STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2016-000140

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JULIE ANN GETSON,

DEFENDANT,

AND

CHRISTY NIMAU, GEORGIA-CAROLINA ENTERPRISES, INC., SURETY, AND ACCREDIT INSURANCE CO., INSURANCE COMPANY,

APPELLANTS.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Julie Ann Getson was arrested in Aiken County in March of 2014 for forgery/possession of counterfeit currency. She was released on a $5,000 surety bond with Christy Nimau signing as surety on behalf of Georgia-Carolina Enterprises. A Notice of Forfeited Recognizance was filed by the State on July 9, 2015, following Getson's failure to appear at the March 16, 2015 term of General Sessions Court. The court issued a Conditional Order to Estreat Bond on July 9, 2015.

On September 8, 2015, a hearing was held before the court for consideration of the Conditional Order to Estreat Bond and Notice of Forfeited Recognizance. At the September 8, 2015 hearing, the court noted Getson was still missing. Sep. 8 Tr. p. 4. Counsel for the surety stated that on February 6, 2015, they became aware warrants for Getson were issued in Crossville, Tennessee for passing counterfeit bills. Sep. 8 Tr. p. 4. Counsel noted that the surety had tracked Getson to Carson City, Nevada, Lincolnton, North Carolina, Phoenix Arizona, and Tulare, California. Sep. 8 Tr. p. 5. Counsel finally stated his belief Getson was still located in Tulare, California. Sep. 8 Tr. p. 5.

Counsel argued:

> Now, this is when, really, my clients did everything that's possible: In California there's a procedure by which you have to take your bond, submit an affidavit to a magistrate, get an order from a magistrate to enforce that bond. All of that was done, your Honor, there in that county of Tulare, at relatively significant expense.

Sep. 8 Tr. p. 6. Counsel continued:

> And South Carolina, for the reasons that are not mine to say, has not put into the NCIC to extradite this lady from California . . . And again, although we certainly can't - - we can't put that NCIC entry in to get her back on extradition from California, but it - - we're in a position that it seems that if really it was the recovery of Ms. Getson that was paramount, you know, that that entry might be made and that we could be talking

> about paying the costs to bring her back instead of just simply estreating the cash when we know where she is, we've obtained a warrant to arrest her. Recognizing that she is not standing here, you know, I can't avoid that fact. But there's nothing legally within our power to do that I'm, aware of that we haven't done, Your Honor.

Sep. 8 Tr. pp. 6-7. The court responded, "That's the risk they take. I'm going to - - $2,500 today and $2,500 in 90 days."

On September 29, 2015, the court issued a Final Order for Estreatment of Bond ordering payment by the surety the sum of $5,000. On October 14, 2015, counsel for Christy Nimau and Georgia-Carolina Enterprises, Inc. filed a "Motion to Reconsider 9.29.15 Final Order for Estreatment of Bond." The court subsequently held a hearing on the motion for reconsideration on November 10, 2015. On December 28, 2015, the court issued an Order Denying Surety's Motion for Reconsideration. In his order, the trial judge outlined the Polk factors and emphasized the fact that he considered them at both the hearing for the Final Order of Estreatment of Bond and at the hearing of the surety's Motion for Reconsideration. R. p. *. The circuit court ordered:

> The Court found that the purpose of bond was to assure the Defendant's appearance in court, that the Defendant's failure to appear in court was willful, that Surety presented no mitigation or explanation justifying the Defendant's failure to appear at the March 16, 2015 Term of General Sessions Court, and that while there may not have been expense to the State at this time, that fact does not foreclose the possibility of future expense. Likewise, the Court considered the extensive efforts made by the Surety to recover the Defendant, but found remission proper regardless.

R. p. *. The court also found:

> As to Surety's second argument that the Court erred in failing to consider the lack of effort by law enforcement to locate the Defendant, the Court finds that law enforcement bore no responsibility for insuring the Defendant's appearance at the March 16, 2015 Term of General Sessions Court and has entered information in the National Crime Information Center (NCIC) to alert law enforcement nationwide of her pending bench warrant.

R. p. *.

Georgia-Carolina Enterprises, Inc. timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

ARGUMENT

I.

The circuit court properly estreated the defendant's bond where the defendant willfully failed to appear at the March 16, 2015 term of General Sessions, and the circuit court did not abuse its discretion in estreating the bond in full where the court carefully considered the required factors and where the amount of bond estreated was not arbitrary or capricious.

Appellant asserts the trial judge erred by failing to consider the lack of costs to the state and the lack of efforts of law enforcement to located the defendant when estreating the bond in full. This argument lacks merit, as the trial judge properly weighed the Polk factors in determining that estreating the bond in the amount of the full $5,000 was proper. Furthermore, the defendant was in the constructive custody of the bond company, therefore the State bore no responsibility for assuring her appearance at the March 2015 term of General Sessions.

The overriding purpose of requiring a criminal defendant to post bond before his release from custody is to insure his appearance at trial. State v. Boatwright, 310 S.C. 281, 285, 432 S.E.2d 139, 141 (1992). (Toal, J., dissenting). "[T]he State's right to estreatment or forfeiture of a bail bond issued in a criminal case arises from the contract, *i.e.*, the bail bond form signed by the parties." State v. McClinton, 369 S.C. 167, 171, 631 S.E.2d 895, 897 (2006). As guarantor, the surety on an appearance bond undertakes the risk of forfeiture in the event the defendant does not appear for trial. Pride v. Anders, 266 S.C. 338, 341, 223 S.E.2d 184, 186 (1976).

"The issue of whether a bond forfeiture should be remitted, and if so, to what extent, is vested in the discretion of the trial judge." Ex parte Polk, 354 S.C. 8, 11, 579 S.E.2d 329, 330 (Ct. App. 2003). "[T]he exercise of that discretion by the trial judge will

not be set aside unless it is made to appear that it was abused." State v. Holloway, 262 S.C. 552, 555, 206 S.E.2d 822, 823 (1974). "Among the factors to be considered in determining whether and to what extent relief will be granted are (1) the purpose of the bond; (2) the nature and willfulness of the default; [and] (3) any prejudice or additional expense resulting to the State." State v. Workman, 274 S.C. 341, 343, 263 S.E.2d 865, 866 (1980). See also Polk, 354 S.C. 8, 13, 579 S.E.2d 329, 331 (Finding that while the decision regarding remission is within the discretion of the trial court, the court should consider, at a minimum, the costs to the State as well as the purpose of the bond and the nature and willfulness of the default in determining whether, and to what extent, a bond forfeiture should be remitted). "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. 281, 283, 423 S.E.2d 139, 140 (citing S.C. Code Ann. § 17-15-180 (1985)).

Firstly, as to Appellant's contention that the trial judge failed to consider the lack of costs to the State in estreating the bond in full, the circuit court's Order Denying Surety's Motion for Reconsideration clearly considers all three Polk factors, including the cost to the State. The court's Order makes clear that there have been no costs to the State as of yet, however the Order notes that the current lack of costs does not foreclose the possibility of future costs to the state. Seeing as the lack of costs was one of the three required factors the circuit court considered in its determination whether and to what extent to estreat the bond, Appellant's argument that the trial judge failed to consider the lack of costs to the state is wholly without merit.

Secondly, as to Appellant's contention that the circuit court erred in failing to consider the lack of efforts of law enforcement to locate the defendant, the circuit court properly found that law enforcement bore no responsibility for ensuring the defendant's appearance at the March 16, 2015 term of General Sessions. "While the defendant is released on bail, he is in the constructive custody of the bondsman. The 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." Boatwright, 310 S.C. 281, 286, 423 S.E.2d 139, 142 (Toal, J., dissenting). Seeing as the defendant is in the constructive custody of the bondsman, the obligation is thus on the part of the bondman to ensure the defendant appears for trial. While Appellant's efforts in pursuing the defendant are admirable, their efforts do not absolve them of liability for the defendant's failure to appear in court; nor do their efforts impose some obligation on the State to intercede when they have failed to locate the defendant for trial. The trial judge did not abuse his discretion in finding law enforcement bore no responsibility for insuring the defendant's appearance at the March 16, 2015 term of General Sessions and the State took sufficient action by entering the defendant's information in NCIC to alert law enforcement nationwide of her pending arrest. Appellant places great emphasis on the State's decision to restrict NCIC extradition to North Carolina, South Carolina, and Georgia, arguing the State should have borne the cost of extradition from California and then sought forfeiture of the bond to cover those costs. Yet this argument ignores two crucial considerations. First, the bond was only for $5,000 and extradition from California would easily exceed that amount. Second, the State is not the surety that

guaranteed the defendant's appearance-the bond company did. Thus, the focus on the NCIC extradition restrictions is not germane.

Appellant seems to rely on S.C. Code Ann. § 38-53-70 to support his assertion that the Court should consider a lack of efforts by law enforcement in determining whether to remit a judgment. Appellant's reliance on § 38-53-70 is misplaced. S.C. Code Ann. § 38-53-70 provides:

> 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. The court shall make available for pickup by the surety or the representative of the surety who executed the bond on their behalf, a true copy of the bench warrant within seven days of its issuance at the clerk of court's office. 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.

Appellant interprets § 38-53-70 as permitting the court to consider a lack of law enforcement assistance in securing the defendant as a factor in whether to remit the bond. However the statutory language, "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," clearly indicates an intent for the court to consider relevant costs to the State, including the efforts and expenditures made by law enforcement in trying to secure the defendant. Appellant's attempt to read in a requirement that law enforcement assist the

bondsman in securing the defendant or the State faces remission of the bond is inconsistent with the purpose of bond and inconsistent with the statutory language. Instead, the logical interpretation supports the conclusion that efforts and expenditures made by law enforcement in trying to secure the defendant are simply one of the costs the court may consider.

Appellant's contentions that the trial judge erred in failing to consider the lack of costs to the state and lack of errors of law enforcement to locate the defendant are thus without merit, as the trial judge's order demonstrates that he did in fact consider those factors in determining estreatment of the full amount was proper. The trial judge did not abuse his discretion in estreating the full amount and declining to remit the bond amount in full or in part. The judgment of the trial judge should be affirmed.

CONCLUSION

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

Respectfully submitted,

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