CRIMINAL PROCEDURE: Affidavit substantially complying with civil procedure for appeal is sufficient for appealing in a criminal case.

BOND: Criminal appeal bond, after conviction, must be approved by the circuit judge and not the circuit clerk.

December 12, 1941

12-19

FILE 48

Honorable John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of December 10, 1941, which is as follows:

> "On the 5th day of November, in the circuit court of this county, one Leonard Huff was tried on a charge of second degree burglary and larceny committed in connection with the burglary, the jury finding him guilty of burglary and larceny and assessed his punishment for the burglary at two years in the penitentiary but assessed no punishment for the larceny.
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> "Court then adjourned to December 1, 1941, to try other cases and to allow time for the filing of a motion for new trial in the Huff case.
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> "Motion for new trial was filed in due time, and on the 3rd of December, 1941, the motion for new trial was overruled, and the following minute entry was made by the clerk.
>
> "'Motion for new trial heretofore filed overruled. Affidavit for appeal filed, and appeal granted to Supreme Court. Appeal bond fixed at $2,500.00 to be approved by the clerk in vacation, said bond to be filed on or before Dec. 8, 1941.'
>
> "Following is the affidavit for appeal,

omitting caption:

"'Leonard Huff, the defendant in the above entitle cause, being duly sworn according to law, upon his oath states that the appeal in said cause is not made for vexation or delay, but because he, the said defendant, believes himself to be aggrieved by the judgment and decision of the court.'

"Court adjourned on the 3rd day of December until next regular term, and on the 5th day of December, the following bond was filed with the clerk and approved by him:

"'We, Leonard Huff as Principal (omitting names of sureties) as sureties, are held and firmly bound to the State of Missouri, in the sum of Twenty Five Hundred Dollars, but to be void upon this condition: Whereas, the said Leonard Huff, the above named defendant, was on the 5th day of November, 1941, convicted on a charge of burglary and larceny, and his punishment fixed at Two years in the Missouri State Penitentiary; and Whereas the said Leonard Huff has been allowed an appeal by the court to the Supreme Court of Missouri. Now, if the said Leonard Huff, defendant and appellant, shall appear in the supreme court and surrender himself to the Marshall of said court if so ordered to so do by said court and to obey the mandate as the Supreme Court shall direct, and that he will render himself in execution, and obey any order which shall be made in the premises, then said bond to be void; otherwise to remain in full force and effect.

"Approved this 5 day of December, 1941. R.C. Jones, Clerk Circuit Court.'

"I do not believe that the affidavit

for appeal meets the requirements of Section 4130, R. S. 1939, yet the supreme court in the case of State v. Wilson, 136 S. W. (2d) l. c. 994, held a similar affidavit met the requirements of the above section, the objection to the affidavit in the case cited being that the affidavit 'does not purport to contain a prayer for appeal.' The affidavit did state "that the appeal prayed for' in the above entitled cause, etc. In this case it does not contain any such words.

"I find no law giving authority to the court to order that the appeal bond be approved by the clerk in vacation. In my opinion, this bond is not valid, as it does not meet the requirements of Sec. 4137, R. S. 1939. Section 4136, R. S. 1939, provides such recognizance, on habeas corpus, with sufficient sureties, be approved by the court or judge.

"The affidavit being insufficient to be considered an application for appeal, and especially the recognizance having been given after court adjourned and approved by the clerk is invalid, in my judgment, and the defendant could be by proper proceedings, surrendered by the sheriff to the warden of the penitentiary."

Section 4130, R. S. Missouri 1939, provides as follows:

"In all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant, provided, defendant or his attorney of record shall during the term at which the judgment is rendered, file his written application for such

appeal."

In the above section all that is necessary to ask for an appeal is the filing of a written application. It has been held in cases hereinafter set out that the filing of the affidavit, as required under the civil code, is considered the same as a written application for appeal. In the case of State v. Wilson, 136 S. W. (2d) 993, l. c. 994, the court, in holding the affidavit sufficient, said:

> "The requirements of the statute with respect to appeals in criminal cases have undergone change from time to time. Under Sec. 2696, R. S. 1899, Sec. 4277, R. S. 1889; Sec. 1973, R.S. 1879; Sec. 1, p. 855, c. 215, Gen. Stat. 1865, the condition imposed upon the defendant in order to perfect an appeal was simply that it be 'applied for' during the term at which the judgment was rendered. This was changed by Laws 1909, p. 461, Sec. 5292, R. S. 1909; Sec. 4086, R. S. 1919, so as to require an affidavit precisely like that provided under the code of civil procedure, except it could not be made by an agent or attorney. The statute in its present form, requiring a 'written application' was enacted in 1925, p. 198.
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> "The affidavit in the case at bar (omitting caption, signature and jurat) reads as follows: 'Richard Wilson, being duly sworn, makes oath and says that the appeal prayed for in the above entitled cause is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the judgment and decision of the court.' The objection that this instrument is not a 'written application' for an appeal is that the affidavit 'does not purport to contain a prayer for an appeal. Its reference to "the appeal prayed for in the above entitled cause" is in the past tense, as if at some previous stage of the case a prayer for an appeal had been made.' In

> State v. Smith, 190 Mo. 706, 90 S. W. 440, 444, decided in 1905, under Sec. 2696, R. S. 1899, embodying the requirement that the appeal be 'applied for,' it was held that an affidavit conforming to the civil code was not necessary, but in reaching that conclusion it was pointed out that, 'In the country circuits the universal practice in perfecting appeals conforms to the requirements of the statute applicable to civil cases, and affidavits are invariably filed.' That practice has again grown up under the present statute, as the instant case attests. We think the filing of such an affidavit a substantial compliance with the statute, and, therefore, overrule the state's motion to dismiss."

In the above holding it is specifically stated that an affidavit conforming to the civil code was not necessary and further held that the affidavit in the case was a substantial compliance with the statute. This affidavit did not contain a prayer for an appeal.

Under the facts in your request the trial court saw fit to recognize the affidavit of Leonard Huff for an appeal in that he ordered the record to read as follows:

> "'Motion for new trial heretofore filed overruled. Affidavit for appeal filed, and appeal granted to Supreme Court. Appeal bond fixed at $2,500.00 to be approved by the clerk in vacation, said bond to be filed on or before Dec. 8, 1941.'"

The affidavit in question stated that the appeal was not made for vexation or delay and further stated all of the elements necessary for an appeal. Under the Constitution it is not mandatory that the court allow an appeal, but under the statute, upon compliance with the procedure set out, the court must allow an appeal. The whole matter is governed by statutory law and not by the Constitution. In our opinion we believe that the affidavit which was approved by the court

in granting the appeal was sufficient.

On the question of bail after conviction the foremost authority and holding was in the case of Ex Parte Carey, 267 S. W. 806, l. c. 807, where the court said:

> "In Missouri there is no constitutional right to bail after conviction; the provision guaranteeing bail, except in capital cases, relates to persons who are accused, before trial and conviction. Ex parte Heath, 227 Mo. 393, 126 S. W. 1031. Nor is there any constitutional right of appeal in this state. Such right is enjoyed solely by statute, and the privileges and immunities ancillary thereto, including stay of execution and bail pending the appeal, are likewise of statutory creation, and consequently limited to the number and kind given by statute. Ex parte Heath, supra; State v. Leonard, 250 Mo. 406, 157 S. W. 305.
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> "The statutory provisions which govern the staying of executions, and the letting of the defendant to bail, pending an appeal from a judgment in a criminal cause, are embodied in the following sections, Revision of 1919:
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> "'Sec. 4088. No such appeal or writ shall stay or delay the execution of such judgment or sentence, except in capital cases, unless the Supreme Court, or a judge thereof, or the court in which the judgment was rendered, or the judge of such court, on inspection of the record, shall be of opinion that there is probable cause for such an appeal or writ of error, or so much doubt as to render it expedient to take the judgment of the Supreme Court thereon, and shall make an order expressly directing that such appeal or writ of error

shall operate as a stay of proceedings on the judgment; but in capital cases the order granting the appeal shall operate as such stay absolutely.

"'Sec. 4089. If the court in which the judgment was rendered, or the judge thereof, refuse such order, he shall nevertheless suspend the execution of the judgment, except as to fine and costs, if necessary, to allow sufficient time to make application to the Supreme Court, or a judge thereof, for such order.

"'Sec. 4090. When any order to stay proceedings shall be made by the Supreme Court, or by any judge in vacation, the same, together with the writ of error, if any, shall be filed with the clerk of the court in which the judgment was rendered, who shall furnish the party filing the same with a certificate thereof, together with a copy of the order.

"'Sec. 4091. If the defendant in the judgment so ordered to be stayed shall be in custody, it shall be the duty of the sheriff, if the order were made by the court rendering the judgment, or upon being served with the clerk's certificate and a copy of the order, to keep the defendant in custody without executing the sentence which may have been passed, to abide such judgment as may be rendered upon the appeal or the writ of error.

"'Sec. 4092. In all cases where an appeal or writ of error is prosecuted from a judgment in a criminal cause, except where the defendant is under sentence of death or imprisonment in the penitentiary for life, any court or officer authorized to order a stay of proceedings under the preceding provisions may allow a writ of habeas corpus, to bring up the defendant,

> and may thereupon let him to bail upon a recognizance, with sufficient sureties, to be approved by such court or judge.'
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> "If the construction of these sections was one of first impression the writer would unhesitatingly hold with the Attorney General, who raises the question, that a convicted defendant cannot be let to bail under section 4092, pending an appeal from a judgment of conviction, unless and until a stay of execution has been granted under the provisions of section 4088. The two sections are in pari materia; they must be read together and both given effect. If section 4092 authorizes the bailing of a defendant regardless of whether he is entitled to a stay of execution under section 4088, then it completely nullifies the plain mandate of the latter section. It seems beyond cavil that, unless a defendant is entitled to a stay of execution, he is not entitled to bail, which is in effect a stay. According to my further reading of the sections just mentioned, a stay of execution, though a condition precedent to bail, does not in and of itself entitle the defendant to bail. He may have an absolute right to a stay of execution under section 4088 and yet bail may be withheld in the discretion of the court. According to the plain language of section 4092, the authority therein conferred is purely discretionary."

The above case very specifically sets out the law in reference to bail after conviction.

Sections 4088, 4089, 4090, 4091 and 4092, R. S. Missouri 1919, mentioned in the above case are now Sections 4132, 4133, 4134, 4135 and 4136, R. S. Missouri 1939, respectively. It will be noticed under Section 4092, R. S. Missouri 1919,

which is now Section 4136, R. S. Missouri 1939, that it specifically states, "* * may allow a writ of habeas corpus, to bring up the defendant, and may thereupon let him to bail upon a recognizance, with sufficient sureties, to be approved by such court or judge.'" It will be seen that it is discretionary with the court whether or not he will grant a writ of habeas corpus and allow bail, but it specifically states that if he grants the writ of habeas corpus the sufficient sureties must be approved by such court or judge. No mention is made of the approval of the surety under the recognizance in any other manner.

Under this section if the trial court, in its discretion, denied bail, the defendant could petition, either by writing or orally, to an appellate court under the same section for bail after conviction. It was so held in the case of Ex parte Beckenstein, 104 S. W. (2d) 404, paragraphs 1-3, where the court said:

> "The city complains that no notice was given to it of this application. The city was not a party to the proceeding and was not entitled to any notice. Notice was given respondent, the sheriff of Buchanan county, and he does not complain. But the writ of habeas corpus is of such importance to the liberty of the people that our writ may issue even though unsupported by any petition. Section 1430, R. S. Mo. 1929 (Mo. St. Ann. section 1430, p. 1638); State ex rel. Hulen v. Trimble, 310 Mo. 274, loc. cit. 286, 275 S. W. 536, loc. cit. 540. And it is not necessary that application first be made to an inferior court. Ex parte Hagan, 295 Mo. 435, loc. cit. 440, 441, 245 S. W. 336."

Since Section 4092, R. S. Missouri 1919, which is now Section 4136, R. S. Missouri 1939, provided that the recognizance with sufficient sureties should be approved by such court or judge it cannot be approved in any other manner. When special powers are conferred or special methods are prescribed for exercise of power, the exercise of such power is within the maxim that the expression of one thing is the exclusion of another and the doing of the thing specified

except in particular way pointed out is nugatory. Kroger Grocery and Baking Company v. City of St. Louis, 106 S. W. (2d) 435, 341 Mo. 62, 111 A. L. R. 589; State ex rel. Kansas City Power and Light Company v. Smith, 111 S. W. (2d) 513, 342 Mo. 75. Section 4136, R. S. Missouri 1939, has not been passed upon in this state but was mentioned in the case of State v. Trimble, 275 S. W. 536, where in paragraph 8 it stated:

> "Whether or not respondents had authority to intrust the approval of the securities to the clerk of the circuit court, we need not here inquire, since such question does not go to the question of jurisdiction of respondents nor to the question of an attempted exercise of powers in excess of their jurisdiction, but only goes to the manner in which they exercised such jurisdiction. If respondents acted erroneously, their act cannot be reveiwed by this proceeding in certiorari. State ex rel. v. Smith, 101 Mo. 174, 14 S. W. 108; State ex rel. Mo. P. Ry. Co. v. Edwards, 104 Mo. 125, 16 S. W. 117; State ex rel. Scott v. Smith, 176 Mo. 90, 75 S. W. 586. That question might have some bearing if the validity of the bail so taken is ever challenged, but such question is not before us, and we express no opinion upon it."

The facts in the above case were to the effect that a circuit judge refused to admit a defendant to bail and he filed a writ of habeas corpus in the Court of Appeals at Kansas City. The writ of habeas corpus was issued without the issuance of a written petition to the effect that the defendant should be admitted to bail and that the bail should be approved by the clerk of the circuit court where the defendant had been refused bail. Upon certiorari to the Supreme Court of this state the court set out in its opinion, paragraph 8, supra. It did not pass specifically on the section but inferred that the validity of the bail might be questioned. In view of these authorities above set out there is no question but that the bond approved by the circuit clerk is nugatory, and there is no question but

that the sheriff has the authority to apprehend the defendant and hold him either for a bond or upon proper authority from the court transmit him to the penitentiary. If the court in this case had issued a stay of execution, as set out under Section 4132, it would be necessary to hold the defendant in the county jail of Iron County, but since under the holding of Ex parte Carey, supra, the filing of the bond took the place of a stay of execution and since the bond does not comply with the statutory law there is no stay of execution and the defendant is subject to apprehension and transportation to the penitentiary upon proper commitment papers.

We would suggest, however, that the defendant be apprehended and that he be given the opportunity to provide a bond in compliance with Section 4136, R. S. Missouri 1939. We suggest this procedure for the reason that if he is taken to the penitentiary he may file a writ of habeas corpus in the Supreme Court for admission to bail pending the appeal in his case which would mean much trouble and expense on the part of the county and state.

CONCLUSION

In view of the above authorities it is the opinion of this department that the affidavit for appeal in the case set out in your request is a substantial compliance with Section 4130, R. S. Missouri 1939.

It is further the opinion of this department that a bond approved by the circuit clerk is void and does not comply with Section 4136, R. S. Missouri 1939.

Respectfully submitted

APPROVED:

W. J. BURKE
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VANE C. THURLO
(Acting) Attorney General

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