CRIMINAL PROCEDURE: Application for extension of time made to trial
PERFECTING APPEALS: court in felony cases within six months period.
EXTENDING TIME: If made thereafter, should not be ruled on; should be made in Supreme Court.

September 4, 1940

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Honorable W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated June 12, 1940, which is in the following terms:

> "A question has lately arisen regarding interpretation of the above section. The facts are these: appeal was prayed and allowed on Dec. 1, 1939 from conviction of felony; on June 3, 1940, defendant's lawyer prayed the circuit court for an additional three months of time in which to perfect appeal (the six months period had elapsed on June 1, 1940): the trial court refused to hear reasons for extending the time on the ground that, when the first six months time had elapsed, the trial court had lost all jurisdiction of the case and the Supreme Court was the proper place to apply for the extension of time.
>
> The files have never left the trial court; the transcript of testimony has not been completed so the bill of exceptions has never been filed for transmissal to the Supreme Court.
>
> I should like the opinion of your office as to whether or not the trial court retains jurisdiction of the case under the

circumstances."

The question is whether an application for extension of time to perfect an appeal in a felony case may properly be sustained by the trial court where such application was made more than six months after the appeal was granted.

Section 3761 R. S. 1929, Mo. St. Ann. page 3301, as amended Laws 1939, page 358, Section 1, provides:

> "If any person taking an appeal to the Supreme Court on conviction for a felony, other than those wherein the defendant shall have been sentenced to suffer death, shall fail to perfect the appeal within six months from the time the appeal is granted, unless good and sufficient cause for not perfecting his appeal be shown to the trial court, for which reason the trial court, or the judge of the trial court in vacation, may extend this time for the period of ninety days, the Attorney General may file his motion before the Supreme Court asking that the appeal may be dismissed, whereupon the Court shall make an order that the appeal be dismissed, unless the defendant shall show to the satisfaction of the Court good cause for not perfecting his appeal." (Underlining ours)

The clause underlined above first appeared in said Section 3761 in the amendment thereof in Laws 1939, page 358, Section 1. The question regarding said clause which is considered here has not been adjudicated.

It might be argued that the said application may be made to the trial court at any time within nine months after the appeal was granted, on the ground that said Section 3761 fails to provide specifically any limitation on the time within which the application must be made.

The nine months period, it might be argued, could be based on the circumstance that the trial court under the statute could extend time for perfecting an appeal to that extent. In construing statutes, the purpose always is to ascertain the intent of the legislature (State vs. Naylor 40 S. W. (2nd) 1079, 328 Mo. 335). In doing this, "the results and consequences of any proposed interpretation of the statute may properly be considered as a guide as to the probable intent of the lawmakers . . ." (Bragg City Special Road District vs. Johnson 20 S. W. (2nd) 22, 323 Mo. 990, l.c. 999, 66 A.L.R. 1053).

The construction above mentioned would make it possible, six months after an appeal was granted, for a motion to dismiss an appeal to be pending in the Supreme Court, and a motion for extension of time to be pending in the trial court, both at the same time. To the extent that the sufficiency of the reasons for failure to perfect the appeal would be drawn in question, the same controversy would be pending before both courts at the same time in the same case. This would undoubtedly produce confusion in the administration of the law. It is a guiding principle of statutory construction that "a construction should never be given to a statute . . . which would work such confusion, unless no other reasonable construction is possible." State ex rel and to use of Jamison vs. St. Louis-San Francisco Ry. Co. 300 S. W. 274, 318 Mo. 285.

The first above mentioned construction would also make it possible, six months after an appeal was granted, for the Supreme Court to dismiss an appeal on one day, and the trial court to order an extension of time on the following day. In that situation, the appeal having been dismissed by the Supreme Court pursuant to statutory authority, the action of the trial court would be useless. It has been ruled by the Supreme Court that "the construction of a constitutional or statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable." State ex rel Norvell Shapleigh Hardware Co. vs. Cook 77 S. W. 559, 178 Mo. 189, l.c. 193. We believe the intention of the legislature is not consistent with the above mentioned construction, and that such construction should be rejected on the above cited authority.

It might also be argued that the application may properly be made to the trial court within nine months after the granting of the appeal, if made before the Supreme Court has dismissed the appeal. This also would be uncertain and tend to produce confusion; we believe the following points and authorities show that it should be rejected.

We believe the legislature intended that after the six months period has expired, the trial court should take no action on applications thereafter filed, and that it intended that after the six months period expired, the reasons for not timely perfecting the appeal should be presented to the Supreme Court. This interpretation may be rested upon the inclusion in the statute of the provision for presenting to the Supreme Court the reasons for not perfecting the appeal, after the expiration of the six months period, in the words "unless the defendant shall show to the satisfaction of the (Sup.) Court good cause for not perfecting his appeal." (parenthesis ours).

It is a rule of statutory construction that the inclusion in a statute of one thing, or method of procedure, is the exclusion of another (State ex rel Barlow vs. Holtcamp (Mo. Sup) 14 S. W. (2nd) 646; Dietrich vs. Jones 53 S. W. (2nd) 1059, 227 Mo. App. 365), and, that where the statute "directs the performance of certain things in a particular manner . . . it implies that it shall not be done otherwise * * * ." 59 C. J. page 984, Section 582.

Under the last mentioned construction, the appellant is not left without a remedy. He can perfect his appeal as soon as possible after the expiration of the six months period, and show to the Supreme Court good cause for not timely perfecting his appeal. The practice of extending time for perfecting appeals, by order of court on sufficient showing in a proper case, has long prevailed in the Supreme Court. We believe it is not too much to require that the application to the trial court for extension of time be made before the six months period has expired. This interpretation of the statute appears to be consistent with the theory of appellate practice that there should be an orderly proceeding from the trial court to the appellate court; that there should

be a definite line of demarcation between the end of the litigation in the trial court and the commencement of the proceeding in the appellate court.

In fairness it would seem to be proper for the trial court to rule on an application for extension of time after the expiration of the six months period, where such application was made within such six months period.

CONCLUSION

On an application made after the expiration of the six months after an appeal shall have been granted in a felony case, the trial court has no jurisdiction to extend time for perfecting the appeal. The application to the trial court for extension of time should be made within the six months period (provided by Section 3761 R. S. 1929 as amended Laws 1939, page 358, Section 1) for perfecting such appeal. If that is not done, then good reason for not timely perfecting the appeal should be shown to the Supreme Court as grounds for overruling a motion to dismiss, and extending time for perfecting the appeal.

Respectfully submitted,

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APPROVED:

COVELL R. HEWITT
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EH:RT