

BAIL: Where a bail bond is conditioned upon the principal's appearance for preliminary hearing or in the event that he is bound over to answer such charges filed against him by "indictment or information," such bond is sufficient to require his appearance in circuit court if preliminary hearing has been held or waived and the defendant has been bound over to answer charges prior to the return of an indictment or the filing of an information. Supreme Court Rule 32.05(b) and Criminal Procedure Form No. 26, promulgated by the Supreme Court of Missouri, do not require appearance for trial if an indictment is returned prior to a preliminary hearing being held or waived, and the court returning the indictment must secure its own bond.

January 13, 1960

Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

This is in reply to your recent request for an opinion as to the legality of a bonding procedure followed in St. Louis County, where a complaint has been filed in magistrate court, but before a preliminary hearing has been held a grand jury indictment is returned on the same charges and the circuit court, by memorandum, thereupon seeks to adopt the bail set by the magistrate for appearance at the preliminary hearing. Your letter reads as follows:

"A procedure is used in St. Louis County in cases involving felonies, wherein the charge is originally filed in the Magistrate Court and then later heard by a Grand Jury.

"I have outlined the procedure and would appreciate an opinion from your office as to its legality. I would appreciate any other advice that your office might give relative to the instant problem.

"The procedure is as follows:

"In a felony case against a defendant, there is an Affidavit filed in a Magistrate Court and the case is set for a preliminary hearing before the Magistrate. The defendant makes bond set by the Magistrate. Then before the preliminary hearing is held, the same case is presented to the Grand Jury. In those cases where a True Bill is returned by the Grand Jury, the Circuit Judge, by memorandum,

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orders the Magistrate to make the bond a continuing bond, returnable in the Circuit Court (if, in the opinion of the Circuit Judge, the bond is sufficient) and orders the Magistrate to forward all papers and the bond to the Circuit Court. The Prosecuting Attorney's Office then enters a nolle prosequi as to the pending case in the Magistrate Court.

"In these cases the Capias that is issued subsequent to the Indictment is not, in fact, executed.

"I am attaching a memorandum that is typical of those files in the cases I discussed."

The sample memorandum enclosed with your letter as used by the circuit court in purporting to adopt this bond reads:

"The Court being informed that the defendant, John Doe, is presently charged with an offense arising out of the same actions of the defendant, and with a charge for the same offense in the Second Magistrate District of St. Louis County, as the Grand Jury has returned by Indictment in this cause; and the Court finds that the defendant has provided good and sufficient bond for his appearance in the aforesaid cause pending in the Second Magistrate District; therefore, the Court orders that the bond in the cause now pending in the Second Magistrate District be a continuing bond to assure the appearance of the defendant in this cause, and orders that the Magistrate transmit that bond together with the transcript in the cause pending before him as aforesaid to the Circuit Clerk of St. Louis County."

After a preliminary study of the questions involved, we wrote to you requesting that you submit a copy of the bond used by the magistrate court and which is "adopted" by the circuit court in such instances.

The bond which you forwarded to us is Criminal Procedure Form No. 26 promulgated by the Supreme Court of Missouri. This bond requires appearances before the magistrate court for preliminary hearing and also purports to cover either an indictment or an information filed after the defendant has been bound over to circuit court, as well as his appearance in magistrate court. The conditions of

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this bond read:

"NOW THEREFORE, if the said defendant shall be and appear in this court on the day of _____, 19____, for preliminary examination herein and from time to time thereafter as required by the Court and will submit himself to the orders and process of the magistrate and that if he be bound over as a result of such preliminary examination or a waiver thereof to answer said charge, then he personally be and appear before the Court at a time to be stipulated by the Magistrate before whom such preliminary hearing is held or waived and thereafter from time to time as required by the order of the said Court for trial and all other proceedings upon such charge as may be filed against him by indictment or information in said court, including the sentence and rendition of final judgment in said cause and shall abide and submit himself to the orders, judgment, sentence and process of said court and shall be and appear in any other court to which said cause may be taken by change of venue from time to time as required by such court for all proceedings, including the trial and rendition of sentence and final judgment, not thence to depart without leave, then this bond shall be null, void, and of no effect, otherwise, in full force and effect in accordance with law." (Emphasis ours.)

The bond further provides:

"All sureties herein submit themselves to the jurisdiction of this court and of the court in which such indictment may be found or information filed upon this charge, after preliminary hearing or waiver thereof, or to any court to which said cause may be taken on change of venue and irrevocably appoint the clerk of such court in which said cause from time to time shall be pending as an agent upon whom may be served for them any notice, motion, pleading or process having to do with any proceeding for the forfeiture of this bond." (Emphasis ours.)

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Fundamentally, a court in construing a bond cannot increase the obligation of a bond nor extend the obligations of either the principal or surety beyond the terms of the bond itself. Any construction purporting to do so would be subject to reversal. This rule is ably stated by the United States Supreme Court in *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541, l.c. 544:

"* * * Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

Other than the conditions of the bond itself, the obligation is also conditional on the law of the state pertaining to bail bonds.

Accordingly, we shall examine the Missouri law on the subject to determine the effect of the applicable law of this state in respect to obligations under this form of bail bond.

Our Supreme Court has held that once an indictment has been returned, jurisdiction to hear the cause set forth in the indictment rests with the court returning the indictment, i.e., the circuit court.

In *State v. Gieske*, 108 S.W. 528, the rule is stated as follows, l.c. 527:

"* * * The section has reference only to informations filed in the circuit or criminal courts which have jurisdiction to hear and determine the guilt or innocence of an accused, and not to informations filed before the justice of the peace or before the St. Louis court of criminal correction, merely for the purpose of binding the defendant over on bail or commit him to jail to await the action of a grand jury or the filing of an information in the circuit or criminal court by the prosecuting or circuit attorney, so that the St. Louis court of criminal correction had no power to retain the case before it for preliminary examination of the defendant after the grand jury had preferred the

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indictment in this case."

Therefore, after either an information is filed or an indictment returned in circuit court, that court has jurisdiction and the magistrate court, conversely, no jurisdiction.

We note that your bond follows in general the requirements imposed by Supreme Court Rule 32.05(b) as to conditions of bonds after a complaint has been filed in magistrate court and for the defendant's appearance for preliminary hearing. This provision reads as follows:

"(b) If a person is admitted to bail for his appearance for a preliminary examination upon a complaint charging the commission of a felony the condition of his bond shall be that he will appear for such examination at a stipulated time, and from time to time as required by the magistrate, that he will submit himself to the orders and process of the magistrate; that if he is bound over to answer the charge upon which he has been granted a preliminary examination or as to which he has waived such examination, he will appear in the court in which an indictment may be found or an information filed against him, at a stipulated time, and from time to time as required by the court, to answer the charge; that he will submit himself to the orders, judgment, sentence and process of the court having jurisdiction to try such offense, either originally or upon change of venue; and that he will not depart without leave."

The conditions of the defendant's bond also follows the court rule in that it requires his appearance not only for trial in circuit court, but it also extends to rendition of sentence and final judgment. Likewise, the sureties also submit themselves not only to the jurisdiction of the magistrate court issuing such process but also to the court in which an indictment is found or an information filed, i.e., circuit court.

Note that Supreme Court Rule 32.05(b) requires that the conditions of the bond be such that the principal agrees to "submit himself" to the jurisdiction of the magistrate court for a "preliminary examination" and to submit himself from time to time in response to the orders and process of the magistrate. The rule further states that "if he be bound over to answer the charge upon which he has been granted a preliminary examination or as to which he has waived such examination, he will appear in the court in which an indictment may

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be found or an information filed against him."

It is our view that this rule contemplates two events as conditions precedent to the bond applying to informations or indictments filed against him so as to require his appearance in circuit court for trial. These two conditions are, of course, holding a preliminary hearing or waiver thereof by the defendant and, secondly, that he be bound over as a result of such preliminary hearing. The form of the bond specifically requires that a preliminary hearing be held or waived and that he be bound over to answer charges in circuit court.

Conclusion

Therefore, it is the conclusion of this office that Supreme Court Rule 32.05(b) and Criminal Procedure Form No. 26, promulgated by the Supreme Court of Missouri, require that a preliminary hearing be held or waived and that the principal on the bond be bound over to answer charges before proceeding by indictment or information, if the same bond is to be used to require appearance for trial as is used to require his appearance at preliminary hearing. Conversely, if preliminary hearing is not held or waived and the defendant is not bound over to answer charges, then Supreme Court Rule 32.05(b) and the terms of Criminal Procedure Form No. 26 promulgated by the Supreme Court of Missouri, do not require the principal's appearance for trial on return of an indictment and purported adoption by the circuit court of the magistrate's preliminary hearing bond. Where an indictment is returned before a preliminary hearing is held the magistrate court would then have no jurisdiction to hold a preliminary hearing and the court returning the indictment must secure a bond conditioned on the defendant's appearance in that court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Jerry B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

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