

CRIMINAL LAW: A defendant in a felony case may, under the pro-
CRIMINAL PROCEDURE: visions of Section 22(a) of Article I of the
FELONIES: Missouri Constitution of 1945, waive his right
to trial by jury, if approved by the court.
Supreme Court Rule 26.01 establishes the method
of waiver of trial by jury in any criminal case.
Section 546.040, RSMo 1949, requiring mandatory
trial by jury in all felony cases, is uncon-
stitutional.

November 7, 1960

Honorable Larry M. Woods
Prosecuting Attorney
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Dear Mr. Woods:

This is in reply to your letter of October 11, 1960, request-
ing an opinion as to whether a defendant in a felony case may,
with the assent of the court, waive a jury trial and try the case
before the court without a jury. Your request reads:

"Reference is made to Section 546.040, R.S.
Missouri 1949 and to Supreme Court Rule
26.01 of the new rules of Criminal Procedure.
These two guides to Missouri criminal pro-
cedure seem to be in conflict inasmuch as
Section 546.040 and the cases cited in head-
note 27 thereunder seems to say that a defend-
ant in a felony case can not waive a trial by
jury, whereas Rule 26.01 seems to say that
the defendant may, with the assent of the Court,
waive a trial by jury and submit the trial of
any criminal case to the Court.

"It has been my understanding in the past that
the statutory provisions will prevail over a
Supreme Court rule where they are in direct
conflict. These two provisions seem to be in
direct conflict to me, so I would appreciate
it if you would give me your opinion in this
matter."

It is our view that the Missouri Constitution of 1945 specif-
ically provides that a jury may be waived by a defendant in a
felony case. Section 22(a) of Article I, of the Constitution of
Missouri, 1945, provides as follows:

"That the right of trial by jury as hereto-
fore enjoyed shall remain inviolate provided
that a jury for the trial of criminal and
civil cases in courts not of record may con-
sist of less than twelve citizens as may be
prescribed by law, and a two-thirds majority

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of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury." (Emphasis ours.)

We interpret this provision to mean that a defendant in a felony case has the unqualified right to a jury trial if he so desires, but that he is also given the right, with the approval of the court, to waive a jury trial and try the issues to the court, in which event the findings of the court have the same force and effect of a determination made by a jury.

The underscored portion of Section 22(a) of Article I, supra, was not embodied in former constitutions of this state and, consequently, it represents an additional right granted to the defendant in a felony case to have the impartial and analytical scrutiny of a circuit judge in trying his case rather than a lay jury, if the defendant so desires. His unqualified right to a jury remains, and waiver of that right will not be inferred or implied. In this respect Rule 26.01 of the Rules of Criminal Procedure promulgated by the Supreme Court of Missouri, effective January 1, 1960, establishes the method of waiver of a jury trial in all criminal cases and is in conformity with the quoted constitutional provision. Rule 26.01 reads:

"(a) All issues of fact in any criminal case shall be tried by a jury to be selected, summoned and returned in the manner prescribed by law, unless trial by jury be waived as provided in this Rule.

"(b) The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court whose findings shall have the force and effect of the verdict of a jury. Such waiver by the defendant shall be made in open court and entered of record.

"(c) In a case tried without a jury the court shall make a general finding and may in addition in his discretion, find the facts specially. The parties shall be entitled to submit to the court requested findings of fact and declarations of law and the court shall thereupon make such

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findings of fact and give such declarations of law as it deems applicable to the case. All fact issues upon which no specific findings are made shall be deemed found in accordance with the result reached. In felony cases the court shall be required to prepare an opinion or give declarations of law to the extent necessary to indicate the court's theory of the law applicable thereto."

Previous to the Constitution of 1945, there had been no similar provision for waiver of a jury trial in felony cases and the cases decided by our courts had interpreted former constitutions to absolutely require a jury trial in felony cases. See as an example, State v. Bresse (1930) 326 Mo. 885, 33 S.W.2d 919, 922[10-11]. The writer has only found one case since the 1945 Constitution in which the Supreme Court of Missouri specifically noted that the Constitution had been changed to provide that a defendant in a felony case could waive a jury trial. In State v. Hardy (1950) 359 Mo. 1169, 225 S.W.2d 693, a case before Division No. 2 of the Missouri Supreme Court, the court noted in passing that it was the first case to come before the court where defendant had waived his right to a jury trial in a felony case under the provisions of Section 22(a) of Article I of the 1945 Constitution of Missouri, however, such procedure was not challenged, nor does there appear to be any case challenging this procedure since that case and we can see no possible basis of challenge for such procedure.

The court in the Hardy case, supra, indicated its view that waiver of a jury trial in a felony case is authorized by the Missouri Constitution of 1945, as follows; l.c. 694:

"* * * Defendant waived a jury, and trial was to the court, as authorized by the new matter appearing as the last clause of §22 Art. I, Const. of Mo., 1945, Mo. R.S.A. This appears to be the first appeal to reach this court in any criminal case tried under this new constitutionally sanctioned procedure."

Accordingly, we turn next to a consideration of Section 546.040, RSMo 1949. This section applies to felonies and reads as follows:

"All issues of fact in any criminal cause shall be tried by a jury, to be selected, summoned and returned in a manner prescribed by law."

Clearly, Section 546.040, supra, is mandatory in its meaning and it requires that all felony cases be tried by a jury. This

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section is then in direct conflict with Section 22(a) Article I, of the Missouri Constitution of 1945. At this point another constitutional provision is applicable, that provision being Schedule, Section 2, of the Constitution of Missouri, 1945, which reads as follows:

"All laws in force at the time of the adoption of this constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this constitution, unless sooner repealed or amended to conform with this constitution, shall remain in full force and effect until July 1, 1946."

By the terms of Section 2 of Schedule, supra, Section 546.040, supra, since it is in direct conflict with Section 22(a) of Article I, supra, would have remained in effect only until July 1, 1946. The Missouri Supreme Court considered Schedule, Section 2, supra, in the case of Pogue v. Swink, 364 Mo. 306, 261 S.W.2d 40, and observed that the State Constitution prevailed over a statute in conflict with any of its provisions by stating at lc. 43:

"A function of a Constitution is to establish the framework and general principles of government. Constitutional legislation prevails over statutory enactments, being superior. We have said: 'Furthermore, it is horn book law that, "if a previous law conflicts with a new constitutional provision, the law withers and decays and stands for naught, as fully as if it had been specifically repealed."'

CONCLUSION

Therefore, it is the opinion of this office that a defendant in a felony case may, with the approval of the court, waive his right to a jury trial and try the case without a jury. This procedure is fully authorized by Section 22(a) of Article I of the Missouri Constitution of 1945, and the proper method of waiving a jury trial in any criminal case is governed by the provisions of Rule 26.01 of the Rules of Criminal Procedure as promulgated

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by the Missouri Supreme Court.

Section 546.040, RSMo 1949, which provides for mandatory trial by a jury in all felony cases, is in conflict with Section 22(a) of Article I, of the Missouri Constitution of 1945 and Section 546.040, RSMo 1949. It is, therefore, unconstitutional.

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

Yours very truly,

John M. Dalton
Attorney General

JBB:smw