

MAGISTRATE COURT:
CHANGE OF VENUE:
BAIL BOND:

Upon a change of venue to a circuit court or to another magistrate court, a cash bond previously posted remains in effect, obviating the necessity for a new bond to insure the defendant's presence in the transfer court.



March 9, 1961

Honorable William J. Esely
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

This is in response to your request for an opinion dated January 18, 1961, which reads as follows:

"I have been asked to obtain an opinion from you on the problem presented by the following circumstances:

"In a traffic case transferred by the Magistrate to Circuit Court where a cash bond has been set and posted; on a change of venue to another county what procedure is involved in regard to the said cash bond? Is the cash bond sent to the other county or is a new one necessary which would be ordered in the second county?"

"Your attention to this matter will be appreciated."

Although not stated in your request, it will be assumed that the transfer to a circuit court and the change of venue to another county referred to therein are those contemplated by Section 517.520 RSMo 1949; which provides as follows:

"1. Upon the filing of the affidavit in due time, requesting change of venue, the magistrate must allow the change of venue and enter an order accordingly, and immediately transmit all of the original papers and a transcript of all of his orders in the case to some competent magistrate in the county, if there be one, unless the party asking for a change of venue shall, in his affidavit, state that another magistrate in the county is a material witness for him

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without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, in which case, or in the event there is no other magistrate in the county, the case shall be certified to the circuit court for trial as if originally filed in the circuit court.

"2. In which case the receiving court or magistrate shall be notified immediately by the magistrate granting the change of venue, by filing with the clerk of the circuit court or magistrate receiving the case on change of venue a certified copy of the order granting the change of venue, and upon receipt of such notice such magistrate or clerk of the circuit court to whom the change of venue is granted shall reset the case for trial on a day certain.

"3. If the change be allowed on account of bias or prejudice of the inhabitants of the county, all of the original papers and such transcript immediately shall be sent to a magistrate of some adjoining county for trial as herein provided: provided, that when such affidavit for change of venue shall be filed, the magistrate shall have no further jurisdiction in the cause except to grant such change of venue. (L. 1945. p. 765 §77)."

The foregoing statute was tested in State ex rel Bone v. Adams, (Mo. Sup. 1956) 291 SW2d 74. In that case, there was a change of venue from a magistrate court to a circuit court under the provisions of Section 517.520. However, the circuit judge refused to accept jurisdiction on the grounds that Supreme Court Rule 11.05 was in conflict with that section, thus abrogating it. (Rule 11.05 provides that the Supreme Court may temporarily transfer circuit, probate, or magistrate judges to magistrate or probate courts.)

After holding that Section 517.520 was a lawful exercise of legislative authority and that it was not in conflict with any constitutional provision, the Supreme Court stated; l.c. 77:

"Section 517.520 covers a specific situation of change of venue as a matter of right on application of a party; Rule 11.05 covers all discretionary transfers of judicial personnel as the interest of justice requires. Whatever our power may be to provide mandatory methods and procedure for change of judge for cause on application of a party, in magistrate courts, we have not undertaken to exercise it and thus the only method and procedure therefor is that provided by Sections 517.510 and 517.520."

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Supreme Court Rule 22.05 implements and facilitates Section 517.520 in the following language:

"The defendant shall be entitled to a change of venue in a misdemeanor case pending in a magistrate court if he shall, before the jury is sworn or the trial is commenced, file an affidavit that he cannot have a fair and impartial trial by reason of the interest or prejudice of the inhabitants of the county. Upon the filing of such affidavit, the procedure provided for change of venue from magistrate courts in civil cases shall be followed."

When the change of venue is allowed, "all of the original papers and a transcript of all * * * orders" are transmitted to the receiving court, and the magistrate court losing the case has no further jurisdiction * * except to grant such change," Section 517.520, supra. (emphasis supplied). This would seem to indicate that the proper procedure with relation to a cash bond previously posted with the losing magistrate would be to transmit it with the rest of the documents pertaining to the case to the transfer court. Moreover, Supreme Court Rule 32.12 provides in part that "If there is a breach of condition of a bond, the court in which a criminal case is then pending shall declare a forfeiture of the bail." (emphasis supplied). Thus, it would appear that when the breach occurs, the proper court to act on it is the one which has jurisdiction at that time. If a new bond always became necessary upon a change of venue, there would have been no reason for the Supreme Court to have employed the word emphasized in the above quotation.

Although Section 543.170, RSMo 1949, provides that, upon a change of venue from a magistrate court, a recognizance will be required to insure the defendant's appearance before the transfer court, Supreme Court Rule 22.06 provides that such a recognizance will be required "if the defendant has not previously been admitted to bail." Compare Supreme Court Rule 30.07. The clear implication is, of course, that where the defendant is free on bail when the change occurs no new recognizance is necessary. Having been promulgated subsequent to the cited statute, the implementing rule governs in any conflict between the two, State ex rel Bone v. Adams, supra, 77, if indeed there is a conflict herein.

Although there have been no Missouri cases on the specific question presented, In Re Moore (Mo. App. 1955), 282 SW 2d 856, discussed the effect of a bond given in a police court upon appeal to the Circuit Court of St. Louis County. The conditions of that bond made

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it returnable at the next term of the named circuit court. However, the defendant sought and received a change of venue of the appeal to the Circuit Court of Pike County, but failed to file a change of venue bond insuring his appearance in the transfer court. The Pike County Court affirmed and sentenced defendant to confinement. In holding that the defendant was lawfully incarcerated, the St. Louis Court of Appeals read into the appeal bond the provisions of Supreme Court Rule 22.13 which sets out as a condition of such bond that the defendant will submit himself to the circuit court "having jurisdiction thereof, either originally or upon a change of venue." (emphasis supplied).

Admittedly, the quoted rule applies to appellate procedure and is much more explicit as to what occurs on a change of venue than the rules and statutes with which we are concerned. However, a portion of that decision was devoted to the effect of Supreme Court Rule 30.07 and the interpretation given it by the Commissioner on his initial hearing of the case. The Commissioner's declarations of law concerning Rule 30.07 contain the portions of the rule applicable to the instant question, as well as his interpretation of its effect, and are set out below:

" (9) Prior to the adoption of supreme court rules 22.13 and 30.07, in cases where defendant was not in custody at the time the change of venue was granted, and where defendant did not voluntarily appear in the transfer court, jurisdiction of the person was not transferred by the order changing the venue. Under such circumstances, in order that jurisdiction of the person be conferred upon the transfer court, it was necessary for the defendant to enter into the recognizance provided for in § 545.540, RSMo 1949 V.A.M.S."

" (11) Supreme court rule 30.08 supplants §§ 545.520, 545.530 and 545.540, RSMo., 1949 V.A.M.S. by the terms of the latter sections it was provided that upon the making of the order changing the venue the defendant "shall enter" into a recognizance for his appearance at the next term of the transfer court, and further provided that no order of transfer shall be effectual unless such bail be given. Under rule 30.07, however, it is provided that upon the making of the order changing the venue defendant "shall be entitled" to be admitted to bail "if the defendant has not previously been admitted to bail," and further provides that no order of transfer shall be effectual unless defendant

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"has been admitted to bail upon a satisfactory bond which has been filed in record with the clerk of the court," " In Re Moore, supra, 858, 859.

In affirming the above quoted declarations, the St. Louis Court of Appeals recognized a "new concept" * * * and a new procedure" resulting "from the operation of, Supreme Court Rules 22.13 and 30.07," l.c. 859. In summing up its discussion of 30.07, the court stated at 860, "By its broad and general terms rule 30.07 refers to and includes all previous admissions to bail, whether by order of the police, magistrate or circuit court."

Although Supreme Court rules of the "30 series" apply to change of venue in circuit courts, the similarity of the language of 30.07 to that employed in 22.06 fully warrants reliance upon the Moore case with respect to its holding that the original bond retains its effect after a change of venue. In these premises, it is submitted that the ordering of a new bond by the transfer court, though not improper, would be completely unnecessary.

CONCLUSION

It is the opinion of this office that where there is a change of venue from a magistrate court in a misdemeanor case to either a circuit court or another magistrate court, a cash bond posted in the court originally having jurisdiction may properly be forwarded to the transfer court, and will serve to compel the appearance of the defendant therein.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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