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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001512-MR

TABITHA COOMER; COURTNEY
MILLER; AND TIMOTHY MILLER

APPELLANTS

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 08-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER¹ AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Tabitha Coomer, Courtney Miller and Timothy Miller
appeal from an order of the Adair Circuit Court revoking and forfeiting Timothy's
bail bond in the amount of \$50,000. The issues presented on appeal are: (1)

¹ Judge Michelle M. Keller concurred in this opinion prior to her appointment to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

whether a \$25,000 bond posted by Tabitha was forfeited when Timothy was charged with committing additional offenses after his arraignment in the Adair District Court; (2) whether the revocation and forfeiture of the entire bond was excessive; (3) whether the circuit court erred when it refused to listen to an audio recording of a drug buy between Timothy and a confidential informant; and (4) whether the circuit court had authority to direct payment of the forfeited bond to the office of the Adair County Sheriff. We conclude that the forfeiture of the entire \$50,000 was excessive and that the circuit court was without authority to direct payment of the forfeited bond to the Adair County Sheriff.

On October 8, 2007, Timothy was arrested and charged with trafficking in a controlled substance, first degree; trafficking in marijuana less than eight ounces; possession of a controlled substance, first degree; and possession of marijuana. On October 24, 2007, he appeared in the Adair District Court for a preliminary hearing and a \$25,000 bond posted by Tabitha on October 15, 2007, was continued. The standard bond form stated that the bond would be forfeited if Timothy failed to appear in court as required. His release was also conditioned on his compliance with the laws of the Commonwealth. The bail bond document advised that a violation of the bond conditions could result in forfeiture of the bond.

Timothy was indicted by the Adair County grand jury on the same charges. After Timothy's arrest on that indictment, his bond was set at \$50,000 by the Adair Circuit Court and Timothy's request to modify the bond to \$25,000 was

denied. On February 19, 2008, Courtney posted an additional \$25,000 cash bond that was applied to the \$25,000 bond posted by Tabitha. The bond form recited that it was conditioned on Timothy making court appearances and “[n]ot breaking any laws of the Commonwealth” and advised that violation of the bond conditions could result in forfeiture.²

Following his release on bail, Timothy was again indicted by an Adair County Grand Jury for drug-related crimes allegedly committed on February 25, 2008. The Commonwealth moved to revoke and forfeit the bonds posted by Tabitha and Courtney on the basis that Timothy violated the conditions of his release.

At a bail bond revocation hearing, Kentucky State Police Detective Scott Hammond testified that he and other police officers worked with undercover agent Jennifer Farlee and, on February 25, 2008, conducted a controlled cocaine buy. Farlee was equipped with a recording device. Detective Hammond testified that he did not observe the drug transaction but observed Timothy in the area. Farlee testified that on February 25, 2008, she met with Timothy who sold her crack cocaine.

At the close of the Commonwealth’s proof, Timothy requested the court to play the audio recording of the alleged drug buy, which he contended contradicted Farlee’s testimony. The court refused, indicating that it had sufficient

² Timothy also faced federal drug charges to which he pleaded guilty and, on May 17, 2010, was sentenced to 151 months confinement.

evidence to determine the matter and listening to the tape was unnecessary because Farlee testified in court.

The circuit court issued an order revoking and forfeiting the entire \$50,000 bail bond to the Adair County Sherriff's Office. This appeal followed.

We first address Tabitha's contention that the district court bond cannot be forfeited because Timothy was rearrested after his indictment, and she did not agree or otherwise acquiesce to its transfer and application to the circuit court bond.

The rule in effect when the bond was posted in the district court and when the \$50,000 bond required by the circuit court, provided:

[B]ail taken at any stage of the proceedings shall continue in effect to insure the appearance of the defendant for any and all purposes at all stages of the proceedings, including appeal. In the event a defendant is ordered bound over to the circuit court after a preliminary hearing, control over bail taken by the district court shall pass immediately to the circuit court.

Kentucky Rules of Criminal Procedure (RCr) 4.54(1). Pursuant to the rule, the bond posted in district court by Tabitha passed to the circuit court. Following Timothy's indictment, the circuit court was authorized to decide the question of bail and summarily exercise its discretion regarding the amount of bail. *Sydnor v. Commonwealth*, 617 S.W.2d 58, 59 (Ky.App. 1981).

Tabitha admits that pursuant to RCr 4.54, the circuit court had authority to modify Timothy's bond after his indictment but argues that Timothy's arrest discharged her liability on the bond. She relies on *Medlin v. Commonwealth*,

11 Bush 605, 74 Ky. 605 (1876) and *Commonwealth v. Skaggs*, 152 Ky. 268, 153 S.W. 422 (1913).

In both cases, the defendant was arrested after the bond was posted and the defendant had escaped from custody. The surety was released from liability on the bond. The reason for the rule was summarized in *Skaggs* as follows:

In the case at bar the court took possession of the defendant and took him out of the custody of his bail, committing him to the custody of the jailor, and while in the custody of the jailor and beyond the control of his bail he escaped. The commonwealth by her own act took charge of the defendant, and, having so taken charge of him and taken him from the custody of his bail, the bail was discharged.

Id. at 423.

The rule in *Skaggs* has no application to this case. Timothy did not escape from custody and was released on the bonds posted by Tabitha and Courtney. Pursuant to our criminal rules, the circuit court properly increased the bond and applied the district court bond posted by Tabitha. The next issue to be addressed is whether forfeiture of the entire \$50,000 bond was proper.

Historically, a bail bond was posted for the sole purpose of enhancing the “prospect that the defendant/appellant will be amenable to the orders and processes of the court.” *Johnson v. Commonwealth*, 551 S.W.2d 577, 578 (Ky. App. 1977). The *Johnson* Court concluded that the forfeiture of bond was because the defendant sold alcoholic beverages or possessed alcohol for resale and,

therefore, an impermissible penalty unrelated to bail. *Id.* at 579. Accordingly, it held that a “cash forfeiture clause conditioned on misconduct other than failure to appear or surrender as directed by the court may not be made part of the bail order.” *Id.* However, in *Clemons v. Commonwealth*, 152 S.W.3d 256 (Ky.App. 2004), the Court interpreted the more recent statutory provisions and our criminal rules regarding bail bonds and held contrary to *Johnson*.

The *Clemons* Court relied on Kentucky Revised Statute (KRS) 431.545 and emphasized that the statute plainly states that bond forfeiture is appropriate if a defendant “shall willfully fail to appear **or shall willfully fail to comply with the conditions of his release**” *Id.* at 259. Additionally, the Court pointed out that RCr 4.42 contemplates that conditions other than the defendant’s appearance in court may be imposed upon the defendant’s release from custody. *Id.* The Court quoted the rule and again emphasized the language allowing conditions other than the defendant’s appearance in court:

(1) If at any time following the release of the defendant and before the defendant is required to appear for trial the court is advised of a material change in the defendant’s circumstances **or that the defendant has not complied with all conditions imposed upon his or her release**, the court having jurisdiction may order the defendant’s arrest and require the defendant or the defendant’s surety or sureties to appear and show cause why the bail bond should not be forfeited or the conditions of release be changed, or both.

. . . .

(3) Where the court is acting on advice that the defendant has not complied with all conditions imposed

upon his or her release, the court shall not change the conditions of release or order forfeiture of the bail bond unless it finds by clear and convincing evidence that the defendant has wilfully [sic] violated one of the conditions of his or her release or that there is a substantial risk of nonappearance.

Id. The Court pronounced that Kentucky was now in conformity with those jurisdictions allowing the imposition of nonappearance conditions to control a defendant's behavior while on pretrial release and the forfeiture of bond if one of those conditions is violated. *Id.* at 259-260.

Although decisions regarding bond issues, including forfeiture, lie within the trial court's discretion, the Court in *Clemons* recognized that a forfeiture will be reviewed for excessiveness. *Id.* at 260. When forfeiture is for breach of a nonappearance condition, the imposition of broad conditions to control a defendant's behavior not only defeats the purpose of a bail bond but could result in increased difficulty in obtaining a bond surety. *State v. Korecky*, 169 N.J. 364, 384, 777 A.2d 927, 939 (2001). In *Korecky*, a case cited with approval in *Clemons*, the Court cautioned trial courts to "weigh carefully the totality of the circumstances" and "exercise the authority to forfeit a bond for a breach of such a condition sparingly." *Id.* We share the concern expressed in *Korecky*. Although our statutes and rules permit forfeiture for breach of a nonappearance condition, the trial court's discretion is not unfettered and must be exercised by applying various factors.

Consistently, the courts have focused on whether justice will be served by forfeiture. “When considering whether or not justice requires the enforcement of a forfeiture, a court must look at several factors, including: (1) the willfulness of the defendant’s breach of the bond, (2) the cost, inconvenience and prejudice suffered by the government, and 3) any explanation or mitigating factors.” *United States v. Ciotti*, 579 F.Supp. 276, 278 (D.C. Pa. 1984). In *State v. Werner*, 667 A.2d 770, 774-775 (R.I. 1995) and *Korecky*, 169 N.J. at 384, 777 A.2d at 939, the Courts applied similar factors when determining whether justice did not require forfeiture and added that the trial courts must consider the source of the bond.

Relying on *Korecky* and *Werner*, in *Martin v. Commonwealth*, 2003 WL 22681798³ (Ky. App. 2003) (2002-CA-002288-MR), this Court summarized the factors to be considered.

The trial court must find ... that the violation was willful. Other factors bearing on the propriety of forfeiture or its amount include the seriousness of the condition violated; the deterrence value of the forfeiture; the cost, inconvenience, prejudice, or potential prejudice suffered by the Commonwealth as a result of the breach; whether forfeiture will vindicate a serious injury to the public interest; the appropriateness of the amount of the bond; and any mitigating factors presented by the defendant.

In concluding that the forfeiture of a bond for breach of a bail condition other than nonappearance was excessive, the Court considered the relevant factors and emphasized that the money forfeited belonged to the defendant’s father. *Id.* In this case, we find similar reasons for reversal.

³ Because there is no Kentucky published case on the point of law, Kentucky Rules of Civil Procedure (CR) 76.28(4)(c) permits this Court to consider an unpublished case.

Timothy's conduct was serious and willful and, therefore, the bond posted was subject to forfeiture. KRS 431.545; RCr 4.42. However, we conclude that the \$50,000 forfeiture was excessive. The money forfeited did not belong to Timothy and was posted as bond by Tabitha and Courtney. Tabitha and Courtney did not participate in Timothy's criminal activities after the bond was posted and there is no evidence that either could have prevented his conduct. Moreover, Timothy appeared at all court dates and there is no evidence that there were costs incurred by the Commonwealth. "Unlike the usual disappearance of the defendant following a failure to appear, [Timothy's] arrest did not require substantial investigative resources and did not require a delay in disposition of the underlying charges." *Commonwealth v. Mayfield*, 827 A.2d 462, 468 (Pa. Super. 2003) (holding that without some detriment to the County or Commonwealth, total forfeiture was error). We conclude that a forfeiture of the entire bond was excessive and remand for reconsideration of the amount.

We address the two remaining arguments. We conclude that the circuit court did not err when it refused to listen to the one and one-half hour recording of the drug buy. A trial court's improper exclusion of evidence will only require reversal if a substantial right of the party is affected. CR 61.01; Kentucky Rules of Evidence (KRE) 103. Although the audio recording was admitted into the record, we have not been directed to any specific portion of the tape that would have changed the finding that Timothy violated a condition of his bond or contradicted Farlee's testimony and, therefore, conclude there was no reversible error.

The parties agree that the trial court had no authority to order the forfeited bond money be paid to the Adair County Sheriff's Office and it must be forfeited to the Commonwealth of Kentucky. When read together, KRS 30A.120 and KRS 431.100 control the disposition of forfeited bonds and require that the money be paid to the Commonwealth.

Based on the forgoing, we affirm that portion of the Adair Circuit Court's order finding that Timothy willfully breached a condition of his bail bond. However, we reverse the order as to the amount of forfeiture and remand for reconsideration consistent with the factors discussed in this opinion. Any forfeited amount shall be paid to the Commonwealth of Kentucky in accordance with KRS 30A.120.

ALL CONCUR.

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