

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TIMOTHY MICHAEL AUBER,

Defendant

AND

AMERICAN FIRE INSURANCE COMPANY

AND

A-1 BAIL BONDS, INC. (AND TOM COTA, LICENSED SURETY BAIL
AGENT),

Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 23 BE 0024

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 19 CR 51

BEFORE:

Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:

Dismissed.

Atty. J. Kevin Flanagan, Belmont County Prosecuting Attorney and *Atty. Jacob Manning*, Assistant Prosecuting Attorney, for Plaintiff-Appellee

Atty. Gary Rosenhoffer, for Appellants

Dated: March 21, 2024

PER CURIAM.

{¶1} Appellants American Fire Insurance Company, A-1 Bail Bonds, Inc. and Tom Cota, licensed surety bail agent, posted a surety bond for Timothy Michael Auber in a matter where he was criminally charged. Appellants filed an appeal following the denial of a motion for remission of the bond by the trial court. However, for the reasons set forth herein, this appeal is moot and must be dismissed.

History of the Case

{¶2} A review of the procedural posture underlying this appeal is necessary to fully understand our decision in this matter. Auber was charged with two counts of aggravated possession of drugs, a fifth-degree felony in violation of R.C. 2925.11(A)(1)(a), and one count of aggravated possession of drugs, a third-degree felony in violation of R.C. 2925.11(A) and R.C. 2925.11(C)(1)(b). On February 21, 2019, Auber waived his right to a preliminary hearing in the Eastern Division County Court in Belmont County and the case was bound over to the Grand Jury of Belmont County and the Belmont County Court of Common Pleas. Auber was released on a recognizance bond.

{¶3} On May 14, 2019, a bind-over review hearing was scheduled to be held in the Belmont County Court of Common Pleas. Auber failed to appear, and a warrant was issued for his arrest. On November 5, 2020, the trial court scheduled a second review hearing after learning of Auber's arrest. That hearing was continued until November 9,

2020 and Auber continued to be held without bond. Due to injuries sustained in a traffic accident that occurred while he was in custody, Auber was unable to attend the November 9 hearing and the matter was again rescheduled.

{¶4} On November 12, 2020, the bind-over review hearing was held. The State planned to present the charges against Auber to the Grand Jury on December 7, 2020. The Court set Auber’s bond in the amount of \$10,000, cash or surety, and imposed other conditions. On November 17, 2020, Appellants posted a surety bond for Defendant Auber and he was released.

{¶5} On November 23, 2020, another warrant was issued for Auber due to his failure to meet with his pretrial supervisor. On January 11, 2021, Auber appeared before the trial court for a review of his bond. The bind-over review hearing was rescheduled at Auber’s request and the Court reinstated Auber’s \$10,000 bond.

{¶6} On January 25, 2021, Auber failed to appear for the bind-over review hearing. His previously reinstated bond was revoked. The trial court scheduled a bond forfeiture hearing for March 1, 2021 and ordered Appellant Cota “*** to then appear to show cause as to why the surety should not be Ordered to pay the amount of the bond to the Clerk.”

{¶7} On January 29, 2021, Appellants filed a motion seeking release from their obligations pursuant to the surety bond posted for Auber. On the same day, the trial court denied the motion stating, “[a]s Defendant’s bond has not yet been Ordered forfeited, the Motion of the bond sureties to be released from further obligations is overruled.”

{¶8} On March 1, 2021, the bond forfeiture hearing was held. Appellant Cota appeared without counsel. Following the hearing, the trial court issued a judgment entry providing: “*** Defendant’s bond is Ordered forfeited and Tom Cota is Ordered to pay

and forfeit that amount to the Clerk. However, the Court will stay execution of the forfeiture Order to permit the surety to capture Defendant. That is, the forfeiture Order is stayed until Monday, March 29, 2021, at 1:00 p.m. If Defendant is not in custody of the Belmont County Sheriff by then, Tom Cota is Ordered to pay the amount of \$10,000.00 to the Clerk, then.” As Auber was not apprehended, on March 30, 2021, the trial court issued a show cause entry when the payment was not made.

{19} On April 16, 2021, Appellants filed a motion seeking release of their obligations associated with Auber’s bond. On the same day, the trial court conducted a show cause hearing. Appellant Cota and Appellant A-1 appeared for the hearing. The trial court issued an entry in which it provided two alternative options for Appellants to resolve the contempt charge. The parties elected the second:

The second was an agreed stay of execution of the forfeiture Order followed by a stipulated and Ordered forfeiture date. Both sides agreed to this second option and to the following stipulated terms:

1. Execution on the forfeiture Order is stayed until Friday, June 11, 2021, at 12:00 p.m.;
2. If Defendant is in the Sheriff’s custody by then, the forfeiture Order will be vacated and both sureties will be released from further responsibility;
and
3. If, however, Defendant is not in the Sheriff’s custody by then, the sureties will pay and forfeit the amount of \$10,000.00 to the Clerk on or before Monday, June 14, 2021.

(April 20, 2021 Trial Court Judgment Entry.)

{¶10} On June 3, 2021, Appellants filed a “Notice as to Defendant’s Whereabouts” with the Court, advising that Auber was being held by law enforcement authorities in West Virginia. On June 7, 2021, Appellants paid the forfeiture bond as ordered by the trial court in the amount of \$10,000.

{¶11} The case against Auber was ultimately resolved in Belmont County. Auber entered a guilty plea to two counts of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(a), a fifth-degree felony, and one count of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(b), a third-degree felony. The trial court sentenced Auber to a total term of 24 months of imprisonment.

{¶12} On May 23, 2023, Appellants filed a motion for remission, which was denied by the trial court as “being both stale and without merit.” This decision forms the basis of this appeal.

Mootness

{¶13} “A case becomes moot when its issues are no longer live, or when the parties no longer have a legally cognizable interest in the outcome.” *U.S. Bank Natl. Assn. v. Marcino*, 7th Dist. No. 09 JE 29, 2010-Ohio-6512, ¶ 7. Nearly two years after payment of the forfeiture bond as ordered by the trial court, Appellants filed a motion with the trial court seeking remission. However, Appellants had voluntarily paid the \$10,000 in satisfaction of the forfeiture order on June 7, 2021.

{¶14} It is well-settled law that satisfaction of a judgment renders an appeal moot. *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 551 N.R.2d 1249, 1250 (1990). “ ‘Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied,

such payment puts an end to the controversy, and takes away from the defendant the right to appeal or prosecute error or even to move for vacation of judgment.’ ” *Id.*, quoting *Rauch v. Noble*, 169 Ohio St. 314, 316, 8 O.O.2d 315, 316, 159 N.E.2d 451, 453 (1959), quoting *Lynch v. Lakewood City School Dist. Bd. of Edn.*, 116 Ohio St. 361, 156 N.E. 188 (1927), paragraph three of the syllabus.

{¶15} There is no evidence in the record to suggest that payment of the \$10,000 involved any duress. Similarly, there is no evidence in the record to suggest this payment was made as the result of any fraudulent actions. In fact, not only did Appellants voluntarily surrender the \$10,000 bond forfeiture, they did so early. As ordered by the trial court, payment was not due until June 14, 2021. Appellants satisfied the forfeiture order on June 7, 2021. It is important to note Appellants **agreed** to the forfeiture payment **and paid the same** as a resolution of the show cause hearing held on April 16, 2021. Appellants did not seek remission of the bond pursuant to R.C. 2937.39 until nearly two years later.

{¶16} R.C. 2937.39 provides for remission as follows: “**After judgment has been rendered against surety** or after securities sold or cash bail applied, the court or magistrate, on the appearance, surrender, or re-arrest of the accused on the charge, may remit all or such portion of the penalty as it deems just ***.” (Emphasis added).

{¶17} We have previously held “**** when considering a request for post-appearance bond remission pursuant to R.C. 2937.39, a trial court should balance the reappearance of the accused and the efforts expended by the surety to effectuate the reappearance against the inconvenience, expense, and delay suffered by the state and any other factors the court finds relevant.” *State v. Smith*, 7th Dist. No. 05 JE 49, 2006-

Ohio-4614, ¶ 44, quoting *State v. Jackson*, 153 Ohio App.3d 520, 795 N.E.2d 57, 2003-Ohio-2213, at ¶ 9. However, Appellants did not avail themselves of this remedy.

{¶18} If Appellants sought to recoup all or a portion of the penalty assessed, Appellants should have sought the relief afforded in R.C. 2937.39 prior to the payment of the \$10,000 judgment and certainly prior to nearly two years after such payment. Appellant chose not to avail themselves of this statutory remedy and instead satisfied the judgment without seeking remission.

{¶19} Appellants chose to pay the forfeiture as ordered in lieu of pursuing other legal remedies to stay enforcement or to otherwise dispute the order. In addition, Appellants took no action for nearly two years after payment. The satisfaction of judgment in this case renders this appeal moot. To proceed without an actual controversy would amount to merely seeking an advisory opinion and “ ‘ *** the court will not perform a vain act when there is no real issue presented in the appeal.’ ” *Freedom Mtge. Corp. v. Boston*, 7th Dist. No. 14 CO 0036, 2016-Ohio-7016, ¶ 9, quoting *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 17-18. Dismissal is the appropriate remedy for a moot appeal.

{¶20} Therefore, this appeal is hereby dismissed. Costs to be paid by Appellants.

JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

JUDGE MARK A. HANNI

NOTICE TO COUNSEL

This document constitutes a final judgment entry.