

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

AZTECA BAIL BONDS, *et al.*, *Appellants*.

No. 1 CA-CV 16-0300
FILED 4-20-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-154789-001
The Honorable Richard L. Nothwehr, 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

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

C A T T A N I, Judge:

¶1 Azteca Bail Bonds and Banker’s Insurance Company (collectively, “Appellants”) appeal the superior court’s order forfeiting a \$75,000 appearance bond posted on behalf of defendant Devin Williams. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In late 2014, Williams was charged in Maricopa County Superior Court with burglary, three counts of theft, possession of narcotic drugs for sale, and sale or transportation of narcotic drugs. Williams was released from custody pending trial after Appellants posted a \$75,000 appearance bond in November 2014.

¶3 On March 3, 2015—two days before a scheduled pretrial conference in the criminal case—Appellants filed a motion to exonerate the bond, stating that Williams had been arrested in Texas “on new charges of marijuana possession, attempting to evade arrest and probation violation” and would be unable to appear. When Williams failed to appear for the March 5 hearing, the superior court issued a bench warrant for his arrest, denied Appellants’ motion to exonerate the bond, and set a bond forfeiture hearing. Over the next year, the forfeiture hearing was continued five times at Appellants’ request.

¶4 The court proceeded with the forfeiture hearing in March 2016, after Williams had been returned to Arizona. Appellants requested that the court forfeit at most only the cost expended by the State to transport Williams back to Arizona (less than \$2,800) and exonerate the balance of the bond, noting that they had cooperated with the State to provide information regarding Williams’s incarceration in Texas, and that the information they provided allowed the Maricopa County Sheriff’s Office to immediately return Williams to Arizona after he was released in Texas. Appellants further argued that the year-long delay had not prejudiced or delayed the State in the underlying criminal case because that case involved multiple

STATE v. AZTECA, et al.
Decision of the Court

defendants, although counsel acknowledged that he was not familiar with the criminal proceedings. Additionally, the indemnitor, Williams's mother, stated that any forfeiture would result in a financial hardship.

¶5 The State noted that Williams had violated his release conditions by leaving Arizona without permission, and that he had apparently committed a new offense while in Texas (although Williams's counsel suggested that the Texas incarceration was for a probation violation from a prior offense, not new charges). The State confirmed that the underlying criminal case had been designated complex, but was unable to specify whether the delay prejudiced that prosecution.

¶6 The superior court ordered the full \$75,000 bond forfeited. Appellants then filed a motion for new trial, arguing that the forfeiture judgment was contrary to law (on the basis that the court had improperly weighed the factors bearing on how much of the bond to forfeit) and that forfeiture of the full \$75,000 constituted excessive damages. *See* Ariz. R. Civ. P. 59(a)(1)(E), (H). The court denied the motion, stating that it had considered all of the factors and arguments presented in the first instance. The court further explained that Williams lacked good cause for his failure to appear, and that the public's interest in the underlying criminal case substantially outweighed Appellants' proffered mitigation.

¶7 The court re-entered the \$75,000 forfeiture judgment (correcting formal defects at Appellants' request), and Appellants timely appealed. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).¹

DISCUSSION

¶8 Appellants argue that the court erred by forfeiting the full amount of the \$75,000 bond. We review the superior court's forfeiture determination for an abuse of discretion, considering the record in the light most favorable to sustaining the judgment. *State v. Old West Bonding Co.*, 203 Ariz. 468, 471, ¶ 9 (App. 2002).

¶9 The primary purpose of an appearance bond is to ensure a criminal defendant appears at court proceedings. *State v. Garcia Bail Bonds*, 201 Ariz. 203, 208, ¶ 19 (App. 2001). The superior court has discretion to forfeit all or part of the bond if the defendant violates a condition of the appearance bond and the violation is not explained or excused. Ariz. R.

¹ Absent material revisions after the relevant date, we cite a statute's current version.

STATE v. AZTECA, et al.
Decision of the Court

Crim. P. 7.6(c); *see also* Ariz. R. Crim. P. 7.6(d)(3) (granting the court discretion if and how to exonerate the bond). Relevant factors for the court to consider in determining whether to forfeit all, part, or none of the bond may include:

- (1) whether the defendant's failure to appear due to incarceration arose from a crime committed before or after being released on bond;
- (2) the willfulness of the defendant's violation of the appearance bond;
- (3) the surety's effort and expense in locating and apprehending the defendant;
- (4) the costs, inconvenience, and prejudice suffered by the state as a result of the violation;
- (5) any intangible costs;
- (6) the public's interest in ensuring a defendant's appearance; and
- (7) any other mitigating or aggravating factors.

Old West, 203 Ariz. at 475, ¶ 26. The surety has the burden to show by a preponderance of the evidence some explanation or other mitigating factor excusing the defendant's non-appearance. *See State v. Bail Bonds USA*, 223 Ariz. 394, 397, ¶ 11 (App. 2010).

¶10 Appellants concede that they did not provide an explanation or excuse for Williams's failure to appear, and that the superior court thus had discretion to forfeit the bond. They argue, however, that the court abused its discretion by forfeiting the entire bond based on an unreasonable balance of the *Old West* factors, an impermissibly myopic focus on Williams's violation of one release condition, and a misunderstanding of the public policy supporting rewarding the surety for its efforts in apprehending an absconding defendant by forfeiting only transport costs. Although the superior court could have lowered the forfeiture amount (and even if a different judge might have reached a different decision), it was not required to do so, and the court's decision was not an abuse of discretion. *See also State v. Int'l Fid. Ins. Co.*, 238 Ariz. 22, 26, ¶ 11 (App. 2015) ("[W]e do not re-weigh those factors to determine whether we would reach the same decision as the trial court.").

¶11 As the superior court noted, Williams willfully violated his release conditions by leaving Arizona to return to Texas. Although violation of a release condition alone—without violating the appearance bond itself—may not justify forfeiture of the bond, *see State v. Sur. Ins. Co.*, 127 Ariz. 493, 495 (App. 1980), in this case absconding to Texas (violating Williams's conditions of release) led directly to his failure to appear (violating the conditions of the bond). The court did not err by considering this factor and its effect on Williams's failure to appear. *Cf. Int'l Fid. Ins. Co.*,

STATE v. AZTECA, et al.
Decision of the Court

238 Ariz. at 25, ¶ 8 (“The primary purpose of an appearance bond is to ensure that the defendant appears at court proceedings.”).

¶12 Nor did the court focus on this factor to the exclusion of all others. Even though Appellants did not request that the court make specific findings of fact, *cf. id.* at 26 & n.7, ¶ 11, the record reflects that the court considered all of the factors presented at the forfeiture hearing.

¶13 The court found—and the record, including Appellants’ own statements, supports the finding—that Williams’s incarceration in Texas arose from new charges as well as a probation violation. A defendant’s voluntary act (commission of a new offense) leading to non-appearance militates in support of forfeiture. *See Garcia Bail Bonds*, 201 Ariz. at 205–06, ¶¶ 10, 12. Additionally, Appellants offered only speculation that the State was not inconvenienced or prejudiced (beyond payment of transport costs) by Williams’s violation, year-long absence, and return two months before trial in the criminal case was set to begin. *See Bail Bonds USA*, 223 Ariz. at 397, ¶ 11; *see also* Ariz. R. Crim. P. 8.2(a)(3) (270-day speedy-trial time limit for complex cases). And the superior court reasonably gave substantial weight to the public’s interest in securing Williams’s appearance to answer in the underlying criminal case, which involved a 15-count indictment against Williams and three co-defendants arising from a string of burglaries and thefts against multiple victims spanning a period of months.

¶14 As Appellants point out, they made an effort to locate Williams, cooperated with the State to facilitate his return, and offered to pay the cost of transporting Williams back to Arizona. We recognize that a surety’s efforts to locate an absconding defendant could justify a more limited forfeiture, which could encourage similar efforts in the future. *Cf. Old West*, 203 Ariz. at 474–75, ¶ 24 (noting that time between defendant’s non-appearance and forfeiture hearing gives the surety “an opportunity to avoid or mitigate the forfeiture” by finding and surrendering the defendant or presenting other mitigating circumstances); *State v. Amador*, 648 P.2d 309, 312–13 (N.M. 1982). But the superior court retains discretion to weigh this factor against other concerns, *Old West*, 203 Ariz. at 475, ¶¶ 25–26, and here the court explicitly considered Appellants’ efforts as well as hardship to the indemnitor as mitigating factors. Given the countervailing interests described above, the court did not abuse its discretion by forfeiting the bond in full.

¶15 Appellants also argue that the face value of the bond is effectively a liquidated damages provision under contract principles, and that forfeiture of the full \$75,000 (particularly when the direct cost to the

STATE v. AZTECA, et al.
Decision of the Court

State was less than \$2,800 to transport Williams back from Texas) impermissibly operated as a penalty. *See Dobson Bay Club II DD, LLC v. La Sonrisa De Siena, LLC*, 239 Ariz. 132, 136, ¶ 10 (App. 2016), *review granted* (Sept. 20, 2016). We disagree.

¶16 Although bond forfeiture operates as “a streamlined substitute for a civil suit resulting from a breach of contract,” *Garcia Bail Bonds*, 201 Ariz. at 206, ¶ 14, an appearance bond is not simply a private agreement that the surety will pay costs incurred by the State to return the defendant to court. The amount of bail (which in turn determines the necessary value of the appearance bond) is not a proxy for anticipated monetary cost to the State, but rather reflects an amount deemed necessary to assure the defendant’s appearance throughout the criminal proceedings, protect witnesses from intimidation, and protect the victim and the public at large. Ariz. Const. art. 2, § 22(B); *see also* A.R.S. § 13-3967(B) (listing considerations guiding the superior court’s discretion in fixing the amount of bail); *Fragoso v. Fell*, 210 Ariz. 427, 434, ¶ 21 (App. 2005). To assure appearance, the bond creates a disincentive for the defendant to abscond by creating a risk of a significant financial loss.

¶17 The *Old West* considerations reflect these broader principles— e.g., the public safety interest implicated by new criminal acts committed while on release and the public (and the victim’s) interest in speedy and effective criminal prosecutions—in guiding the superior court’s discretion in the wake of a defendant’s unexcused non-appearance. Although expense borne by the surety and monetary cost to the State are factors for the court’s consideration, limiting forfeiture determinations to simply a calculation of the State’s monetary “damages” would undermine the purpose of bail and improperly constrain the court’s discretion to consider all relevant factors weighing on the issue. *See Old West*, 203 Ariz. at 475, ¶ 26; *Int’l Fid. Ins. Co.*, 238 Ariz. at 25–26, ¶¶ 11–12. Thus, the superior court did not abuse its discretion by considering relevant factors and ordering forfeiture of the full amount of the bond, and Appellants are not entitled to relief.

STATE v. AZTECA, et al.
Decision of the Court

CONCLUSION

¶18 The judgment is affirmed.



AMY M. WOOD • Clerk of the Court
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