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SC Court of Appeals

STATE OF SOUTH CAROLINA

COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

COURT OF GENERAL SESSIONS

STEPHANIE P. MCDONALD, CIRCUIT COURT JUDGE

Indictments Nos. 2011-GS-10-7749, 2012-GS-10-0711, 2012-GS-10-1680, 2012-GS-10-1818

Appellate Case No. 2014-001516

The State of South Carolina ..... Respondent,

v.

Deangelo Mitchell, Defendant and AA Ace Bail by Frances and Palmetto Surety Corp., Sureties for the Defendant, ... Appellants.

INITIAL BRIEF OF APPELLANT

November 19, 2014

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B. **The amount of estreatment in this matter was arbitrary and capricious and did not comply with the factors established by Ex Parte Polk.**

STATEMENT OF THE CASE

On or about September 19, 2011 Deangelo Mitchell was arrested on warrant M726862 (Possession with Intent to Distribute Cocaine), and subsequently released on a $25,000.00 Bond. On or about December 20, 2011 Mr. Mitchell was arrested on warrants M99502 (Trafficking in Cocaine), M995386 (Manslaughter), and M995387 (Distribution of Cocaine) and a $400,000.00 bond was set. During a preliminary hearing on January 25, 2012 Mr. Mitchell's bond was consolidated on all of his pending charges and with the consent of the State a $150,000.00 surety bond was set with the specific condition of house arrest and electronic monitoring that was to be provided by a third party company. On February 13, 2012, a $150,000.00 appearance recognizance surety bond was executed by the Appellant with the Charleston County Clerk of Court.

On July 26, 2012, Deangelo Mitchell was called to Court before the Hon. Stephanie P. McDonald upon request by the State for a hearing to determine whether a revocation of his bond was appropriate as a result of alleged violations to the electronic monitoring element of the January 25, 2012 bond Order. Mr. Mitchell did appear on this date and after hearing testimony and arguments, the Court issued an Order revoking his bond and remanding Mr. Mitchell into custody.

On August 8, 2012 a Notice of Forfeited Recognizance was filed by the State seeking an estreatment of the bond posted by the Appellant. Two hearings were held regarding the State's request for estreatment, one on September 7, 2012 and an additional hearing on October 11, 2012.

Mr. Mitchell remained in the custody of the County Detention Center until he entered a

guilty plea on September 16, 2013. Upon entry of his plea, Mr. Mitchell was remanded to the South Carolina Department of Corrections where he remains currently serving an active sentence.

On July 8, 2014 an Order of Estreatment of Bond was filed by the Hon. Stephanie P. McDonald, said order was received by the Appellant on July 9, 2014. A Notice of Intent to Appeal was filed by the Appellant on July 15, 2014. Requests for the transcripts of the three (3) hearings in this matter were made by the Appellant and the final transcript was received on October 2 , 2014. A request for extension to file Initial Brief and Designation of Matter was filed by the Appellant on October 13, 2014 and the Court granted an extension by Order until December 3, 2014.

ARGUMENT

I. The Trial Judge erred in ordering the estreatment of an appearance bond in this matter.

The overriding purpose of requiring the posting of a bond before releasing the defendant from custody is to insure the defendant's appearance in court. See State v. Workman, 274 S.C. 341, 263 S.E. (2d) 865 (1980); Town of Mayesville v. McCutcheon, 205 S.C. 241, 31 S.E. (2d) 390 (1944); Saunders v. Hughes, 2 Bailey 504 (1831)

SC Code Section 17-15-20 establishes the premise that bonds allowing the release of a Defendant facing criminal charges are specifically for appearance.

> (A) 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.
>
> (B) 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. An appearance bond is valid for a period of three years from the date the bond is executed for a charge triable in circuit court and eighteen months from the date the bond is executed for a charge triable in magistrates or municipal court. In order for the surety to be relieved of liability on the appearance bond when the time period has run, the surety must provide sixty days written notice to the solicitor, when appropriate, and the respective clerk of court, chief magistrate, or municipal court judge with jurisdiction over the offense of the surety's intent to assert that the person is no longer subject to a valid appearance bond. If the appropriate court determines the person has substantially complied with his court obligations and the solicitor does not object within the required sixty days by demanding a hearing, the court shall order the appearance bond converted to a personal recognizance bond and the surety relieved of liability.

A bondsman's duty is to act as a surety for the individual who has been released on bond to insure that the Defendant appears before the Court as Ordered. It is not a specific duty of a

bondsman to act as a guarantor of the specific behavior of an individual on bond, but they are to ensure that the Defendant does appear to have an adjudication on the matter to which they were bonded. It is not the Appellant's position that an individual who is out on bond does not have to comply with specific requirements relating their release, nor does the Appellant take the position that a bond may not be revoked for failure to adhere to conditions of release, it simply maintains that the obligation as a surety for an appearance recognizance is satisfied when an individual appears for Court and ultimately has their matter adjudicated while they are present.

A bondsman always has the authority to physically remand the defendant to the custody of the jurisdiction holding the bond and relieve himself from the obligation under the bond. State v. Brakefield, 302 S.C. 317, 396 S.E. (2d) 103 (1990) and accordingly after relinquishing custody to the State they are to be exonerated from all liability on an appearance bond. *Id.* Similarly, Rule 46 of the Federal Rules of Criminal Procedure governs bail and bail forfeiture in federal criminal cases. Specifically relevant to this matter is Rule 46(f) and 46(g):

> (f) **Bail Forfeiture.**
> (1) Declaration. The court must declare the bail forfeited if a condition of the bond is breached.
> (2) Setting Aside. The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose if:
> (A) the surety later surrenders into custody the person released on the surety's appearance bond; or
> (B) it appears that justice does not require bail forfeiture.
> (g) **Exoneration.** The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture. **The court must exonerate a surety who deposits cash in the amount of the bond or timely surrenders the defendant into custody**.

In this matter, the Trial Court erred when it looked only to actions under taken by the individual while he was out on bond and failed to consider the ultimate purpose of the surety, or bondsman, on an appearance bond is to ensure the Defendant's appearance for Court.

A. When the Defendant is delivered to the Court or to the Custody of the State the bondsman has satisfied his obligations and any estreatment is improper.

The actual bond form used by the Court in this matter, form SCCA/511 clearly states on its face that the bondsman is to act in its capacity as a surety for **appearance recognizance**. This form is the approved form issued by the South Carolina Court Administration to be used on bonds in criminal matters. Beyond any other claims made by the State, the purpose of the bond which released Deangelo Mitchell was that of an appearance bond. There were a number of conditions imposed on Mr. Mitchell as part of the Order, that was said to accompany the Bond form, specifically relevant to this matter, the condition of electronic monitoring.

The Appellant does not contest that Mr. Mitchell may have had several potential violations with the electronic monitoring provision of his bond, nor does the Appellant contest that the Court lacked authority to revoke Mr. Mitchell's release and have him placed back in custody pending trial or plea. The Appellant maintains that when they secured Mr. Mitchell's appearance in Court as noticed on July 26, 2012, where Judge McDonald ordered his bond revoked, they fulfilled their obligation as surety. Once the Court remanded Mr. Mitchell to custody by revoking and terminating his bond, at that hearing, which the surety secured his presence for, all obligations of the Appellant were compete in accordance with SC Code Section 17-15-20.

The disconnect in the positions of the State and the Appellant in this matter arise over the Court's interpretation of State v. Boatwright 310 S.C. 281, 423 S.E.2d 139 (1992). In its Order, the Trial Court relies on the dicta of Boatwright to state "that estreatment for a violation of the good behavior condition is proper." However, it is important that this Court look to what the actual issue of behavior was in Boatwright. In Boatwright the behavior condition violated was

that the Defendant **failed to appear as noticed**. The argument in that case centered around if the actions of a separate agency which made it impossible for the Defendant's appearance constituted the fault of the bondsman. Since the Defendant did not appear in accordance with his appearance bond the estreatment was ordered. This is clearly distinctive from the matter at bar. In a vacuum considering only the dicta but not the underlying facts of Boatwright was in err.

As previously noted the long standing South Carolina jurisprudence as well as the State Statutes dealing with bonds, bondsman, and estreatment all maintain that the obligation of a bondsman is to secure the Defendant's appearance. Under South Carolina law, when the terms of the bond are breached, the bond is estreated by a conditional order. S.C. Code Ann. § 17-15-170 (1976); *See* Pride v. Anders, 266 S.C. 338, 223 S.E.2d 184 (1976); State v. Holloway, 262 S.C. 552, 206 S.E.2d 822 (1974).

The Court erred in issuing a final order where the bondsman did comply. The bondsman should have further been exonerated from any sanctions from the Court.

The question of exoneration has been recently considered in several jurisdictions In United States v. Mann, No. 6:09-cr-48, (SD Georgia 2014) and in United States v. Salyer No. 2:10-cr-0061 LKK (ED California 2014) Courts examined the Government's attempt to estreat a bond and found that when the Defendant is surrendered into custody it was proper to return forfeited funds and to exonerate the surety.

The fact underling the reason the bond was revoked would only be relevant if the Court was forced to issue a bench warrant for a failure to appear. In that circumstance it would have been proper to begin a Polk analysis in making a determination as to a bond estreatment. Even if that were the case here, which it is clearly not, the Appellant would be properly exonerated upon securing the Defendant into the State's custody.

B. The amount of estreatment in this matter was arbitrary and capricious and did not comply with the factors established by Ex Parte Polk.

Where the Appellant maintains that the Order of any estreatment was improper and in err, it would further maintain that the amount of $75,000.00 is incongruous with a proper Ex Parte Polk analysis and was arbitrary and capricious.

Section 38-53-70 lays the foundation for what must be considered by the Court prior to ordering an estreatment:

> "In making a determination as to remission of the judgment, the court shall consider the costs to the State or any 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."

Section 38-53-70 of the 1976 Code of Laws of South Carolina, as amended.

The construct established by §38-53-70 has been scrutinized in several opinions, and solidified in Ex Parte Polk, 354 S.C. 8, 573 S.E.2d 329 (Ct. App 2003). In Polk, the Court looked to § 38-53-70 as well as the cases of State v. Boatwright, and State v. Workman, to determine what must be addressed before ordering the estreatment. The Court overturned a bond estreatment saying that although some amount could be deemed appropriate by the Trial Judge, several factors must be examined to avoid an abuse of discretion.

In its ruling, the Polk Court determined that standard established by the 5th Circuit case United States v. Parr, 594 F.2d. 440 (1979) should be applied in South Carolina, and that at a minimum the trial Judge must consider the following Three (3) factors:

1. The purpose of the Bond.
2. The nature and wilfulness of the default.

3. Any prejudice or additional expense resulting the State stemming from the Default.

Ex Parte Polk, 354 S.C. 8, 13, 573 S.E.2d 329, 331 (Ct. App 2003)

After careful weighing of these Three (3) factors the Court is to use its discretion in determining a proper estreatment amount. It is the Appellant's position that the Court did not give the proper examination of these factors and failed to properly address the requirements in its ruling that an estreatment be ordered in the amount of Seventy Five Thousand Dollars ($75,000.00).

While maintaining the Appellant's position that any estreatment was improperly ordered; in making it's order, the Court's failure to properly address the three (3) elements of a bond estreatment. The first element, relating to the purpose of the bond in this matter is not under contention. The purpose of Mr. Mitchell's bond being set at $150,000.00 directly related to the seriousness of the matter, and the danger to the community and potential flight risk associated with potential sentences.

The Second element of nature and wilfulness of default has been thoroughly addressed in the Appellant's first argument. Their was no default on the appearance recognizance bond, the Defendant did appear for Court when requested on July 26, 2012, by doing such the bondsman fulfilled their obligation as surety on Mr. Mitchell's bond.

When examining the question of costs to the State, Polk notes that Section 38-53-70 "unambiguously provides that the trial court must consider the costs to the state in determining remission of the judgement on a forfeited bond." State v. Polk, 354 S.C. at 12, 579 S.E.2d at 331 (2003). Any failure to weigh those costs would deem the Court's judgement arbitrary and capricious. Id. In the present matter, the only considerations addressed were those costs incurred by the State in its attempt to wrongfully estreat the Bond. The State did offer affidavits and a

memoranda as to the costs associated with their preparation for the estreatment hearing, but they were not related to obtaining custody of the Defendant nor did they deal with any prejudice to the State in the prosecution of Mr. Mitchell. Since the Defendant was remanded to the custody of the local detention center subsequent to his bond revocation hearing, to which he was present, there were no costs associated with any alleged bond violations.

Additionally there was **no actual** prejudice or additional expense upon the State stemming from the alleged Default. The affidavits offered by the State at the estreatment hearing on October 11, 2012 were accountings of the State's efforts to be enriched through estreatment, they did not substantiate any costs to secure the Defendant's presence and make no mention of costs incurred by his non-appearance in court. The State was left in this matter in the exact position they would have been had the Defendant never been bonded in the first place, no time nor resources were expended to locate the Defendant, re-secure his custody, or have his underlying charges adjudicated.

By ordering estreatment in the amount of $75,000.00 the Court failed to show how that applied in the adjudication or conviction of Mr. Mitchell or in the securing of his appearance to be adjudicated or convicted.

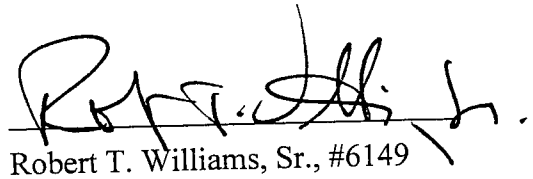
CONCLUSION

The Trial Court erred in it's decision to Order an estreatment of the appearance bond posted by the Appellant in this matter. Where the Defendant appeared for Court as noticed the Appellant as a surety for appearance fully complied with their obligation and should be exonerated from any Order of estreatment.

The Trial Court further erred by abusing its discretion in determining the amount of any estreatment to be ordered. The Court failed to properly consider Polk factors including the actual costs to the State as well as prejudice in procuring the Defendant for trial/plea, but instead utilized bond estreatment as a punitive action. In this matter the Court's ruling was arbitrary and capricious.

Respectfully submitted,

November 15, 2014



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PROOF OF SERVICE

I certify that I have served the **Initial Brief** on the Respondent by depositing copies of it in the United States Mail, postage prepaid, on November 19, 2014, addressed to Scarlett A. Wilson, Solicitor and James P. Stack, Assistant Solicitor, Ninth Judicial Circuit,101 Meeting Street, Suite 400, Charleston, South Carolina 29401; and Alan McCrory Wilson, Attorney General and Salley W. Elliott, Assistant Attorney General, S.C. Attorney General's Office, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201.

I further certify that all parties required to be served have been served.

Dated: November 19, 2014

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