STATE OF KANSAS

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Curt T. Schneider
Attorney General

August 28, 1978

ATTORNEY GENERAL OPINION NO. 78- 284

Mr. Wm. Rex Lorson
Saline County Attorney
300 West Ash
City-County Building
Salina, Kansas 67401

Re: Bailbondsmen--Power To Arrest--Effect On Arrest Power By Exoneration

Synopsis: The bondsman may arrest and surrender his principal to the sheriff after the court's order of forfeiture, and ask the court to set the forfeiture aside. Further, the court may set aside such a forfeiture should it find, in the exercise of its discretion, that justice does not require the enforcement of the bond forfeiture.

* * *

Dear Mr. Lorson:

You ask whether a bailbondsman is empowered to arrest his principal under K.S.A. 22-2809 having remitted the amount of bond into court for failure of his principal to appear. The Kansas Supreme Court has construed the pertinent statutes, K.S.A. 22-2807 - 22-2809, inclusive, in State v. Midland Insurance Company, 208 Kan. 886, 494 P.2d 1228 (1972).

In Midland, the bonding company's principal failed to appear January 25, 1971, having once failed to appear at an earlier trial setting. The trial court, having already set aside the earlier bond forfeiture again forfeited defendant's bond. On January 25, 1971, the state moved the court for judgment of forfeiture, giving notice to the bonding company, pursuant to K.S.A. 1971 Supp. 22-2807, that the motion was to be heard on February 12, 1971. On

February 10, 1971, the bonding company moved the court to set aside the forfeiture pursuant to K.S.A. 1971 Supp. 22-2807(2), alleging that, at its own expense, it had redelivered the defendant to the county sheriff pursuant to K.S.A. 1971 Supp. 22-2808 - 2809. Midland also offered to pay all actual costs suffered by reason of defendant's absence from court on the appointed appearance date. At the hearing of both motions on February 12, 1978, the trial court overruled Midland's motion to set the forfeiture aside and entered judgment in favor of the state. The Kansas Supreme Court reversed the finding of the trial court, and ordered the forfeiture set aside.

In so deciding, the court first looked to the provisions of K.S.A. 1971 Supp. 2807, which has not since been changed, the salient portions of which provide:

> "Paragraph (1) of this statute recites that if there is a breach of condition of an appearance bond the court in which the bond is deposited shall declare a forfeiture of the bail. Paragraph (2) provides that the court may direct that a forfeiture be set aside upon such conditions as it may impose, if it appears justice does not require enforcement of the forfeiture. . . . Subparagraph (4) provides that after entry of judgment the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this section."

It was Midland's contention that

> "Where the surety on an appearance bond has arrested and surrendered its principal to a custodial officer of the court at its own expense, as authorized in K.S.A. 1971 Supp. 22-2809, and has paid or offered to pay all costs incurred by the state resulting from the defendant's nonappearance, that the surety is automatically entitled to be released from further liability on its undertaking and that he should be exonerated as provided by K.S.A. 1971 Supp. 22-2808." State v. Midland, supra, at p. 888.

The court said:

> "The question of whether or not the forfeiture of a bond should be set aside is a matter resting solely within the sound judicial discretion of the trial court."

The Court then made some observations as to the purpose of bail:

> "The primary purpose of bail is not to beef up public revenues or to punish the bail, or surety. (State v. Wynne, 356 Mo. 1095, 204 SW2d 927). Rather it is to permit a person accused of crime, but whose guilt has not been established, to remain at large pending trial while ensuring so far as possible, that he will be present in court to meet the charges directed against him. (In re Application of Shetsky for Return of Bail Money, 239 Minn. 463, 60 N. W. 2d 40). . . .
> Upon entering into a recognizance the defendant, as principal, is in effect released to the surety and is so far placed in the hands of the latter that he may be taken into custody by the surety and surrendered to the court. (K.S.A. 1971 Supp. 22-2809; Craig v. Commonwealth, 228 Ky. 157, 155 S. W. 2d 768.)" State v. Midland, supra, p. 889.

Next, the court recited the general rule that

> "A statute which authorizes the court to set a forfeiture aside or to remit a part or the whole of a penalty where the principal surrenders or is produced by the surety, entrusts the granting of relief to the sound discretion of the court. (Anno., 84 A.L.R., Bail--Forfeiture--Relief From, § IIb., p. 424.) Such we believe to be the import of K.S.A. 1971 Supp. 22-2807 which follows exactly the wording of Rule 46(f)(2), Federal Rules of Criminal Procedure." State v. Midland, supra, at p. 890.

Further, at pp. 890-891, the court said:

> "Matters which should be given consideration in exercising the discretion contemplated in

> 22-2807(2) include the timeliness of the surety's action in surrendering the principal; whether the prosecution has been placed at a disadvantage by reason of the default; whether there was connivance on the part of the surety contributing to default; and whether the principal's default was with the surety's knowledge and consent."

and that

> "an additional consideration be kept in mind when application is made to set aside a forfeiture prior to judgment. At least one of the purposes which may be served by a provision permitting a forfeiture to be set aside must surely be to encourage the surety to locate, arrest and bring a defaulting defendant to the bar of justice. There would be small incentive for the surety to run down and return its principal at its own expense if no part of the penalty of the bond could be remitted under equitable conditions. (Hicks v. Commonwealth, 265 Ky. 123, 95 S. W. 2d 1076; Fortney v. Commonwealth, 140 Ky. 545, 131 S. W. 333.)" at pp. 891-892.

Finally, the court found it significant that:

> ". . . under the terms of 22-2807(3) no judgment by default may be entered against the surety until more than 10 days after notice has been served as provided by the act. This provision is not found in Federal Rule 46 or in many state statutes bearing on the subject. It must have been included in our statute for a purpose. We believe the reason for its inclusion was to give the surety an opportunity to locate and surrender a defaulting

> principal within the 10 day period and to request the forfeiture be set aside on terms which are just and fair. This construction accords with what we deem to be the general tenor of the act: Before judgment, a forfeiture may be set aside upon equitable conditions where justice does not require its enforcement and EVEN AFTER JUDGMENT IS ENTERED A REMISSION IN WHOLE OR IN PART MAY BE GRANTED ON LIKE CONDITIONS." [Emphasis added.]

In view of the constructions placed upon K.S.A. 22-2807 -2809, by the Kansas Supreme Court, it is my opinion that the bondsman may arrest and surrender his principal to the sheriff after the court's order of forfeiture, and ask the court to set the forfeiture aside. Further, the court may set aside such a forfeiture should it find, in the exercise of its discretion, that justice does not require the enforcement of the bond forfeiture.

Sincerely,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:MGM:jj