

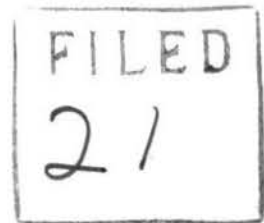
CRIMINAL PROCEDURE:
SECTION 544.530, RSMo. 1949:
SUPREME COURT RULE 32.01:

Under provisions of Section 544.530
RSMo. 1949, and Supreme Court Rule
32.01, when defendant is charged by
indictment or information with crim-

inal offense in circuit court, bail not fixed, and court not in session, it is mandatory duty of circuit clerk to ascertain if offense is bailable within meaning of Article 1, Section 20, Constitution of Missouri, 1945. If bailable, to fix reasonable bail, and to release defendant when sufficient bond in that sum given. If offense not bailable, bail must be refused. Reasonableness of bail question of fact for clerk. Bail fixed in greater sum than will secure attendance of defendant at trial or from time to time, term to term continued to, and restrains defendant from departing without leave, is excessive within meaning of Article 1, Section 21, Constitution of Missouri, 1945, and denies defendant's constitutional right to bail for bailable offense. Subject to these exceptions clerk has no discretionary powers of refusal to admit defendant to bail or to prescribe time, place or conditions of admittance to bail.

November 5, 1953

Honorable Bill Davenport
Prosecuting Attorney
Christian County
Ozark, Missouri



Dear Sir:

This department is in receipt of your recent request for a legal opinion which reads as follows:

"At the request of the Clerk of the Circuit Court of this County we wish to ask for the opinion of your office in interpreting the provisions of Supreme Court rules 32.01 and 32.03 and also Sections 544.530 and 544.560 R.S.Mo. 1949.

Such laws provide in substance that the Judge or Magistrate shall admit persons to bail where justified and that the Clerk of the Court may admit such persons to bail in the absence of the Judge or Magistrate and under certain conditions.

Our question is whether the Clerk's duty of admitting a person to bail, and setting such

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bail where it has not been set by the Judge, is mandatory, assuming that the Judge or Magistrate's duty therein is mandatory and what discretion, if any, the Clerk has to refuse to admit a person to bail, or short of refusal, what discretionary power, if any, he has over the time, place, or conditions of admitting one to bail."

We understand the inquiry to be for a construction of Supreme Court Rules 32.01 and 32.03, also Section 544.530 and 544.560, RSMo. 1949, insofar as they relate to the duties of the circuit clerk in fixing the amount of bail of a person charged with crime in the circuit court, and, upon the bail bond being given and approved by the clerk, his order releasing him, and whether the duties of the clerk in this particular are mandatory, and what discretion, if any, he has to refuse to admit a person to bail.

Supreme Court Rule 32.01, referred to above, reads as follows:

"Bail--Admission by Judge or Clerk. When a defendant is entitled to bail, the court in which the complaint, indictment or information is pending, or the judge or magistrate thereof, shall admit him to bail, but if the court is not in session, the clerk of the court may admit the defendant to bail."

Supreme Court Rule 32.02, also referred to above, reads as follows:

"Bail--Admission by Sheriff or Peace Officer. When the sheriff or other peace officer shall have a person under arrest and in custody by virtue of a warrant issued upon an indictment for a felony, or upon a warrant of commitment for failure to furnish bail, and the amount of bail is specified on the warrant, the sheriff or other peace officer may admit the defendant to bail in the amount so specified. If the defendant is under arrest and in custody by virtue of a warrant issued upon a complaint, information or indictment charging the commission of a misdemeanor, the sheriff or other peace officer may admit the defendant to bail in the amount specified upon the warrant, or, if the amount of bail is not so specified and the judge or magistrate thereof is not in the county, the sheriff or other peace officer may admit the defendant to bail in an amount not less than \$100.00 nor more than \$1,000.00."

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Section 544.530, RSMo. 1949, provides that when one is in custody or under arrest for a bailable offense, by whom bail may be taken. Said section reads as follows:

"When the defendant is in custody or under arrest for a bailable offense, the court in which the indictment or information is pending may let him to bail and take his bond or recognizance, or, if the court is not in session, the clerk of the court may fix the amount of such bail and take his bond or recognizance."

Section 544.560, RSMo, 1949, authorizes the sheriff to take bail of one arrested and in his custody under a warrant of commitment, and reads as follows:

"When any sheriff or other officer shall arrest a party by virtue of a warrant upon an indictment or shall have a person in custody under a warrant of commitment on account of failing to find bail, and the amount of bail required is specified on the warrant, or if the case is a misdemeanor, such officer may take bail, which in no case shall be less than one hundred dollars, and discharge the person so held from actual custody."

Upon a comparison of Section 544.530 supra, and Supreme Court Rule 32.01, supra, it is apparent that the provisions of each are the same regarding the duty of a circuit clerk in admitting persons to bail, and that since the rules of criminal procedure for all Missouri courts, were adopted by the Supreme Court for the purpose of implementing and giving effect to the applicable sections of the revised statutes, we believe that a construction of Rule 32.01, supra, would be equally good as a construction of Section 544.530, supra, or that a construction of the section would be a good construction of the court rule as far as the duties of the circuit clerk are concerned.

In effect, both provide that when a defendant is in custody or has been arrested for a bailable offense, the court in which the indictment or information is pending may admit him to bail and take his bond or recognizance, or if the court is not in session the clerk may fix the amount of bail and take the bond or recognizance.

In this connection the question might arise as to what offenses are bailable within the purview of the statute and court rule. While neither specifically state what offenses are bailable, we must look to another source for an explanation of what offenses were meant to

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be included within the meaning of the term "bailable offenses." We therefore direct your attention to Article 1, Section 20, Constitution of Missouri, 1945, which reads as follows:

"Bail Guaranteed--Exceptions.--That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

In the case of *Ex parte Spoor*, 173 S.W. 2d. 943, in construing Article 2, Constitution of Missouri 1875, which is the same as Article 2, Section 20, Constitution of 1945, quoted above, and in applying same to the facts before the court, the court said at l.c. 944:

"There is only one question presented by the record for our determination: Is the proof of petitioner's guilt of a capital offense evident or the presumption great, within the meaning of Section 24, Article 2, of the Constitution Mo. R.S.A.? 'What is meant by the presence of proof evident, or its alternative, presumption great, is simply that, if the evidence is clear and strong, leaving a well-guarded and dispassionate judgment to the conclusion that the offense has been committed as charged, and that the accused is the guilty agent, and that he would probably be punished, capitally if the law is administered, bail is not a matter of right, and should be refused.' (Italics ours) *Ex parte Burgess*, 309 Mo. 397, 274 S.W. 423, 426."

Following the same line of thought as indicated by the preceding excerpt, the Supreme Court stated in the opinion of *Ex parte Verden*, 237 S.W. 734, at l.c. 737:

"* * *We think the proper test is whether the evidence before the judge on the hearing for bail tends strongly to show guilt of a capital offence, which is only another way of saying the proof must be evident or such facts must be shown as to raise a strong presumption of guilt of the crime charged. If so, bail should be denied; if not, it should be granted.

"(5-6) Confinement in jail prior to trial is not authorized because defendant may eventually be convicted of the charge by a jury, or as any part of his punishment, if guilty, but to assure his presence when the case is called

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for trial and during the progress thereof. The only theory on which bail can be denied in any capital case is that the proof is so strong as to indicate the probability that defendant will flee if he has the opportunity, rather than face the verdict of a jury. Where the proof is not evident or the presumption great, the accused should be admitted to bail in such sum as in the judgment of the court will insure his presence to submit himself in judgment before the trial court. The amount will be determined by the court in view of all the circumstances in the case and the extent of the ability of the accused to give it. * * *"

In commenting upon the purpose of a bail bond, and the constitutional right of the defendant to be released upon giving bail with sufficient sureties, in the case of State ex rel Corella v. Miles, 303 Mo. 648, the court said at l.c. 651-652:

"1. Section 24, Article II, of the Constitution of Missouri, provides that any person charged with a felony, except in capital offense in certain cases has a right to be released upon giving bail with sufficient sureties. It is a right of which a defendant cannot be deprived. (6 C.J. p. 953.)

"Section 25, Article II, of the Constitution of Missouri, provides that excessive bail shall not be required. The purpose of giving bonds is to secure the appearance of the defendant at trial and when the Constitution forbids excessive bail it means that bail shall not be more than necessary to secure that attendance. (6 C.J. p. 989.) * * * * Since the only purpose of bond is to secure the appearance of the defendant at the trial, any bail fixed at more than is necessary to secure that appearance is excessive within the meaning of Section 25, Article II, of the Constitution.

"II. The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates Section 24, Article II, of the Constitution. For that is saying the offense is not bailable when the Constitution says it is." (Underscoring of last paragraph ours.)

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In view of the foregoing, and in answer to the inquiry of the opinion request, it is our thought that when a defendant is in custody, or has been arrested for a criminal offense, an indictment or information setting forth the charge for which he is held has been filed in the circuit court having jurisdiction to try defendant on said charge, and the court is not in session, it is the mandatory duty of the clerk to ascertain whether or not the offense thus charged is a bailable one within the meaning of Article 1, Section 20, Constitution of Missouri, 1945. If the offense is found to be bailable then it is the further mandatory duty of the clerk, and he has no legal cause for refusal to fix the amount of bail in a reasonable sum, and upon defendant's furnishing a bail bond in that amount with sufficient sureties to order the release of the defendant. If after investigation the clerk finds the offense is not a bailable one within the meaning of above cited constitutional provision, then, and only then, is it his duty to deny the defendant bail.

When the offense is found to be bailable, the question might present itself to the clerk as to what might be a reasonable sum for bail, but such a question is clearly one of fact which can only be determined by the clerk in each individual case. However, it might be stated as a general rule applicable in every instance that the fixing of bail in a greater sum than is believed to be reasonably necessary to secure the attendance of the defendant at the time and place of the criminal proceeding against him in circuit court, or from time to time, or term to term to which the cause might be continued, and not to depart without leave of court, would be excessive and a violation of Article 1, Section 21, Constitution of Missouri of 1945, and a denial of defendant's constitutional rights. Such improper action would, in effect, declare a criminal offense not bailable, when the Constitution declared it to be bailable. Subject to exceptions in the particulars noticed above in admitting a defendant to bail, the clerk has no discretionary power in prescribing the time, place or conditions of the admittance to bail.

CONCLUSION

It is the opinion of this department that under the provisions of Section 544.530, RSMo. 1949, and Supreme Court Rule 32.01, when a defendant is charged by indictment or information with a criminal offense in the circuit court of proper jurisdiction and the amount of defendant's bail has not been fixed, and said court is not in session, it is the mandatory duty of the clerk of that court to ascertain if the offense charged is bailable within the meaning of Article 1, Section 20, Constitution of Missouri, 1945. If the offense is bailable the clerk must fix the amount of bail in a reasonable sum, and upon defendant furnishing a bail bond in that sum,

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with sufficient sureties to order the defendant's release. If the offense is found not to be bailable then, and only, is it the clerk's duty to refuse to admit the defendant to bail. While the reasonableness of the amount of bail is a question of fact to be determined by the clerk in each individual case, yet, bail fixed in any greater sum than is believed necessary to secure the attendance of the defendant at the time and place of trial of the criminal charge against him, or from time to time, or term to term to which the cause may be continued, and which will restrain the defendant from departing therefrom without leave of court, is excessive bail within the meaning of Article 1, Section 21, Constitution of Missouri, 1945, and denies the defendant his constitutional right to secure bail for a bailable offense. Subject to these exceptions the circuit clerk has no discretionary powers of refusal in admitting a defendant to bail, or in prescribing the time, place or conditions of admittance to bail.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General