

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

INTERNATIONAL FIDELITY INSURANCE COMPANY,
Appellant.

No. 2 CA-CV 2016-0045
Filed August 31, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. CR20121143002
The Honorable Lee Ann Roads, Judge Pro Tempore

AFFIRMED

COUNSEL

Barbara LaWall, Pima County Attorney
By Christopher L. Straub, Deputy County Attorney, Tucson
Counsel for Appellee

Clifford Sherr, Phoenix
Counsel for Appellant

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 International Fidelity Insurance Company (“IFIC”) appeals the trial court’s judgment forfeiting \$95,000 of the \$100,000 appearance bond posted on behalf of Augustin Rivera, the defendant in the related criminal proceeding. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the trial court’s decision. *State v. Copperstate Bail Bonds*, 222 Ariz. 193, ¶ 12, 213 P.3d 342, 344 (App. 2009). In 2012, Rivera was charged with multiple felonies relating to an armed home invasion. He was released on a \$100,000 bond posted by IFIC as surety for the bail bondsman. Rivera absconded, and was convicted of multiple charges following a jury trial held *in absentia* in September 2013. The court issued a warrant for Rivera’s arrest and ordered that bond-forfeiture proceedings be commenced.

¶3 IFIC’s fugitive-recovery agent Marvin Bordeaux searched extensively for Rivera, and in August 2013 had informed the United States Marshals Service that Rivera might be in Silver City, New Mexico. The marshals arrested Rivera in Hurley, approximately ten miles from Silver City, on October 31, 2013. Rivera, who was heavily armed, was recaptured after a four-hour standoff involving more than twenty officers. At the bond forfeiture hearing, Deputy Marshal Andres Medina testified Bordeaux’s information had been helpful “towards the beginning” of his search, but that he used his own sources to ultimately locate Rivera. The trial court found “no legally recognizable explanation or excuse for [Rivera’s] failure to appear,” but exonerated \$5,000 of the bond, approximately double the amount of IFIC’s expenses.

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¶4 IFIC appealed the decision, and we concluded the trial court had erred by allowing the state to present evidence of jail costs that were not incurred as a result of Rivera's failure to appear, reversed the judgment, and remanded the case for reconsideration. *State v. Int'l Fid. Ins. Co.*, 238 Ariz. 22, ¶ 15, 355 P.3d 624, 628-29 (App. 2015). On remand, a different judge heard argument concerning the evidence that had been presented at the prior hearing, and, without relying on the excluded jail expenses, again ordered \$95,000 of the bond forfeited.

¶5 This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶6 IFIC argues the trial court gave insufficient weight to its efforts to locate Rivera when ordering most of the bond forfeited, and that the ruling amounts to an unenforceable penalty. "We review a trial court's order forfeiting the bond for an abuse of discretion, but we interpret de novo court rules governing appearance bonds." *State v. Old W. Bonding Co.*, 203 Ariz. 468, ¶ 9, 56 P.3d 42, 45 (App. 2002).

Application of *Old West* Factors

¶7 "[T]he primary, if not paramount, purpose of bail under the Arizona Constitution is to guarantee a defendant's appearance in court while protecting victims, witnesses, and the public." *Fragoso v. Fell*, 210 Ariz. 427, ¶ 21, 111 P.3d 1027, 1034 (App. 2005); *see also Int'l Fid. Ins. Co.*, 238 Ariz. 22, ¶ 8, 355 P.3d at 627 (primary purpose of appearance bond to ensure defendant appears at court proceedings). "[A] surety assumes the risk of a defendant's failure to appear" and should therefore "exercise care in ascertaining the defendant's circumstances and community ties before executing an appearance bond" on a defendant's behalf. *In re Bond Forfeiture in Pima Cty. Cause No. CR-20031154*, 208 Ariz. 368, ¶ 4, 93 P.3d 1084, 1085 (App. 2004). A surety is generally not entitled to exoneration of a bond when the failure to appear is due to the defendant's own misconduct. *See State v. Garcia Bail Bonds*, 201 Ariz. 203, ¶¶ 10, 12, 33 P.3d 537, 539-40 (App. 2001).

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¶8 The trial court has discretion, however, to exonerate all or part of an appearance bond despite a defendant's violation of any bond conditions. See Ariz. R. Crim. P. 7.6(c), (d); see also *Old W. Bonding Co.*, 203 Ariz. 468, ¶ 25, 56 P.3d at 49. The text of Rule 7.6(c)(1) contemplates forfeiture of the bond in such situations, but requires a hearing for "the parties and any surety to show cause why the bond should not be forfeited." The court's discretion in such proceedings "must be exercised reasonably, not whimsically." *Old W. Bonding Co.*, 203 Ariz. 468, ¶ 25, 56 P.3d at 49.

¶9 In *Old West*, we did not attempt to exhaustively identify every factor a court might consider in exercising its discretion concerning exoneration or forfeiture of a bond, but specifically identified the following:

- (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.

Id. ¶ 26.

¶10 IFIC argues the trial court abused its discretion by placing undue emphasis on Rivera's willful failure to appear, and by otherwise failing to reasonably balance the factors identified in *Old West*. IFIC also asserts the court "mistakenly interpreted" the public interest in ensuring Rivera's appearance "as specifically 'intertwined' with" his willful failure to appear. We disagree.

¶11 Nothing in *Old West* prohibits a trial court from placing greater emphasis on the willfulness of a defendant's failure to appear. In fact, extra emphasis is appropriate because the failure to

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appear relates to the “primary purpose” of an appearance bond. *See Int'l Fid. Ins. Co.*, 238 Ariz. 22, ¶ 8, 355 P.3d at 627. Here, Rivera participated in an armed standoff in an attempt to evade recapture, an action reflecting a striking degree of willfulness. Further, we are unconvinced by IFIC’s insistence that the dangerous nature of Rivera’s ultimate recapture was irrelevant to the public’s interest in ensuring his appearance, as this interest encompasses concern for the safety of the general public as well as those individuals who are given the task of recapturing an absconding defendant. *See Fragoso*, 210 Ariz. 427, ¶ 21, 111 P.3d at 1034.

¶12 IFIC also maintains forfeiture of such a large portion of the bond serves to discourage sureties and any indemnitors from assisting in the apprehension of absconding defendants, because they “will lose everything anyway.” And, IFIC claims the trial court “basically ignored” four *Old West* factors favoring exoneration of the bond: IFIC’s efforts, inconvenience and cost to the state, the public’s interest in the defendant’s appearance, and other mitigating factors. IFIC claims it “met” these factors by virtue of its efforts “in aiding the apprehension and surrender of the defendant.”

¶13 Notably, IFIC’s claim to have met four separate *Old West* factors appears to overstate the effect of its recovery agent’s efforts. IFIC’s contributions may have lessened the effort the state ultimately expended in locating Rivera, but his ultimate recapture did not occur as a direct result of the information IFIC obtained. Rather, he was captured only after a month of additional investigation and a dangerous standoff that required a substantial amount of time and resources on the part of the state. Thus, we are not convinced IFIC’s recovery efforts were sufficient to require a conclusion it had “met” any other *Old West* factors and, in any event, the trial court was not required to reward IFIC’s efforts. *See State v. Affordable Bail Bonds*, 198 Ariz. 34, ¶ 21, 6 P.3d 339, 344 (App. 2000) (not abuse of discretion to deny full exoneration of bond when surety directs law enforcement officers to fugitive’s precise location). Its decision to exonerate approximately twice the amount of IFIC’s expenses was not an abuse of discretion.

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Application of Contract Law

¶14 IFIC also argues the trial court's decision to forfeit such a large portion of the bond is "prohibited as a penalty and unenforceable under" principles of contract law. The state correctly notes this argument was not made before the court. At the hearing on remand, IFIC only briefly analogized forfeiture of the bond to a "liquidated damage clause," asserting it was "unfair and . . . unenforceable," without citing any authority for that proposition or further developing its theory. We thus conclude IFIC has waived this argument by failing to raise it below. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects . . . errors not raised in the trial court cannot be raised on appeal.").

Disposition

¶15 We affirm the trial court's judgment forfeiting \$95,000 of the appearance bond.