

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04-27-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CV 09-0503
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
AALPHA BONDING & SERVICES, LLC,)
) Not for Publication -
Appellant.) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-131831-003

The Honorable Lisa VandenBerg, Commissioner

AFFIRMED

Andrew P. Thomas, Maricopa County Attorney Phoenix
By Davina Bressler, Deputy County Attorney
Sarah L. Corcoran, Deputy County Attorney
Attorneys for Appellee

Clifford Sherr, Attorney at Law Phoenix
Attorney for Appellant

B A R K E R, Judge

¶1 Aalpha Bonding & Services, LLC ("Appellant") appeals
commissioner's order forfeiting the appearance bond issued to

defendant Gilberto Dominguez ("Dominguez"). For the following reasons, we affirm.

Facts and Procedural History

¶2 Dominguez was arrested and charged with first degree murder. The trial court set a secured appearance bond of \$100,000.00 for Dominguez's release. The conditions of the supervised release required Dominguez to appear in court and participate in electronic monitoring and drug and alcohol monitoring. On July 10, 2008, Better Bail Bonds posted a \$100,000.00 bond on behalf of Dominguez.¹ Dominguez's appearance at court proceedings was a condition of the bonding agreement.

¶3 The trial court issued a warrant for Dominguez's arrest on November 14, 2008, because "Dominguez absconded from electronic monitoring supervision on November 14, 2008, and his current whereabouts is unknown." On November 17, 2008, the trial court affirmed the bench warrant for Dominguez's arrest when Dominguez failed to appear for the complex case management conference scheduled on that date. Dominguez was present at the previous case management conference when the November 17 conference was scheduled. At the November 17 conference, the trial court did not notify the bondsman and surety of

¹ The record is unclear on Appellant's relationship with Better Bail Bonds and the appearance bond Better Bail Bonds issued to Dominguez.

Dominguez's failure to appear nor did the court set a bond forfeiture hearing.

¶14 The Pima County Sheriff's Department took Dominguez into custody on December 8, 2008. On December 15, 2008, John Peru, an agent of Better Bail Bonds and Safety National Casualty Insurance, filed an affidavit to exonerate the bond because Dominguez was in police custody. Similarly, on December 31, 2008, Dominguez filed a motion to exonerate the bond because he was in police custody and had been so since December 8, 2008.

¶15 On January 13, 2009, Dominguez was present for the complex case management conference. The trial court turned its attention to Dominguez's failure to appear at the November 17 conference. When asked by the trial court if a hearing was necessary to determine whether pretrial release conditions were violated, Dominguez, through counsel, admitted to violating release conditions. The court found Dominguez violated his release conditions by failing (1) to appear before the court on November 17, (2) to participate in drug testing on November 5, 2008, and (3) to prove compliance with electronic monitoring procedures. The court then set a bond forfeiture hearing before a commissioner. The court stated the motions to exonerate would be addressed at the bond forfeiture hearing.

¶16 At the bond forfeiture hearing, Dominguez was represented by counsel and Peru was present on behalf of Better

Bail Bonds and Safety National Casualty Insurance. The court reviewed the January 13 transcript and stated, "Given that information, the Court at this point affirms [the trial court's] finding that the Defendant did fail to appear on November 17th of 2008 before [the trial court] and that the Defendant was provided notice of that hearing." The commissioner entered an order forfeiting the entire appearance bond. Appellant filed a timely notice of appeal.

¶17 Pursuant to Arizona Revised Statutes ("A.R.S.") § 12-2101(B) (2003), we have jurisdiction of this appeal.

Discussion

¶18 We view the facts in the light most favorable to upholding the judgment. *State v. Copperstate Bail Bonds*, 222 Ariz. 193, 195, ¶ 12, 213 P.3d 342, 344 (App. 2009). We review a trial court's order forfeiting a bond for an abuse of discretion but consider *de novo* the construction of statutes and court rules governing bonds. *State v. Garcia Bail Bonds*, 201 Ariz. 203, 205, ¶ 5, 33 P.3d 537, 539 (App. 2001).

1. Appellant's Nonappearance at the Bond Forfeiture Hearing

¶19 The Arizona Supreme Court has exclusive jurisdiction over who may practice law in Arizona. *In re Creasy*, 198 Ariz. 539, 541, ¶ 7, 12 P.3d 214, 216 (2000). Pursuant to Arizona Rule of the Supreme Court 31(b), only active members of the State Bar of Arizona are authorized to practice law in Arizona.

Ariz. R. Sup. Ct. 31(b). The practice of law includes "representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration or mediation." *Id.* 31(a)(2)(A)(3).

¶10 Unlike an individual who may appear *in propria persona*, a corporation cannot appear in court without an attorney.² *Boydston v. Strole Dev. Co.*, 193 Ariz. 47, 49, ¶ 7, 969 P.2d 653, 655 (1998); *Ramada Inns, Inc. v. Lane & Bird Adver., Inc.*, 102 Ariz. 127, 128, 426 P.2d 395, 396 (1967). Here, John Peru, an agent for Safety National Casualty Insurance and Better Bail Bonds, purported to represent Appellant at the bond forfeiture hearing. Peru was not a licensed attorney. Because a non-attorney cannot represent a corporation at a bond forfeiture hearing, Appellant made no appearance at the hearing.

¶11 Our analysis could, and perhaps should, end at this point. *State v. Eazy Bail Bonds*, 1 CA-CV 09-0278, slip op. at *6, ¶ 12 (Ariz. App. April 22, 2010) (finding bond and surety companies failed to appear at bond forfeiture hearing because they were not represented by an attorney). Typically, a party waives the right to allege error on appeal by failing to raise the issue before the lower court. *Englert v. Carondelet Health*

² Arizona Rule of the Supreme Court 31(d) specifies narrow exceptions to this general rule; however, none of the exceptions allow a corporation to appear at a bond forfeiture hearing without an attorney.

Network, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000). Because Appellant made no appearance at the bond forfeiture hearing, it failed to contest forfeiture of the appearance bond. On this rationale there is no basis for us to consider any error asserted on appeal.

¶12 We recognize that Appellant filed a motion for reconsideration and/or new trial. This does not assist Appellant. In terms of the motion for reconsideration, there was no evidence presented, as we discuss *infra*, upon which the commissioner could come to a contrary conclusion. As to the motion for new trial, Appellant does not assert that there was any newly discovered evidence that had subsequently become available to it, but which was not presented at the hearing. See Ariz. R. Civ. P. 59(a)(4) ("Material evidence, newly discovered, which with reasonable diligence could not have been discovered and produced at the trial."). Finally, as the State argues in its supplemental brief, because of the failure to appear by Appellant, this proceeding has more similarities to the setting aside of a default judgment. Yet, there was no effort made in the motion to reconsider and/or new trial to meet the requirement of good cause necessary to set aside a ruling based on a nonappearance. See *Ramada Inns*, 102 Ariz. at 129, 426 P.2d at 397 (permitting the setting aside of a default for "mistake, inadvertence, surprise or excusable neglect" when such

is the act of a "reasonably prudent person under the same circumstances").

¶13 Despite the foregoing, in the exercise of our discretion, we take Appellant's nonappearance into account but decline to treat it as a complete waiver of all issues. We now turn to whether the trial court abused its discretion by ordering forfeiture of the appearance bond on the record before us.

2. Violation of the Appearance Bond

¶14 Appellant contends the commissioner misinterpreted Arizona Rule of Criminal Procedure 7.6(c)(2) when she determined Dominguez's failure to appear at the November 17 hearing violated a condition of the appearance bond. This argument hinges on Appellant's contention that the trial court implicitly found no violation of the appearance bond on November 17. We disagree.

¶15 Rule 7.6 governs the forfeiture of bail bonds. Rule 7.6(c)(1) states:

If at any time it appears to the court that the released person has violated a condition of an appearance bond, it shall issue a bench warrant for the person's arrest. Within ten days after the issuance of the warrant, the court shall notify the surety, in writing or by electronic means, that the warrant was issued[.] The court shall also set a hearing within a reasonable time not to exceed 120 days requiring the parties and

any surety to show cause why the bond should not be forfeited.

Ariz. R. Crim. P. 7.6(c)(1). At the forfeiture hearing, "the court may enter an appropriate order of judgment forfeiting all or part of the amount of the bond" if "the violation is not explained or excused." *Id.* 7.6(c)(2).

¶16 The evidence does not support Appellant's argument. The trial court affirmed the previously issued bench warrant for Dominguez's arrest when Dominguez failed to appear in court on November 17. Dominguez was taken into custody on December 8, 2009. At the January 13 conference, the trial court asked Dominguez about the release violations, stating:

I have at least two different petitions before me indicating that he has violated pretrial conditions. He did not appear before me on November 17 in this Court. I don't know whether he didn't appear before me because he was in custody in another jurisdiction, or whether he was not picked up by Pima County until after that.

I guess my first question to you is, what is your position on whether or not we need to have an evidentiary hearing to prove pretrial release violations, or whether he's willing to admit the pretrial release violations set forth within those petitions, and ask the Court then to take up the issue of what his new conditions of release ought to be in light of those violations?

Dominguez then admitted to violating the conditions of his release.

¶17 After the court found clear and convincing evidence that failure to appear on November 17 was one of three violations of the release conditions, the trial court then addressed the motions to exonerate and forfeiture proceedings. The court stated:

With respect to the existing \$100,000 bond, I have two different motions before me to exonerate that bond, because the defendant is back in custody.

I guess that puzzles me some because it seems to me that his failure to appear has violated his conditions of release, which would suggest that bond forfeiture proceedings would be appropriate.

I'm going to set the matter before the appropriate Commissioner for a bond forfeiture proceeding.

¶18 Thus, when Dominguez admitted that failure to appear violated a condition of his release, the trial court instituted bond forfeiture proceedings. Appearance at court proceedings was a condition of the bonding agreement. Pursuant to Rule 7.6(c)(1), the trial court properly set a bond forfeiture hearing on January 13 when it appeared to the court that Dominguez violated a condition of his appearance bond. It was within the court's discretion to set forfeiture proceedings on January 13 when it determined Dominguez's nonappearance was not caused by involuntary detention. Accordingly, the commissioner

presiding over the bond forfeiture proceedings did not err in affirming the finding of the trial court.

3. Exoneration and Mitigation

¶19 Appellant contends the commissioner misinterpreted Rule 7.6(d)(2) because she failed to consider the affidavit for exoneration filed by Peru. Appellant also contends that the commissioner erred in applying standards for exoneration and mitigation. These arguments are misplaced.

¶20 If violation of the bond is not explained or excused, "the trial court may exercise its discretion in determining whether to forfeit all, part, or none of the appearance bond pursuant to Rule 7.6(c)(2) and whether any part of the bond not forfeited should be exonerated pursuant to Rule 7.6(d)(2) or (3)." *State v. Bail Bonds USA*, 223 Ariz. 394, 397, ¶ 10, 224 P.3d 210, 213 (App. 2010) (citation omitted). The bonding company has the burden to prove excuse or explanation by a preponderance of the evidence. *State v. Martinez-Gonzales*, 145 Ariz. 300, 302, 701 P.2d 8, 10 (App. 1985).

¶21 Neither Appellant nor Dominguez presented evidence regarding excuse or explanation. As noted above, Appellant was not represented by counsel. Therefore, Appellant did not appear at the bond forfeiture hearing and could not offer evidence. See *supra* ¶ 10. Although the court, on its own, may call and interrogate witnesses, Ariz. R. Evid. 614(a)-(b), we disagree

with Appellant that Peru appeared before the court as a witness. "A witness is a person whose declaration under oath or affirmation is received for any purpose." Ariz. R. Civ. P. 43(a). Peru was not sworn in; therefore, Peru did not appear as a witness. Thus, Appellant presented no evidence.

¶22 Further, we decline to place the burden on the court to call witnesses, essentially on behalf of a party, when that party has failed to appear. At the forfeiture hearing, the commissioner recognized that the bonding company was not represented, yet still permitted its agent to address the court:

I'll note that the agent that's here today was present at the first hearing on this matter in March, and the Court did give the bonding agent an opportunity to be heard today, but the bonding company is a corporate entity, and so I'll note that Counsel for the bonding company has not appeared to present witnesses or evidence. However, considering the agent was present at the last hearing and present today, the Court would entertain information presented by that individual.

We discourage the practice of permitting an agent for a corporation to "be heard" when our supreme court has made it plain that a corporation must be represented by an attorney. *Ramada Inns*, 102 Ariz. at 128, 426 P.2d at 396. To permit a non-attorney agent to act in this way, when the corporation has failed to appear, either leads to or results in the unauthorized practice of law. Ariz. R. Sup. Ct. 31(a)(2)(A)(4).

¶123 At the hearing, Dominguez's attorney properly appeared. He argued that Dominguez was not acting as a reasonable person because he was suffering from a gunshot wound to the head and a recent change of medications resulted in him having an irrational mental state. However, there was no evidence in the record supporting this argument. Dominguez's attorney could have called witnesses to testify about Dominguez's mental state but chose not to do so. The court did not preclude witness testimony, and Dominguez's attorney failed to call the witnesses even after the court openly construed his statement as argument and not evidence.

¶124 As to Peru's affidavit, it was not properly presented to the court because it was not offered into evidence by an attorney who appeared on Appellant's behalf. See Ariz. R. Sup. Ct. 31(a)(2)(A)(4) ("'Practice of law' means providing legal advice or services to or for another by . . . preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity."). Moreover, even if the affidavit had been properly presented, it was within the commissioner's discretion to forfeit the entire bond because the affidavit made no showing that the "surety surrender[ed] the defendant into the custody of the sheriff" pursuant to A.R.S. § 13-3974 (2010) or did anything to assist the police in rearresting Dominguez.

¶25 Appellant also contends the commissioner abused her discretion when she refused to consider Dominguez's willfulness in failing to appear on November 17 as a factor relevant to mitigation. In *State v. Old West Bonding Co.*, we indicated that "the willfulness of the defendant's violation of the appearance bond" may be a relevant consideration that "might bear on the court's discretionary decision on whether, and in what amount, to forfeit an appearance bond." 203 Ariz. 468, 475, ¶ 26, 56 P.3d 42, 49 (App. 2002). Here, there was no abuse of discretion because there was no evidence for the court to consider on the issue of Dominguez's willfulness that was contrary to his admission that he violated his release conditions by failing to appear. Appellant failed to appear through counsel at the hearing, and Dominguez's attorney presented no evidence. Therefore, it was within the commissioner's discretion to enter an order forfeiting the entire appearance bond.

Conclusion

¶26 For the foregoing reasons, we affirm the court's order forfeiting the appearance bond.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

PETER B. SWANN, Judge