

FORFEITURE OF
RECOGNIZANCE:

In proceeding upon a forfeiture of a recognizance, Supreme Court Rule 32.12 should be followed rather than Section 544.640, RSMo 1949.



June 6, 1957

Honorable James A. Cole
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Cole:

Your recent request for an official opinion reads:

"I request an Attorney General's opinion on the following fact situation involving Supreme Court rule Number 32.12 and Section 544.640, 544.650, and 540.660 of R. S. Mo. 1949.

"The facts pertaining to these sections are as follows:

The defendant was arrested under warrant issued upon the information of the Prosecuting Attorney for the crime of issuing an insufficient funds check. The matter was filed directly in the Magistrate Court. The defendant waived jury and the matter was presented to the Court and the defendant found guilty and punishment assessed at 6 months in the Franklin County jail and a fine of One Hundred (\$100.00) Dollars together with the costs. Thereafter, and within time, the defendant appealed the judgment of the Magistrate Court and an appeal was taken to the Circuit Court of Franklin County, Mo. There the defendant gave a new bond in the amount of Three Thousand (\$3000.00) Dollars. The cause was set for trial and upon date of setting defendant waived the jury and the matter proceeded to trial and the defendant was found guilty in the Circuit Court and punishment was assessed at Nine (9) months in the Franklin County jail and

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fined in the sum of Two Hundred (\$200.00) Dollars. Thereafter, within time, defendant filed a motion for a new trial and within Ninety (90) days said motion was overruled by the Circuit Court of Franklin County. In due time, the defendant appealed the case to the St. Louis Court of Appeals. After expiration of the time to perfect appeal to the St. Louis Court of Appeals, the St. Louis Court of Appeals dismissed the Appeal of the defendant on its own initiative for failure of Appellant to perfect the appeal and comply with the rules. The dismissal of the St. Louis Circuit Court of Appeals is as follows:

CAPTION OMITTED

'Now at this day, it appearing to the Court that the Appeal from the judgment of conviction entered herein by the Circuit Court of Franklin County on April 27, 1956, has not been perfected within the time prescribed by law and the rules of Court, it is ordered by the Court of its own initiative that said appeal be and the same is hereby dismissed for failure of Appellant to perfect the Appeal and to comply with the rules; and that said Appellant pay the costs of this Appeal.'

"The Defendant is at the present time serving a sentence in St. Louis City.

"The Circuit Court of Franklin County has entered a forfeiture of recognizance.

"The question involved is whether to proceed solely under Supreme Court rule 32.12 by now filing a motion for judgment on the default and forfeiture or whether to follow 544.640 and have a Writ of Scire Facias issued.

"I would appreciate you advising as to the procedure to be followed in the forfeiture of this recognizance."

All references to statutes herein are to RSMo 1949 unless otherwise indicated.

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Section 5 of Article V of the Constitution of Missouri places broad rule making power in the Supreme Court of Missouri as to practice and procedure. That section reads:

"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 the purpose."

In regard to this matter, the Missouri Supreme Court, in the case of State v. Robbins, 269 S.W. 2d 27, at l.c. 29, has stated:

"By order of this court, en banc, on April 14, 1952, rules of criminal procedure were adopted, effective January 1, 1953, pursuant to authority granted by Article V, §5, of the Missouri Constitution of 1945, V.A.M.S.; and, by order of this court on December 8, 1952, effective January 1, 1953, Supreme Court Rule 1.34 was rescinded and it was reiterated that 'appeals in criminal cases from and after January 1, 1953 (shall) be governed by the provisions of Rules 28.01 to 28.17'. Since defendant in the instant case sought to take an appeal from the final judgment rendered on January 21, 1953, the question as to whether a valid appeal was taken in this case, and therefore, whether this court has jurisdiction to hear the cause on appeal must be determined under Supreme Court Rule 28.03, the pertinent portion of which is as follows: 'After the rendition of final judgment in any criminal case, the defendant shall be entitled to take an appeal as provided in these Rules. An appeal shall be taken by filing a notice of appeal in the same manner and within the same time after final judgment as provided for civil cases.' * * *."

In regard to the effect that a Supreme Court Rule has when it is in conflict with a statute on the same subject, we direct attention to the following article by John Gibson and Jerome W. Seigfreid in 19 Mo. Law Review 70. At l.c. 73, the article reads:

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"The Missouri Supreme Court has often stated that in construing the Constitution, primary stress will be placed on the natural and ordinary meaning of the words. The plain meaning of the language, however, furnishes only doubtful assistance in determining the effect of the rules on the statutes. It would seem, however, that the restrictions placed on the rule making power indicate that where the court may make rules, the statutes will be superseded. The Constitution carefully excepts substantive rights, evidence law, oral examination of witnesses, juries, the right to trial by jury and the right of appeal from the authority of the court to change in any way, and any changes relating thereto must come from the legislature, where there is no other conflicting Constitutional provision. The subject matter of the rule making power is thus closely confined, and the inference would be that the court has full authority in the restricted sphere in which it can operate. This view is further strengthened by the power vested in the legislature to annul or amend any rule by law. It would seem that the reservation of the veto power must mean that, until the legislature acts, the rules of the court will be of controlling force, even though they are in conflict with existing statutes. Thus the inference is strong, from the restricted grant of the rule making power that the plain meaning of the Constitutional provision intended that the rules would replace the statutes."

From the above, it would appear to be perfectly plain that a Supreme Court Rule takes precedence regardless of any statutes upon the same subject so long as the Supreme Court Rule is within the boundaries of the Constitutional grant of authority set forth above found in Section 5 of Article V of the Missouri Constitution.

Section 544.640, to which you refer, reads:

"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

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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."

Rule 32.12 of the Supreme Court reads:

"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."

From the above, it will be seen that a different procedure in the matter of forfeiture is set forth in Rule 32.12 than in Section 544.640. On the basis of our reasoning above, in this situation, you should follow rule 32.12.

CONCLUSION

It is the opinion of this department that in proceeding upon a forfeiture of a recognizance that Supreme Court Rule 32.12 should be followed rather than Section 544.640, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General