CRIMINAL LAW: State has right to appeal only when information or indictment is adjudged insufficient, or where judgment thereon has been arrested or set aside because of the insufficiency of the indictment or information.

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November 15, 1945

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Honorable Llyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based on the following statement of facts:

> "We tried the above-mentioned case in the Circuit Court of Laclede County for four days last week, and the Jury found the defendant guilty, and assessed his punishment at 25 years in the State Penitentiary. The charge was murder in the first degree, by saturating the clothing of the brother-in-law of the defendant with kerosene and setting him on fire, resulting in his death the same day, March 31, 1945, the charge further invoking the habitual criminal act, and setting out seven previous penitentiary terms served by the defendant. Claude Woods of Richland, and Bradshaw and Fields of Lebanon, represented the defendant. After the verdict was returned, Judge Barton, before whom the case was tried, allowed the defendant thirty days to file a motion for a new trial. In connection with extending the date for filing the motion for a new trial, the Judge made certain comments about the sufficiency of the circumstantial evidence, which indicated that he might sustain the motion and grant the defendant a new trial, for error in not having sustained the demurrer to the evidence.

"This is a case that has attracted much attention, and the people of Rolla and Phelps County, generally, are very much interested in seeing Wagoner go back to the penitentiary where he belongs. While it is true the evidence was circumstantial, yet there was a lot of it, including definite threats made by the defendant as recent as an hour before the fire. I am definitely sure in my own mind that the conviction would stand up, so far as the sufficiency of the evidence to make a prima facie case is concerned.

"The thing I am interested in is the possibility of an appeal prosecuted by the State, from the ruling of the Court sustaining the motion for a new trial, in the event that the Court does grant a new trial. I presume the State would have to pay for the cost of the bill of exceptions, if we take the appeal. I used some fifty-four witnesses, and the trial having lasted four days, the costs of such an appeal would naturally be considerable. There is a tremendous local interest in the case, especially due to the fact that the evidence showed the defendant, an habitual criminal, has threatened to kill several witnesses who testified against him at the hearing and the trial of the case. If the motion for new trial is granted and no appeal is taken, I greatly fear that I will have the greatest of difficulty assuring these witnesses that they can safely go ahead and again testify against the defendant, as they are all very much afraid of him. I do not know what the final ruling of Judge Barton will be on the motion for a new trial, as it will not be argued until I have had a reasonable chance to make necessary preparation to meet the issues raised in the motion, but I would like to know that your office would sanction an appeal, in case a new trial is granted on any ground, other than purely the weight

of the evidence."

In the case of State v. Carson, 18 S.W. (2d) 457, l.c. 459, 323 Mo. 46, the Supreme Court of Missouri said:

> "There was no appeal at common law. The only authority for an appeal by the state must be found in the statute. * * *"

Your attention is called to the following sections of the Revised Statutes of Missouri 1939, which are the only ones dealing with an appeal by the State:

Section 4142.

> "The state, in any criminal prosecution, shall be allowed an appeal only in the cases and under the circumstances mentioned in the next succeeding section."

Section 4143.

> "When any indictment or information is adjudged insufficient upon demurrer or exception, or where judgment thereon is arrested or set aside, the court in which the proceedings were had, either from its own knowledge or from information given by the prosecuting attorney that there is reasonable ground to believe that the defendant can be convicted of an offense, if properly charged, may cause the defendant to be committed or recognized to answer a new indictment or information, or if the prosecuting attorney prays an appeal to an appellate court, the court may, in its discretion, grant an appeal."

Section 4145.

> "If no appeal be taken by or allowed to the state in any case in which an appeal would lie on behalf of the state,

> the prosecuting attorney may apply for and prosecute a writ of error in the Supreme Court, in like manner and with like effect as such writ may be prosecuted by the defendant; but in such case the defendant shall not be required to enter into any recognizance to answer further to such offense, but if the judgment of the circuit court shall be reversed, the defendant may be arrested on warrant and brought before the circuit court for judgment, or such other proceedings as the case may require."

The court in the Carson case, supra, discussed the subject of appeal by the State at length and definitely defined the State's rights and grounds in the prosecution of an appeal, and in construing the above sections of the statutes said, l.c. 459:

> "It is plain from these statutes that the state may appeal from an order arresting a judgment or holding an information or indictment insufficient on demurrer or exception. * * * *"

In the case of State v. Reisman, 37 S.W. (2d) 675, the State attempted to appeal from an adverse ruling by the trial court on a demurrer filed to a plea in abatement, and the court, in construing the statutes, said at l.c. 677:

> "* * * * If there is any authority for such an appeal, it must be derived from a strict construction of the section of the statute allowing appeals. State v. Clipper, 142 Mo. 474, 476, 44 S.W. 264. Reverting to that section, we find that the appeal is permitted only 'when any indictment or information is adjudged insufficient upon demurrer or exception, or where judgment thereon is arrested or set aside.' In the instant case it is patent that the information was not adjudged insufficient upon demurrer or exception. No judgment thereon was arrested or set aside. No one of the three things occurred which would give rise to the expressed right of appeal. * * * *"

In the case of State v. Futrell, 46 S.W. (2d) 588, l.c. 589, the court, in following the authority of the Carson case, supra, said:

> "The right of the state to an appeal in this case should be upheld upon the authority of State v. Carson, 323 Mo. 46, 18 S.W. (2d) 457. It is true that the order of the trial court sustaining the motion for a new trial appears to state two grounds for the order. But the second ground is the supplement of the first, and the two together make but one cause for a new trial. The stated reason for the order was that the information did not state facts sufficient to constitute the felony of abortion, as it did not allege the nature or kind of instrument used, how used, or on what part of the body. 'For the foregoing reasons' runs the order, 'and for the reason the court permitted the state to prove the kind of instrument and how and where used over the objections of defendant, the motion for a new trial is sustained.' It is obvious that, to the mind of the trial court, the objectionable testimony would have been admissible if the information had been held to be sufficient. In the Carson Case, supra, the trial court, in sustaining the motion for a new trial, gave in like manner one principal reason and two corollaries, which together made but one cause for the order, namely the insufficiency of the information. We hold that the state was entitled to an appeal in this case."

A ruling by the trial court that a motion for a new trial should be sustained because the evidence was not sufficient is not appealable by the State. In the case of State v. Early, 49 S.W. (2d) 1060, l.c. 1061, the court said:

> "We have examined the record in connection with the other assignment (No. 5) in the motion for a new trial and find that, while there was a motion to quash the indictment filed by the defendant, this was withdrawn

> prior to the trial. No demurrer was filed to the indictment or overruled by the court. We do find that at the conclusion of the trial that the court sustained a demurrer to the evidence. It is apparent that the state has no right of appeal in this case (sections 3752 and 3753, R.S. 1929) and the appeal is dismissed."

Section 4145, supra, deals with the State's right to sue out a writ of error, which right is only granted in a case in which an appeal would lie on behalf of the State. The court, in discussing this subject, said in the case of State v. Beagles, 174 Mo. 624, l.c. 626, 74 S.W. 851:

> "The question which forces itself upon our attention at the outset, is the right of the State to prosecute a writ of error upon the facts disclosed. Section 2709, Revised Statutes 1899, provides that, 'When any indictment is quashed, or adjudged insufficient upon demurrer, or when judgment thereon is arrested, the court in which the proceedings were had, either from its own knowledge or from information given by the prosecuting attorney, that there is a reasonable ground to believe that the defendant can be convicted of an offense if properly charged, may cause the defendant to be committed or recognized to answer a new indictment; or if the prosecuting attorney prays an appeal to the Supreme Court, the court may, in its discretion, grant an appeal.' The State is allowed an appeal only in the cases and under the circumstances mentioned in the foregoing section.
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> "By section 2711, Revised Statutes 1899, 'if no appeal be taken by or allowed to the State in any case in which an appeal would lie on behalf of the State, the prosecuting attorney may apply for and prosecute a writ of error

> in the Supreme Court, in like manner and with like effect as such writ may be prosecuted by the defendant,' etc. This last mentioned section was evidently intended to grant the State the right to bring up a criminal case by writ of error, a right which this court held had not been granted in the condition of the law up to the time of the decisions in State v. Copeland, 65 Mo. 497, and State v. Cox, 67 Mo. 46.
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> "Writs of error are only allowed, however, by section 2711, supra, in cases in which an appeal would lie."

Your request for this opinion deals mainly with the subject of sufficiency of the evidence, but I notice in paragraph three you state, "but I would like to know that your office would sanction an appeal, in case a new trial is granted on any ground, other than purely the weight of the evidence." I call this particular part of your request to your attention because an appeal might lie if the court, in ruling on a motion for a new trial in which the question of the sufficiency of the information is raised, granted the defendant a new trial on that ground alone. Otherwise, the State would not have the right to prosecute an appeal.

Conclusion.

It is the opinion of this department that the State can only appeal in a criminal case where an indictment or information is adjudged insufficient upon demurrer or exception, or where judgment thereon is arrested or set aside because of the insufficiency of the indictment or information.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

W. O. JACKSON
(Acting) Attorney General

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