, that he was present during the whole trial."

Honorable Roy W. McGhee, Jr.

The effect of these three statutes is that judgment may not be pronounced by a court upon conviction for an offense punishable by imprisonment, which imprisonment has been assessed as a punishment by the jury in the absence of the defendant; and that no defendant may be permitted to be placed upon his trial or to enter a plea of guilty in misdemeanor cases except when personally present or if the court and prosecuting attorney consent to such trial, or the receipt of such plea, in the absence of the defendant.

However, in this regard we direct your attention to the following provisions of Section 5, Article V, of the Constitution of Missouri, 1945:

"Rules of practice and procedure--duty of Supreme Court--power of legislature.--The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to that purpose."

Pursuant to the constitutional authority so conferred the Supreme Court of Missouri has promulgated two rules dealing with the subject matter of the above quoted three statutes. Inasmuch as such rules are, in our opinion, related solely to criminal practice and procedure, it is our opinion that they supersede the provisions of the quoted statutes to the extent of any conflict. We perceive no conflict with Section 546.030, RSMo 1949, in so far as it relates to the matter now under consideration, but do observe a conflict with the other two statutes quoted. Rule 27.08 of the Supreme Court of Missouri reads as follows:

"If the defendant has been convicted of a felony, he must be personally present when sentence and judgment are pronounced. If he has been convicted of a misdemeanor, he must be personally present when sentence and judgment are pronounced unless the court and the prosecuting attorney consent to the absence of the defendant. If the defendant is in custody, he must be brought before the court for judgment and sentence; if he is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in the state as a warrant of arrest in other cases."

Honorable Roy W. McGhee, Jr.

Rule 29.02 of the Supreme Court of Missouri reads as follows:

"No person shall be tried upon an indictment or information for a felony unless he be personally present during the trial; nor shall any person be tried for or be allowed to enter a plea of guilty of a misdemeanor unless he be personally present or the court and prosecuting attorney consent to such trial or plea in the absence of the defendant."

Having determined that such rules establish the practice and procedure to be followed we thereupon consider the three questions you have propounded under paragraph number 2 of your letter of inquiry.

Your first question reads: "Do these two rules allow the magistrate court to accept the plea of and pronounce sentence upon an absent defendant whose appearance is entered by his attorney?" Our consideration of the rules quoted supra, lead us to the conclusion that the answer to this question must be in the negative. Such answer, however, is qualified by the following conclusion that such procedure may be followed with the consent of the court and the prosecuting attorney.

Your second question reads as follows: "Do they allow a defendant to enter a plea by mail?" Our further consideration of the quoted rules lead us again to the conclusion that the answer to this question must also be in the negative subject to the same qualification mentioned with respect to question number 1.

Your third question reads as follows: "If the answer to either question is in the affirmative, should service of the warrant be waived, and if so, what return, if any, should the sheriff make upon the warrant?" Having answered questions numbers 1 and 2 in the negative, it becomes unnecessary to answer question number 3.

#### CONCLUSION

In the premises we are of the opinion:

That a court having jurisdiction of prosecutions for misdemeanors may not accept a plea of, and pronounce sentence upon an absent defendant whose appearance is entered by an attorney, except with the joint consent of such court and the prosecuting attorney; and,

That the defendant may not enter a plea to an information for a misdemeanor by mail except with the joint consent of the court, wherein such cause is pending, and the prosecuting attorney.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON  
Attorney General