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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002288-MR

JAMES VICTOR MARTIN, JR. — APPELLANT

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 02-CR-00034

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: BAKER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: James Martin, Jr., appeals from an order of the Breckinridge Circuit Court, entered September 9, 2002, forfeiting to the Commonwealth half of his $20,000.00 bail bond. Martin contends that the trial court abused its discretion by ordering forfeiture of the bond upon insufficient grounds. To the extent that the forfeiture in this case was excessive, we agree.

In April 2002, Martin was indicted on charges that he had committed incest and rape against his six-year-old daughter.

He was arraigned in May 2002, and bond was set at $20,000.00 cash. A few days later Martin and his surety, his father, James Martin Sr., executed the bond. Martin Sr. posted the cash, and both men promised that Martin would appear for all court proceedings. Both also agreed to several collateral conditions of release including one forbidding Martin Jr. from having any contact with the alleged victim. On June 7, 2002, Martin violated the no-contact condition. The child's mother brought the child to Martin Sr.'s home, where Martin was staying, and with the mother observing from a distance, Martin visited with her. When the visit was brought to the court's attention, the court revoked Martin's bail and ordered that $10,000.00 of the bond be forfeited. Martin eventually pled guilty to first-degree sexual.[1]

On appeal, Martin argues that the purpose of a bail bond is primarily to ensure that the released defendant appears for court proceedings. Bond forfeiture, he maintains, should be reserved for cases in which the defendant violates that primary purpose and misses an appearance. Forfeiture is not appropriate, he contends, when, as in the case, the defendant has breached one of the collateral conditions of release. He relies on cases from other jurisdictions, whose bail statutes

[1] KRS 510.110.

differ from ours, and on Johnson v. Commonwealth,[2] which did not construe this state's then new statutory provisions concerning bail, but did hold that bail bonds ought not to be forfeited for reasons not closely related to the bail.

As the Commonwealth points out, however, and as the trial court noted, both KRS 431.545 and RCr 4.42 contemplate bond forfeiture for reasons other than the defendant's failure to appear in court. The statute provides in pertinent part that

> [i]f a defendant shall willfully fail to appear or shall willfully fail to comply with the conditions of his release . . . [t]he court may order a forfeiture of the bail.

RCr 4.42 (1) provides that

> [i]f at any time following the release of the defendant and before the defendant is required to appear for trial the court is advised of a material change in the defendant's circumstances or that the defendant has not complied with all conditions imposed upon his or her release, the court having jurisdiction may order the defendant's arrest and require the defendant or the defendant's surety or sureties to appear and show cause why the bond should not be forfeited or the conditions of release be changed, or both. . . . Where the court is acting on advice that the defendant has not complied with all conditions imposed upon his or her release, the Court shall not change the conditions of release or order forfeiture of the bail bond unless it finds by clear and convincing evidence that the defendant has willfully violated one of the

[2] Ky. App., 551 S.W.2d 577 (1977).

> conditions of his or her release or that there is a substantial risk of nonappearance.

The General Assembly has thus placed Kentucky among the majority of jurisdictions which permit bond forfeiture for the violation of a bail condition other than nonappearance.[3]

This does not mean, of course, that forfeiture is mandated or that it will be appropriate in all cases, no matter how insignificant the violation. It does mean, however, that the matter is entrusted in the first instance to the discretion of the trial court and may be reviewed in this Court only for abuse of that discretion.[4] The trial court must find, as the provisions quoted above emphasize, that the violation was willful. Other factors bearing on the propriety of forfeiture or its amount include the seriousness of the condition violated; the deterrence value of the forfeiture; the cost, inconvenience, prejudice, or potential prejudice suffered by the Commonwealth as a result of the breach; whether forfeiture will vindicate a serious injury to the public interest; the appropriateness of

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[3] *See* State v. Korecky, 777 A. 2d 927 (N.J. 2001) (collecting cases).

[4] *Cf.* Abraham v. Commonwealth, Ky. App., 565 S.W.2d 152 (1977) (trial court generally enjoys broad discretion in matters related to bail); United States v. Gambino, 17 F.3d 572 (2nd Cir. 1994) (discussing the similar federal rules).

the amount of the bond; and any mitigating factors presented by the defendant.[5]

As the trial court found, the breach in this case—open visitation for at least half-an-hour outside Martin Sr.'s home--is not disputed and was plainly willful. We also agree with the trial court that the breach was serious. An accused rapist should not have contact with his alleged victim and the principal witness against him, particularly an infant victim. The breach was potentially prejudicial to the Commonwealth. In light of these factors, we are not persuaded that the trial court abused its discretion by ordering that a portion of the bond be forfeited.

We are persuaded, however, that the amount of the forfeiture was excessive. The money forfeited did not belong to Martin. The defendant's father pledged his life savings and apparently had every intention of seeing to it that Martin complied with the no-contact order. The child's mother brought the child to his house against his wishes and advice. To be sure, neither he nor Martin did all that he might have done to prevent the contact once the child had arrived, but the fact that the situation was thrust upon him is a mitigating circumstance. Although it was potentially prejudicial, the

[5] State v. Korecky, *supra;* State v. Werner, 667 A. 2d 770 (R.I. 1995).

visit did not in fact interfere with the prosecution or impose costs upon the Commonwealth. Martin did not miss any appearances in court. Nor is this a case with much deterrence value. In light of these many countervailing factors, a $10,000.00 forfeiture is excessive.

Accordingly, we affirm the September 9, 2002, order of the Breckinridge Circuit Court to the extent that it forfeits a portion of Martin's bail bond, but we reverse the order to the extent that the forfeiture is excessive and remand for reconsideration of the forfeiture amount in light of the factors discussed above.

TACKETT, JUDGE, CONCURS.

BAKER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

BAKER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in part and respectfully dissent in part. I concur with so much of the majority's opinion which posits that forfeiture of a portion of the bond was proper; however, I dissent with that part of the majority's opinion which declares the amount of bond forfeiture ($10,000) excessive.

While the majority initially recognizes that bond forfeiture is within the sound discretion of the circuit court, it nevertheless invades that discretion by subsequently concluding the amount of forfeiture was excessive. The majority cites to myriad "countervailing factors" to support its

conclusion of excessiveness; however, just as there are certain factors or evidence supporting the appellant's position, there are likewise compelling factors or evidence opposing same. It is precisely in such a conflicting environment that the discretion of the circuit court should prevail.

In the case at hand, I view Martin's particular bond violation to be most egregious. As a condition of the bond, the circuit court forbade Martin from having contact with his six-year old daughter. This condition was undoubtedly placed upon Martin for the protection of the young girl. Martin was originally indicted upon charges of incest and rape of his daughter and eventually pled guilty to first-degree sexual abuse. The circuit court found, and the majority agreed, that Martin's "breach in this cases – open visitation for at least half-an-hour outside Martin Sr.'s home – is not disputed and was plainly willful." Under these circumstances, due deference should be afforded the trial court, as I perceive no abuse of its discretion.

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