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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Cherokee County
The Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

Cornelius Sentell Mayberry,

DEFENDANT,

and

John Steen d/b/a John Steen Bail Bonding and Palmetto Surety Corp., as Surety,

PETITIONERS.

Op. No. 2022-UP-245

APPELLATE CASE NO. 2020-000771

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that a Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the Circuit Court's decision to order the estreatment of the appearance bond in this matter?

STATEMENT OF THE CASE

This is an appeal from an order confirming judgment and estreating bond against Petitioners, John Steen d/b/a John Steen Bail Bonding and Palmetto Surety Corporation.

On May 16, 2018, Petitioners posted a $465,000 surety bond securing the release of Cornelius Mayberry from jail. (R. p. 001). Mayberry subsequently failed to appear for a term of General Sessions Court in Cherokee County and a bench warrant was issued for his arrest. (R. p. 140).

On February 19, 2019, the State filed a Petition for Estreatment of Bond and an Order and Rule to Show Cause requiring Petitioners to appear and show cause why judgment should not be confirmed against them in the amount of $465,000.00. (R. p. 018). Following two estreatment hearings, the Circuit Court issued a written order confirming judgment against Petitioners. (R. p. 006).

On June 8, 2022, the South Carolina Court of Appeals affirmed the Circuit Court's decision to order the estreatment of the entire bond in an unpublished opinion, State v. Mayberry, Op. No. 2021-UP-249 (S.C. Ct. App. filed June 8, 2022). Petitioners filed a petition for rehearing on June 21, 2022. The Court of Appeals issued an order denying the petition for rehearing on August 16, 2022. This Petition for Writ of Certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

Cornelius Mayberry was arrested in Cherokee County on May 3, 2018, and charged with trafficking heroin, trafficking methamphetamine or cocaine base, and unlawful neglect of a child. (R. pp. 140-141) (R. p. 028, lines 8-14; p. 030, lines 13-15). On May 16, 2018, Petitioners posted a $465,000 surety bond to secure Mayberry's release from jail and placed a GPS monitor on him. (R. pp. 001-003); (R. p. 096, lines 8-16).

Nearly three months after he was released on bond, on August 14, 2018, Mayberry was indicted by a federal grand jury on essentially the same charges that were pending in Cherokee County. (R. p. 030, lines 16-22).

While Mayberry was out on bond, he complied with the conditions of his bond by satisfying the requirements of first and second appearances in the Court of General Sessions. (R. p. 036, lines 8-14; R. p. 051, lines 6-12). Mayberry maintained good behavior by not being arrested, wearing a GPS monitor, and checking in with the bond agent every two weeks. (R. p. 109, lines 19-24).

On August 27, 2018, two weeks after Mayberry was federally indicted, he was stopped by two police officers, Lieutenant David Oglesby, a state-federal joint task force officer with Cherokee County Sheriff's Department and the Department of Homeland Security, and Captain Ronnie Painter, an officer with the Cherokee County Sheriff's Department. (R. p. 060, lines 6-22; p. 090, lines 8-17). The officers initiated the stop to arrest Mayberry on a federal pickup order. (R. p. 061). After the officers approached the vehicle Mayberry was driving, an altercation occurred between Oglesby and Mayberry. Mayberry accelerated the vehicle, which went off the road, flipped, and landed on Oglesby's legs. Mayberry exited the vehicle and attempted to flee

after being handcuffed by Painter. (R. pp. 090-093). He later cut the GPS monitor off. (R. p. 096, lines 20-24).

Neither of the officers involved in the takedown of Mayberry nor any agent of the state or federal government contacted Petitioners to request assistance with locating or securing Mayberry prior to the traffic stop. (R. p. 068, line 17–p. 069, line 11).

Although Petitioners were not given the opportunity to help secure Mayberry prior to the traffic stop, they immediately began working their community, informants, and indemnitors to locate Mayberry after they were made aware of his escape. (R. p. 097, lines 16-20). Petitioners also contacted the monitor company and tracked Mayberry's prior GPS movements. (R. p. 097, lines 20-24). Despite their efforts, Petitioners were not able to immediately locate Mayberry.

Mayberry's state cases were subsequently docketed for the October 8, 2018, term of General Sessions Court in Cherokee County. (R. pp. 142-143). Mayberry failed to appear and a bench warrant was issued on October 15, 2018. (R. pp. 140-141).

On February 19, 2019, the Solicitor filed a Petition for Estreatment of Bond as well as an Order and Rule to Show Cause, requiring Petitioners to show cause why judgment should not be confirmed in the sum of $465,000. (R. p. 018).

Two estreatment hearings were held. No witnesses testified during the first hearing on March 11, 2019. However, the Solicitor and Petitioners, through their attorney, presented arguments. At the conclusion of the hearing, Judge Cole agreed to allow a second hearing because the Solicitor sought to present evidence supporting his position and Petitioners' attorney requested the right to cross-examine any witnesses presented by the State. (R. p. 045, line 10–p. 046, line 5).

A second hearing was held on April 8, 2019. Prior to the hearing, on April 2, 2019, Petitioners secured Mayberry and turned him over to the county jail. (R. p. 115, lines 7-23). Officer Oglesby and Officer Painter both testified about what happened during the traffic stop, but most of the testimony during the second hearing was about the expenses each party claimed they incurred because of this incident.

David Oglesby Testimony

Officer Oglesby testified that he broke his ankles, broke his fibula, and injured his knees when Mayberry's vehicle rolled on top of him. (R. p. 063, lines 1-4; p. 064, lines 2-6). He further testified that his medical bills were covered by workers' compensation and he was out of work for two and a half to three months. (R. 064, lines 13-16 and lines 7-12).

Angela Jarrett Testimony

Angela Jarrett is the financial counselor for Cherokee Medical Center. (R. p. 077, lines 16-18). She testified that the amounts indicated on two of Officer Oglesby's bills were correct. First, she confirmed that an $82,992.26 hospital bill had a $0 balance. Insurance paid $17,093.28 and the remainder of the balance was written off. (R. p. 080, lines 7-15). She also confirmed that a $31,000 helicopter transport bill was still due in full. (R. p. 080, lines 16-18; p. 081, lines 5-11).

Steve Muller Testimony

Steve Muller is the Sheriff of Cherokee County. (R. p. 083, lines 1-4). He testified about the man-hours the state and federal officers committed to the search for Mayberry and the costs associated with the search. He testified that the federal government dedicated 930 man-hours, at a cost of $64,356, and the state government dedicated 990 man-hours, at a cost of $17,958. (R. p.

084, lines 5-22). Sheriff Muller further testified that workers' compensation paid $68,020.98 in medical bills stemming from Officer Oglesby's injuries. (R. p. 084, line 23–p. 085, line 5).

Scott Willis Testimony

Scott Willis is the senior executive officer of Palmetto Surety Corporation. (R. p. 095, lines 14-16). He testified that he immediately contacted Mayberry's bondsman after he learned that Mayberry had escaped federal custody. (R. p. 097, lines 7-15). Because there was no state bench warrant for Mayberry's arrest, Willis instructed the bail agent to begin searching for Mayberry but not to interfere with the federal government's efforts to apprehend him. (R. p. 097, lines 7-24). Willis further testified that he activated three multi-state recovery teams to assist the recovery efforts, which ultimately resulted in Mayberry's capture. (R. p. 098, line 9–p. 099, line 12; p. 100, lines 6-8).

John Steen Testimony

John Steen was the bondsman on the bond for Mayberry. (R. p. 109, lines 13-15). He testified that he began looking for Mayberry the day after he escaped federal custody. (R. p. 110, line 12–p. 111, line 4). He subsequently assisted with capturing Mayberry and submitting Mayberry to law enforcement officers. (R. p. 113, lines 4-23).

Don Mescia Testimony

Don Mescia is the managing general agent and legislative liaison for Palmetto Surety Corporation. (R. p. 129, lines 17-19). He testified about Palmetto Surety's increased efforts to capture Mayberry from March 12, 2019, to April 2, 2019. (R. p. 130, line 8–p. 133, line 19). He estimated that his group committed about 350 hours to capturing Mayberry. (R. p. 133, lines 7-9).

ARGUMENT

The Court of Appeals erred in affirming the Circuit Court's decision to order the estreatment of the appearance bond in this matter.

The Circuit Court made several findings in its order confirming judgment against Petitioners for the entire $465,000 bond. "(1) the Petition is properly before the Court; (2) the Defendant breached the conditions of bond by failing to appear and not being of good behavior; (3) the recognizance has been forfeited by that breach and a conditional judgment properly entered; (4) the surety has been provided an opportunity to show cause and present any excuse for nonperformance of the recognizance; (5) no reason sufficient to this Court has been given excusing nonperformance of the recognizance; (6) the forfeiture of the recognizance was not the result of ignorance, unavoidable impediment, an act of law rendering performance impossible, or other impediment created by the State and beyond the control of the defendant, preventing performance; (7) the forfeiture of the recognizance was by deliberate and wilful [sic] default of the defendant; and (8) the conditional judgement entered on the forfeiture is therefore confirmed." (R. p. 017).

The Circuit Court concluded that although it had "much empathy toward the surety . . . in light of the fact that he has presented evidence of significant effort expended in the successful surrender of the defendant . . . *the law*, upon application of the facts as established by the record, *allows this Court no discretion* in affording relief by way of a remission of the forfeiture. Should the legislature wish to grant the Court greater discretion in these matters, it may do so by enactment or by repeal of S.C. Code Ann. § 17-15-180." (R. p. 017) (emphasis added).

A. The Circuit Court erred by ruling it had no discretion to remit any portion of the bond as a matter of law and by failing to make factual findings pursuant to Ex Parte Polk and S.C. Code Ann. § 38-53-70, and the Court of Appeals erred by holding these issues were not preserved for appellate review.

In this case, the Circuit Court was vested with the discretion to remit all or a portion of the forfeited bond. See S.C. Code Ann. § 38-53-70 ("At any time before execution is issued on a judgment of forfeiture against a defendant or his surety, the court may direct the judgment be remitted in whole or in part, upon conditions as the court may impose, if it appears that justice requires remission."); see also State v. Lara, 386 S.C. 104, 107, 687 S.E.2d 26, 28 (2009) ("The courts of this State are vested with discretionary power to grant relief from bond forfeitures."); Ex Parte Polk, 354 S.C. 8, 13, 579 S.E.2d 329, 331 (2003) ("[T]he decision regarding remission is within the discretion of the trial court.").

The Circuit Court abused its discretion by refusing to exercise its discretion and ruling it had no discretion to remit the bond as a matter of law. See Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (An abuse of discretion has occurred "[w]hen the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised.").

However, the Court of Appeals held that these issues were not preserved for appellate review. State v. Mayberry, Op. No. 2021-UP-249 (S.C. Ct. App. filed June 8, 2022) ("Whether the circuit court erred by asserting it lacked discretion to remit Mayberry's bond or by failing to make specific factual findings is not preserved for appellate review because these issues were neither raised to nor ruled upon by the circuit court.").

Although an issue is only preserved for appellate review if it is raised to the Circuit Court, "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C.

138, 142, 587 S.E.2d 691, 693-94 (2003). In this case, it is clear from the record that Petitioners' counsel argued that the Circuit Court had the discretion to remit Mayberry's bond and was required to make factual findings pursuant to Ex Parte Polk, 354 S.C. 8, 579 S.E.2d 329 (Ct. App. 2003), and S.C. Code Ann. § 38-53-70.

Petitioners raised these issues on three separate occasions before the Circuit Court issued its Order for Confirmation of Judgment.

During the first estreatment hearing, Petitioners' counsel argued that the Circuit Court had to consider the Polk[1] factors in deciding whether, and to what extent, the bond should be estreated. (R. pp. 034-035). Petitioners' counsel concluded his argument as follows: "There has to be some sort of factual determination that Your Honor can draw, from the facts, that would lead the Court to make a determination regardless of what would be the appropriate amount of money to, to be estreated, if any should be estreated." (R. p. 035, lines 14-24).

During the second estreatment hearing, Petitioners' counsel again argued that the Circuit Court should consider the Polk[2] factors, and S.C. Code Ann. § 38-53-70, in deciding whether, and to what extent, the bond should be estreated. (R. p. 057).

Finally, in their Brief in Opposition to Bond Estreatment, Petitioners again argued that the State "failed to provide sufficient evidence to comply with the mandatory Polk factors." (R. p. 025).

[1] Although the hearing transcript references the "Pope factors," it is clear from the record that Petitioner's counsel was discussing the "Polk" factors. (R. pp. 051-052) (Solicitor Barnette cites Ex Parte Polk as the case that has been discussed by Petitioners' counsel.).

[2] Again, although the transcript references the "Poke case" and "Pope," the record clearly reflects that both parties and the Circuit Court understood that Ex Parte Polk was being discussed. (R. pp. 051-052).

Furthermore, in its Order for Confirmation of Judgment, the Circuit Court discussed Polk and S.C. Code Ann. § 38-53-70 before ruling that it had no discretion to remit any portion of the bond as a matter of law. Therefore, the Circuit Court understood the issue of remission was before it for consideration. Polk, 354 S.C. at 11, 579 S.E.2d at 330 ("[W]e disagree with the State's assertion that Polk failed to raise the issue of remission to the trial court. *Our reading of the record convinces us the trial judge understood the issue of remission to have been before him for consideration* inasmuch as the court ruled on the issue of considering the cost to the State resulting from [the Defendant's] failure to appear.") (emphasis added).

Because Petitioners argued that the Circuit Court should remit Mayberry's bond, in whole or in part, after making factual findings pursuant to Polk and S.C. Code Ann. § 38-53-70, Petitioners implicitly raised the issue of whether the Circuit Court had the discretion to remit the bond. Thus, when the Circuit Court failed to make such factual findings and ruled that it had no discretion to remit any portion of the bond, those issues were properly preserved for appellate review.

B. The Court of Appeals erred by affirming the Circuit Court's ruling that the entire bond should be estreated based on the "willful default" of the Defendant without considering whether Petitioners' actions constituted a "willful failure to fulfill [their] obligations as the bondsperson," pursuant to State v. Mitchell.

In its opinion, the Court of Appeals held that "[t]he Circuit Court did not abuse its discretion by finding the attempt by federal law enforcement to arrest Mayberry was not an intervening event because the testimony indicating Mayberry evaded arrest, removed his ankle monitor, and was not detained until April 2019 was evidence indicating Mayberry's failure to appear constituted 'willful default.'"

Although Mayberry's actions clearly indicate that he willfully defaulted on the terms of his bond, the Circuit Court failed to consider the willfulness, or lack thereof, of Petitioners' actions. See S.C. Code Ann. § 17-15-180 ("If any person shall forfeit a recognizance from ignorance or unavoidable impediment and not from willful default, the court . . . may . . . remit the [bond] as may be deemed reasonable.") (emphasis added); State v. Mitchell, 421 S.C. 365, 373-74, 807 S.E.2d 193, 197 (2017) ("[T]he circuit court may consider evidence of a bondsperson's willful failure to fulfill their obligations as the bondsperson, in addition to the factors expressed in Polk, in determining whether, and to what extent, a bond forfeiture should be remitted.").

In this case, law enforcement did not contact Petitioners before the officers involved attempted to arrest Mayberry. (R. p. 068-069). However, once Petitioners were made aware of Mayberry's escape, they began working their community, informants, and indemnitors to locate Mayberry. (R. p. 097). Petitioners' efforts eventually resulted in Mayberry's capture. (R. p. 115).

Therefore, because Petitioners' actions do not constitute a willful failure to fulfill their obligations as the surety, the Circuit Court erred by failing to consider Petitioners' actions before ruling that the bond should be estreated.

CONCLUSION

For the reasons stated above, this Court should grant certiorari, reverse the decision of the Court of Appeals, and remand this matter to the Circuit Court with instructions that it make appropriate factual findings and properly exercise its discretion to remit the bond based on the evidence and testimony presented at the second hearing.

Respectfully submitted,

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