Supreme Court of Ohio Clerk of Court - Filed August 28, 2018 - Case No. 2018-1143

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	**SUPREME COURT CASE NO. 2018-1143**
Appellant,	)	
	)	**ON APPEAL FROM THE**
vs.	)	**COURT OF APPEALS, NINTH APPELLATE**
	)	
JERMONT WADE,	)	**DISTRICT 17CA011081**
	)	
Defendant,	)	**LORAIN COUNTY**
	)	**COURT OF COMMON PLEAS**
and	)	**CASE NOS. 16CR093186 &**
	)	
SLY BAIL BONDS,	)	**16CR093187**
	)	
Appellant.	)	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF THE STATE OF OHIO

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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This Honorable Court should not accept jurisdiction for the following reasons:

1. This case does not present a substantial constitutional question because Appellant's counsel misunderstands the criminal bail/surety statutes. The statutes upon which he relies, R.C. 2713.21 through R.C. 2713.23, apply to civil proceedings. This is confirmed by the fact that R.C. 2713.01 provides "In a civil action, a defendant can be arrested before judgment only in the manner prescribed . . . ." Criminal bond and the conditions for discharge and release of the surety are covered by R.C. 2937.40, which the surety does not even cite to, let alone analyze. Instead, Sly Bail Bonds attempts to apply a civil bond statute enacted in 1953, with has no subsequent amendments, and which has never been applied in the context of relieving liability of a surety for a criminal bond. There is no substantial constitutional question because the surety simply tried to apply the wrong statute. The appellate court did not err.

2. This case is not of public or great general interest because the surety does not present an issue which has divided the lower courts or which presents an issue that is likely to recur. The Ninth District was presented with an argument that attempted to apply the wrong statute to the facts presented, and held as much. That decision is not erroneous and does not create a case of great general or public interest.

STATEMENT OF THE CASE AND FACTS

The essential facts underlying Jermont Wade's prosecution are not in dispute in this case. On January 27, 2016, the Lorain County Grand Jury returned two indictments in case numbers 16CR093186 and 16CR093187 charging Jermont Wade in each case with one count of non-support of dependents in violation of R.C. 2919.21(B), felonies of the fourth degree. Bond in each case was set at $3,000 cash or surety and $3,000 personal. The Appellant, Sly Bail Bonds, posted the $3,000 surety bonds in each case.

The matter proceeded through the pre-trial process until April 27, 2016 when the defendant failed to appear for the scheduled pre-trial. The trial court issued a capias warrant for the defendant's arrest in both cases and ordered the bonds revoked and forfeited. Upon the arrest of the defendant on July 25, 2016, the defendant was held at the Lorain County Jail until the defendant appeared in court on July 27, 2016.

On July 27, 2016, Wade entered guilty pleas in both cases. The trial court accepted Wade's pleas, vacated the bond forfeiture orders, and reinstated the bonds in both matters. The trial court scheduled sentencing for October 26, 2016 at 10:00 a.m. On August 8, 2016, approximately twelve (12) days after the trial court reinstated Wade's two bonds, the surety moved for release from the bond obligation.

Wade failed to appear for sentencing on October 26, 2016. The trial court issued a new capias warrant for the defendant's arrest on both cases and revoked and forfeited the bonds in both matters. The trial court scheduled a hearing for the defendant and surety for December 14, 2016 to show cause why judgment should not be entered against them for the penalty stated in the recognizance. The court notified the defendant of the hearing at his listed address by ordinary mail and sent notice of the forfeiture and hearing to show cause to the surety. The

surety filed a motion on November 3, 2016 to vacate the forfeiture and a separate motion the same day to compel a ruling. The surety followed those motions on December 2, 2016 with a motion to discharge bond. The State of Ohio responded in opposition on December 13, 2016.

On December 14, 2016, the trial court held the show cause hearing. Attorney Cusma appeared for the surety and presented no evidence. Following brief arguments, the trial court noted that Wade remained a fugitive at that time and on December 15, 2016 entered judgment against the surety, Sly Bail Bonds, and its insurance underwriter for $3,000.00 in each case to be paid forthwith to the clerk.

The surety, Sly Bail Bonds, filed notice of appeal in both cases on January 13, 2017. Following briefing, and an oral argument which the surety did not attend, the Ninth District Court of Appeals affirmed the trial court's decision on June 26, 2018.

Sly Bail Bonds filed notice of appeal to the Ohio Supreme Court on August 10, 2018. The State of Ohio hereby responds in opposition, respectfully urging the Court to decline jurisdiction and dismiss the appeal.

LAW AND ARGUMENT

I. CHAPTER 2713 OF THE REVISED CODE, BY ITS OWN TERMS, DOES NOT APPLY TO CRIMINAL BAIL/BOND PROCEEDINGS.

The essential thrust of Appellant's argument is that the appellate court erred in holding that R.C. 2713.21 through R.C. 2713.23 do not apply to bond matters in criminal proceedings. Citing extensively to specific provisions within that chapter, the surety contends that the trial court and the court of appeals erred when it refused to apply the provisions to the bond issue in this criminal case. Contrary to the surety's claims, Chapter 2713 of the Revised Code does not apply since there is a specific provision of Chapter 2937 which controls the issue presented. Indeed, R.C. 2713.01 itself specifies that the provisions in that chapter apply to civil actions. For the reasons which now follow, the surety's arguments lack merit; the court should decline jurisdiction and dismiss the appeal.

Chapter 2713, enacted in 1953 without any subsequent amendments, is entitled "arrest and bail," but its first section gives away the limitations of applying it in a criminal cause. R.C. 2713.01 provides "**In a civil action**, a defendant can be arrested before judgment only in the manner prescribed . . . ." *Id.* (emphasis added) "Bond" under Chapter 2713 of the Revised Code is governed by R.C. 2713.03, which provides that the "order of arrest provided for by section 2713.02 . . . shall not be issued by the clerk of the court until there is executed, by sufficient sureties of the *plaintiff*, a bond to the effect that the *plaintiff* will pay to the defendant all damages, not exceeding double the amount of the plaintiff's claim stated in the affidavit, which he may sustain by reason of the arrest if the order proves to have been wrongfully obtained." R.C. 2713.03 (emphasis added). In essence, Chapter 2713 covers bonds in civil cases for judgments which are paid by the plaintiff in attaching or otherwise seizing assets in a pre-judgment setting. The "order of arrest" may only be issued by a clerk upon a plaintiff's affidavit

stating the nature of the plaintiff's claim with the amount "as nearly as may be," and establishing either an exigency or a fraud. R.C. 2713.02.

As this Court has recognized, the statutory defenses available to exonerate a surety in a criminal case are contained in R.C. 2937.40(A). *State v. Hughes*, 27 Ohio St. 3d 19, 20, 501 N.E.2d 622 (1986). Footnote 1 of the *Hughes* Court's opinion specifies that the defenses for sureties are *only* discharged and released under the three (3) listed methods in that statute. Nothing in the *Hughes* Court's opinion made mention of, let alone referred to, Chapter 2713. The Court's silence on this question speaks volumes.

Sly Bail Bonds cites to this Court's decision in *State v. Kole*, 92 Ohio St. 3d 303, 2001 Ohio 191, in support of its argument that Chapter 2713 applies to criminal bond issues. In fact, Sly Bail Bonds argues in support of the Court accepting jurisdiction that the Ninth District's decision has the effect of "eliminat[ing] the statutory protections afforded to a surety" to apprehend fugitives. In *Kole*, this court reversed and remanded a criminal trespass conviction against a "fugitive recovery agent" (also known as a bounty hunter) when the bounty hunter's attorney failed to present "what might have been a crucial statutory defense available to the defendant . . . ." *Id.* at 304. Reviewing the belated discovery of R.C. 2713.22 during the appellate proceeding, this Court applied *Strickland* to the ineffective assistance of counsel claim and determined that counsel's performance was both deficient and prejudicial. Nowhere, however, did this Court hold that the statute does in fact provide a defense to the claimed violations of abduction and burglary. The Court specifically reserved that issue for another day. *Id.*

The Seventh District noted in *State v. Chappell*, 7th Dist. Mahoning Nos. 16MA0004 & 16MA0005, 2017 Ohio 5712, at 11, that the Eighth District in *Mota v. Gruszcynski*, 197 Ohio

App. 3d 750, 2012 Ohio 275 (8th Dist.), at ¶ 15, had already observed that "no Ohio court has interpreted R.C. 2713.22 as providing carte blanche authority to a bounty hunter in pursuit of a fugitive to enter the dwelling of a third party who is not a party to the bail contract." The *Chappell* court concluded that the "plain language of R.C. 2713.22 does not give bail bondsmen the unfettered authority to enter the residence of a third party in order to arrest a fugitive." *Id.* at ¶ 12. Nothing about the Ninth District's decision in this case "eliminates" a bondsman's claimed authority under *Kole*; as confirmed by the Seventh and Eighth Districts, that authority has never existed. Indeed, it would be an odd result for bounty hunters to have more authority to enter a house in search of a fugitive than sworn law enforcement officers.

Even if Chapter 2713 of the Revised Code could be said to have some arguable applicability to criminal surety bonds, there is a more specific provision of the Revised Code that applies. When two statutes cover the same issue, rules of construction mandate that the more specific provision prevails. R.C. 1.51. In this case, even if the general provision of bonds in civil cases had any applicability, the more specific section, R.C. 2937.40, prevails as an exception to the general provision. Moreover, R.C. 2937.40, the specific provision, is the later adopted provision, having been enacted in 1990 versus the 1953 adoption of Chapter 2713. Furthermore, it is clear that the manifest intent of the General Assembly was for this provision to apply to bond in criminal cases. *Compare* R.C. 1.51.

Section 2937.40 of the Revised Code contains the exhaustive list of circumstances under which the surety may have the bail discharged and released. The statute provides:

> (A) Bail of any type that is deposited under sections 2937.22 to 2937.45 of the Revised Code or Criminal Rule 46 by a person other than the accused shall be discharged and released, and sureties on recognizances shall be released, in any of the following ways:
>
> 1) When a surety on a recognizance or the depositor of cash or securities as bail for an accused desires to surrender the accused

> before the appearance date, the surety is discharged from further responsibility or the deposit is redeemed in either of the following ways:
>
> a) By delivery of the accused into open court;
> b) When, on the written request of the surety or depositor, the clerk of the court to which recognizance is returnable or in which deposit is made issues to the sheriff a warrant for the arrest of the accused and the sheriff indicates on the return that he holds the accused in his jail.
>
> 2) By appearance of the accused in accordance with the terms of the recognizance or deposit and the entry of judgment by the court or magistrate;
>
> 3) By payment into court, after default, of the sum fixed in the recognizance or the sum fixed in the order of forfeiture, if it is less.

R.C. 2937.40.

In *State v. Lee*, 9th Dist. Lorain No. 11CA010083, 2012 Ohio 4329, this Court considered a similar issue as the one presented in the instant case. There, ABC Bail Bonds argued that it should have been provided with an opportunity to object prior to the reinstatement of a bond after the defendant failed to appear for a scheduled court date. Rejecting the holding of the Second District decision in *State v. Hancock*, 2d Dist. Montgomery No. 21000, 2006 Ohio 1594, the Ninth District held that if a surety believes that continuation of a bond is too risky it may apply for a discharge of the bond under Crim. R. 46 and R.C. 2937.40. *Lee*, 2012 Ohio 4329, at ¶ 17, citing *State v. Hopings*, 6th Dist. Lucas No. L-07-1061, 2008 Ohio 375, at ¶ 9. The Ninth District was persuaded by the reasoning of the Sixth District in *City of Toledo v. Gaston*, 188 Ohio App. 3d 241, 2010 Ohio 3217, at ¶ 24, wherein the court held that, under the unambiguous language of R.C. 2937.40, the determinative event for discharge and release of bail and sureties is payment of the sum set forth in the forfeiture judgment, not the declaration of a forfeiture.

Quoting this Court, the Ninth District wrote that "[t]he fact remains that the defendant [was] released to the surety as a continuance of the original imprisonment. As part of its agency relationship with the defendant, the surety was obligated to remain informed of the status of the defendant's case." *Lee*, 2012 Ohio 4329, at ¶ 20, quoting *State v. Stevens*, 30 Ohio St. 3d 25, 28, 505 N.E.2d 972 (1987). Beyond the obvious practical concerns of ABC's proposed statement of law in that appeal, "requiring the trial court to essentially provide for a new bond once a defendant is retaken into custody ignores the standard established in R.C. 2937.40(A)(3), which identifies payment of the sums ordered in the order of forfeiture as the event triggering release and discharge of the obligations of a surety under a bail bond." *Id.* Thus, ABC was not released of its obligations despite the order of the trial court forfeiting the bond upon Lee's failure to appear. By "reinstating" the bond after Lee subsequently appeared in court, the trial court merely recognized the existence of an agency relationship. *Id.*

Additionally, Crim. R. 46(H), entitled "continuation of bonds," provides that unless a surety has moved for discharge, the same bond shall continue until the return of a verdict, or the acceptance of a guilty plea. The rule further provides that the trial court has discretion to continue the same bond pending sentencing or disposition of the case on review.

This case is similar to *Lee*. After Wade failed to appear for a scheduled pre-trial, a capias was issued for his arrest and the bond was forfeited. After Wade was apprehended, the bond forfeitures were vacated and the original bonds were reinstated two days after his apprehension following his guilty pleas in both cases on July 27, 2016. After the trial court reinstated the bonds, the surety filed a motion for relief from liability on August 8, 2016. That motion remained pending until the scheduled sentencing hearing on October 26, 2016. Wade again failed to appear in court and a capias was again issued for his arrest. The trial court again

ordered the bond revoked and forfeited. The show cause hearing occurred on December 14, 2016, at which time the surety still had not apprehended the defendant, whose last whereabouts were known to be in Toledo, Ohio.

The surety did not comply with the specific provisions of R.C. 2937.40(A). There is no dispute that the defendant did not appear in accordance with the terms of the recognizance. R.C. 2937.40(A)(2). There is similarly no dispute that the surety has not paid into court, after default, the sum fixed in the recognizance or the sum fixed in the order of forfeiture, if it be less. R.C. 2937.40(A)(3). The only dispute this case presents is the surety's contention that it was entitled to discharge and release of the bail under R.C. 2937.40(A)(1).

To be entitled to discharge and release of the bail under that provision, however, the surety would have to deliver the accused into open court or, on the written request of the surety, the clerk to which the recognizance is returnable issues to the sheriff a warrant for the accused and the sheriff indicates on the return that he holds the accused in his jail. R.C. 2937.40(A)(1). This case did not proceed on either basis. At no point did the surety deliver the defendant into open court or request in writing that the clerk of court issue an arrest warrant. Instead, the court issued a capias for the defendant's arrest following Wade's failure to appear for a scheduled pre-trial. Because the defendant's arrest was not accomplished as a result of the surety's written request for an arrest warrant, the sheriff's return indicating that he held the accused in jail was not on the surety's request for a clerk's warrant to arrest but rather on the court's capias. R.C. 2937.40(A)(1)(b) therefore did not apply in this case.

Sly Bail Bonds also argues that the Ninth District's decision in this case eliminates statutory protections for sureties which protect against unavoidable risks such as the death of a criminal defendant or the imprisonment of a defendant in a separate criminal matter. Sly Bail

Bonds claims that these are "unavoidable circumstances" not caused by any fault of the surety. First, the death of the defendant would result in the dismissal of the criminal case under the abatement doctrine and the ensuing discharge of the bond. Second, sureties are regularly held responsible for the costs of extradition from another state when the defendant is apprehended in another jurisdiction after committing a new offense. These conditions are neither extraordinary nor unusual; sureties pay the cost of extradition for defendants who flee the jurisdiction.

The Ninth District held in 1986 that a trial court does not abuse its discretion in refusing to vacate a bond forfeiture when the surety lacks a sufficient defense to the judgment. *State v. Hollis*, 9th Dist. Lorain No. 3913, 1986 Ohio App. LEXIS 7528 (July 9, 1986), at *3, citing *State v. Ward*, 53 Ohio St. 2d 40, 42, 372 N.E.2d 586 (1978). A sufficient defense is a showing of good cause why the surety failed to produce the defendant. *Id.* A sufficient defense does not, however, include the defendant's flight or the impossibility of retrieving them. *Id.* The Ninth District in *Hollis* rejected the surety's argument that impossibility was a defense to bond forfeiture actions. Quoting *State v. Ohayon*, 12 Ohio App. 3d 162, 467 N.E.2d 908 (8th Dist. 1983), the *Hollis* court observed that "the escape of a defendant is the business risk of a bail surety. It is precisely the situation which a surety guarantees against." *Hollis*, 1986 Ohio App. LEXIS 7528, at *3-4, quoting *Ohayon*, 12 Ohio App. 3d at 165.

Holding sureties responsible for the flight of the criminal defendant for whom they have posted bond ensures that sureties do not indiscriminately post bond for defendants without first evaluating a particular defendant's flight risk. In essence, the surety seeks to have the Court rule in such a way as to create legal precedent for the proposition that sureties can extract money from criminal defendants or their family members with no concomitant risk. Operated in the way Sly Bail Bonds envisions, criminal bail would no longer be a form of insurance to guarantee

the appearance of the defendant in court, but rather a guaranteed stream of revenue for the bondsman.

CONCLUSION

For all of the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court decline jurisdiction over the instant discretionary appeal.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of the State of Ohio was sent via email to Patrick Cusma at patcusma@sbcglobal.net, this 28th day of August, 2018.

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