DISMISSAL OF AN APPEAL: It is the opinion of this department that a person who has been convicted of a misdemeanor in magistrate court and who has perfected an appeal to the circuit court, may dismiss his appeal, after which the judgment of the magistrate court is reinstated and becomes of full force and effect.

March 25, 1954

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Courthouse
Liberty, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

> **"We have been asked by Judge James S. Rooney, Judge of the Seventh Judicial Circuit, for your opinion on the following question.**
>
> **"In the case of a conviction for misdemeanor in the Magistrate Court, where said conviction is appealed to the Circuit Court by the defendant, and transcript filed in the office of the Circuit Clerk, may the defendant dismiss the appeal and pay the fine issued by the Magistrate or serve the sentence, whichever the case may be, or is it necessary after transcript has been filed on such a case in the Circuit Court, that there be a disposition of same either by trial or a plea of guilty in that court?"**

In your above letter you state that "said conviction is appealed to the circuit court by the defendant, and a transcript filed in the office of the Circuit Clerk. . ."

We note that the filing in circuit court of a transcript of the proceedings in magistrate court is only one of a number of necessary steps in perfecting an appeal from a conviction for a misdemeanor in magistrate court to the circuit court. These necessary steps are set forth in Section 543.290, 543.300, and 543.310, RSMo. 1949. However, from your statement that "said

conviction is appealed to the circuit court by the defendant," we will assume that all of the steps necessary to perfect this appeal were taken in addition to the filing of the transcript, and that the appeal was taken and perfected.

This being the situation, the first question which we have to answer is, when such an appeal as we have discussed above is perfected, can the appellant dismiss his appeal?

On this matter Corpus Juris Secundum, Volume 24, page 646, Section 1821, states:

> "Allowance of withdrawal of an appeal is generally considered to be discretionary with the court; but some authorities consider it to be a right personal to the appellant.--The rule in most jurisdictions seems to be that accused is not entitled to withdraw the appeal as a matter of right, and that the question of withdrawal is largely within the discretion of the court, except perhaps in cases where the consent of the adverse party is obtained. So, to withdraw the appeal it is necessary that appellant obtain a court order, and there can be no withdrawal merely by his conduct. Appellant's application to dismiss will not be granted where this would permit an abuse of the processes of the law; but it will be granted if the court, after reviewing both the law and the evidence, finds no error, or, where the motion is by the state, if the information is fatally defective. According to some authorities, unless good cause is shown to the contrary, appellant may waive the right to appeal and have the appeal dismissed on his own motion, the right being considered a personal one to him. Likewise, in other jurisdictions the appeal is considered to be a voluntary matter which may be voluntarily abandoned at any time, and on appellant's compliance with the rules of court requiring that his application be made in person by affidavit signed and sworn to by him, the court will

> dismiss the appeal. It has been held that appellant's request in this regard will be complied with although it entails the withdrawal of an opinion of affirmance; but there is authority to the effect that an appeal cannot be dismissed on appellant's request where the appellate court has written and filed an opinion therein. A sworn request of this character may not be withdrawn on the ground that it was made under a delusive hope of pardon."

No Missouri cases are cited under the above section, which deals with appeals in criminal cases.

We here call attention to the case of Bench v. Watts, 109 S.W. 2d 893, decided by the Springfield Court of Appeals in 1937. In that opinion the court stated:

> "This action, in the nature of an injunction, was tried in the circuit court of Christian county, at the regular January term thereof, 1936, resulting in a judgment for the defendant. The injunction was dissolved and plaintiff's petition was dismissed. Thereafter, on the same day, plaintiffs filed a motion for a new trial and the cause was continued on motion. On May 27, 1936, the same being the first judicial day of the May term of said Christian county circuit court, the motion for a new trial was overruled, and on the same day plaintiffs duly took an appeal to this court.
>
> "The appellants have filed in this court their motion to dismiss the appeal. This case belongs to the class of cases wherein the appeal can be dismissed, after once having been taken, and the appeal is therefore dismissed, upon motion and request of appellants."

We now direct attention to the case of McCord v. State, 239 S.W. 2d 822, a Texas case decided in 1951. In that opinion the court said:

> "The conviction is for the offense of the unlawful failure to stop and render aid after an automobile collision. The penalty assessed is confinement in the county jail for a period of six months and a fine of $500.
>
> "Since perfecting his appeal, appellant has filed a written motion, duly verified, requesting the dismissal thereof. The motion is granted and the appeal is dismissed."

In view of the above, and of the lack of specific holdings on this point in Missouri, we believe that it can be said that a person who has perfected an appeal to the circuit court from a misdemeanor conviction in magistrate court, may dismiss his appeal.

Having held that an appellant to the circuit court from a conviction for a misdemeanor in magistrate court, could dismiss his appeal, the next question with which we are confronted is the situation of such an appellant after his appeal has, by his own motion and with the consent of the circuit court, been dismissed. We believe that in such a situation the judgment of the magistrate court would be reinstated and would become of full force and effect.

In this regard we direct attention to the case of State v. Reed, 206 Missouri 719, a case decided by the Missouri Supreme Court in 1907. In that opinion the court stated:

> "A prosecution was commenced by the prosecuting attorney of Butler county by information against the defendant for an assault with intent to kill Judge Jesse C. Sheppard, on December 3, 1906. Judge W. N. Evans of an adjoining circuit was called in to try the cause, on account of the disqualification of Judge Sheppard. Defendant was duly arraigned and pleaded not guilty, was tried and convicted and his sentence assessed at two years in the penitentiary and he was sentenced accordingly. From that sentence he appealed to this court but after the cause had been briefed for the State the

> defendant and his attorney filed a formal dismissal of his appeal, thus leaving the judgment of the circuit court in full force and effect."

The above case is, obviously, further authority for our position that an appellant may dismiss his appeal, and for our further position that such a dismissal reinstates the judgment of the lower, in this case magistrate, court.

In this regard we would also call attention to the case of McAnaw v. Matthis, 129 Missouri 142, which at l.c. 152 stated:

> "When the appeal was finally dismissed, the original judgment came into force again, by virtue of the principles of our system of procedure, which have been elucidated in Lewis v. Railroad (1875), 59 Mo. 495. It is true that a justice's judgment is distinguishable from a judgment of the circuit court (considered in that case) in that the former is opened up for a new trial of the cause if the appeal becomes ultimately operative; but if the appeal be dismissed finally, the first judgment is then good, for what it is worth as it stood originally; or, at least, it forms a sound basis on which to found an execution to enforce it, in the court where a transcript thereof has been filed, which is the question now before us."

We would also call attention to the case of Pullis v. Pullis, 157 Mo. 565, which case holds that where a defendant appeals from the judgment of a justice of the peace, and his appeal is dismissed for failure to file the requisite appeal bond, the judgment of the justice is left in full force. We would also call attention to the case of Walther v. Woodson, 190 S.W. 61, which at l.c. 62 states:

> "The appeal on the merits and on the question of costs removed the entire case bodily to the circuit court for trial de novo, without regard to any error or imperfection in the judgment below. Hull v. Beard, 80 Mo. App. 200. And it vacated the judgment, at

> least until the appeal was disposed of; but on dismissal of the appeal the judgment, or whatever portion of it is valid, became a finality. Sublette v. St. Louis, etc., R. Co., 96 Mo. App. 113, 69 S.W. 745; Pullis v. Pullis, 157 Mo. 565, 587, 590, 57 S.W. 1095."

It is, therefore, our opinion, in view of the above, that when an appeal is dismissed that the judgment of the lower court is reinstated.

CONCLUSION

It is the opinion of this department that a person who has been convicted of a misdemeanor in magistrate court and who has perfected an appeal to the circuit court, may dismiss his appeal, after which the judgment of the magistrate court is reinstated and becomes of full force and effect.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/vtl