

CRIMINAL LAW:
CRIMINAL PROCEDURE:
MAGISTRATES:
MAGISTRATE COURT:
PRELIMINARY EXAMINATION:
SUPREME COURT RULES:

Person charged with felony may be bound over after preliminary examination for appearance at some specific time sooner than the first day of the next term of circuit court. A criminal case may be tried at the discretion of the court having jurisdiction if the defendant is given a reasonable time to prepare his case.

OPINION NO. 185

May 22, 1964

Honorable John B. Mitchell
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Mr. Mitchell:

This is in response to your opinion request of May 1, 1964, which reads as follows:

"It has long been the habit of Magistrates upon certifying a felony case to the Circuit Court to bind the defendant over to the next term of Circuit Court, however, Rule 23.08 states in part as follows:

'...if it appear that a felony has been committed and that there is probable cause to believe the accused guilty, the Magistrate shall hold the accused to answer in the court having jurisdiction of the offense. ...'

"Rule 23.11 states:

'Upon the completion of preliminary examination, if the defendant be bound over to answer a felony charge, all papers in connection with the hearing shall be certified by the Magistrate or the Clerk to the Clerk of the Court in which the offense is cognizable, within ten days; unless the Court shall sooner convene, in which event the Magistrate shall so certify on or before the day set for the court to convene.'

"Rule 32.05 (b) states in part as follows:

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'If a person ... is bound over to answer the charge upon which he has been granted a preliminary examination or as to which he has waived such examination he will appear in the court in which an indictment may be filed or an injunction filed against him at a stipulated time, and from time to time as required by the court, to answer the charge. ...'

"May the Magistrate stipulate some time other than the first day of the next term of court as the time for appearance of a defendant who gives bail bond after being bound over for trial to the Circuit Court in a felony case even if the defendant objects?"

"If the answer to the above question is in the affirmative, may that date be set on a day certain sooner than the first day of the next term of Circuit Court even if the defendant objects?"

"May the matter be tried in the Circuit Court sooner than the next term of that court even if the defendant objects?"

The only specific provision made by statute regarding the time at which a defendant can be brought to trial is Section 545.810, RSMo 1959, requiring that a defendant be given a reasonable time to plead. This section provides:

"The defendant in an indictment or information in a court of record, shall not be required to plead thereto until he shall have had a reasonable time in which to examine the same and to prepare his pleadings."

Article I, Section 18 (a), Constitution of Missouri, 1945, insures the right of a defendant to a speedy public trial and states:

"That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the

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accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county."

Rule 32.05(c), Rules of Criminal Procedure, provides for admission to bail of a person bound over to the Circuit Court after a preliminary hearing:

"(c) If a person is admitted to bail after he has been bound over to answer a charge, or after an indictment has been found or an information filed against him, the condition of his bond shall be that he will appear in the court in which an indictment or information has been or may be found or filed against him, at a stipulated time and from time to time as required by the court, to answer the charge; that he will submit himself to the orders, judgment, sentence and process of the court having jurisdiction to try such offense, either originally or upon change of venue; and that he will not depart without leave."

Section 544.450, RSMo 1959, makes this provision for admitting such persons to bail:

"If the offense with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable, on the first day of the next term thereof, and from day to day, and term to term thereafter, and to abide sentence and judgment therein, and not to depart such court without leave, and thereupon he shall be discharged."

There appears to be a discrepancy between those two provisions, in that the Supreme Court Rule makes the condition of the bond that the defendant will appear at a stipulated time, and from time to time as required by the Court, whereas Section 544.450, supra, makes the condition of the bond that

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the defendant appear on the first day of the next term of the Court before which the charge is cognizable and from day to day, and term to term thereafter.

The Supreme Court of Missouri is given rule-making power by the Constitution of Missouri, 1945, Article V, Section 5:

"The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Thus, by this constitutional authority the Supreme Court may promulgate rules of practice and procedure which vary from rules of practice and procedure previously established by the Legislature.

Section 544.450 originally appeared in the Missouri Revised Statutes of 1825. It has thereafter remained in our statutes, and was last amended in 1931. However, our Missouri Constitution, which permits our Supreme Court to establish rules of practice and procedure for our state courts under Article V, Section 5, became effective on March 30, 1945. Thereafter, in pursuance of this constitutional authority, Supreme Court Rule 32.05(c) was adopted on April 14, 1952, and became effective on January 1, 1953.

Since the time at which a bail bond is returnable is clearly procedural, and Supreme Court Rule 32.05(c) was promulgated subsequent to Section 544.450, and by virtue of the 1945 Constitutional authority, said Supreme Court Rule must prevail.

Therefore, the return date of a bail bond should be as specified in Supreme Court Rule 32.05(c).

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It is our understanding of your letter that you are primarily interested in determining whether a defendant may be brought to trial sooner than the first day of the next term of Court as set forth in Section 544.450. This section was enacted for the purpose of providing a method for admitting persons to bail, and not for the purpose of setting the time at which the trial should be held. That this section does not necessarily determine the time at which a person may be brought to trial, is made clear by State v. Bryant, 356 Mo. 1223, 205 S.W. 2d 732. In this case, decided by the Supreme Court of Missouri in 1947, the defendant complained, on appeal, that the trial court erred in forcing defendant to trial when the cause was not returnable until the May Term. The Court declared this contention without substance, saying, l.c. 734:

"* * * Criminal cases are not returnable to particular terms of court, as civil cases were under our former code, so there can be nothing in that portion of defendant's assignment. * * *"

Thus, a trial may be set at any time, having a regard for the defendant's right to a speedy trial and to a reasonable time to prepare his case. What is a reasonable time must, of course, be determined upon the factual situation of each case.

CONCLUSION

(1) Under Supreme Court Rule 32.05(c), which has precedence over Section 544.450, RSMo 1959, a Magistrate may stipulate some time other and sooner than the first day of the next term of circuit court as the time for appearance of a defendant who gives bail bond after being bound over for trial to the circuit court in a felony case even though defendant objects.

(2) A criminal case may be tried at any time within the discretion of the court having jurisdiction over it with regard, however, for the defendant's right to a speedy trial and a reasonable time within which to prepare his case.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,


THOMAS F. EAGLETON
Attorney General