STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case Tracking No. 2020-000771

The State, Respondent,

vs.

Cornelius Sentell Mayberry, Defendant,

and

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

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The circuit court did not err in ordering the estreatment of the bond in this matter in full. There was no intervening event which rendered it impossible for the parties to meet their expectations on the bond contract. Further, the circuit court properly exercised his discretion in refusing to remit any portion of the bond.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On May 3, 2018, Mayberry was arrested on charges of trafficking in heroin and trafficking in methamphetamine or cocaine base, as well as unlawful neglect of a child. On May 16, 2018, the magistrate court set bond requiring surety in the amount of $465,000, which was subsequently posted. The bond specifically required:

> That the above named defendant be released from custody on the condition that he will personally appear before the designated court at the place, date and time required to answer the charge made against him and do what shall be ordered by the court and not depart the State without the permission of the court and be of good behavior.

(Bail Proceeding Form; R.1). In particular, the form required Appellant to be present at the Court of General Sessions term beginning July 26, 2018. Additionally, it specifically provided: "If no disposition is made during that term, the defendant shall appear and remain throughout each succeeding term of court until final disposition is made of his case, unless otherwise ordered by the court. (Bail Form; R.1). The form was signed by the judge, Mayberry, and John Steen on behalf of the surety bondsman.

On August 14, 2018, a federal indictment and bench warrant was issued for Mayberry. (Federal Order for Bench Warrant; R.3). On August 27-28, 2018, pursuant to the federal bench warrant, Lt. David Oglesby, a Cherokee County Sheriff's Department Officer assigned to the Homeland Security Investigation Task Force, and Captain Ronnie Painter, with the Cherokee County Narcotics Division, attempted to arrest Mayberry. (4/18T.12-13; Brief in Opposition to Estreatment; R.60-61; 21).

The officers saw Mayberry's vehicle at his house and proceeded up the street to wait for backup. While waiting, Painter saw the vehicle pass and the officers got in behind the vehicle and initiated a traffic stop. (4/18T.43; R.91). After getting Mayberry's license, Oglesby tells Mayberry

that they have warrants for his arrest and grabbed his arm. At that point, according to Oglesby, "[t]hings went south" and he and Mayberry started fighting. (4/18T.14; R.62).

Oglesby heard the accelerator pressed and the motor race. He was stuck in the window fighting with Mayberry as the vehicle went off the right side of the road. The vehicle flipped over and landed on top of Oglesby. It pinned him by his lower extremities. (4/18T.44; R.92). Mayberry got out of the car through the roof, started fighting with Painter while trying to take Painter's gun. (4/18T.15; R.63). Painter managed to handcuff Mayberry who was still struggling; however, he never really obtained control of Mayberry. During this time Oglesby was "screaming for his life" so Painter let go of Mayberry to assist his partner. (4/18T.45; R.93). Mayberry fled the scene as Painter called for EMS and attempted to move the vehicle. (4/18T.45; R.93). While he was a fugitive, Mayberry cut off the bond company's GPS monitor. (4/18T.39; R.87).

Oglesby had to be airlifted to Spartanburg Regional. He had two broken ankles, which had to be repaired with plates, screws, and wires. He broke a fibula and also had damage to his knees. (4/18T.15-16; R.63-64). He was out of work for several months and on desk duty for around a month and a half. He had physical therapy and numerous doctor visits and follow-ups. (4/18T.16; R.64). Oglesby continued to have pain when he got up and when he walks at the time of trial. (4/18T.17; R.65).

Mayberry was noticed to appear at the October 8, 2018 term of court. (Notice Docket October 8; R.142). Mayberry failed to report as required by the Notice and by the terms of his bond, which required him to show up at every term of court beginning July 26, 2018. As a result, a Bench Warrant was issued for Mayberry's arrest on October 15, 2018. (State Bench Warrant; R.140).

After ninety days, Mayberry remained at large. As a result, the Solicitor's Office asked the court to estreat and confirm judgment against Appellant as Surety in the full amount of the bond signed by Appellant on behalf of Mayberry. (Petition for Estreatment of Bond; R.18). On February 15, 2019, the circuit court issued an Order and Rule to Show Cause for Estreatment of Bond based on the State's Petition. (Rule to Show Cause; R.5). Appellant was ordered to appear on March 11, 2019, to show cause for why the judgment should not be confirmed against him in the amount of $465,000.00. (Rule to Show Cause; R.5).

The circuit court held a hearing on March 11, 2019. Mayberry had not been apprehended by the time of the hearing. The parties made arguments at the hearing, but nothing was determined. (3/11T.1-22; R.26-47).

The parties reconvened for a second hearing on April 18, 2019. By the time of this hearing, Mayberry had been apprehended and was in custody of the State of South Carolina. The State asked the court to confirm the judgment and estreat the entire amount of the bond due to the violation by Mayberry and the costs associated with his behavior and failure to appear. Appellant maintained the federal warrant constituted an intervening event which precluded confirming judgement under section 17-15-170 of the South Carolina Code. At the hearing, the State presented Oglesby's and Painter's testimony. Further, the State presented the extensive medical costs related to Oglesby's injuries. Medical costs exceeded $100,000. Additionally, the costs incurred by both state and federal authorities in attempting to locate Mayberry were presented. Homeland security spent 930 man hours at a cost of $64,356, while the Cherokee County Sheriff's Department spent 990 man hours at a cost of $17,958.

After the hearing, the circuit court issued its order. The circuit court noted that Appellant argued the federal indictment "supersedes the State indictment" and the attempt to arrest Mayberry

on the federal indictment constitutes an "intervening factor" or "an act of law rendering performance impossible" preventing Appellant from "bringing Mayberry to court or surrendering him to custody because he was already in the 'custody' of Federal authorities." (Order p.4; R.9).

The circuit court found the "federal government's decision to criminally indict a defendant for the same conduct which is the subject of a state court indictment does not render the proceedings in state court void nor does the federal action preempt the state proceedings" and concluded "the appearance recognizance issued by a state court judge remains valid . . . ." (Order p.8; R.13).

The circuit court found that federal custody could have been a basis for Appellant to be relieved of the obligation. However, the court specifically found:

> (1) Mayberry was not "in custody" as was Boatwright; (2) Mayberry had not been surrendered to custody by his surety, (3) Mayberry physically resisted and eluded custody by conduct severely injuring a law enforcement officer attempting to place him under a lawful arrest; (4) no action taken by the State prevented the defendant from appearing in court; and (5) only Mayberry's resistance of arrest and elusion from apprehension prevented him from appearing in court or being surrendered to custody by his surety.

(Order p.9; R.14). The circuit court further found that no actions by the federal authorities prevented Mayberry from appearing or from exercising good behavior as required by his bond. As a result, the circuit court found his failure to appear and to act in good behavior to be "a wilfull default." (Order p.10; R.15).

The court then considered the amount to remit if anything. The court specifically found Mayberry violated both the requirement he appear as well as the condition he be of good behavior. After analyzing the applicable statutes,[1] as well as noting the factors in Ex Parte Polk, 354 S.C. 8, 579 S.E.2d 329 (Ct. App. 2003), the circuit court found:

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[1] S.C. Code Ann. § 17-15-180 and S.C. Code Ann. § 38-53-70.

> (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 and why judgment should not be confirmed; (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 default of the defendant; and (8) the conditional judgment entered on the forfeiture is therefore confirmed.

(Order p.12; R.14).

STANDARD OF REVIEW

The Supreme Court set forth the standard of review for the forfeiture or remission of a bond:

> An appellate court reviews the circuit court's ruling on the forfeiture or remission of a bail bond for abuse of discretion. An abuse of discretion occurs when the circuit court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. McClinton, 369 S.C. 167, 170, 631 S.E.2d 895, 896 (2006). This standard was recently iterated in State v. Mitchell, 421 S.C. 365, 370, 807 S.E.2d 193, 195 (2017).

ARGUMENT

I. The circuit court did not err in ordering the estreatment of the bond in this matter in full. There was no intervening event which rendered it impossible for the parties to meet their expectations on the bond contract. Further, the circuit court properly exercised his discretion in refusing to remit any portion of the bond.

Appellant contends the circuit court erred in failing to find an intervening or superseding event prevented Mayberry's ability to comply with the bond and relieved Appellant of his obligation under the bond. He asserts the issuance of a federal indictment and the attempt to arrest pursuant to a federal bench warrant relived him of his obligations. However, Mayberry's bad behavior thwarted any attempts to place him in federal custody and his fleeing prevented him from being present when his case was originally called. As a result, there was not intervening event sufficient to remove Appellant's obligation under the appearance recognizance bond. Additionally, the circuit court found the failure to comply with the terms of the bond to be entirely willful, and as a result, properly refused to remit any portion of the bond.

A person charged with a noncapital offense may be released on his own recognizance or, *inter alia*, upon the execution of an appearance bond in a specified amount with good and sufficient surety or sureties approved by the court. S. C. Code Ann. § 17-15-10 (Supp. 2019).

> An appearance recognizance or appearance bond must be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what is enjoined by the court, and not to leave the State, and be of good behavior toward all the citizens of the State, or especially toward a person or persons specified by the court.

S.C. Code Ann. § 17-15-20(A) (Supp. 2019). In addition, the statute provides: "Unless a bench warrant is issued, an appearance recognizance or an appearance bond is discharged upon adjudication, a finding of guilt, a deferred disposition, or as otherwise provided by law." S. C.

Code Ann. § 17-15-20(B) (Supp. 2019). Upon breach of a condition of the recognizance, the recognizance is forfeited and the liability of the surety to pay the amount of the penalty becomes fixed, "unless relieved or exonerated by action of the court." Pride v. Anders, 266 S.C. 338, 340, 223 S.E.2d 184, 185 (1976). "Estreatment for a violation of the good behavior condition is proper." State v. Boatwright, 310 S.C. 281, 283, 423 S.E.2d 139, 140–41 (1992) (citing State v. Workman, 274 S.C. 341, 263 S.E.2d 865 (1980)).

Further, the statutory scheme provides the procedure for an estreatment of a bond:

> Whenever the recognizance is forfeited by noncompliance with its condition, the Attorney General, solicitor, magistrate, or other person acting for him immediately shall issue a notice to summon every party bound in the forfeited recognizance to appear at the next ensuing court to show cause, if he has any, why judgment should not be confirmed against him. If any person so bound fails to appear or, upon appearing, **does not give a reason for not performing the condition of the recognizance as the court considers sufficient,** then the judgment on the recognizance is confirmed.

S.C. Code Ann. § 17-15-170 (Supp. 2019) (emphasis added). The legislature has then provided: "If any person shall forfeit a recognizance from ignorance or unavoidable impediment and **not from wilful default**, the court of sessions may, on affidavit stating the excuse or cause thereof, remit the whole or any part of the forfeiture as may be deemed reasonable." S.C. Code Ann. § 17-15-180 (Supp. 2019) (emphasis added).

The legislature has provided a grace period for a surety to surrender his defendant upon the issuance of a bench warrant, and further allows remission of all or a portion of the forfeited amount "if it appears that justice requires the remission of part or all of the judgment." See S.C. Code Ann. § 38-53-70 (Supp. 2019) ("If a defendant fails to appear at a court proceeding to which he has been summoned, the court shall issue a bench warrant for the defendant. . . . If the surety fails to surrender the defendant or place a hold on the defendant's release from incarceration, commitment,

or institutionalization within ninety days of the issuance of the bench warrant, the bond is forfeited. At any time before execution is issued on a judgment of forfeiture against a defendant or his surety, the court may direct that the judgment be remitted in whole or in part, upon conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment. In making a determination as to remission of the judgment, the court shall consider the costs to the State or a county or municipality resulting from the necessity to continue or terminate the defendant's trial and the efforts of law enforcement officers or agencies to locate the defendant.").

In the instant case, there is no question Mayberry failed to act in good behavior by resisting arrest and fleeing, an action which resulted in severe injury to Oglesby. Further, Appellant conceded below the bond required Mayberry to be in court on October 8, 2018; Appellant was on notice of the need for Mayberry to be present October 8; and Mayberry did not appear as required on October 8. (3/11T.16; R.41). Additionally, Appellant agreed the bench warrant was properly issued for Mayberry's arrest, ninety days had passed, and Mayberry had not been apprehended by the time of the March hearing. (3/11T.19; R.44). There is no question that the conditions of the bond were breached by Mayberry.

Intervening Act

The first question is whether there is a sufficient reason to justify Mayberry's failure to conform to the conditions of the bond or to relieve Appellant of his obligations to pay the penalty associated with the default under the bond. Initially, it should be noted that the federal indictment, even if based on the same acts, does not preclude the State from proceeding with its indictment and charges. See Gamble v. United States, 139 S.Ct. 1960 (2019) (upholding the "dual sovereign" doctrine which allows prosecution by both state and federal governments even on same conduct because they are still considered different offenses); S.C. Code Ann. § 44-53-410 (Supp. 2019)

("If a violation of this article is a violation of a Federal law or the law of another state, the **conviction or acquittal** under Federal law or the law of another state for the same act is a bar to prosecution in this State."(emphasis added)).

Next, the attempted execution of the federal warrant did not alleviate Mayberry's required attendance at the October 8 term of court because he was never successfully under federal control. The attempt to take Mayberry into custody was unsuccessful and, as a result, he was never in the actual custody of the federal government. Appellant was not relieved of its obligation to pay the penalty associated with Mayberry's breach of the terms of the bond contract because Appellant knew he was not under federal control, knew he was required to attend the October 8 term, and Mayberry failed to appear at the term.

"It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law." Taylor v. Taintor, 83 U.S. 366, 369, 21 L. Ed. 287 (1872). Taylor was cited by Justice Toal in her dissent in Boatwright. The Court in Boatwright found: "Because bond is contractual in nature, estoppel may operate against the State or the surety in a bond arrangement. Boatwright, 310 S.C. at 283, 423 S.E.2d at 140. As such, the Court explained: "When extradition is accomplished, the surety is no longer able to perform his obligation under the contract to deliver the defendant to court. Accordingly, the surety should be released from liability when estreatment is ordered for non-appearance after defendant has been extradited." Id. This would be a clear example of an intervening act which prohibited the defendant from appearing at a subsequent term of court and would relieve the surety of any responsibility for default.

Another example, which demonstrates what is necessary for an intervening event to justify remission of the bond forfeited is cited by Justice Toal in her dissent—Davis v. State of South

Carolina, 107 U.S. 597 (1883). In Davis, the defendant indicted for murder in Spartanburg County and taken into custody. He entered into a recognizance along with several sureties and was released on bail. While on bail he filed a petition for writ of habeas corpus to the circuit court of the United States for the district of South Carolina. Id. Pursuant to the writ of habeas corpus, he was "taken into the custody of the marshal, the jurisdiction of the circuit court of the United States of his person, and of the indictment against him, was completely vested, and that of the state courts ceased altogether." Id. at 601. Because he was taken into custody and his case was transferred from the circuit court, the obligation on the recognizance ceased and could not be forfeited for failing to appear in state court.

Here, Mayberry was never in the custody of the federal authorities. While Painter appears to have placed him in handcuffs, the struggle never ceased and the defendant fled the scene while Painter sought to help Oglesby. As a result, he was never in federal custody such that the obligation of his attendance at a state court term of court ceased or was prevented. Instead, what prevented Mayberry from attending the October 8 term of court, and established Appellant's liability for the penalty resulting from Mayberry's default, was Mayberry's own willful behavior in resisting arrest, fleeing, cutting off his electronic monitor, and remaining on the run until finally being apprehended well after he had already violated the terms of his bond. The federal authorities did not prevent his attendance by taking him into custody similar to what occurred in Davis, so there was no intervening act which justified or excused Mayberry's performance and required remission of the forfeited bond.

Amount of Remission

The second question is whether the circuit court abused its discretion in finding Mayberry's default to be willful and, as a result, not remitting any portion of the forfeited bond. "[T]he

obligation of appellant-surety was not to the State to produce defendants at the time to be later set, but was rather an obligation to answer, **to the extent of the penalty**, for the default of the defendants, as principals, in the event they did not appear on the date set for trial. When the defendants defaulted by their failure to appear, the liability of the appellant, as surety, became fixed." Pride v. Anders, 266 S.C. 338, 341, 223 S.E.2d 184, 186 (1976). "As guarantor, the surety on an appearance bond undertakes the risk of forfeiture in the event the defendant does not appear for trial." Ex Parte Polk, 354 S.C. 8, 11, 579 S.E.2d 329, 330 (Ct. App. 2003).

The circuit court did not abuse its discretion in estreating the entire amount and denying a request to remit any portion of the bond. As discussed above, section 17-15-180 provides: "If any person shall forfeit a recognizance from ignorance or unavoidable impediment and not from wilful default, the court of sessions may, on affidavit stating the excuse or cause thereof, remit the whole or any part of the forfeiture as may be deemed reasonable." This section must be read in conjunction with section 38-53-70, which provides in relevant part: "At any time before execution is issued on a judgment of forfeiture against a defendant or his surety, the court may direct that the judgment be remitted in whole or in part, upon conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment." As a result, the best way to give efficacy to both sections is to find justice is required under section 38-53-70 when the court, in its discretion, finds the forfeiture was caused by ignorance or unavoidable impediment. If the court, in its discretion, finds the forfeiture was cause by a willful default, then the entirety of the bond amount should be forfeited and remission should not occur. See State v. Holloway, 262 S.C. 552, 555, 206 S.E.2d 822, 823 (1974) ("Under [the prior version of section 17-15-180], relief from the bond forfeiture is permitted where it is made to appear By affidavit that the forfeiture resulted

'from ignorance or unavoidable impediment and not from wilful default'; and the burden of establishing justification for remission of such forfeiture rests upon the applicant.").

In discussing remission of the judgment, the South Carolina Supreme Court has stated: "If bond is forfeited because of ignorance or unavoidable impediment **rather than willful default,** the trial court may, on affidavit showing cause or excuse, remit the forfeiture in full or in part." Boatwright, 310 S.C. at 282-283, 423 S.E.2d at 140; see also, State v. Edens, 88 S.C. 302, 70 S.E. 609, 610 (1911) (finding the surety liable upon a breach of a condition of recognizance and indicating the court "may in its discretion . . . where the forfeiture is caused from ignorance or unavoidable cause, remit the whole or any part of the forfeiture."). The Court recognizes that if the default is willful then remission is not appropriate. This is consistent with the statute and the rationale behind the bond.

Additionally, the appellate courts have asked lower courts to consider several factors in determining whether to remit any portion of a judgment, when it is appropriate to remit any amount:

> [I]n determining whether any remission of the judgment is warranted, the trial court is not limited to considering only the actual cost to the State. Our courts have held the following factors, at the least, should be considered in determining whether, and to what extent, the bond should be remitted: (1) the purpose of the bond; (2) the nature and wilfulness of the default; (3) any prejudice or additional expense resulting to the State.

Polk, 354 S.C. at 12–13, 579 S.E.2d at 331. In the instant case, the circuit court clearly considered the factors in deciding not to remit any portion of the bond. Specifically, the circuit court found:

> 1) "the defendant breached the conditions of bond by failing to appear and not being of good behavior";

2) "the surety has been provided an opportunity to show cause and present any excuse for nonperformance and why judgment should not be confirmed" and "no reason sufficient to this Court has been given excusing nonperformance of the recognizance";

3) "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"; and

4) "the forfeiture of the recognizance was by deliberate and wilful default of the defendant."

(Order p. 12; R.17). While the court clearly placed significance on the willful nature of the default, it had other information and discussed that information in its order. The circuit court knew Mayberry's failure to exercise good behavior cost Oglesby or others approximately $115,000 in medical expenses including expense to airlift him from the scene. The circuit court also was presented the expenditure of man hours and the cost of those man hours by both the Cherokee Sheriff's Department and Homeland Security seeking to apprehend Mayberry. As a result, the circuit court had before it all the information necessary to make a proper determination and concluded, as a result of the significance it placed on the willful nature of Mayberry's actions, no remission was appropriate.

Accordingly, this Court should affirm the circuit court's decision to estreat the bond in whole and find the circuit court did not abuse its discretion in refusing to remit any portion of the forfeited bond.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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January 7, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Cornelius Sentell Mayberry, Defendant,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed January 7, 2021, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 7th day of January, 2021.

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