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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LIBERTY BAIL BONDS and BANKER'S
INSURANCE COMPANY, as Real
Parties in Interest for
Defendant Miguel Fernando Pena, *Appellants*,

and

AMERI-BAIL BONDS and LEXINGTON
NATIONAL INSURANCE COMPANY, as
Real Parties in Interest for
Defendant Scott Alan Sokol, *Appellants*.

No. 1 CA-CV 12-0213

FILED 12-5-2013

Appeal from the Superior Court in Maricopa County

No. CR2007-171597-002

CR2011-120058-001

The Honorable Brian S. Rees, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Maricopa County Attorney's Office , Phoenix
By Kimberly Felcyn

Counsel for Appellee

Clifford M. Sherr, Attorney at Law, Phoenix
By Clifford M. Sherr

Counsel for Appellants

MEMORANDUM DECISION

Chief Judge Diane M. Johnsen delivered the decision of the Court, in which Presiding Judge Patricia K. Norris and Judge Jon W. Thompson joined.

J O H N S E N, Judge:

¶1 In these consolidated appeals, bondsmen appeal the superior court's order forfeiting their appearance bonds. The bondsmen argue the court abused its discretion by concluding the defendants failed to offer good cause for their failures to appear. For the following reasons, we affirm the court's findings.¹

FACTS AND PROCEDURAL BACKGROUND

¶2 After the State indicted Scott Alan Sokol on a charge of armed robbery, a Class 2 dangerous felony, the superior court granted Sokol's release upon the condition that he post a secured appearance bond and remain under house arrest with electronic monitoring.² Ameri-Bail Bonds and Lexington National Insurance Company (collectively "Lexington") posted a \$12,000 appearance bond securing his release. After Sokol failed to appear at a status conference, the court issued a bench

¹ In a separate opinion, we address other issues raised in this appeal. See ARCAP 28(g).

² We examine the evidence "in the light most favorable to support the judgment of the trial court." *State v. Garcia Bail Bonds*, 201 Ariz. 203, 205, ¶ 5, 33 P.3d 537, 539 (App. 2001).

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warrant for his arrest and, pursuant to Arizona Rule of Criminal Procedure ("Rule") 7.6(c), scheduled a bond forfeiture hearing. Sokol was arrested 20 days after the status conference "at a location that was not his house." By the time of the forfeiture hearing, Sokol was in the custody of the Department of Corrections and was not present at the hearing. The bondsmen asserted the State had some evidence that at a hearing after Sokol's arrest, the judge hearing Sokol's case had "felt that the failure to appear was an accident because of confusion over the court dates." The court hearing the forfeiture matter, however, found no reasonable cause for Sokol's failure to appear and no evidence in mitigation.

¶3 Miguel Fernando Pena was charged with transportation of marijuana, a Class 2 felony, and money laundering, a Class 3 felony. Liberty Bail Bonds and Banker's Insurance Company (collectively "Banker's") posted a \$25,000 appearance bond securing his release. After Pena, like Sokol, failed to appear at a later proceeding, the court issued a bench warrant for his arrest and scheduled a bond forfeiture hearing. About five weeks later, officers arrested Pena after they encountered him during a traffic stop. At the forfeiture hearing, Pena testified he had failed to appear at his sentencing hearing because he narrowly avoided being kidnapped and feared for his life. The court found there was no reasonable cause for his failure to appear.

¶4 The court consolidated the bond hearings in both matters and entered a consolidated judgment forfeiting the bonds. The bondsmen timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2013).³

DISCUSSION

¶5 Upon a defendant's failure to appear in court as required, the superior court schedules a hearing "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, if the violation of a release condition "is not explained or excused, the court may enter an appropriate order of judgment forfeiting all or part of the amount of the bond, which shall be enforceable by the state as any civil judgment." Ariz. R. Crim. P. 7.6(c)(2). The bondsman must provide by a preponderance of the

³ Absent material revisions after the relevant date, we cite a statute's current version.

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evidence an explanation or excuse for a defendant's failure to appear. *State v. Bail Bonds USA*, 223 Ariz. 394, 397, ¶ 11, 224 P.3d 210, 213 (App. 2010). The explanation or excuse required by Rule 7.6(c)(2) must be a reasonable cause. *State v. Old W. Bonding Co.*, 203 Ariz. 468, 471, ¶ 14, 56 P.3d 42, 45 (App. 2002).

¶6 The superior court is the trier of fact at a forfeiture hearing and, contrary to the bondsmen's argument on appeal, it has discretion pursuant to Rule 7.6(c)(2) to accept or reject the credibility of any witness's testimony. *Haas v. Morrow*, 54 Ariz. 455, 456, 97 P.2d 204, 204 (1939).

¶7 Lexington argues that because Sokol's failure to appear was not willful, there was reasonable cause for his nonappearance under Rule 7.2(c)(1). The willfulness of the defendant's nonappearance is one of several factors the court may consider in its discretion in deciding whether and in what amount of the bond to forfeit. *Old W. Bonding Co.*, 203 Ariz. at 474-75, ¶¶ 23, 26, 56 P.3d at 48-49.

¶8 Lexington contends Sokol's failure to appear was a good-faith mistake that the court must excuse. In other contexts, Arizona courts have borrowed the concept of excusable neglect from Arizona Rules of Civil Procedure 55(c) and 60(c) concerning relief from judgments in the civil context to decide whether a mistaken failure to appear or to perform some other act constitutes good cause. See *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304-05, ¶ 16, 173 P.3d 463, 468-69 (App. 2007) (parental severance hearing); *Maldonado v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 476, 478, 897 P.2d 1362, 1364 (App. 1994) (failure to appear at unemployment insurance benefit hearing).

¶9 In the civil context, "[t]he neglect must be "excusable," not merely 'unexplained,'" *Baker Int'l Assocs., Inc. v. Shanwick Int'l Corp.*, 174 Ariz. 580, 583, 851 P.2d 1379, 1382 (App. 1993), or mere carelessness, *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871 P.2d 698, 710 (App. 1993). The only explanation offered at the hearing was that Sokol made an unexplained mistake about his court date.⁴

⁴ Lexington also argues that the bond would have not been forfeited in its entirety if it had timely received notice of Sokol's failure to appear. This argument fails when, as here, the bondsman has been afforded an opportunity to contest the forfeiture. *Old W. Bonding Co.*, 203 Ariz. at 475, ¶ 28, 56 P.3d at 49.

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¶10 Banker's argues that Pena's excuse, fear for his life, is more compelling. Even if we accept that argument, the superior court did not misinterpret Rule 7.6(c)(2) by considering Pena's credibility and other evidence, such as Pena's failure to turn himself in thereafter. *See Morrow*, 54 Ariz. at 456, 97 P.2d at 204.

¶11 In sum, the court did not misinterpret Rule 7.2(c)(1) or otherwise abuse its discretion in concluding that the explanations and excuses offered by the bondsmen did not constitute reasonable cause for the defendants' failures to appear.

CONCLUSION

¶12 For the foregoing reasons, the court in the bond forfeiture hearing acted within its discretion pursuant to Arizona Rule of Criminal Procedure 7.6(c)(2) in finding that the explanations and excuses offered by the defendants and the bondsmen did not amount to reasonable cause. We affirm those findings by the court.



Ruth A. Willingham · Clerk of the Court
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