STATE OF LOUISIANA	*	NO. 2015-KA-1232
VERSUS	*	COURT OF APPEAL
LADAREUS J. JONES	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
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DYSART, J., DISSENTS.

I respectfully dissent. This case presents a *res nova* issue under La. C.Cr.P. art. 345 B as to whether a surety may have a bail bond forfeiture set aside when a defendant is subsequently arrested, briefly detained and then released. I feel that the majority has failed to consider the totality of the language of the statute. The statute expressly states that "[i]f the defendant ***is*** incarcerated by the officer originally charged with his detention at any time prior to forfeiture or within the time allow by law for setting aside a judgment for forfeiture of the bail bond", the surety may obtain "a letter [from any officer in charge of any facility charged with the detention of the defendant] verifying that the defendant ***is*** incarcerated." La. C.Cr.P. art. 345 B. (Emphasis added).

Here, the defendant failed to appear for a scheduled arraignment, and two and a half months later, was arrested on a DWI charge and charged in Traffic Court. He was bonded out within a day and then subsequently failed to appear on that charge.[1] He was therefore not "incarcerated" at the time the surety obtained the letter of detention. Moreover, according to the record before us, the defendant remained free and was not thereafter surrendered (either by FCS or self-

[1] Mr. Jones was arrested on July 9, 2013 for DWI and came before the Traffic Court where bail was set at $6,500.00. Mr. Jones obtained a surety bond from Accredited Surety and Casualty Company, Inc., and that bond, too, was forfeited by a judgment dated August 13, 2013. An alias capias was issued by the Traffic court for Mr. Jones' arrest with bail set at $10,000.00.

surrendered) for almost two years after he failed to appear for his April 26, 2013 arraignment. It was not until February 27, 2015, that the defendant actually appeared in court for his arraignment on the possession charges, to which he ultimately pled guilty on March 5, 2015.[2] That FCS should be absolved of ***all*** obligations under the bonds by the providential one-day arrest and release of the defendant is certainly not the intent of Article 365.

In my view, the present tense wording of Article 365 contemplates incarceration at the time the surety obtains the letter from the officer originally charged with his detention. It requires that a defendant ***be*** incarcerated and that the letter of verification demonstrate that the defendant ***is*** incarcerated at that time. This finding is in keeping with our jurisprudence which has interpreted Article 345 to "appl[y] to circumstances in which a defendant who fails to make a court appearance cannot be surrendered by the surety because the defendant has been subsequently incarcerated and is still in jail." *State v. Ramee,* 05-748, p. 4 (La. App. 5 Cir. 5/9/06), 930 So.2d 1092, 1095. (Emphasis added).

Under La. R.S. 15:83, a surety, "when entering into a criminal bail bond obligation, must consider the risks of his undertaking and assume those risks reasonably foreseeable." The statute then provides that "[t]he surety is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible." La. R.S. 15:83 C. This Court found a defendant's failure to appear in court because he was in federal protective custody and working with the federal government on a case to be a fortuitous event warranting performance on a bond impossible. *See*, *State v. Allen*, 11-0693 (La. App. 4 Cir. 8/8/12), 98 So.3d 926. In *State v. De La Rosa*, 43,696, p. 6 (La. App. 2 Cir. 10/22/08), 997 So.2d 165, however, the risk that an alien defendant would flee to

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[2] The record does not reflect the circumstances by which the defendant appeared in court on February 27, 2015. There is no indication in the record that he was brought to court by FCS or at its direction.

his native country and fail to make a court appearance did not meet the definition of a fortuitous event because it was "an obvious and foreseeable risk involved in a bail bond obligation."

In my opinion, the risk that a defendant may be arrested on a traffic violation after the entry of a bond forfeiture and detained briefly is not such a fortuitous event that would absolve a surety from liability under the bond. On this basis, I would affirm the trial court's judgment denying the motion to set aside bond forfeiture.