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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

FILED BY CLERK

JUL 18 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re)	2 CA-CV 2012-0107
)	2 CA-CV 2012-0108
)	2 CA-CV 2012-0109
BOND FORFEITURE IN PINAL)	(Consolidated)
COUNTY CAUSE NUMBERS)	DEPARTMENT B
CR201103204, CR201101969, and)	
CR201101968)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
)	Rule 28, Rules of Civil
)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause Nos. CR201103204, CR201101969, CR201101968

Honorable Dwight P. Callahan, Judge Pro Tempore

AFFIRMED

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Tempe
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ESPINOSA, Judge.

¶1 Regulator Bail Bonds (“Regulator”) appeals from the trial court’s order forfeiting three appearance bonds totaling \$70,000, posted on behalf of defendant Arlie

Perryman. Regulator argues that the court abused its discretion in ordering the forfeiture without first considering all relevant factors. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court’s judgment. *State v. Garcia Bail Bonds*, 201 Ariz. 203, ¶ 5, 33 P.3d 537, 539 (App. 2001). In August 2011, Perryman was arrested and charged in two separate causes for theft of means of transportation, unlawful use of means of transportation, and trafficking in stolen property. He was released from custody in October after Regulator posted two separate appearance bonds for \$10,000 each on his behalf.

¶3 Perryman attended all hearings related to those charges, but was arrested again on December 16 for theft of means of transportation and unlawful use of means of transportation. The bond for the new charges was set at \$50,000. In January 2012, Regulator filed a “motion to exonerate” each of the first two appearance bonds in the Pinal County Superior Court, as Perryman had been re-incarcerated in the same jurisdiction for the December 16 charges. The court never ruled on the motions.

¶4 On January 11, Regulator posted the \$50,000 bond on Perryman’s behalf. Two months later on March 8, the Pinal County Attorney moved that Perryman be declared non-bondable pursuant to article II, § 22(A)(2) of the Arizona Constitution. Perryman’s counsel was notified of the motion, but Regulator claimed it had not received notice, which the state did not contest. According to Regulator, Perryman had last communicated with his counsel on March 9. He then failed to appear for a settlement conference on March 23, and a bench warrant was issued for his arrest.

¶5 At a bond forfeiture hearing on June 19, the trial court ordered all three appearance bonds forfeited, stating that Regulator must have contemplated the \$70,000 responsibility and the likelihood the state would seek to take custody of Perryman. Regulator now appeals that judgment. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶6 We review a trial court's decision to forfeit an appearance bond for an abuse of discretion. *State v. Old West Bonding Co.*, 203 Ariz. 468, ¶ 9, 56 P.3d 42, 45 (App. 2002). Regulator contends the court committed such an abuse in 1) failing to exonerate the two \$10,000 bonds pursuant to its motions for exoneration, filed in January 2012; and 2) failing to consider mitigating factors in its decision to forfeit the \$50,000 bond, primarily the state's failure to notify Regulator of its March 8, 2012, motion to hold Perryman non-bondable.

The \$10,000 Bonds

¶7 Regulator contends the trial court erred by failing to consider mitigating factors before ordering forfeiture of the two \$10,000 bonds. Specifically, Regulator argues the court should have considered that Perryman had been returned to custody solely because he was being charged with new offenses and not because he had failed to appear for any hearing on the original charges.

¶8 Exoneration of an appearance bond is mandatory if the defendant did not commit any violations of the conditions of the bond, and if there is no further need for the bond. *See* Ariz. R. Crim. P. 7.6(d)(1). If a defendant has violated conditions of the bond,

the court still has discretion to exonerate it if the surety “delivers an affidavit to the sheriff stating that the defendant is incarcerated in this or another jurisdiction, and the sheriff reports the surrender or status to the court.” Ariz. R. Crim. P. 7.6(d)(2). In Arizona, it is a mandatory condition of release that “the person refrain from committing any criminal offense.” Ariz. R. Crim. P. 7.3(a)(2). A violation of that condition cannot be “explained or excused” under Ariz. R. Crim. P. 7.6(c)(2). *See State v. Rocha*, 117 Ariz. 294, 297, 572 P.2d 122, 125 (App. 1977). Nevertheless, an unexcused violation of a condition of release does not necessarily require forfeiture of the bond, and the court retains discretion as to its disposition. *See Old West Bonding Co.*, 203 Ariz. 468, ¶ 23, 56 P.3d at 48; Ariz. R. Crim. P. 7.6(c)(2). In exercising that discretion, the court may consider relevant mitigating and aggravating factors, but is not obligated to do so. *See Old West Bonding Co.*, 203 Ariz. 468, ¶ 26, 56 P.3d at 49.

¶9 Regulator moved to exonerate the two \$10,000 bonds because Perryman had been re-incarcerated in the same jurisdiction for new criminal charges. Only two days later, Regulator posted a \$50,000 bond for Perryman, despite not having received a ruling on its motion. Once Perryman had been released on the \$50,000 bond, however, the court no longer could consider exoneration under Ariz. R. Crim. P. 7.6(d)(2) (court may exonerate bond if surety “surrenders the defendant to the sheriff of the county in which the prosecution is pending, or delivers an affidavit to the sheriff stating that the defendant is incarcerated in this or another jurisdiction, and the sheriff reports the surrender or status to the court”). And not having exonerated the \$10,000 bonds, it was within the court’s discretion to order forfeiture of those bonds because Perryman had

violated a mandatory condition of release by committing new criminal offenses. *See Rocha*, 117 Ariz. at 297, 572 P.2d at 125. Although Regulator claims the trial court should have considered as mitigating factors that Perryman never had missed court and had no outstanding bench warrants at the time he was arrested for new charges, those factors may have been relevant but were not binding on the court's discretion. *See Old West Bonding Co.*, 203 Ariz. 468, ¶ 26, 56 P.3d at 49.

¶10 In sum, we agree with the state that Regulator eliminated Rule 7.6(d)(2), Ariz. R. Crim. P., as a basis for exoneration when it posted the \$50,000 bond on behalf of Perryman, securing his release from custody. And the trial court did not abuse its discretion in ordering forfeiture of the two \$10,000 bonds in light of Perryman's violation of the mandatory condition of release.

The \$50,000 Bond

¶11 In Arizona, "a surety assumes the risk of a defendant's failure to appear." *In re Bond Forfeiture in Pima Cnty. Cause No. CR-20031154*, 208 Ariz. 368, ¶ 4, 93 P.3d 1084, 1085 (App. 2004). The surety alone is responsible for the consequences of its decision to contract with the defendant to post an appearance bond on his or her behalf. *Id.* Unless there is a bench warrant for the defendant's arrest, the state is not required to inform the surety of a criminal defendant's status regarding court proceedings. *See* Ariz. R. Crim. P. 7.6(c)(1). In fact, the surety has "an affirmative duty to the court to remain in regular contact with any defendant released pursuant to an appearance bond." Ariz. R. Crim. P. 7.1(f)(3).

¶12 Rule 7.6(d)(3) grants trial courts broad discretion in determining whether or not to exonerate a bond. In *Old West Bonding Co.*, this court articulated a nonexclusive list of “relevant considerations” that may bear on a court’s decision whether to order forfeiture of an appearance bond, including “any . . . mitigating or aggravating factors.” 203 Ariz. 468, ¶ 26, 56 P.3d at 49. Regulator argues the trial court failed to consider as mitigating factors that 1) the state created an incentive for Perryman to flee by moving that he be found non-bondable two months after he was released on bond, and 2) Regulator was not notified of the motion and therefore did not have a chance to prevent Perryman from fleeing.

¶13 Regulator maintains that had the state moved for Perryman to be declared non-bondable before the \$50,000 bond was posted, Regulator would not have posted the bond and the issue never would have arisen. But the state’s motion was within its authority. *See* Ariz. Const. art. II, § 22(A)(2) (persons who commit felony offenses while released on bail not bailable); *In Re Bond Forfeiture in Cochise Cnty. Cause No. CR201100916*, 663 Ariz. Adv. Rep. 15, ¶¶ 8, 10 (Ct. App. Jun. 28, 2013) (state may seek to hold defendant non-bondable if defendant falls under exception to constitutional right to bail, Ariz. Const. art. II, § 22(A)(2)). Moreover, it is clear the court considered the timing of the state’s motion before ruling, as evidenced by the court’s statement, “there is no possibility that the bondsman contemplated anything other than . . . a likelihood that eventually the State would seek to put Mr. Perryman in custody.” Thus, the court considered this mitigating factor raised by Regulator—it simply did not find it sufficient to warrant exoneration.

¶14 Regulator also contends, with no citation to authority, that the trial court should have considered Regulator’s lack of notice of the state’s motion. However, as noted above, neither the court nor the state was responsible for notifying Regulator. *See* Ariz. R. Crim. P. 7.6(c)(1). And although it alleges the state’s motion motivated Perryman to flee, Regulator alone bore the risk for his decision to do so. As the trial court correctly pointed out, while perhaps the state could have better communicated with Regulator, “the burden is on the bonding company to know what’s going on with the case[;] the burden is not on the State to notify the bonding company.” *See* Ariz. R. Crim. P. 7.1(f)(3).

¶15 The record reflects that the trial court considered the mitigating factors raised by Regulator. The court also could consider the totality of the circumstances and find that Regulator knew or should have known the state eventually would seek to return Perryman to custody. Accordingly, we find no abuse of discretion in the trial court’s decision ordering the \$50,000 bond forfeited.

Disposition

¶16 The trial court’s order forfeiting the three appearance bonds is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge