

STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 89- 37

The Honorable Michael R. O'Neal
State Representative, 104th District
State Capitol, Room 426-S
Topeka, Kansas 66612

RE: Criminal Procedure -- Conditions of Release --
Release Prior to Trial; Appearance Bonds

Synopsis: A surety is discharged from further obligation on a trial appearance bond when the criminal defendant's verdict is announced, unless by the terms of the agreement the parties to the bond intend that it apply to post-conviction release. A unilateral modification by the court may not extend the terms of the bond without the consent of the surety. Cited herein: K.S.A. 22-2202, 22-2801, 22-2802, 22-2804, 22-2807, 22-2808.

* * *

Dear Representative O'Neal:

As State Representative for the One Hundred Fourth District, you have requested our opinion regarding the release of defendants on surety appearance bonds. Specifically, you ask whether bonds executed to secure the release of a defendant prior to trial may be extended to cover periods after conviction by the court without notification to the surety.

A suretyship is a contractual obligation whereby one person promises to answer for the default or miscarriage of another. See Federal Land Bank v. Heath, 160 Kan. 645, 649 (1945). An appearance bond is an agreement "entered into by a person in custody by which the person is bound to comply with the conditions specified in the agreement." K.S.A.

22-2202(2). It is a three part contract between the principle and the surety on the one hand, and the state on the other. State v. Indemnity Ins. Co. of N. Amer., 9 Kan.App.2d 53, Syl. ¶ 1 (1983). The purpose of an appearance bond is to assure the criminal defendant's presence at the time and place of trial. State v. Foy, 224 Kan. 558, 552 (1978); State v. Midland Ins. Co., 208 Kan. 886 (1972), Syl. ¶ 1.

Individuals who are charged with a crime are given the opportunity to avoid needless detention pending their appearance to answer charges or pending appeal unless detention serves the ends of justice or the public interest. K.S.A. 22-2801. A person's release prior to trial is governed by the provisions of K.S.A. 22-2802. That section requires the release of an individual upon the execution of an appearance bond which sets forth the conditions of release and is deposited in the office of the magistrate or the clerk of the court where the release is ordered. Individuals who have been convicted of crime and are either awaiting sentence or who have filed a notice of appeal may be released by the court and required to execute an appearance bond as in a pretrial release. K.S.A. 22-2804. If there is a breach of condition of an appearance bond, the court shall declare the bail forfeited. K.S.A. 22-2807(1). An obligor is discharged when the conditions of the appearance bond have been satisfied, or when a forfeiture has been set aside or remitted. K.S.A. 22-2808.

The release pending an appearance to answer charges is distinct from the release pending an appeal after conviction. State v. Reed, 237 Kan. 685, 688 (1985). You correctly point out that the standards for judging post conviction releases are more onerous than those for pre-trial releases. Garton v. Marsteller, 545 F.Supp.994, 996-97 (D. Kan. 1982). In light of these statutory provisions, you ask whether a pre-trial bond issued under K.S.A. 22-2802 may unilaterally be transformed to a post-conviction bond as required under 22-2804.

We believe that a pre-trial surety is discharged from his obligation when the accused person appears at a hearing and the verdict is announced, unless the parties intend to bind the surety further. As we previously stated, the purpose of the bond is to assure the defendant's presence at the time and place of trial. The trial court has jurisdiction over many phases of the criminal proceeding. In State v. Osbey, 238 Kan. 280, 288 (1985), the court held that where a person has been convicted of a crime and not legally sentenced, a proper sentence may later be imposed. Additionally, the trial court retains jurisdiction for 120 days following the imposition of a sentence. See State ex rel. Owens v. Hodge, 230

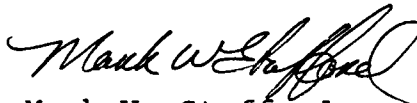
Kan. 804, 812 (1982). However, the trial court loses jurisdiction when an appeal is docketed. State v. Dedman, 230 Kan. 793, Syl ¶ 2 (1982). We do not believe, however, that the court's jurisdiction is the deciding factor. Rather, we must look to the particular stage of the proceeding and the terms of the agreement to determine the scope of the bond. In State v. Holmes, 222 Kan. 212, 213-14 (1977), the court held that a defendant who has been found guilty of a felony has been "convicted" even though the person has not yet been sentenced. For purposes of determining whether or not a surety is discharged on a pre-release bond, we believe that the statutes contemplate that the appearance bond extend only to the time of announcing a verdict. Unless the terms of the bond extend the obligation of the surety to cover post conviction release, a unilateral modification of the bond may not occur without the consent of the surety. See State v. Indemnity Insurance Company of North America, 9 Kan.App.2d 53, Syl ¶ 1 (1983). See also State v. Chappell, 11 Kan.App.2d 546 (1986) (contractual provision which voided bond if conditions of release are modified, surety discharged upon criminal defendant entering into diversion agreement).

In conclusion, it is our opinion that a surety is discharged from further obligation on a trial appearance bond when the criminal defendant's verdict is announced, unless by the terms of the agreement the parties to the bond intend that it apply to post-conviction release. A unilateral modification by the court may not extend the terms of the bond without the consent of the surety.

Very truly yours,



ROBERT T. STEPHAN
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