No. 81071-1

FAIRHURST, J. (dissenting) – Under the majority's decision, a surety is now free to ignore, or even be complicit in, a defendant's failure to show up for court-ordered appearances for a 60-day period without concern that its bond moneys will not be returned. The majority's decision rewrites Washington's bail bond statutes and dangerously undercuts the financial incentive for sureties to ensure defendants comply with the terms of bail. In doing so, the majority's decision fails to respect the balance of incentives for sureties spelled out by the legislature in chapter 10.19 RCW and undermines the equitable role of the trial court.

I dissent from the majority's interpretation of our bail bond statute and agree with the Court of Appeals that the trial court did not abuse its discretion when it refused to vacate the default judgment against All City Bail Bonds. I concur with the majority's result to the extent it rejects the Court of Appeals' novel balancing test for partial exoneration of a bail bond.

FACTS

All City is a bail bond agent licensed by the state of Washington. On June 5, 2005, All City posted a $20,000 appearance bond for defendant William Joseph Kramer to secure his presence at all court hearings to answer to the charge of first degree child molestation.

On December 8, 2005, Lincoln County Superior Court issued a bench warrant for Kramer's arrest based on a violation of his conditions of pretrial release. The warrant stated that bail would not be accepted. On Monday, December 19, 2005, Kramer failed to appear for a scheduled 9:30 a.m. hearing. Kramer's attorney was present and confirmed that Kramer was aware of the hearing. Upon motion by the State, the trial court immediately entered a default judgment and order of forfeiture pursuant to RCW 10.19.090.

That same day, Kramer informed All City's agent, Charles Stewart, by telephone that he had missed his hearing, claiming he could not locate his attorney and feared he would be taken into custody. Stewart remained in daily telephone contact with Kramer or his family members from December 19 to 26, 2005,[1] and

[1]All City submitted a declaration from Stewart describing his communications with Kramer while Kramer was at large. Clerk's Papers (CP) at 26-28. The State does not dispute All City's statement of the facts. Report of Proceedings at 5.

was aware of Kramer's location throughout. Stewart advised Kramer to turn himself in to either All City or the authorities, but took no further action. At some point in their communications, Kramer requested that he be allowed to remain at large in order to spend Christmas with his family. Stewart agreed, arranging for Kramer to surrender himself to All City on either the evening of December 26, 2005, or the morning of December 27, 2005.[2]

On December 26, 2005, the police apprehended Kramer at the home of Kramer's mother without the assistance of All City. Kramer remained in custody from his apprehension until judgment and sentencing.

ANALYSIS

Our constitution mandates bail in all criminal cases except for capital offenses. Wash. Const. art. I, § 20. Where the defendant must seek the assistance of a bondsman in posting a bail bond, a surety relationship is formed in which the bondsman is the surety, the defendant is the principal, and the State is the obligee. *In re Marriage of Bralley*, 70 Wn. App. 646, 652-53, 855 P.2d 1174 (1993). The

[2]As Stewart stated in his declaration: "From December 19, 2005, until December 26, 2005, I was in daily contact with the Defendant and the Defendant's family. The Defendant requested that he be allowed to spend Christmas with his family, and stated he would surrender himself immediately after Christmas . . . . The Defendant agreed that he would meet me either in the evening of December 26, 2005, or in the morning of December 27, 2005, to surrender himself to my custody so that I could transport him to the jail." CP at 27.

surety "has a special role in the production and security of the accused. This person is responsible if the accused does not appear at the required time." *Id.* at 653. A surety undertakes a calculated risk that the defendant will not comply with court orders and that the bond will be forfeited. *See* RCW 10.19.090.

The primary purpose of bail is to secure the appearance of the defendant at all court hearings. *State v. Heslin*, 63 Wn.2d 957, 960, 389 P.2d 892 (1964). However, "[b]ail is not taken on forfeiture as money is taken for a debt . . . . There should be no suggestion of bounty or revenue to the state or of punishment to the surety." *State v. Jackschitz*, 76 Wash. 253, 255, 136 P. 132 (1913). Nevertheless, it is the risk of forfeiture that provides the incentive to the surety to assist in securing the appearance of defendants at court hearings. As we articulated in *Jackschitz*, "in cases of flight, a recapture may be aided by the bondsmen who, it is presumed, will be moved by an incentive to prevent judgment, or, if it has been entered, to absolve it and to mitigate its penalties." *Id.* at 256.

The legislature balanced the financial risks facing sureties in chapter 10.19 RCW. RCW 10.19.090 contains the general rule mandating bond forfeiture when a defendant fails to appear. Any harshness in this forfeiture rule is tempered by RCW 10.19.105 and .140, which each provide means for sureties to recover bond money

even when a defendant initially fails to appear. In addition to the two avenues for bail bond exoneration provided by RCW 10.19.105 and .140, trial courts also retain equitable powers to grant relief in appropriate circumstances.[3] As discussed below, the majority disturbs this scheme by rewriting RCW 10.19.105 and by not giving proper deference to the equitable determination of the trial court.

The bail bond statutes: chapter 10.19 RCW

The legislature's scheme to encourage the giving of bail, while at the same time securing the appearance of the defendant, is clearly articulated in Washington's bail bond statutes. RCW 10.19.090 mandates forfeiture upon the defendant's failure to appear:

> In criminal cases where a recognizance for the appearance of any person . . . shall have been taken and a default entered, the recognizance shall be declared forfeited by the court, and at the time of adjudging such forfeiture said court shall enter judgment against the principal and sureties named in such recognizance for the sum therein mentioned, and execution may issue thereon the same as upon other judgments.

RCW 10.19.090 anticipates that judgment and forfeiture will occur within 30 days.

RCW 10.19.100 then provides a means to delay and, possibly, prevent

[3]In addition, RCW 10.19.090 provides for exoneration of a bond if the surety is not notified in writing of the failure of the defendant to appear. ("If the surety is not notified by the court in writing of the unexplained failure of the defendant to appear within thirty days of the date for appearance, then the forfeiture shall be null and void and the recognizance exonerated.")

execution for those sureties who are willing to post a second bond to secure judgment on the recognizance bond:

> The parties, or either of them, against whom such judgment may be entered in the superior or supreme courts, may stay said execution for sixty days by giving a bond with two or more sureties, to be approved by the clerk, conditioned for the payment of such judgment at the expiration of sixty days, unless the same shall be vacated before the expiration of that time.

For those sureties that are willing to take on extra financial risk and post a stay bond under RCW 10.19.100, RCW 10.19.105 allows the forfeiture judgment under RCW 10.19.090 to be vacated if the defendant is returned within 60 days:

> *If a bond be given and execution stayed*, *as provided in RCW 10.19.100*, and the person for whose appearance such recognizance was given shall be produced in court before the expiration of said period of sixty days, the judge may vacate such judgment upon such terms as may be just and equitable, otherwise execution shall forthwith issue as well against the sureties in the new bond as against the judgment debtors.

(Emphasis added.) For sureties that are not willing to post a stay bond and/or are unable to secure the presence of a defendant within 60 days, return of the bond is still available under RCW 10.19.140 within a 12-month period after forfeiture. RCW 10.19.140 provides:

> If a forfeiture has been entered against a person in a criminal case and the person is returned to custody or produced in court within twelve months from the forfeiture, then the full amount of the bond, less any and all costs determined by the court to have been incurred by law

> enforcement in transporting, locating, apprehending, or processing the return of the person to the jurisdiction of the court, shall be remitted to the surety if the surety was directly responsible for producing the person in court or directly responsible for apprehension of the person by law enforcement.

Under RCW 10.19.140, if the surety is directly responsible for returning the defendant within 12 months, the amount of the bond can be returned to the surety minus any costs that law enforcement may have incurred in assisting in the return of the defendant.[4] If the surety cannot recover under RCW 10.19.105 or RCW 10.19.140, the court still has the discretion to vacate the forfeiture under its inherent equitable authority. *Jackschitz*, 76 Wash. at 256.

In this case, All City chose not to apply for a stay bond under RCW 10.19.100 and is therefore not eligible for relief under RCW 10.19.105. Although All City argued below that it is entitled to relief under RCW 10.19.140, the trial court held All City's telephone conversations with Kramer were not sufficient to find All City directly responsible for Kramer's arrest, and the Court of Appeals affirmed. *State v. Kramer*, 141 Wn. App. 892, 900, 174 P.3d 1193 (2007). All City did not raise its argument regarding relief under RCW 10.19.140 before this court, so we do not address it. RAP 13.7(b). If All City is due any relief in this

[4] RCW 10.19.140, which was enacted in 1986, specifically requires that the surety be "directly responsible for producing the person in court or directly responsible for apprehension of the person by law enforcement."

case, it must come from the court's inherent equitable authority to exonerate the bond.

The majority misinterprets the statutes

The majority is uncomfortable with the fact that operation of the statutes in this case results in denial of exoneration of the bond. To reach a different result, the majority distorts the language of RCW 10.19.100 and .105. The result is a new bright-line test that dangerously alters the balanced incentives for sureties by giving them a 60-day window in which they are relieved of all obligations to facilitate the return of missing defendants.

Sureties have three different avenues for relief: RCW 10.19.105, .140, and the trial court's equitable powers, discussed below. The plain language of the statute indicates that relief under RCW 10.19.105 is conditioned on posting a stay bond under RCW 10.19.100. RCW 10.19.105 ("If a bond be given and execution stayed, as provided in RCW 10.19.100 . . . ."). The majority asserts that the clear condition imposed by RCW 10.19.105 is contradicted by the language of RCW 10.19.100. Majority at 7. The majority interprets RCW 10.19.100 to mean "a surety 'may stay said execution . . . by giving a bond . . . *unless* [the default

judgment] *shall be vacated before the expiration of that time.'"* Majority at 7 (alterations in original). This interpretation of RCW 10.19.100 suggests that a court can vacate judgment before a stay bond has been posted. In light of its interpretation of RCW 10.19.100, the majority concludes that relief under RCW 10.19.105 is not conditioned on posting a stay bond and seeking a stay.

However, the majority's interpretation gives rise to the bizarre implication that a surety may *not* stay execution of the judgment if the judgment will be vacated before the stay period ends. This result is absurd not only because it would prevent the most deserving sureties from receiving a stay, but also because there is no method for determining what judgments will and will not be vacated within the stay period. The majority even admits that its interpretation may require that a bond be filed, and a stay granted, only after 60 days have passed from the date of forfeiture. Majority at 8 n.2.

The statute is amenable to a much more reasonable interpretation. The majority's error is in asserting that the language "unless the same shall be vacated before the expiration of that time" applies to the language "may stay said execution." RCW 10.19.100 provides for the giving of a bond "conditioned for the payment of such judgment at the expiration of sixty days, unless the same shall be

vacated before the expiration of that time." If we interpret "unless the same shall be vacated before the expiration of that time" to apply to the clause that immediately precedes it, then the language simply becomes part of the condition of the stay bond. Consequently, RCW 10.19.100 would simply mean that a surety may stay execution of a judgment by posting a stay bond, and the stay bond will be used to satisfy the judgment after the stay ends if the judgment is not vacated during the stay, but the stay bond will not be used to satisfy the judgment if the judgment is vacated during the stay. Not only does this interpretation have the benefit of avoiding absurd results, it also has the benefit of allowing RCW 10.19.100 to work in harmony with RCW 10.19.105. Because this interpretation of RCW 10.19.100 envisions that any vacation of a judgment will take place during the stay, it is consistent with the interpretation that relief under RCW 10.19.105 is available only when "a bond be given and execution stayed."

The majority attempts to bolster its interpretation of RCW 10.19.105 by quoting heavily from the Court of Appeals opinion in *State v. Hampton*, 42 Wn. App. 130, 709 P.2d 1221 (1985), *rev'd*, 107 Wn.2d 403, 728 P.2d 1049 (1986). However, *Hampton* does not stand for the proposition that relief is available under RCW 10.19.105, even when a stay bond has not been posted. *Hampton* stands for

the proposition that failure to meet the requirements of RCW 10.19.105 does not foreclose relief under a court's inherent equitable power. *Id.* at 135-36.

The majority correctly asserts that a surety may skip seeking a stay and may file directly for vacation of a judgment outright. Majority at 7-8. However, a surety that does so is proceeding under RCW 10.19.140 or appealing to the equitable powers of the trial court, not proceeding under RCW 10.19.105, which, as explained above, is available only in cases where the surety posts a stay bond under RCW 10.19.100. All City already dropped its appeal of its eligibility for relief under RCW 10.19.140. The majority should focus on the court's inherent equitable authority instead of stretching RCW 10.19.105 to reach its result.

The majority's new rule reduces the financial incentives our legislature provided to sureties by giving them a 60-day window in which they are relieved of all obligations to facilitate the return of missing defendants. This kind of reduction in the financial incentives facing sureties is the same kind of dangerous reduction in balanced incentives that was vetoed in the 1986 legislative session. In 1986, the legislature attempted to amend RCW 10.19.090 to allow trial courts to reduce the amount of the bond at the time of forfeiture. Laws of 1986, ch. 322, § 2. The governor vetoed this provision stating that "[r]educing the face value of the bond

when the defendant fails to appear could undermine the incentive to bring defendants to justice, thereby weakening the criminal justice process." *Id.* (governor's explanation of partial vetoes).

Our bail bond statutes, as written, do not provide the relief the majority seeks in this case. If the majority believes All City is entitled to relief under the unique facts of this case, it should address its arguments to the trial court's inherent equitable powers to facilitate bail, and not needlessly reinterpret our bail bond statutes.

Equitable relief

Trial courts have discretion to grant relief from forfeiture where sureties are not entitled to relief under chapter 10.19 RCW, but where, under the circumstances of the case, relief would promote the giving of bail as well as bail's purpose of securing the presence of the defendant. *State v. Sullivan*, 172 Wash. 530, 535, 22 P.2d 56 (1933); *State v. Olson,* 127 Wash. 300, 302, 220 P. 776 (1923). This equitable relief is within the inherent discretionary power of the trial court, which should be exercised liberally in order

> "that the state may be relieved of the burden of keeping an accused person; that the innocent shall not be confined pending a trial and formal acquittal; that, in cases of flight, a recapture may be aided by the bondsmen who, it is presumed, will be moved by an incentive to prevent judgment, or, if it has been entered, to absolve it and to

mitigate its penalties."

State v. Ringrose, 71 Wn.2d 99, 102, 426 P.2d 848 (1967) (quoting *Jackschitz*, 76 Wash. at 256). The trial court must, therefore, use its equitable powers to encourage the giving of a bond but bear in mind that the purpose of the bond is to secure the defendant's appearance at court. "'That discretion, however, is not to be arbitrarily exercised. It is a judicial discretion.'" *State v. O'Day*, 36 Wn.2d 146, 152, 216 P.2d 732 (1950) (quoting *State v. Johnson*, 69 Wash. 612, 616, 126 P. 56 (1912)).

> The test, in determining the question whether the trial court erred in refusing to vacate the forfeiture of a bail bond, "is not alone one of time whether prompt or otherwise; nor good faith, or the lack of it; nor compensation, or lack of it, to the bondsmen or surety; nor whether there are organized, undisclosed principals in procuring the business of furnishing bail" but "is the judicial discretion of the trial judge, who, in formulating and arriving at his judgment, may look to all such things."

State v. Van Wagner, 16 Wn.2d 54, 62, 132 P.2d 359 (1942) (quoting *State v. Jimas*, 166 Wash. 356, 360, 7 P.2d 15 (1932)).

In determining whether equitable relief is appropriate Washington courts have looked primarily to the reasons for nonappearance and the actions of the surety in returning the defendant to the custody of the court. We have considered whether the defendant acted in good faith by surrendering,[5] the diligence of the surety,

[5]*Johnson*, 69 Wash. at 616; *Jackschitz*, 76 Wash. at 254; *O'Day*, 36 Wn.2d at 159; *Van*

[6] the defendant's reason for failing to appear,[7] whether the surety and defendant colluded or "trifled with the court,"[8] whether law enforcement or the surety secured the defendant's appearance,[9] and whether the defendant was produced within a reasonable time.[1] In no case, however, have we found the trial court abused its discretion by denying relief based solely on the length of time between the defendant's failure to appear and his return to custody. Unfortunately, that is the only factor the majority considers when it determines that All City is entitled to return of the bond.

Although the majority bases All City's claim to equitable relief on the short period of time during which Kramer remained at large before he was located and arrested by local law enforcement, other facts do not weigh in All City's favor. Kramer did not have a good faith reason for his failure to appear. He did not attend his hearing because a bench warrant had been issued for his arrest, and Kramer feared he would be taken into custody. Kramer did not surrender himself to the

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Wagner, 16 Wn.2d at 62.

[6]*Johnson*, 69 Wash. at 616; *Jackschitz*, 76 Wash. at 254; *Olson* 127 Wash. at 301; *O'Day*, 36 Wn.2d at 159; *Jimas*, 166 Wash. at 358, 361; *Heslin*, 63 Wn.2d 957; *State v. Ohm*, 145 Wash. 197, 198, 259 P. 382 (1927).

[7]*Johnson*, 69 Wash. at 614; *Olson*, 127 Wash. at 302; *Van Wagner*, 16 Wn.2d at 55; *O'Day*, 36 Wn.2d at 150; *Jackschitz*, 76 Wash. at 255; *Sullivan*, 172 Wash. at 535.

[8]*Johnson*, 69 Wash. at 615; *Jimas*, 166 Wash. at 358.

[9]*Johnson*, 69 Wash. at 614; *Jackschitz*, 76 Wash. at 254; *Olson*, 127 Wash. at 300; *Van Wagner*, 16 Wn.2d at 55; *O'Day*, 36 Wn.2d at 159.

[1]*Johnson*, 69 Wash. at 614; *State v. Mullen*, 66 Wn.2d 255, 258-59, 401 P.2d 991 (1965).

court. Although All City spoke with Kramer daily and knew his location, it took no action other than advising Kramer to turn himself in and advising his mother to cooperate with police. Kramer and All City agreed together that Kramer could remain at large until after Christmas. All City received notice of forfeiture on December 20, 2005, and had an opportunity to request a stay. Kramer was taken into custody by law enforcement without the assistance of All City. Both the Court of Appeals and the trial court were troubled by the fact that All City appeared to be usurping the role of the court by deciding when Kramer should surrender to the court. *Kramer*, 141 Wn. App. at 898; Report of Proceeding at 8, 10-11, 13-14, 18.

The majority relies heavily on *State v. Mullen*, 66 Wn.2d 255, 401 P.2d 991 (1965). In *Mullen*, we held it was an abuse of discretion for a trial court to refuse to vacate forfeiture of a bond when a defendant was returned to custody 21 days after his scheduled appearance. *Id.* at 258-59. Our opinion in *Mullen* is silent as to whether the surety posted a stay bond in that case. *See id.* at 255-59. We held the trial court abused its discretion even though there was no evidence that the surety took any action to secure Mullen's return. *Id.* at 259. However, there is a big difference between this situation and the one in *Mullen*. There was no evidence that the surety in *Mullen* had knowledge of the location of the principal when it failed to

act. Also, in *Mullen*, the surety did not actively agree to delay capturing the principal. This case is distinguishable.

Although our bail policy is designed to encourage the giving of bail, it is based upon the assumption that the surety will be diligent to prevent judgment by securing the appearance of the defendant. *Jackschitz*, 76 Wash. at 256. All City could have requested a stay, but did not. All City knew Kramer's location and could have returned him to custody, but did not. All City could have notified law enforcement of Kramer's location, but did not. Most importantly, All City did not have to agree to delay Kramer's capture. Having failed to act on its own behalf to preserve the bond, All City argues that the trial court abused its discretion by refusing exoneration. I disagree. The trial court had tenable grounds for denying relief and, therefore, did not abuse its discretion. *Hampton*, 107 Wn.2d at 408-09 ("'A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.'" (quoting *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984))).

CONCLUSION

For the reasons articulated above, I dissent from the majority's interpretation of our bail bond statutes and agree with the Court of Appeals that the trial court did

not abuse its discretion when it refused to vacate the default judgment against All City. If the majority believes there should be a different result in this case, it should focus on a proper review of the trial court's equitable discretion and not disrupt Washington's bail bond statutes.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice James M. Johnson

Justice Debra L. Stephens