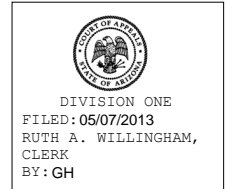


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CV 12-0541
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
LEXINGTON NATIONAL INSURANCE) Rule 28, Arizona Rules of
COMPANY,) Civil Appellate Procedure)
)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-152420-003

The Honorable Brian S. Rees, Commissioner

AFFIRMED

William G. Montgomery, Maricopa County Attorney Phoenix
By Kimberley Felcyn, Deputy County Attorney
Attorneys for Appellee

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

B R O W N, Judge

¶1 Lexington National Insurance Company ("Lexington")
appeals the superior court's judgment forfeiting an appearance
bond. For the following reasons, we affirm.

BACKGROUND

¶2 Lexington posted an appearance bond on behalf of Alex Andrew Fernandez, who was charged with seven felony drug counts.¹ A release order required Fernandez, among other things, to "appear to answer and submit to all further orders and processes of the court."

¶3 At a hearing on February 7, 2012, Fernandez entered into a plea agreement that mandated incarceration and required him to plead guilty to attempted possession for sale of narcotic drugs, a Class 3 felony, and misconduct involving weapons, a Class 4 felony. The superior court deferred acceptance of the plea until the time of sentencing and affirmed Fernandez's prior release orders. When Fernandez failed to appear at the sentencing hearing, the court issued a bench warrant for his arrest and scheduled a bond forfeiture hearing. After conducting the hearing, the court found no reasonable cause existed for Fernandez's failure to appear and entered a judgment forfeiting the bond.

¹ Although the bond receipt is not in the record, the parties do not dispute this fact.

¶14 Lexington timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2013).²

DISCUSSION

¶15 The primary purpose of an appearance bond is to ensure that a person charged with a crime is present at court proceedings. *State v. Garcia Bail Bonds*, 201 Ariz. 203, 208, ¶ 19, 33 P.3d 537, 542 (App. 2001). If it appears to the trial court that a person released on an appearance bond has violated a condition of the bond, it must issue a bench warrant for that person's arrest and, within 120 days, conduct a bond forfeiture hearing. Ariz. R. Crim. P. 7.6(c)(1). At the forfeiture hearing, the court may order all or part of an appearance bond forfeited if the violation is not explained or excused. Ariz. R. Crim. P. 7.6(c)(2). In determining whether to order forfeiture, the court may consider all relevant circumstances, including a "defendant's willfulness in violating the order to appear, the effort and expense expended by Lexington 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,

² Absent material revisions after the relevant date, we cite a statute's current version.

1086 (App. 2004) (citing *State v. Old West Bonding Co.*, 203 Ariz. 468, 475, ¶ 26, 56 P.3d 42, 49 (App. 2002)).

¶16 We review the superior court's order forfeiting an appearance bond for an abuse of discretion, but consider its interpretation of the court rules governing appearance bonds de novo. *Garcia Bail Bonds*, 201 Ariz. at 205, ¶ 5, 33 P.3d at 539. We view the evidence in the light most favorable to upholding the judgment. *Id.*

¶17 Lexington contends the superior court committed reversible error by releasing Fernandez because, by agreeing to the plea, he was "convicted" for purposes of Arizona Rule of Criminal Procedure 7.2(c)(1). That rule provides that the court shall not release a defendant on bond once he has been convicted of an offense for which he is likely to be imprisoned, except in circumstances not implicated in this case. Lexington argues the court's release of Fernandez violated Rule 7.2(c)(1) and therefore required the court to exonerate the appearance bond as a matter of law because it caused significant prejudice to Lexington by materially changing its obligation.

¶18 In support of its argument, Lexington cites *In re Lazcano*, 223 Ariz. 280, 222 P.3d 896 (2010). In that case, Lazcano was arrested and indicted for burglary and sexual assault in Texas in 2002. *Id.* at 281, ¶ 2, 222 P.3d at 897. Pursuant to a plea agreement, he pled no contest to a reduced

charge of attempted sexual assault and the court deferred adjudication while he completed a ten-year term of probation. *Id.* Under the deferred adjudication, if Lazcano successfully completed the probation the court could dismiss the charges against him, but could send him to prison without a trial if he did not. *Id.* 282, ¶ 5, 222 P.3d at 898.

¶9 In 2008, after graduating from law school and passing the Arizona bar examination, Lazcano applied for admission to the Arizona Bar. *Id.* at 281, ¶ 3, 222 P.3d at 897. The Arizona Supreme Court held that the Committee on Character and Fitness correctly treated the deferred adjudication as a conviction for purposes of determining whether Lazcano had good moral character because "Arizona law defines a conviction as a determination of guilt by verdict, finding, or the acceptance of a guilty or no contest plea; formal entry of judgment is not required." *Id.* at 282, ¶ 7, 222 P.3d at 898.

¶10 Lexington contends that the superior court's decision to defer acceptance of Fernandez's plea was analogous to the Texas court's deferred adjudication in *Lazcano* and therefore a "conviction" under Arizona law. We disagree. The Texas law allowing for the deferred adjudication procedure at issue in *Lazcano* required the trial court to hear evidence and find that it substantiated the defendant's guilt. Tex. Code Crim. Proc. Ann. art. 42.12, sec. (5)(a) (West 2012). We presume the Texas

court followed that procedure and therefore its deferred adjudication satisfied Arizona's definition of a conviction, as discussed by the Arizona Supreme Court. *Lazcano*, 223 Ariz. at 282, ¶ 7, 222 P.3d at 898 (stating Arizona law defines a conviction as a determination of guilt by finding).³ In contrast, the court in this case did not hear any evidence or make a finding regarding Fernandez's guilt and did not accept his guilty plea. See *id.*

¶11 Because the superior court did not accept Fernandez's plea agreement, he was not "convicted" for purposes of Arizona Rule of Criminal Procedure 7.2(c)(1), and the court did not violate that rule by releasing him on bond. See *State v. Green*, 174 Ariz. 586, 587, 852 P.2d 401, 402 (1993) (stating a "conviction generally occurs after a determination of guilt is made" pursuant to Ariz. R. Crim. P. 7.2(b)); Ariz. R. Crim. P. 26.1(c) (defining "determination of guilt" as "a verdict of guilty by a jury, a finding of guilt by a court following a non-jury trial, or the acceptance by the court of a plea of guilty or no contest."). We therefore reject Lexington's argument that the superior court was required to exonerate the appearance bond as a matter of law.

³ Further, we note that although the Texas court ostensibly "deferred adjudication" on Lazcano's no contest plea, it retained the discretion to send Lazcano to prison without a trial if he did not comply with the probation conditions. *Lazcano*, 223 Ariz. at 282, ¶ 5, 222 P.3d at 898.

CONCLUSION

¶12 For the foregoing reasons, we affirm.

_____/s/_____
MICHAEL J. BROWN, JUDGE

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, PRESIDING JUDGE

_____/s/_____
DIANE M. JOHNSEN, JUDGE