

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-786-2010
 :
 KEVIN DIXON, : Opinion and Order regarding Bail Forfeiture
 Defendant :

OPINION AND ORDER

This Opinion and Order addresses yet again an issue involving the forfeiture of bail and a subsequent request to set aside said forfeiture.

On June 2, 2010, Kermit Yearick, hereinafter “surety”, posted a \$15,000.00 bond for Defendant’s bail. Defendant was accordingly released.

On September 15, 2010, Defendant failed to appear for a hearing and the Commonwealth’s oral Motion to Revoke and Forfeit bail was granted. The Court cited Defendant’s “repeated failure” to comply with the conditions of bail, specifically failing to “attend court proceedings.” The Court directed that the notice of revocation and forfeiture be served on both the Defendant and surety in accordance with the applicable Rules of Criminal Procedure.

On September 29, 2010, the surety filed what is known as a “bail piece” indicating his desire to be removed as surety once the Defendant was incarcerated or new bail was posted. The surety indicated on his bail piece that the Defendant changed his address without notice and continued with criminal activity.

On September 20, 2010, a Bench Warrant was issued by the Court for Defendant’s arrest and apprehension.

On August 25, 2014, long after the bail revocation and forfeiture, bail piece and Bench Warrant, the Defendant was apprehended. He was returned to Lycoming County and brought before the Court on August 27, 2014. The Court vacated the Bench Warrant and refused to set bail.

The day after, on August 28, 2014, the Commonwealth filed a written notice of forfeiture which was subsequently served on the surety on September 2, 2014.

On September 18, 2014, the surety filed the pending Motion to Dismiss, Remit and Set Aside the Bail Forfeiture.

A hearing was held before the Court on October 16, 2014. The surety testified that he was not made aware of the September 15, 2010 Order until September of 2014 after he returned from a trip out of the country and was advised of such by his attorney. He confirmed that prior to September of 2014 he was never served with forfeiture notice by personal or certified mail as directed in the prior Court Order.

He testified that as a precautionary matter in September of 2010, he applied for a bail piece. It was mailed from his Mill Hall, PA address and he did not have an opportunity to review the court file. He indicated that he filed the bail piece because he had spoken with the Defendant's girlfriend who advised the surety that the Defendant no longer lived "there" and was "back to using drugs." Through the surety's oral argument following the hearing and subsequent written submission to the Court, he argues that because the notice of forfeiture was not sent until four years after it was filed, he is entitled to a full remitter and set aside of the forfeiture as a matter of law. The surety claims that his due process rights

were violated and that the equitable doctrine of laches precludes forfeiture.

More specifically, the surety argues that his due process rights were violated because he “completely lost his 20-day stay period” under Rule 536 of the Pennsylvania Rules of Criminal Procedure. The surety also argues that his obligation to act arose only after he received notice of the forfeiture and at that time his obligation could not be performed because the Defendant was in fact already incarcerated. The surety finally argues that the inordinate delay in the notice prejudiced him thus constituting a defense of laches.

The Commonwealth argues on the contrary that the surety was well aware of the Defendant’s misconduct in August of 2010 when the surety filed the bail piece. The Commonwealth counters that accordingly the surety was not prejudiced. The surety knew of the Defendant’s breach within two weeks of the forfeiture and “had every reason to hunt for the Defendant.” Instead, the Commonwealth argues, that the surety “just filed it away.”

“Bail is the security or other guarantee required and given for the release of a person, conditioned upon a written undertaking, in the form of a bail bond, that the person will appear when required and comply with all conditions set forth in the bail bond.” Pa. R. Crim. P. 103.

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 days after notice of the forfeiture 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).

It is clear under Pennsylvania law that a forfeiture “may be set aside or remitted as justice requires” and “equitable principles apply when a court is faced with the decision whether to modify or remit a forfeiture.” Commonwealth v. Gaines, 74 A.3d 1047, 1051 (Pa. Super. 2013), citing, Pa. R. Crim. P. 536 (A) (2) (d) and Commonwealth v. Nolan, 288 Pa. Super. 484, 432 A.2d 616 (Pa. Super. 1981). It is well settled that “the decision to allow or deny a remission of bail forfeiture lies within the sound discretion of the Trial Court.” Commonwealth v. Chopak, 615 A.2d 696, 701 (Pa. 1992). (further citations omitted).

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

interests of justice require. Commonwealth v. Hann, 81 A.3d 57, 67-68 (Pa. 2013).

That these factors should not be applied rigidly. Hann, Id. at 68.

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.

In evaluating the facts of record as established at the hearing along with the respective arguments of the parties, the Court cannot conclude as a matter of law that the surety is entitled to a complete remitter or set aside or in the alternative a dismissal of the forfeiture order. While there certainly was a substantial delay in providing the notice, the purpose of the notice is to advise the surety of the defendant's misconduct and to enable the surety to attempt to secure the return of an absent defendant or to present a defendant before the Court who may have violated a different condition of bail.

This is not a situation where the surety had no notice of the Defendant's breach of bail conditions. Furthermore, this is not a situation where the surety had no opportunity to cure any default by the Defendant. Under the circumstances, it can be argued that the notice was superfluous. While the notice was provided inordinately late, the Court cannot conclude that such a delay prejudiced the surety to the extent the surety claims. While

the Defendant was apprehended prior to the notice being sent, the Court is of the opinion that prior to determining the surety's Motion, it must consider all of the Hann factors as well as any other factors as the interest of justice require.

ORDER

AND NOW, this 15th day of January 2015 the surety's Motion to Dismiss the Commonwealth's Application for Bail Forfeiture is **DENIED**. A hearing on the surety's Motion to Remit and Set Aside is scheduled for the **19th day of March, 2015 at 9:30 a.m. in Courtroom No. 4** of the Lycoming County Courthouse .

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Nicole Spring, Esquire (APD)
David Lindsay, Esquire (counsel for bail bondsman)
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Gary Weber, Esquire (Lycoming Reporter)
Work File