

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-73-2014
 :
 MICHAEL D. WALLACE, JR., : Opinion and Order regarding Bail Forfeiture
 Defendant :

OPINION AND ORDER

By Information filed on January 31, 2014, Defendant was charged with one count of Possession With Intent to Deliver and one count of Possession of a Controlled Substance (small amount). Defendant was arrested on the charges on January 9, 2014. Bail was set at \$28,500.00, surety approved. On January 14, 2014, Kermit Yearick posted the surety bond on behalf of the Defendant and the Defendant was released.

On May 1, 2014, the Commonwealth filed a Motion to Revoke and Forfeit Bail. The Commonwealth contended that the Defendant violated the conditions of his bail by engaging in criminal activity while released on bail. A hearing was set for June 12, 2014. The Defendant failed to appear for the hearing and the Commonwealth's Motion to Revoke Bail was granted.

Following the filing of the Commonwealth's Motion to Revoke on May 1, 2014 but prior to the Court granting the Motion to Revoke on June 12, 2014, Mr. Yearick filed an Application for Bail Piece instructing the Court that he desired to be removed as surety. By Order dated May 13, 2014, Mr. Yearick was authorized to apprehend and detain the Defendant. In connection with the Commonwealth's Motion to Forfeit Bail, which was not addressed in the Court's June 12, 2014 Order, a hearing was held on June 27, 2014.

Following that hearing, the Court scheduled a further evidentiary hearing for July 18, 2014 “on the Commonwealth’s Motion to Forfeit Bail as it pertains to bail bondsman Kermit Yearick.”

Rule 536 of the Pennsylvania Rules of Criminal Procedure governs both the revocation and forfeiture of bail. A person who violates a condition of bail is subject to a revocation of release and/or a change in the conditions of the bail bond by the bail authority. Rule 536 (A) (1) (a). When a monetary condition of release has been imposed and the Defendant has violated a condition of the bail bond, the bail authority may order the cash or other security forfeited and shall state in writing or on the record the reasons for doing so. Rule 536 (A) (2) (a). Procedurally, if a forfeiture is ordered, it shall not be executed until twenty (20) days after notice of the Forfeiture Order and the forfeiture may be set aside or remitted under the appropriate circumstances. Rule 536 (A) (2) (c) (d). As well, a bail authority may “exonerate a surety who deposits cash in the amount of any forfeiture ordered or who surrenders the Defendant in a timely manner.” Rule 536 (C) (1).

The procedure utilized by the Court in this particular case does not appear to be in complete technical compliance with the Rules. It appears that the Rules direct the Court to address the revocation and forfeiture matters at the same time. The Court did not do so in an effort to encourage Mr. Yearick to make substantial efforts to identify the Defendant’s whereabouts and to apprehend him. The hearing that was held on July 18, 2014, while styled as a hearing on the Motion for Forfeiture can better be described pursuant to the Rules as a hearing on whether the forfeiture should be set aside in full or in part.

The decision to allow or deny remission of a bail forfeiture lies within the sound discretion of the trial court. Commonwealth v. Chopak, 532 Pa. 227, 615 A.2d 696 (1992). In determining the appropriateness of remittance, the Court must consider several factors including but not limited to the following: (1) whether the applicant is a commercial bondsman; (2) the extent of the bondsman's supervision of the defendant; (3) whether the Defendant's breach of the recognizance of bail conditions was willful; (4) any explanation or mitigating factors; (5) the deterrence value of forfeiture; (6) the seriousness of the condition violated; (7) whether the forfeiture will vindicate the injury the public interest suffered as a result of the breach; (8) the appropriateness of the amount of the recognizance of bail; (9) the cost, inconvenience, prejudice or potential prejudice suffered by the Commonwealth as a result of the breach; and (10) any other factors as the interest of justice require. Commonwealth v. Hann, 81 A.3d 57, 67-68 (Pa. 2013).

The remission of bail forfeitures is a practice calculated to encourage bondsmen to actively seek the return of absent defendants. Commonwealth v. Hernandez, 886 A.2d 231, 236 (Pa. Super. 2005), appeal denied, 587 Pa. 720, 899 A.2d 1122 (2006). The results of a bondsman's efforts to secure the return of an absent defendant, as well as the extent of these efforts, are prime considerations in the determination of the amount of remission of bail forfeitures. Id.

The Court must weigh the above-referenced factors and determine whether justice requires full, partial or no forfeiture at all. "Courts should further consider the public interest served by a forfeiture order; but courts must be careful when examining the potential

vindication of a general, public harm that they act in a non-punitive manner, as the object of bail forfeiture is ‘not to enrich the government or punish the defendant. Nor can it be used as a balm to soothe the disappointment resulting from the inability to punish and rehabilitate.’”

Hann, supra. at 70.

At the hearing in this matter, Trooper Fishel testified on behalf of the Commonwealth. He is employed by the Pennsylvania State Police in their Vice and Narcotics Unit.

While Defendant was out on bail, the Pennsylvania State Police with the assistance of a confidential informant, arranged for controlled buys of heroin from Defendant. On three separate occasions, February 12, 2014, March 24, 2014 and April 23, 2014, controlled purchases of 50 bags of heroin were made from Defendant. Following the last purchase, an arrest warrant was secured for Defendant, but he could not be located. He was “referred” to the wanted list and was entered into the national database regarding such.

Trooper Fishel further testified that at least ten officers worked on the investigation. Three to four hours of time was spent by each officer in connection with the controlled purchases, and a great amount of overtime was incurred. There were administrative expenses and time associated with the paperwork, and it took at least a week to document the investigation. The state police expended \$900.00 in buy money that was never recovered, there were lab fees, certain equipment was used, troopers appeared in court at least three to four times, and efforts were made in attempting to locate Defendant. Once Defendant was located, time and resources were utilized in transporting Defendant to be

arraigned and then ultimately detained in jail.

Kermit Yearick next testified. He is employed as a commercial bondsman through Seneca Insurance Company.

He had a previous business relationship with Defendant, bailing him out on the charges that Defendant faced in 2010. Mr. Yearick believed that Defendant complied with his bail conditions at that time. As evidenced by Exhibit C of the Commonwealth's motion to revoke and forfeit bail, however, Defendant did not comply with his bail conditions. He failed to appear for his sentencing hearing for his 2010 charges, but the Commonwealth sought a contempt finding and additional incarceration as a sanction rather than forfeiture of the bail bond.

Bail in this matter was set at \$28,500.00. The fee paid to Mr. Yearick for his services was 7 % or \$1,995.00. A portion of this was paid to Mr. Yearick prior to Defendant being released and the remaining portion was paid within two weeks.

Mr. Yearick met with Defendant at the Lycoming County Prison and reviewed the prospective bail conditions and bail paperwork. Mr. Yearick then appeared for Defendant's preliminary hearing and posted the bail. He also met with Defendant two weeks later, at which time he was paid his remaining fee. Out of the fee that was received from Defendant, Mr. Yearick paid Bail USA a percentage, as well as Seneca Insurance Company.

According to Mr. Yearick, he did not concern himself too much with Defendant. Mr. Yearick conceded that he do not do a background check, did not look at the criminal charges, did not supervise Defendant, did not access any database to keep track of

Defendant and did not check on Defendant to determine the Defendant's residence. Instead, in deciding whether to post bail, Mr. Yearick's major consideration was the ability of the guarantor (Defendant's mother) to repay him should Defendant default.

As a general rule, Mr. Yearick rarely posts bail over \$100,000.00. He considers the reputation of the defendant to some extent but, more importantly, he looks at the "assets of the person backing up the defendant."

In this particular case, once he discovered that Defendant failed to appear, he immediately contacted Defendant's mother. He was informed that Defendant was "back and forth" from Brooklyn, NY.

Subsequent to the June 12, 2014 hearing, Mr. Yearick hired a constable to look for Defendant in the Williamsport area and a bounty hunter to search for Defendant in the New York area. He also obtained authorization to apprehend Defendant.

The bounty hunter found Defendant in New York. Defendant was apprehended on June 20 and transported from Brooklyn, NY to Allentown, PA and then to the Lycoming County Prison, where Mr. Yearick met with him.

Taking into account all of the fees and expenses paid by Mr. Yearick in connection with the legal proceedings and the eventual apprehension of Defendant, he estimated that he was out approximately \$3,000.00.

Following the hearing, Mr. Yearick argued that none of the amounts should be forfeited. He argued that he "did exactly what the rule is intended to do." He noted that at a significant cost to himself he apprehended Defendant. Furthermore, he noted that there

would be no purpose in forfeiting any monies under the circumstances. He noted for example that there would be no deterrence value on Defendant and that the public interests were not at all detrimentally affected.

The Commonwealth countered that at least a partial forfeiture was appropriate in considering all of the relevant factors. The Commonwealth conceded that Defendant was apprehended due to Mr. Yearick's efforts, but that the purposes of forfeiture mandated that under the circumstances there be some loss of monies.

Under all of the circumstances, the Court finds that a partial forfeiture is warranted. Mr. Yearick is a commercial bondsman making a profit from the business of posting bail for individuals charged with criminal offenses.

In this particular case, the bail appeared to be less than what it should have been in light of Defendant's prior drug-related conviction. Defendant was clearly a risk to commit other drug-related offenses and, given his New York roots, a risk to flee should the Defendant be charged with those offenses. The Court takes judicial notice of the fact that sentences become more severe in the face of repeated drug-related crimes.

The approximate \$2,000.00 fee that Mr. Yearick obtained for his services appears to relate only to his promise of apprehending Defendant if he fled. Other than meeting with Defendant on one occasion at the prison and at the preliminary hearing, no further services were provided by Mr. Yearick. The fact that Mr. Yearick met with the Defendant on one other occasion to obtain the remaining portion of his fee is of no significance.

Surprisingly, Mr. Yearick neither kept track of the proceedings nor took any efforts to monitor or supervise Defendant's compliance with the terms and conditions of bail. He failed to conduct any kind of a background check and did not even consider the nature of the criminal charges. Through his own admission, he considered only the fact that Defendant previously had a business relationship with him, that the bail was \$28,500.00 and that Defendant's mother was a good risk to repay him should monies need to be forfeited. He admittedly concerned himself with the guarantor and her ability to pay and did not concern himself "too much" with Defendant or his charges.

Defendant's breach of the bail conditions was willful. The Commonwealth has shown to a preponderance of the evidence that Defendant was involved in three drug deliveries, each of which involved 50 baggies of heroin. This willful breach was extremely serious. Defendant exposed the public at large, as well as others, to the potential for violence often times associated with drug transactions but also, more importantly, to the direct harm caused by distributing a highly addictive poison into society.

Clearly, the Commonwealth incurred costs and inconvenience because of the Defendant's willful and serious breach, although the Court under these circumstances does not place much weight on this factor given the fact that the costs and inconvenience were associated with new charges for which Defendant will be punished if he is convicted.

The Court does not place much weight on the deterrence value of forfeiture. The Court agrees with the defense position that forfeiture will not deter future defendants at all. A partial forfeiture, however, may deter bondsmen from looking solely to the

guarantor's ability to pay when determining whether to post a bond and from failing to take any measures whatsoever to supervise the defendant.

There are some mitigating factors in this case, which primarily include the substantial efforts undertaken Mr. Yearick to apprehend the Defendant as well as the short period of time in which it took to apprehend the Defendant following the June 12, 2014 initial hearing.

On balance, the Court is of the opinion that the interests of justice favor a partial forfeiture. A partial forfeiture acknowledges the injury that the public suffered in large part by Mr. Yearick's failure to properly assess the risks prior to agreeing to post bail and, more importantly, his failure to take any measures to supervise Defendant or at the very least to make Defendant somewhat accountable. By concerning himself only with the guarantor, Mr. Yearick suggests that posting a bond is a money determinative transaction and nothing more. Such is certainly not the case. When a bondsman undertakes to post bond on behalf of an individual charged with a crime, that bondsman assumes more of a responsibility than simply making sure that the guarantor has sufficient monies to reimburse the bondsman should the conditions of bail be broken.

Accordingly, the following Order is entered:

ORDER

AND NOW, this 7th day of August 2014 following a hearing, the Commonwealth's Motion to Forfeit Bail is **GRANTED** in part. Ten percent (10%) of the bail or \$2,850.00 is hereby forfeited to the Commonwealth of Pennsylvania.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Nicole Spring, Esquire (APD)
David Lindsay, Esquire (counsel for bail bondsman)
Hall & Lindsay, P.C. 138 E Water St., Lock Haven PA 17745
Gary Weber, Esquire (Lycoming Reporter)
Work File