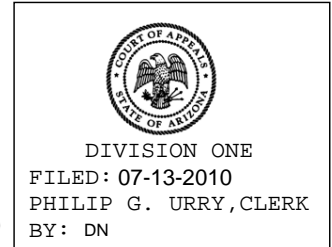


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CV 09-0539
)
) DEPARTMENT D
Appellee,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
) Rule 28, Arizona Rules of
FRANK BADILLA,) Civil Appellate Procedure)
)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2004-011444-002 DT

The Honorable Carolyn K. Passamonte, Commissioner

AFFIRMED

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

Blumberg & Associates Phoenix
By Bruce E. Blumberg
Attorney for Appellant

B R O W N, Judge

¶1 Frank Badilla appeals the trial court's order forfeiting the bond he posted on behalf of Laura Sicairos-Loza ("defendant").¹ For the reasons that follow, we affirm.

BACKGROUND

¶2 In March 2004, defendant was charged with a felony by direct complaint. Badilla posted a \$45,000 cash bond on defendant's behalf. The release order directed her to appear for a preliminary hearing on April 8, 2004, and defense counsel was appointed to represent her. On April 8, a supervening indictment was issued and sent to defendant at her former jail address, but not to the address stated on her release order. The supervening indictment informed defendant to appear for arraignment on April 19, 2004. Defendant failed to appear on that date, but her attorney was present and endorsed on the minute entry. The trial court continued the arraignment to May 3, 2004. On that date, according to the minute entry, defendant failed to appear and defense counsel made statements to the court, which issued a bench warrant. A bond forfeiture hearing was set for August 4, 2004. Defense counsel, defendant, and Badilla were endorsed on the minute entry. At the hearing, the court found defendant had not been properly served with the notice of supervening indictment, and therefore vacated the

¹ The defendant in the underlying case is not a party to this appeal.

hearing, affirmed the bond previously posted, and affirmed the bench warrant as issued. Defense counsel and Badilla were endorsed on the minute entry.

¶3 Based on a subsequent review of the record, which occurred four and a half years later,² the trial court set a new bond forfeiture hearing for February 6, 2009, "so that the [d]efendant and the bond poster can appear before the court and show cause why the \$45,000.00 cash bond posted March 30, 2004, should not be forfeited." Defense counsel, defendant, and Badilla were endorsed on the minute entry. Neither defendant nor her counsel appeared at the February hearing. Badilla, however, was present, although he was not represented by counsel. At that hearing, Badilla requested a continuance in order to locate and surrender defendant on the bench warrant. The continuance was granted and the hearing was rescheduled for March 13, 2009. Neither the defendant nor Badilla was present at the March 13, 2009, hearing, but Badilla was represented by counsel and another continuance was granted. Badilla filed a motion to exonerate the bond in May 2009. Two additional continuances were granted before the bond forfeiture hearing was conducted on June 26, 2009.

² The record provides no explanation as to why nothing occurred regarding the bond during this time period.

¶14 After considering Badilla's motion to exonerate, the State's response to the motion, and oral arguments from counsel, the court found there were no reasonable grounds for defendant's failure to appear and no mitigating circumstances, particularly in light of the two minute entries mailed to both the defendant and Badilla regarding the hearings scheduled in May and August 2004. The court therefore ordered the \$45,000 cash bond posted by Badilla in March 2004, forfeited. Badilla timely appealed.³

DISCUSSION

¶15 Badilla argues the trial court abused its discretion in denying his motion to exonerate and forfeiting the appearance bond he posted for defendant in March 2004. We review the trial court's order forfeiting an appearance bond for an abuse of discretion, but we interpret the court rules governing appearance bonds de novo. *State v. Old West Bonding Co.*, 203 Ariz. 468, 471, ¶ 9, 56 P.3d 42, 45 (App. 2002).

¶16 Badilla first argues that because the trial court failed to properly provide defendant with the notice of

³ Badilla filed his notice of appeal on July 24, 2009. A signed final judgment was not entered until August 3, 2009. An appeal made to this court from a superior court ruling before the entry of a signed final judgment is not, however, jurisdictionally defective; rather, it simply takes effect when the clerk of the court enters the final judgment. See *Guinn v. Schweitzer*, 190 Ariz. 116, 117, 945 P.2d 837, 838 (citing *Barassi v. Matison*, 130 Ariz. 418, 421-22, 636 P.2d 1200, 1203-04 (1981)).

supervening indictment, defendant had a valid explanation for her failure to appear at the arraignment. The State counters that regardless of any defect in the service of notice of supervening indictment, defendant was informed of her obligation to appear at all subsequently scheduled proceedings and make contact with her appointed counsel within two days of her release. The State further contends that defendant's failure to contact her appointed counsel as ordered or to update the court with any changes to her address as required constitutes deliberate ignorance of the proceedings against her and therefore cannot excuse her failure to appear. Based on the record before us, we agree with the State and conclude that the trial court did not abuse its discretion in forfeiting the bond.

¶17 We note first that Badilla has failed to provide this court with the transcripts of any of the hearings conducted in the superior court. See ARCAP 11(b); see *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (noting that appellant is responsible for making certain that the record on appeal contains all transcripts necessary for reviewing court to consider issues raised on appeal and when that party fails to include necessary items, the court assumes that they would support trial court's findings and conclusions). Although the record does not indicate that any evidentiary hearings were conducted, the minute entries reflect the presence of

defendant's attorney at the two arraignment hearings and that he or she made statements to the court during at least one of those hearings. Without a transcript, we obviously do not know what defense counsel told the court. Furthermore, Badilla asserts on appeal that at the June 26, 2009, bond hearing, he provided "factual and legal grounds to excuse and explain the non-appearance of [defendant]." Because he failed to provide a transcript of the bond hearing, we must presume to the contrary.

¶18 When considering whether to order the forfeiture of an appearance bond the trial court may consider all the relevant circumstances, including, "the defendant's willfulness in violating the order to appear, the effort and expense expended by the surety in trying to locate and apprehend the defendant, any intangible costs, or any other aggravating or mitigating factors that prevented the defendant from appearing." *In re Bond Forfeiture in Pima County Cause No. CR-20031154*, 208 Ariz. 368, 370, ¶ 5, 93 P.3d 1084, 1086 (App. 2004) (citing *State v. Old West Bonding Co.*, 203 Ariz. 468, 475, ¶ 26, 56 P.3d 42, 49 (App. 2002)). Here, the trial court found:

[T]he Defendant has never appeared before the court to answer to the charges in this matter following her release on \$45,000.00 cash bond [posted] March 30, 2004. The bond poster, Mr. Badilla, has informed the Court that he has had no contact with the Defendant since her release on bond, and that he does not have any information regarding her whereabouts. Although the

hearing date noted on the bond receipt did not occur, the bond poster was on notice that the Defendant was required to appear at all subsequent hearings. The Defendant and bond poster were both endorsed on the Minute Entry dated May 3, 2004, which ordered that a Bench Warrant issue, a clear indication that [D]efendant was still required to appear and answer to the charges. The bond poster was again endorsed on the Minute Entry dated August 4, 2004, following a Bond Forfeiture Hearing. That Minute Entry affirmed the warrant and affirmed the previously posted bond. Based upon this notice, the bond poster should have known that the Defendant had a continuing duty to appear.

Badilla does not refute the contention that defendant had proper notice of subsequent proceedings and an ongoing obligation to remain in contact with her attorney and the court regarding the charges against her; nor does he attempt to negate his obligations as the bond poster. See *Id.* at 369, ¶ 4, 93 P.3d at 1085 (recognizing that “[i]t is well settled in this jurisdiction that a surety assumes the risk of a defendant’s failure to appear”).

¶19 In addition, “a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it.” Ariz. R. Crim. P. 9.1. The defendant’s voluntary absence may be inferred if “the defendant had personal knowledge of the time of the proceeding, his right to be present, and the warning that the proceeding would take place in his absence if he failed to appear.” *State v. Muniz-Caudillo*,

185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996) (citing *State v. Tudgay*, 128 Ariz. 1, 2, 623 P.2d 360, 361 (1981)); Ariz. R. Crim. P. 9.1.

¶10 As the trial court found, defendant did not have personal knowledge of the April 19, 2004, arraignment. It is undisputed, however, that defendant had personal knowledge of the April 8, 2004, preliminary hearing and her rights and obligations prior to her failure to appear. The cash bail receipt, which was provided to defendant when she was released from custody, informed her that "Defendant is to appear on: April 8, 2004 at 08:30" and "failure to appear on the above date or *any subsequent scheduled court date* may result in forfeiture of this bond and the issuance of another warrant for the Defendant's arrest." (Emphasis added). Additionally, the release order prominently warned defendant of her right to be present at all pretrial and trial proceedings concerning this case and that a failure to appear could result in a warrant for her arrest and the proceedings going forward in her absence. Moreover, the release order notified defendant of her obligation to "continue to reside at the present address" or alternatively "to notify the court promptly in the event [she] change[d] [her] place of residence." It also notified defendant that a public defender had been appointed to represent her, provided appointed

counsel's contact information, and ordered her to contact appointed counsel "within 2 days of release [from] jail."

¶11 Even assuming that defendant did not receive the notice of supervening indictment resetting the April 8, 2004, hearing for April 19, 2004, she was given notice of her obligation to appear before the court on April 8, 2004, and at all subsequently scheduled hearings as detailed on the release order. The record reflects that her appointed counsel was properly noticed of subsequent hearings and appeared on defendant's behalf at both of the arraignment proceedings scheduled by the court. Further, nothing in the record suggests that defendant appeared at the court in anticipation of the preliminary hearing scheduled for April 8, 2004, or that she made any effort to contact her appointed attorney or the court to update her address or to learn of upcoming proceedings despite her being ordered to do so. See *Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354 (finding that defendant had voluntarily absented himself from proceedings, even though he did not have actual notice of original or continued trial dates, in view of the fact that prior to trial, court admonished defendant that if he did not appear the trial would continue in his absence and defendant failed to keep in contact with counsel to ascertain trial dates). Moreover, Badilla was noticed on all minute entries at his last known address and personally appeared

at the hearing where the bond and bench warrant of March 30, 2004, were affirmed. Badilla again appeared at the February 6, 2009, bond forfeiture hearing and requested additional time to "locate and surrender the Defendant on the bench warrant" but failed to produce defendant at any of the subsequently scheduled bond forfeiture hearings.

¶12 Nor do we find persuasive Badilla's assertion that the trial court improperly imposed a time limit within which Badilla could seek exoneration when it referred to the five-year period that elapsed from the time the bond was posted until Badilla filed for exoneration. The reference to the five-year period was offered merely to illustrate that defendant had ample opportunity to comply with the requirement to appear on the charges and Badilla had similarly ample opportunity to locate and surrender her for this purpose. We therefore decline to find any error on this basis.

¶13 Finally, Badilla argues the trial court erred in finding that no reasonable excuse or mitigating circumstances existed explaining defendant's failure to appear. He contends that the defendant's release on bond was based on a contract between defendant and the State, which required defendant to appear on April 8, 2008, for a preliminary hearing but did not equate to a notice and a requirement to appear for subsequent hearings. For the reasons discussed above, *supra* ¶ 10, we

disagree. Moreover, when a surety posts a bond it is not a contract between the defendant and the State as Badilla contends; it is a contract between the surety and the State wherein the surety "agrees with the state to produce the defendant at the necessary court appearance or pay the penalty in the amount of the bond." *Gearing v. State*, 24 Ariz. App. 159, 160, 536 P.2d 1051, 1052 (1975); see also Ariz. R. Crim. P. 7.1(e) (stating that a "'surety' is one . . . who executes an appearance bond and binds himself or herself to pay its amount if the person released fails to comply with its conditions"). In keeping with the obligations of this contract, the surety has the duty to "keep informed of the defendant's whereabouts and his required court appearances or suffer the consequences." *Gearing*, 24 Ariz. App. at 160, 536 P.2d at 1052.

¶14 When Badilla posted the appearance bond for the defendant, he accepted the responsibility for keeping track of defendant and ensuring she appear before the court as required by the terms of her release. He admits that he has had no contact with the defendant since her release and has no information about her current whereabouts. It is undisputed that defendant has never appeared before the court to answer the charges against her and Badilla has not offered any reason for her absence or his failure to remain informed in that regard. The trial court did not err in concluding that no reasonable

excuse or mitigating circumstances existed explaining defendant's failure to appear.

CONCLUSION

¶15 For the foregoing reasons, we affirm the trial court's order forfeiting Badilla's \$45,000 bond.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

SHELDON H. WEISBERG, Judge