2011 PA Super 143

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JUSTIN LAMAR CULVER	:	
APPEAL OF: JOHN T. ROBINSON, A DULY AUTHORIZED AGENT AND ATTORNEY-IN-FACT OF EVERGREEN NATIONAL INDEMNITY COMPANY	:	No. 3048 EDA 2010

Appeal from the Order entered October 21, 2010
in the Court of Common Pleas of Pike County Criminal Division
at No. CP-52-CR-0000119-2007

BEFORE: DONOHUE, MUNDY, AND STRASSBURGER*, JJ.

OPINION BY MUNDY, J.: Filed: July 8, 2011

Appellant, Evergreen National Indemnity Company, through its agent and attorney-in-fact John T. Robinson (Evergreen), appeals from the order entered October 21, 2010,[1] denying its petition to set aside or remit forfeiture of Justin Lamar Culver's (Defendant's) bail and release Evergreen as surety. We reverse and remand.

Defendant was charged on February 2, 2007, in a separate case, with one count each of burglary, criminal trespass, criminal mischief, and attempt

[1] The trial court's October 21, 2010 order also denied the petition of Seneca Insurance Company seeking remission of the forfeited bail of Defendant in a companion case. In Seneca's contemporaneous appeal at 3120 EDA 2010, raising identical issues, we similarly reversed in an unpublished memorandum filed contemporaneously herewith.

*Retired Senior Judge assigned to the Superior Court.

to commit theft by unlawful taking.[2] At Defendant's preliminary arraignment that same day, the Magisterial District Judge conditioned Defendant's release on payment of $25,000.00 bail. On February 9, 2007, Defendant's bail was posted by Seneca Insurance Company (Seneca) as surety. These charges were bound over to the Court of Common Pleas at Criminal Information No. 62-2007.

On March 26, 2007, Defendant was charged in a new complaint in the instant case with false imprisonment, terroristic threats, simple assault, and harassment.[3] Certified Record (C.R.) at 1. At his preliminary arraignment, the Magisterial District Judge conditioned Defendant's release on payment of $100,000.00 bail. ***Id.*** These charges were bound over to the Court of Common Pleas at Criminal Information No. 119-2007. C.R. at 1, 5. On May 7, 2007, Defendant filed a petition for bail reduction at No. 119-2007. C.R. at 2. After a hearing, the trial court denied the petition. C.R. at 7. On June 14, 2007, Evergreen posted Defendant's bail as surety. C.R. at 10.

Accordingly, Defendant was released subject to the conditions of bail set at each number. On September 6, 2007, the trial court issued a bench warrant for the arrest of Defendant due to his failure to appear at his combined omnibus pretrial hearing for both criminal informations. C.R. at 14.

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[2] 18 Pa.C.S.A. §§ 5502(a), 3304(a)(5), 3503(a)(1)(ii), and 901(a), respectively.

[3] 18 Pa.C.S.A. §§ 2903(a), 2706(a)(1), 2701(a)(1), and 2709(a)(1), respectively.

On September 10, 2007, Defendant was newly arrested and charged with second-degree murder, two counts of robbery, burglary, conspiracy to commit robbery, conspiracy to commit burglary, firearms not to be carried without a license, and possession of firearm prohibited, stemming from a home invasion perpetrated on August 24, 2007.[4] On September 11, 2007, upon oral motion of the Commonwealth, the trial court revoked Defendant's bail at both 62–2007 and 119–2007. C.R. at 19.

The instant case and the case at 62-2007 were then the subject of numerous continuances.[5] C.R. at 20-29, 35. Defendant was convicted by a jury of second-degree murder, conspiracy, and the other charges at No. 298-2007, on March 18, 2009. On March 19, 2009, the trial court granted a Commonwealth motion for forfeiture of Defendant's bail at both 62–2007 and 119–2007. C.R. at 31. On April 6, 2009, Evergreen filed a petition to set aside or in the alternative, remit forfeiture and release surety. C.R. at 33. At a hearing held May 21, 2009, the parties proposed to submit a stipulation of facts and briefs to the trial court in lieu of testimony and oral arguments. N.T., 5/21/09, at 2-4. The stipulation was filed on June 22,

[4] 18 Pa.C.S.A. §§ 2502(b), 3701, 3502(a), 903, 903, 6106(a)(1), and 6105(a)(1), respectively. These charges were bound over to the trial court at Criminal Information No. 298-2007. Defendant's co-conspirator, Marquis Keeys, was tried separately.

[5] Defendant was convicted of all the charges at No. 62-2007 following a jury trial on November 12, 2009. The Commonwealth entered a *nolle prosequi* in the case *sub judice* on November 16, 2009. C.R. at 51.

2009.[6] C.R. at 39. The trial court denied Evergreen's petition by order filed October 21, 2010. C.R. at 52.

[6] The stipulation provided as follows.

STIPULATION

TO THE HONORABLE, THE JUDGE OF THE AFORESAID COURT:

Bruce DeSarro, Assistant District Attorney in and for the County of Pike, Commonwealth of Pennsylvania, respectfully represents that:

1. Counsel for Evergreen National Indemnity Company, Patrick Reilly, Esq., and for Seneca Insurance Company, James Swetz[,] Esq., and the Commonwealth have agreed to stipulate to several items for the factual record pertaining to the remission motions filed by [sic] with respect to the above-captioned matters.

2. The parties stipulate to the Commonwealth's request to incorporate the record of the cases of Commonwealth v. Justin Culver (298-2007) and Commonwealth v. Marquis Keeys (334-2007).

3. The parties stipulate that for the purpose of the Court's decision on remission, the Commonwealth accrued no costs in apprehending Justin Culver with respect to the above-captioned cases nor do any of the enumerated costs noted herein relate to the apprehension of Justin Culver.

4. The parties agree to stipulate that the following costs were incurred by the Commonwealth and County of Pike in the cases of Justin Culver under caption 298-2007 and Marquis Keeys under caption 334-2007 as is noted in attachment "A".

5. The Attorney[s] Reilly and Swetz have been presented with this Motion and have agreed to the stipulation in separate letters which are attached.

C.R. at 39. Exhibit "A", referenced in the stipulation, itemized the Commonwealth's costs relative to the new charges as follows: $8,789.85 for prosecuting Keeys, $552.50 for prosecuting Defendant, $12,797.16 for prosecuting both Keeys and Defendant, and $103,348.54 for Keeys' court appointed defense.

Evergreen filed a notice of appeal on November 3, 2010. C.R. at 53. In timely compliance with the trial court's order, Evergreen filed a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b), on November 23, 2010. C.R. at 58. The trial court submitted its Rule 1925(a) opinion on December 21, 2010. C.R. at 59.

Evergreen raises the following questions for our review.

> 1. Are the 'costs' alleged by the Commonwealth the type of 'costs, inconvenience and prejudice' contemplated by the Superior Court in ***Commonwealth v. Mayfield***, 827 A.2D 462 (Pa. Super. 2003) and ***Commonwealth v. Riley***, 946 A.2d 696 (Pa. Super. 2008)?
>
> 2. Because the Commonwealth suffered no cognizable 'cost, inconvenience or prejudice' as a result of Defendant's breach of bail bond, is [Evergreen] entitled to have the forfeiture of $100,000.00 bail bond in question set aside?

Evergreen's Brief at 7.

The standard and scope of review we employ when reviewing a trial court's grant or denial of bail forfeiture remission is well settled.

> The decision to allow or deny a remission of bail forfeiture lies within the sound discretion of the trial court. Accordingly, our review is limited to a determination of whether the court abused its discretion in refusing to vacate the underlying forfeiture order. To establish such an abuse, the aggrieved party must show that the court misapplied the law, exercised manifestly unreasonable judgment, or acted on the basis of bias, partiality, or ill-will to that party's detriment. If a trial court erred in its application of the law, an appellate court will

> correct the error. Our scope of review on questions of law is plenary.
>
> ***Commonwealth v. Hernandez****,* 886 A.2d 231, 235 (Pa. Super. 2005), *appeal denied*, 587 Pa. 720, 899 A.2d 1122 (2006) (quotations and citations omitted).

Commonwealth v. Riley, 946 A.2d 696, 698 (Pa. Super. 2008).

Since the questions posed by Evergreen are variant formulations of the same issue, we will address them together. As noted in the procedural summary, the parties submitted a stipulation to the trial court in lieu of testimony. Therefore, the facts underlying the appeal are not in dispute. Based on those facts, Evergreen maintains that the costs advanced by the Commonwealth in the stipulation cannot support a showing of prejudice where Defendant's "re-arrest on the Subsequent Charges … did not, in fact, cause any delay in proceeding against [Defendant] on the charges in the First Case." Evergreen's Brief at 12. "While the 'costs' of apprehending a defendant who breaches the conditions of bail are directly related to the breach, the 'cost' of prosecution on new charges clearly arises out of the new charges, and not out of the breach of the condition of bail on the prior charges." ***Id.*** at 18.

The Commonwealth counters that it was prejudiced by incurring costs "directly attributable to [Defendant's] criminal conspiracy." Commonwealth's Brief at 5. The Commonwealth urges that costs establishing prejudice to the Commonwealth, for purposes of determining remission or set-aside of a bail forfeiture, "do not need to only fall under the

category of apprehension costs or costs of prosecution on the 'bailed' case. The forfeiture should be enforced in [sic] the Commonwealth is prejudiced **in any manner**." ***Id.*** at 8 (emphasis original). Thus, the Commonwealth would include as prejudicial costs the full expense of trying Defendant for the new murder and conspiracy charges, as well as the full costs of prosecuting Defendant's co-conspirator in a separate trial, including the co-conspirator's court-appointed defense costs. Thus, the parties are at variance in their interpretations of our prior case law in this area.

Matters concerning the administration of bail are subject to the Rules of Criminal Procedure. ***See*** 42 Pa.C.S.A. § 5702 (providing that "all matters relating to the fixing, posting, forfeiting, exoneration and distribution of bail and recognizances shall be governed by general rules"). Pa.R.Crim.P. 526 prescribes the conditions that must accompany any release of a defendant on bail. These include, *inter alia*, to "appear at all times required" and to "refrain from criminal activity." Pa.R.Crim.P. 526(A)(1), (5). These standard conditions were duly imposed in the case *sub judice* and at 62–2007. C.R. at 1.

Procedures and criteria governing forfeiture are further set forth in pertinent part as follows.

> **Rule 536. Procedures Upon Violation of Conditions: Revocation of Release and Forfeiture; Bail Pieces; Exoneration of Surety**
>
> (A) Sanctions

...

> (2) Forfeiture
>
> (a) When a monetary condition of release has been imposed and the defendant has violated a condition of the bail bond, the bail authority may order the cash or other security forfeited and shall state in writing or on the record the reasons for so doing.
>
> (b) Written notice of the forfeiture shall be given to the defendant and any surety, either personally or by both first class and certified mail at the defendant's and the surety's last known addresses.
>
> (c) The forfeiture shall not be executed until 20 days after notice of the forfeiture order.
>
> (d) The bail authority may direct that a forfeiture be set aside or remitted if justice does not require the full enforcement of the forfeiture order.

Pa.R.Crim.P. 536.

In ***Commonwealth v. Mayfield***, 827 A.2d 462 (Pa. Super. 2003), the trial court had granted the Commonwealth revocation and forfeiture of defendant's bail when he was arrested for an assault while released on bail. The trial court later denied the surety's petition for set-aside or remission. On appeal, this Court made clear that breach of conditions other than failure to appear could trigger bail forfeiture proceedings in accordance with Pa.R.Crim.P. 536. "Thus, Rule 536, when considered in conjunction with Rule 526, *infra*, would appear to allow forfeiture for a defendant's failure to appear, to obey orders of the bail authority, to give timely written notice of a change of address, and to refrain from criminal activity generally."

Mayfield, ***supra*** at 467. We cautioned, however, that further inquiry was necessary when set-aside or remission is requested under subsection (d) of the Rule. ***Id.*** "Nevertheless, the trial court's discretion to grant bail forfeiture is not unbounded; an award of forfeiture is subject to remission 'if justice does not require the full enforcement of the forfeiture order.' ***See*** Pa.R.Crim.P. 536(A)(2)(d)." ***Id.*** The ***Mayfield*** Court then adopted a three-part test a trial court must employ when determining whether justice requires forfeiture in light of a request for set-aside or remission.

> When a defendant breaches a bail bond, without a justifiable excuse, and the government is prejudiced in any manner, the forfeiture should be enforced unless justice requires otherwise. When considering whether or not justice requires the enforcement of a forfeiture, a court must look at several factors, including: 1) the willfulness of the defendant's breach of the bond, 2) the cost, inconvenience and prejudice suffered by the government, and 3) any explanation or mitigating factors.
>
> [***United States v.***] ***Ciotti***, [579 F.Supp. 276, 278 (W.D.Pa. 1984)] (citations omitted). We note that the language the court used is both mandatory ('must look at several factors'), and conjunctive ('and'). Although this language of the district court does not control our disposition, we do find it persuasive and therefore reaffirm its application to claims for remission of bail forfeiture **regardless of the breach of bail condition from which they arise**.

Id. at 468 (emphasis added).

The ***Mayfield*** Court then applied this test to the facts before it, holding the trial court abused its discretion in denying remission. We

determined that the defendant's re-arrest supported the trial court's finding of a willful breach of the bond. However, we further determined the record did not support a finding of prejudice suffered by the Commonwealth.

> Unlike the usual disappearance of the defendant following a failure to appear, Mayfield's arrest did not require substantial investigative resources and did not require a delay in disposition of the underlying charges. In the absence of at least some demonstrated detriment to Montour County, the Commonwealth, or the trial court, we conclude, as a matter of law, that the record fails to establish a legally cognizable basis for the total forfeiture the trial court ordered.

Id. at 468-469.

We again addressed the application of the ***Ciotti***/***Mayfield*** test in ***Commonwealth v. Hernandez***, 886 A.2d 231, 235 (Pa. Super. 2005), *appeal denied*, 899 A.2d 1122 (Pa. 2006). Therein we held that a trial court's failure to employ the ***Ciotti***/***Mayfield*** analysis is not *per se* error where the record permits this Court to independently evaluate its applicability. ***Id.*** at 239. In distinguishing the case before it from the facts in ***Mayfield***, the ***Hernandez*** Court noted that unlike Mayfield, Hernandez violated his bail by failing to appear as required and was sought thereafter on a fugitive warrant. "[T]he Commonwealth was prejudiced by Hernandez's disappearance, which delayed the disposition of his underlying charges. The Commonwealth spent money and manpower to recapture Hernandez[.]" ***Id.*** at 240.

In ***Hernandez***, we also addressed the third prong of the ***Ciotti***/***Mayfield*** test, a review of mitigating factors. We emphasized the relation of this prong to policy concerns underlying remission of bail forfeitures. "Remission of forfeitures is a practice calculated to encourage bondsman [sic] to seek actively the return of absent defendants." ***Id.*** at 236, *quoting* ***Commonwealth v. Fleming***, 485 A.2d 1130, 1131 (Pa. Super. 1984). We ultimately held in ***Hernandez*** that the surety's efforts to secure the defendant's recapture did not qualify as mitigation if such efforts "did not have any impact on Hernandez's ultimate capture." ***Id.*** at 239.

We reaffirmed the central relevance of this policy consideration in ***Riley***, ***supra***. "Although we recognize that the alleged breach in this case is the post-release criminal activity, our law has clearly established that the purpose of bail forfeiture is to encourage bondsmen to act so as to prevent additional **recapture costs** for the Commonwealth." ***Id.*** at 702 (emphasis added). In ***Riley***, the trial court revoked and forfeited the defendant's bail based on his arrest on new charges. Thereafter, upon petition of the surety, the trial court remitted two thirds of the defendant's bail but confirmed the forfeiture of the remaining $25,000.00. On appeal by the surety, the Commonwealth argued, in ***Riley***, that the forfeiture was justified based on prejudice it suffered in prosecuting the defendant on the new charge. ***Id.*** at 698. We disagreed.

> [T]here was no showing of any particular costs incurred by the Commonwealth. A deputy district

> attorney testified that she spent some time working on the new drug charges of April 2006, but there was **no testimony as to any cost related to the initial charges for which Appellant had posted the bond**. The purported costs associated with filing an information and other aspects of the new charges were nothing more than the "nominal" expenses that existed in ***Mayfield***, in which the government also argued that new criminal activity was grounds for revocation. Further, the Commonwealth incurred no costs related to the actual recapture of Riley, as Appellant immediately undertook to locate him once it learned of his absence, took him into custody, and returned him to the Commonwealth. This response is precisely what the threat of forfeiture is designed to encourage….

Id. at 700-701 (emphasis added).

> Here, the Commonwealth has **not shown any cost specific to Riley's failure to appear** since he was timely tried, convicted, and sentenced, and Appellant achieved a speedy apprehension and return of him once it knew of his disappearance. … Further, these are no more than the "nominal" costs **associated with any new criminal activity** and are not sufficient to meet the cost/prejudice prong of the ***Mayfield*** test.

Id. at 702 (citations omitted; emphasis added).

The trial court found ***Riley*** inapplicable to the case *sub judice*.

> ***Riley*** [] stands for the proposition that nominal costs alone cannot form the basis of enforcing a forfeiture. The case at hand is distinguishable from ***Riley***, however, in that, here, [Defendant's] criminal activity resulted in more than nominal costs to the Commonwealth. Seneca and Evergreen have in fact stipulated to substantial costs incurred by the Commonwealth. Accordingly, the holding in ***Riley*** is not applicable and does not require that the previously ordered forfeiture be set aside or remitted.

Trial Court Opinion, 10/21/10, at 5-6.

Upon close review of the parties' stipulation, we conclude that ***Riley*** is controlling and that the Commonwealth and trial court construe the holding in ***Riley*** too narrowly. The trial court and Commonwealth focus solely on the conclusion of the ***Riley*** Court that the costs asserted by the Commonwealth in that case were "nominal," precluding a finding of prejudice. Prior to that observation, however, we clarified in ***Riley*** that the costs relevant to such inquiry were those "specific to Riley's failure to appear" and those "related to the initial charges for which Appellant had posted the bond." ***Riley***, ***supra*** at 701, 702. It is the costs so clarified that the ***Riley*** Court determined were nominal.

In the instant case, the Commonwealth would have us extend as relevant costs in support of a prejudice finding, the full prosecution of Defendant for the new charge, the full cost of prosecution for a co-conspirator, and the full cost of providing court-appointed defense. The Commonwealth takes this position notwithstanding its own admission that it endured no prejudice from Defendant's absence or in connection with the underlying charges for which bail was posted. We find no support for such an extension and further determine that to do so would run contrary to the various policy considerations underlying remission of bail forfeitures.

The Commonwealth's position would essentially make Evergreen a guarantor of Defendant's law-abiding behavior while released on bail. This

in turn would render the third ***Ciotti*/*Mayfield*** prong, requiring inquiry into a surety's mitigation efforts, moot and run contrary to our holding in ***Mayfield*** that the prongs of inquiry into the propriety of remission are "mandatory" and "conjunctive." ***Mayfield***, ***supra*** at 468. The policy cited above, designed to encourage sureties to "seek actively the return of absent defendants," would be obviated. ***Hernandez***, ***supra*** at 239. The Commonwealth's position would also have the deleterious effect of making sureties wary of offering bail and thus impair an accused's constitutional right to pretrial bail. If the climate for corporate sureties were to be made so difficult, an accused's access to bail options could be severely curtailed.

We bear in mind that the determination of a defendant's eligibility for bail is made by a court applying the criteria, set forth in Pa.R.Crim.P. 523, that are "relevant to the defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond." ***Id.*** To make a surety a guarantor of such findings is unjust and cannot support a denial of remission under the ***Ciotti*/*Mayfield*** test.

We also note that this case is unusual in that the new charge at 298-2007 proceeded to trial while the dispositions of the earlier charges at 62–2007 and 119–2007 were postponed through numerous continuances.[7]

[7] No explanation for the numerous continuances appears in the certified record.

Since a bail bond is valid until final disposition of a case,[8] the Commonwealth's position could invite manipulation of the timing of case dispositions to enhance or avoid forfeiture claims.

We do not hold that a defendant's criminal activity while released on bail cannot impact prejudice to the Commonwealth in recapturing that defendant or that such costs may not attach to a case bringing new charges against the defendant. For example, the Commonwealth may expend greater and more costly efforts to apprehend a defendant released on bail who is deemed dangerous or is engaged in criminal conduct, than a defendant who simply did not appear as required. Such costs would be relevant even if incurred in connection with new charges. This circumstance does not apply to the instant case. Here the Commonwealth seeks recompense for normal costs of prosecution unrelated to Defendant's release status.

For all the foregoing reasons we determine that absent any showing of prejudice by the Commonwealth in the parties' stipulation, the trial court erred in denying Evergreen's petition to set aside or remit forfeiture and release surety. Consequently, we reverse the trial court's order of October 21, 2010, denying Evergreen's petition and remand with instructions.

Order reversed. Remanded with direction to remit entire bail forfeiture in favor of Evergreen. Jurisdiction relinquished.

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[8] ***See*** Pa.R.Crim.P. Rule 534.