

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Unpublished Opinion No. 2016-UP-070 (S.C. Ct. App. February 17, 2016)
(Denial of Rehearing Filed April 22, 2016)
(Petition for writ of certiorari Granted December 16, 2016)

Appellate Case No. 2016-000980

The State of South Carolina Respondent,

v.

Deangelo Mitchell, Defendant,

and

AA Ace Bail by Frances and Palmetto Surety Corp., as Surety, Petitioner.

PETITIONER'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Was it error to issue an Order estreating Defendant Mitchell's appearance recognizance bond where the Defendant was made available for all Court proceedings?
2. Was the estreatment amount set by the Court's Order arbitrary and capricious where it failed to 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 surety 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 surety bond was set. During a preliminary hearing on January 25, 2012 Mr. Mitchell's bond was consolidated on all of his pending charges with the consent of the State and 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 Petitioner and filed with the Charleston County Clerk of Court.

On July 26, 2012, Deangelo Mitchell was called to Court before the Honorable 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 requirement of the \$150,000.00 appearance recognizance surety bond Order issued January 25, 2012. Mr. Mitchell did appear on this date. 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 Honorable Stephanie P. McDonald and was received by the Petitioner on July 9, 2014. A Notice of Intent to Appeal was filed by the Petitioner on July 15, 2014. The Court of Appeals issued its ruling on February 17, 2016 and a timely motion to reconsider was filed by the Appellants. The Court of Appeals denied the petition for rehearing by Order on April 22, 2016.

On May 11, 2016 the Petitioner filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. An Order granting the Petitioner's writ was filed on December 16, 2016 and this brief follows.

ARGUMENT

1. **The Court's Order that estreated Defendant Mitchell's appearance recognizance bond was in error where the Defendant was made available for all Court proceedings.**

This case centers on the question of what is the overriding purpose behind requiring the posting of a bond before a defendant is released from pre-trial custody. Historically, and most recently in State v. Policao, 402 S.C. 547, 741 SE 2d 774 (2013), the Court has maintained the central purpose of a surety is to insure the defendant's appearance in court. See State v. Workman, 274 S.C. 341, 263 S.E. 2d 865 (1980) and Town of Mayesville v. McCutcheon, 205 S.C. 241, 31 S.E.2d 390 (1944)

The arguments posed by the State and the lower Court's focus appears to rely on reading only a limited portion of State v. Boatwright 310 S.C. 281, 423 S.E.2d 139 (1992) and Workman, Id. In Boatwright the Court found that the "good behavior" condition of the Defendant's bond was violated was that the Defendant **failed to appear as noticed**. Appellant in that case argued that the bond should not be estreated where it was impossible for the Defendant to appear because he was being detained by another agency out of the State. The bondsman in that case argues that there should be no estreatment because he was physically and lawfully unable to compel the appearance of the Defendant before the Court. Despite those arguments, because the Defendant **did not appear in accordance with his appearance bond, the estreatment was ordered**. By only addressing the good behavior clause of a bond under SC Code Section 17-15-20 the Court erred in two ways. First, it did not compare the underlying facts present in the current matter with those in Boatwright. Second, by disregarding any consideration of SC Code Section 38-53-70 the Court's Order fails to adequately reconcile two conflicting

statutes that govern bonds and surety bondsman.

The question remains, what is a surety bondsman's duty, when is that duty complete, and what recourse exists in a case where a bondsman is forced to reacquire a Defendant who has not appeared for adjudication of their case.

The aforementioned specific conflict of statutes arises between, SC Code Section 17-15-20 which establishes the allowance of bonds, with specific conditions for the release of a Defendant facing criminal charges with an expectation of appearance, and SC Code Section 38-53-70 which address exoneration of a bondsman upon delivery of a Defendant to the custody of the State if a Defendant fails to meet one of the conditions of his appearance bond.

SC Code Section 17-15-20 states:

(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.

And SC Code Ann Sec 38-53-70, which states in pertinent 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. 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. The court, in its discretion, may permit the surety to pay the estreatment in installments for a period of up to six months; however, the surety shall pay a handling fee to the court in an amount equal to four percent of the value of the bond. If at any time during the period in which installments are to be paid the defendant is surrendered to the appropriate detention facility and the surety complies with the recommitment procedures, the surety is relieved of further liability.

Ultimately, the Petitioner maintains that the obligation as a surety for an appearance recognizance bond, which was the Petitioner's role in this matter, is satisfied when an individual Defendant appears for Court and ultimately has their criminal case adjudicated. By statute if the surety does not ensure a Defendant's appearance prior to the issuance of a bench warrant, their obligation is further completed upon delivery of the Defendant to the Court; and upon such delivery, the surety should be exonerated from any obligation as allowed for under this Statute. See State v. Policao, *Id.*

The Petitioner does not contest the State's position that an individual who is out on bond must comply with specific requirements relating their release. Additionally, the Petitioner agrees that a bond may be revoked for failure of a Defendant to adhere to conditions of release, including that of good behavior. Finally, the Petitioner further acknowledges that estreatment may be proper upon a violation of bond terms, however would argue that the estreatment must be **conditional** and the penalty should be relieved upon the surrender of the Defendant to the State in accordance with the SC Code Ann Sec 38-53-70.

In the present matter the Defendant did violate a condition of his bond and the Petitioner

recognizes that had the Defendant failed to appear to address the potential revocation of his bond, the trial court's would have had the apparent ability to order an conditional estreatment against the surety. However, in this matter, the facts do not reconcile with the order of estreatment due to the simple fact that the Petitioner did surrender the Defendant to the Court prior to any required Court appearance and certainly before the establishing of an allotted payment period. At no point did the appearance surety fail in its obligation to deliver the Defendant to the Court, and thus the surety should therefore have been relieved from all further liability.

SC Code Ann Sec 38-53-70 was written to mirror, Rule 46 of the Federal Rules of Criminal Procedure governing 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.** (Emphasis added)

In this matter, the Court only looked to the to actions undertaken by the Defendant while he was out on bond and failed to consider the ultimate purpose of the surety, or bondsman, which on an appearance bond is to ensure the Defendant's appearance for Court.

The Petitioner bondsman did that which was required and delivered the Defendant to justice after they were informed the State was seeking a bond revocation, an action not completed by the surety in Boatwright. The Court was never forced to issue a bench warrant for failure to

appear because the Defendant appeared as per his bond. The Petitioner completed their obligation as an appearance surety fully. Immediately upon completion of the surrender of the Defendant the Petitioner should have been relieved from any liabilities under an order of estreatment.

If the Courts were to hold a Bondsman accountable for all actions of a Defendant while out on bond, without providing any incentive to deliver a Defendant to the Court in compliance with their appearance bond, the system would fail. SC Code Ann Sec 38-53-70 exists for just this reason, to provide a recourse to a surety and an incentive to deliver a non-compliant Defendant to justice. It is unconscionable that the Petitioner is being punitively punished, by way of estreatment, despite the fact they completed their obligation as an appearance surety prior to the necessity of the State to seek a bench warrant for non-appearance.

If the prior Order of the Court were to remain the law of this case, had the Petitioner not ensured the Defendant's appearance at the State's hearing on their motion to revoke bond, waited for the issuance of a bench warrant for failure to appear and the subsequent estreatment order, and then placed the Defendant in custody it would have suffered no extended financial liability as clearly stated by statute. In essence, the Order in this case would encourage a lack of diligent and timely action by the sureties since acting prior to the issuance of a bench warrant results in financial damages. This ruling places untenable standards on those who would act as sureties and counter-intuitively encourages a failure to bring Defendants to Court as required.

2. **The Court's Order that set the amount of monies to be estreated was arbitrary and capricious and did not comply with the factors established by Ex Parte Polk.**

While the Petitioner maintains no estreatment was appropriate in his matter, if the Court

were to rule in the alternative, a thorough Polk analysis must be considered in all estreatment cases and 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.

After careful weighing of these Three (3) factors the Court is to use its discretion in determining a proper estreatment amount.

In making its ruling regarding the amount of estreatment ordered, the Court focused its *Ex parte Polk* analysis to find that a trial court may consider elements beyond the actual costs to the State. The Court ruled that the trial court may consider the costs and inconvenience to the State as well as seek to provide a deterrent against defendants from future violations. Additionally, the Court laid the burden upon the Petitioner or the Defendant to demonstrate a lack of prejudice upon the State. The Petitioner generally agrees on these position however, Court did fail to fully examine the actual facts of this case as they relate to these concepts. Additionally, the Court did not address Section 38-53-70 which lays an additional 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.

It is the Appellant's position that the Court did not give the proper examination of either Section 38-53-70 or Polk factors and failed to properly address all requirements that exist in its

ruling for an estreatment to be ordered in the amount of Seventy Five Thousand Dollars (\$75,000.00).

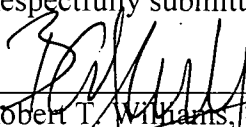
In the present matter the Defendant was remitted to the custody of the State by the Petitioner prior to any actual trial preparation or trial proceedings. There was absolutely no burden placed on the State in his prosecution either in any time delay or actual monetary resource expenditure. The State suffered no real or theoretical prejudice in preparing to seek justice against the Defendant on his outstanding charges because he was in their custody. Subsequent to the Appellant's actions, the State was left in this matter in the exact position they would have been had the Defendant never been bonded out in the first place. No time nor resources were expended to locate the Defendant, re-secure his custody, or have his underlying charges adjudicated. The only costs put forward by the State in this matter were those created in preparing for an attempt to estreat money from the Appellants; and nothing towards the actual locating or prosecution of the Defendant. As such, these estreatment considerations would not qualify as the costs contemplated by the *Polk* rationale. The estreatment order, where the Defendant was delivered to the State's custody by the Petitioner, prior to even the issuance of a bench warrant in this case was purely punitive.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court reverse the decision of the Court of Appeals affirming rulings of the Trial Court as it relates to: Order of estreatment of an appearance bond where the Petitioner successfully completed its obligations, and further hold that the estreatment amount ordered represented an arbitrary and capricious amount not congruous with a proper Polk analysis.

The Petitioner respectfully requests the Court overturn the Order of Estreatment and direct the Trial Court to issue an Order in favor of the Petitioner absolving them of any liability, or at a minimum remand the matter for consideration by the Trial Court for a proper examination of the required elements for an estreatment Order.

Respectfully submitted,



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January 7, 2017.

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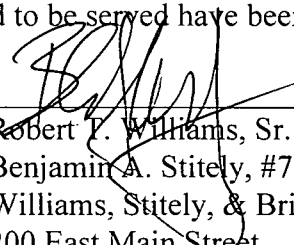
Deangelo Mitchell, Defendant,
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AA Ace Bail by Frances and Palmetto Surety Corp., as Surety, Petitioner.

PROOF OF SERVICE

I certify that I have served the **Petitioner's Brief and Appendix** on the Respondent by depositing copies of it in the United States Mail, postage prepaid, on January 4, 2017, addressed to Alan M. Wilson, Attorney General, Vann Henry Gunter, Jr., Assistant Attorney General, Office of the Attorney General, Post Office Box 11549 Columbia, South Carolina 29211; Scarlett Anne Wilson, 9th Circuit Solicitor, O.T. Wallace Building, 101 Meeting Street Charleston, SC 29401; a copy of the **Petitioner's Brief and Appendix** was served on Jenny A. Kitchings, Clerk of Court, S.C. Court of Appeals, Post Office Box 11629, Columbia, South Carolina, 29211, postage prepaid and deposited in the United States Mail on January 4, 2017.

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

Dated: January 4, 2017


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