

1978 S.C. Op. Atty. Gen. 194 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-167, 1978 WL 22635

Office of the Attorney General

State of South Carolina

Opinion No. 78-167

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\*1 TO: Richard A. Harpootlian

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Fifth Judicial Circuit

It is within the trial court's discretion to place a defendant on his recognizance after a jury has been drawn and sworn in his case and during trial of said case.

QUESTION:

What are a defendant's rights concerning bail after a jury has been drawn and sworn in his case?

AUTHORITY:

Ex Parte [McCutchen](#), 205 S.C. 241, 31 S.E. 2d 390 (1944).

[State v. Collins](#), 19 N.C. App. 553, 199 S.E. 2d 491 (1973).

[State v. Roberts](#), 122 W. Va. 536, 11 S.E. 2d 172 (1940).

[State v. Wright](#), 140 S.C. 357, 138 S.E. 828 (1927).

8 Am. Jur. 2d, 'Bail & Recognizance,' § 25.

8 C.J.S., 'Bail,' § 36(5).

Circuit Court Rule 35, South Carolina Code (1976), Vol. 22.

26 R.C.A., 'Trial,' § 18.

[Sections 17-15-10, et seq.](#), South Carolina Code (1976).

DISCUSSION:

South Carolina's statutory provisions (§§ [17-15-10, et seq.](#), Code of Laws (1976)) concerning bail and recognizances do not address whether it is appropriate to release a defendant on his recognizance after a jury has been impanelled in his case and thereafter during the course of the trial of his case. It appears to be the general rule in other jurisdictions that this is a matter delegated to the trial court's sound discretion.

8 C.J.S., 'Bail,' § 36(5) states:

Until trial commences enlargement on bail is the rule, on adequate assurance that accused will appear at the trial, but once the trial begins the right to bail is circumscribed by other pressing considerations; however, the right of a person charged

with crime to be released during trial is heavily favored. In some jurisdictions there is no constitutional or statutory right to the allowance of bail during the progress of a trial of a felony, although the court may in its discretion release accused from custody during his trial where his offense is bailable.

8 Am. Jur. 2d, 'Bail and Recognizance,' § 25, is to the same effect:

It is the general rule in the states that the trial court has the right, in its discretion, to order a defendant who has been at large on bail into custody during the trial, or during recess, even though the offense of which the defendant is charged is bailable.

Of course, if the trial judge has discretion to order the defendant to be taken into custody during trial, the clear implication is that he has a similar discretion not to order the defendant taken into custody and, therefore, to allow him to remain free on recognizance during the trial of his case. See, also, [State v. Collins](#), — N.C. —, 199 S.E. 2d 491 (1973); [State v. Roberts](#), 122 W. Va. 536, 11 S.E. 2d 172 (1940).

Thus it appears that, generally, the question is one addressed to the trial court's sound discretion.

South Carolina, however, has the following Circuit Court Rule:

No person shall be tried on an indictment unless personally present, except for misdemeanor; and upon the trial of any person charged with an offense for which the law requires that he should be arraigned the prisoner shall be placed in the dock.

**\*2** And after arraignment the prisoner shall remain in custody of the Sheriff until discharged therefrom by due process of law, and that the condition of all recognizances in cases of felony be so drawn as to require the accused to appear and plead to such indictment as may be preferred against him.

Circuit Court Rule 35, South Carolina Code (1976), Vol. 22. Since the rule requires the accused to remain in custody of the Sheriff 'until discharged . . . by due process of law,' the question is raised whether admitting the defendant to bail after arraignment constitutes a discharge from the Sheriff's custody by 'due process of law.'

No South Carolina case has decided this specific question. However, [State v. Wright](#), 140 S.C. 357, 138 S.E. 828 (1927), provides sufficient authority to conclude that the trial judge may exercise his discretion, discharging a defendant from custody and placing him on his recognizance, and that this would constitute a discharge 'by due process of law,' thereby satisfying the provisions of Rule 35.

In [Wright, supra](#), defendant had been out upon recognizance until he was arraigned. Defendant asked that his recognizance be continued until trial, but this was refused. On appeal, the Court stated this refusal was not an abuse of discretion by the trial court, citing Rule 35. It then quoted as follows from 26 R.C.L., 'Trial,' § 18:

While statutes exist in some jurisdictions which prevent the trial Judge from ordering an accused, out on bail, into custody during the trial, and some Courts have held it an abuse of discretion to make such an order in the absence of circumstances justifying it . . . , the general rule may be said to be that the trial Court has the right, in its discretion, to order a defendant who has been at large on bail, into custody during the trial.

The Court then concluded that 'a trial Court cannot have its discretionary power over the person of the accused affected by the allowance of bail by a lower Court.'

Had the Court cited only Rule 35 for the proposition that it was not an abuse of discretion to deny bail after arraignment, one might conclude that, arguably, a defendant never could be admitted to bail after arraignment. However; by adding the quote from R.C.L., and by virtue of the Court's remarks immediately thereafter, it appears the Court still felt it was within the trial court's discretion to grant or refuse bail after arraignment and during trial. Hence, Wright and Rule 35 are consistent with the general rule observed in other jurisdictions that the accused may be admitted to bail during the trial of his case in the discretion of the trial judge.

The practice of admitting a defendant to bail during his trial is consistent with the presumption of his innocence until he is convicted. It also serves the policy of allowing a defendant to assist his counsel in the effective preparation and presentation of his defense during trial. Of course, the countervailing consideration in this regard is that the Court should also take care to see that the defendant appears for his trial: 'The object of permitting the accused to give bail is to allow him his freedom pending the outcome of his trial and at the same time assure the Court of his presence for trial.' (Emphasis supplied.) Ex Parte McCutchen, 205 S.C. 241, 31 S.E. 2d 390 (1944).

CONCLUSION:

\*3 For the foregoing reasons, it is the opinion of this Office that it is within the trial court's discretion to place a defendant on his recognizance after a jury is impaneled in his case and during trial of the case.

Brian P. Gibbes, Supervisor  
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