

RENDERED: JULY 19, 2019; 10:00 A.M.  
TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000134-MR

CASSANDRA PASSMORE, SURETY  
FOR DEFENDANT JESSE PASSMORE

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 17-CR-000203-001

COMMONWEALTH OF KENTUCKY;  
and JESSE PASSMORE

APPELLEES

OPINION  
REVERSING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: KRAMER, NICKELL, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Cassandra Passmore appeals a January 9, 2018 order of the Jefferson Circuit Court which (1) denied her motion for exoneration and a refund regarding a bail bond she posted as surety for appellee Jesse Passmore, and which

instead (2) granted the Commonwealth's motion to have the bond deemed forfeited. Upon review, we reverse.

On December 2, 2016, the Louisville Metro Police Department's SWAT team executed a no-knock search warrant on a home occupied by appellee Jesse Passmore. Jesse became combative when the team entered, and a search of the premises revealed guns and drugs. Jesse was arrested and charged with multiple offenses including possession of a handgun by a convicted felon; possession of a firearm by a convicted felon; illegal possession of a controlled substance (methamphetamine) while in possession of a firearm; and nine counts of third-degree assault.

On December 3, 2016, the Jefferson District Court entered its first order regarding the terms of Jesse's bail, fixing it in the amount of \$25,000 and adding a nonfinancial condition: "Not to violate any local, state, or federal laws." On December 5, 2016, during Jesse's in-person arraignment and following a motion from the Commonwealth, the district court then entered a second order regarding the terms of Jesse's bail, adding another nonfinancial condition: Due to the nature of his offenses, it directed Jesse to "not be in possession of any firearm or deadly weapon." However, no one posted bail for Jesse at that time, so he remained in the custody of the Louisville Metro Department of Corrections.

The following month, the Jefferson Circuit Court assumed jurisdiction after a grand jury indicted Jesse on all counts. Jesse was arraigned on January 30, 2017, whereupon the circuit court entered an order regarding discovery and fixing the terms of Jesse’s bail. In pertinent part, the circuit court stated in its order that “Bail shall remain at \$25,000 full cash.” Below that, the circuit court’s pre-printed order also included the following sentence: “The Defendant shall comply with the following non-financial condition(s) of release: \_\_\_\_\_.” As indicated, the line following that latter sentence of the circuit court’s order was left blank. Indeed, before September 26, 2017, nothing in the circuit court’s record indicated there would be any nonfinancial conditions attached to the terms of Jesse’s bail.

On September 26, 2017 – the date Jesse was released from custody after Cassandra posted a cash bond in the requisite amount of \$25,000 – the circuit court’s record only indicated that the terms of Jesse’s bail were subject to the nonfinancial conditions generally associated with bail.<sup>1</sup> Jesse promised and Cassandra undertook to ensure under penalty of forfeiture that: (1) Jesse would

---

<sup>1</sup> In every bail bond, a defendant or one or more sureties promise that the defendant will, “while at liberty as a result of an order fixing bail and of the execution of a bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when the defendant’s attendance is required and otherwise render himself or herself amenable to the orders and processes of the court, and that in the event the defendant fails to do so, the signers of the bond will pay to the court the amount of money specified in the order fixing bail.” Kentucky Rule of Criminal Procedure (RCr) 4.00(a).

appear in court when his attendance was required; and (2) Jesse would otherwise render himself “amenable to the orders and process of this and any other court in which this proceeding may be pending for any and all purposes and at all stages (including, in the event of indictment, proceedings thereafter) in accordance with RCr 4.54.”

As an aside, both of those nonfinancial conditions were set forth in a boilerplate paragraph of a pre-printed AOC-365.1 form that Cassandra executed before posting Jesse’s bail, which memorialized the terms of Jesse’s release from custody and Cassandra’s obligations as his surety. Like the circuit court’s pre-printed arraignment order of January 30, 2017, the AOC-365.1 form included space for the Jefferson Circuit Clerk to indicate whether any other nonfinancial conditions accompanied the terms of Jesse’s release. The form also included a checklist for the clerk to indicate whether any of the following nonfinancial conditions also applied:

- Report to your local pretrial services office located at \_\_\_\_\_  
Telephone \_\_\_\_\_
- *No further violations of law*
- No contact with alleged victim
- Not to be on the property of \_\_\_\_\_
- No illegal use of alcohol or controlled substances

- *No illegal use/possession of firearms or other deadly weapon*

(Emphasis added.)

But, like the circuit court, the clerk did not indicate that these or any other nonfinancial conditions applied to the terms of Jesse's bail.

About two months after Jesse was released on bail, authorities then allegedly discovered him loading stolen items (including a firearm) into a vehicle. Jesse was arrested, taken into custody, and charged with felony burglary in the first degree. Days later, Cassandra moved the circuit court to exonerate the \$25,000 bond she had posted on Jesse's behalf.<sup>2</sup> *See* RCr 4.50(2). The Commonwealth, on the other hand, subsequently filed a motion with the circuit court asking for a determination that Jesse had forfeited his \$25,000 bond because, as it represented, Jesse had "willfully violated the terms of his release by picking up a new felony arrest and possessing a firearm."

The circuit court held a hearing on December 18, 2017, regarding the parties' opposing motions. There, Cassandra noted (1) sureties generally do not serve the role of ensuring "that people don't commit new crimes;" and (2) nothing within the four corners of the AOC-365.1 form or elsewhere in the circuit court's record indicated that an arrest for a felony or possession of a firearm were

---

<sup>2</sup> Cassandra's *pro se* motion did not specifically cite any rule, but substantially complied with RCr 4.50.

considered nonfinancial conditions of Jesse's bond. Therefore, she argued, exoneration of her liability on the \$25,000 bond – rather than forfeiture – was warranted.

The Commonwealth, for its part, argued in relevant part as follows:

One of the conditions of bond I think that's standard, whether it's considered a financial or nonfinancial condition, I don't know how it's considered by the court, but it is a standard condition that no new offenses be picked up whether bond's been posted, or whether someone's ROR. Also, there's often a condition of no firearms. Here, I think, I don't know if that was in place or not. If it was, I believe there's, um. Certainly, the standard here is clear and convincing evidence, but I believe there's probable cause at a minimum, and I think there's more than that as well. So, we're of the position that his bond, as posted by the surety, should be forfeited due to his willful violation of the conditions of his bond by picking up these new charges. There is a case, Clemons v. Commonwealth, 152 S.W.3d 256, that discusses, I think, in a brief but thorough fashion situations similar to this, where nonfinancial conditions were violated. In that case, an individual was caught past curfew and drinking alcohol. The court in that case found that a portion of the bond be forfeited. The Court of Appeals held that that was fine. Essentially, bonds, stating that bonds are discretionary and the decision to remit bonds lies solely with the court, um, and also, in so finding that nonfinancial conditions being violated is a sufficient reason to forfeit a bond. And so, that's essentially where we're at.

After considering the parties' respective positions, the circuit court then explained its own position from the bench:

On the conditions [Cassandra] signed, for the bond slip I have up here, it says “violation of conditions and or failure to appear. If you willfully fail to appear, fail to comply with the conditions of release.”<sup>3</sup> And here, that’s what’s at issue. The conditions of release, which could be nonfinancial, carried over from the district court, which were explicitly no new offenses and no firearms. And it says, “or otherwise fail to render yourself amenable to the orders and processes of the courts,” which includes this court as well as the district court. So, it is right there in the paperwork that she signed. And it furthers that if you do not, the court may order forfeiture of the bond. It’s in the very, it’s all one sentence, actually. So, I would submit to you that it is there. Um, and it’s right where she was signing above [Jesse’s] name. And then, it also talks about, uh, the other courts in which it’s proceeding, so it was a bond here, and it was a bond in district court, and it says that. It’s not just failure to appear. It, it says “and violations of conditions.” So, it’s in what she signed.

Following the hearing, the circuit court entered an order on January 9, 2018, granting the Commonwealth’s forfeiture request.<sup>4</sup> In its order, the circuit

---

<sup>3</sup> The entirety of the statement referenced by the circuit court, as set forth in boldface in the AOC-365.1 form, was as follows:

**Violation of Conditions and/or Failure to Appear:  
If you willfully fail to appear, fail to comply with the conditions of your release, or otherwise fail to render yourself amenable to the orders and processes of the courts, the court may issue a warrant for your arrest and may order forfeiture of the bond, and you shall be subject to prosecution for bail jumping per KRS 520.070 and KRS 520.080. You may also be subject to contempt of court per KRS 432.280.**

<sup>4</sup> Cassandra notes that in its January 9, 2018 order, the circuit court did not specifically address her motion to be exonerated from liability on Jesse’s bond. Nevertheless, in granting the Commonwealth’s forfeiture request, the circuit court’s order resolved her motion. Where claims in an action are mutually exclusive, “adjudicating in favor of one is negating the other.” *Furlow v. Sturgeon*, 436 S.W.2d 485, 486 (Ky. 1968).

court discussed much of the factual and procedural posture of this matter stated above but added: “This Court continued the District Court’s bond. That bond remained the same over several months and throughout numerous pre-trial conferences (occurring on March 21, 2017, April 21, 2017, May 23, 2017, July 12, 2017, and September 13, 2017).” The circuit court then stated its reasons for granting the Commonwealth’s forfeiture request, explaining in relevant part:

On December 3, 2016, the on-call Jefferson County District Court, Hon. Ann Delahanty presiding, set [Jesse’s] bond at \$25,000 full cash. She also imposed the non-financial condition of no new violations of the law. At Defendant’s in-person arraignment on December 5, 2016, the Court left the monetary bond and non-financial condition the same, but added another, “no guns.”

.....

“Bonds are discretionary, and the decision to impose, forfeit, or remit bonds lies solely with the Trial Court.” Clemons v. Commonwealth, 152 S.W.3d 256 (Ky. App. 2004). Here, [Jesse] was obligated to appear in Court as directed AND refrain from violating the law. Surety should have educated herself about the bond conditions before posting bond. Further, it is unreasonable to suffer the misconception that a Court will allow a defendant to continue to rack up serious charges while out on bond. She should reasonably have foreseen that: (a) Defendant would be arrested if he was charged with new offenses and a bond would be set by the Court hearing the new charges; (b) the Court would issue an order of arrest and/or set a new bond on the original charges; and (c) she would risk losing her bond. Further as a matter of logic, if [Jesse] were held in jail on other charges, Surety could not bring him to Court herself, and thus she would be unable to guarantee his appearance as she swore to do,



thus endangering her future use of the posted bond money. While her argument as to the Clerk's failure to check boxes on the bond posting form is novel, it does not change the points discussed above. Further, it is likely the Clerk's office viewed the form as merely a receipt for the monetary transaction.

In short, the circuit court held that "no guns" and "no violations of the law" were nonfinancial conditions of Jesse's bail because they "carried over" from the district court; Cassandra should have been aware of those conditions because they were noted in the district court's record; and that a nonfinancial condition to the effect of "no new violations of the law" was, foreseeably, a condition and basis of forfeiture implicit in every bail bond.

Cassandra now appeals the circuit court's January 9, 2018 order. As below, her primary arguments are that (1) Jesse's arrest for burglary or possession of a firearm during his pretrial release did not violate any nonfinancial conditions of the bail he took before the circuit court; and (2) even if they were conditions, they were unenforceable against the bond she posted because she lacked notice of and never agreed to them.

We need only address Cassandra's first point because it is dispositive. As noted, a major premise of the circuit court's ruling was that the conditions of Jesse's bail set forth in Jefferson District Court "carried over" to or were "continued" by the Jefferson Circuit Court. To the extent the circuit court was implying that this was made apparent or accomplished by its "numerous pre-trial

conferences (occurring on March 21, 2017, April 21, 2017, May 23, 2017, July 12, 2017, and September 13, 2017),” we disagree. Courts speak only through their written, signed, and entered orders. *See Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt*, 439 S.W.2d 313, 314 (Ky. 1968). Here, the only indications of record regarding what may have transpired during any of those conferences derive from five documents bearing those respective dates, each styled “order of commitment.” Each document is an unsigned, preprinted, one-page form that identified Jesse Passmore as “defendant;” listed his case number and charges; and, with respect to bail considerations, merely noted: “Bond \$25,000 cash.” Nowhere in its record did the circuit court attach any conditions upon Jesse’s bail, or specify that it was continuing any of the conditions set by the district court.

We likewise disagree if the circuit court was implying that, notwithstanding, the conditions of Jesse’s bail set forth in Jefferson District Court “carried over” or were “continued” by operation of some contractual or legal principle. To be sure, in the AOC-365.1 form Cassandra executed, Cassandra promised as surety that Jesse would render himself “amenable to the orders and process of this and any other court in which this proceeding may be *pending* for any and all purposes and at all stages (including, in the event of indictment, proceedings thereafter) in accordance with RCr 4.54.” (Emphasis added.) Moreover, RCr 4.54(1) provides in part that “bail *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[.]” (Emphasis added.)

But, Jesse was never released on bail while his case was *pending* before the district court. Consequently, the bail offered by the district court – which did include both nonfinancial conditions at issue in this matter – was not the bail that Jesse *took* on September 26, 2017. Rather, upon his indictment on January 30, 2017, jurisdiction over Jesse’s bail passed from the district court to the circuit court. RCr 4.54(1). The circuit court was then required to fix bail. RCr 6.54(1). And when the circuit court did so, the district court’s prior bail order expired, and any requirements which attended it did not automatically “carry over,” but instead became moot and unenforceable. This principle was recently expressed in *Jeter v. Commonwealth*, 554 S.W.3d 850, 852 (Ky. 2018). There, a criminal defendant was never released on bail while the district court had jurisdiction of his case; therefore, “all requirements which attended” the district court’s bail order – including a condition of bail that would have granted the criminal defendant \$100 a day bail credit pursuant to KRS 431.066(5)(a) – became “moot and unenforceable” after the circuit court assumed jurisdiction over his case and subsequently fixed bail following an indictment. *Id.*

We likewise disagree with the circuit court’s second premise, *i.e.*, that a nonfinancial condition to the effect of “no new violations of the law” was a foreseeable condition and basis of forfeiture implicit in *every* bail bond.

There is no dispute that this type of requirement *can* be a nonfinancial condition of bail in Kentucky.<sup>5</sup> Indeed, the AOC-365.1 form itself underscores that it is probably a frequent condition; the form provides a box that need only be checked next to the phrase “No further violations of law” to indicate it applies. But, there *is* a box that must be checked on the AOC-365.1 form. In the circuit court’s pre-printed January 30, 2017 order, there *was* a blank line for the circuit court to specify what nonfinancial conditions applied to Jesse’s bail. And, so far as this Court is aware, in every case where a nonfinancial condition has been contemplated as a basis of bond forfeiture, the nonfinancial condition at issue was – whether by a checked box, filled-in blank, or otherwise – explicitly stated in an effective court order and ensuing bond agreement.<sup>6</sup>

---

<sup>5</sup> In *Clemons v. Commonwealth*, 152 S.W.3d 256, 259, n.5 (Ky. App. 2004), this Court cited with approval *State v. Hernandez*, 1 Neb. App. 830, 511 N.W.2d 535, 538-39 (1993), which indicated, in turn, that a “crime-free condition” was an example of a nonfinancial condition which, if breached, justified forfeiture of a bond).

<sup>6</sup> See, e.g., *Clemons v. Commonwealth*, 152 S.W.3d 256, 257-58, (Ky. App. 2004); *Johnson v. Commonwealth*, 551 S.W.2d 577, 578 (Ky. App. 1977). Additional nonpublished cases illustrative of this point (but non-binding, see CR 76.28(4)(c)) include: *Qualls v. Hardin Circuit Court*, No. 2014-CA-001149-MR, 2016 WL 1739123 at \*1 (Ky. App. April 29, 2016) (unpublished) (“[C]onditions were attached to Appellant’s bond, which stated that Appellant should have no further violations of the law and should report to Hardin County Pretrial Services.”); *Durham v. Commonwealth*, No. 2013-CA-000749-MR, 2014 WL 2632160 at \*2

Moreover, there are at least three reasons why nonfinancial conditions – particularly something to the effect of “no violations of law” – should not be considered a nonfinancial condition of forfeiture unless explicitly stated so. First and most obviously, if a circuit court’s purpose in attaching a nonfinancial condition to bail is “to control the defendant’s behavior while on pretrial release,”<sup>7</sup> it is difficult to see how that purpose could be served if no one is explicitly made aware of the nonfinancial condition in question.

Second, prospective sureties are entitled to assess the risk of forfeiture when deciding to post bond and to rely upon the court’s record and the bond agreement when doing so. We have observed that “[w]hen forfeiture is for breach of a nonappearance condition, the imposition of broad conditions to control a defendant’s behavior . . . could result in increased difficulty in obtaining a bond

---

(Ky. App. June 13, 2014) (unpublished) (the circuit court imposed non-financial conditions of release which included that “Durham submit to random testing of his blood, breath, urine or perspiration and that he violate no state, federal or local law. These written conditions were provided to Durham and both Durham and the surety, his father, signed the written bond form which contained non-financial conditions of release.”); *Coomer v. Commonwealth*, No. 2011-CA-001512-MR, 2013 WL 1844759 at \*1 (Ky. App. May 3, 2013) (unpublished) (“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.”); *Woosley v. Commonwealth*, No. 2004-CA-001224-MR, 2005 WL 1125183 at \*1 (Ky. App. May 13, 2005) (the release form, an “AOC-365,” listed all nonfinancial conditions on an attached form including “not to commit any public offenses.”); *Martin v. Commonwealth*, No. 2002-CA-002288-MR, 2003 WL 22681798 at \*1 (Ky. App. Nov. 14, 2003).

<sup>7</sup> *Clemons*, 152 S.W.3d at 259.

surety.”<sup>8</sup> In that vein, it is difficult to see how *any* prospective surety would agree to post bond if the bond could be forfeited for the breach of a nonappearance condition that is not set forth in the record of the court which effectively fixed the bond.

Third, and contrary to the circuit court’s logic set forth in its January 30, 2017 order, a principal’s subsequent arrest and incarceration during a period of pretrial release has traditionally been viewed as a ground of *exoneration*, not forfeiture. *See Miller v. Commonwealth*, 192 Ky. 709, 234 S.W. 307, 308 (1921), explaining:

A principal which seems to be controlling in all cases of the execution of bail is that the sureties have control and custody of the principal, and are bound for his appearance to answer the charge, until they relieve themselves of the liability by surrendering him to the court or to the jailer.

In the contract between the sureties and the state, there is also an implied covenant on the part of the latter that it will not interfere with the right of the sureties to retain the principal in their custody, nor with their right to discharge themselves as bail for him, by taking him into actual custody and surrendering him to the court, or delivering him to the jailer, and will furthermore assist them in so doing, through its peace officers if their assistance is necessary, and they are called upon to render such assistance in the manner prescribed by law. Hence the sureties are excused from fulfilling the requirements of the bond if they are prevented by the act of the law, or by the act of the obligee, the state, through

---

<sup>8</sup> *Coomer*, 2013 WL 1844759 at \*3 (citation omitted).

its constituted authorities. Cases supporting this principle are the numerous ones where a person upon bail to answer a public offense is imprisoned in another place in the state, or where he has become insane and is confined by the law in an asylum for the insane.

(Citations omitted.) *See also Briggs v. Commonwealth*, 185 Ky. 340, 214 S.W. 975, 977 (1919) (“Where the Commonwealth has taken the principal into its custody for another offense, and thereby prevents his appearance and discharge of the recognizance, it presents a good defense for the sureties when proceeded against for forfeiture.” (Citations omitted.)). *See also Maxie v. Commonwealth*, No. 2015-CA-001495-MR, 2017 WL 6547066 at \*1(Ky. App. Dec. 22, 2017)<sup>9</sup> (“Shortly after [his subsequent arrest during pretrial release], and because Maxie was in custody, the surety on Maxie’s bail bond on the first indictment was exonerated in accordance with RCr 4.50.”).

We review a circuit court’s decisions with respect to bond forfeiture under the abuse of discretion standard. *Clemons*, 152 S.W.3d at 260. Here, nothing in RCr 4.50 or elsewhere in the criminal rules prohibited Cassandra, as surety, from exonerating herself from liability upon the bond at issue when her principal, Jesse, was subsequently arrested during pretrial release: Jesse’s arrest violated no nonfinancial condition specified by the court that fixed the terms of his bail; and Cassandra sought exoneration prior to any declaration of forfeiture.

---

<sup>9</sup> Cited for purposes of illustration, not as persuasive authority per CR 76.28(4)(c).

Thus, in deeming the bond forfeited rather than exonerated, the circuit court abused its discretion and accordingly erred.

In conclusion, the Jefferson Circuit Court is REVERSED, with directions to exonerate Cassandra from liability on Jesse's bond and refund the money she posted.

ALL CONCUR.

BRIEFS FOR APPELLANT:

F. Todd Lewis  
Louisville, Kentucky

BRIEF FOR APPELLEE,  
COMMONWEALTH OF  
KENTUCKY:

Andy Beshear  
Attorney General of Kentucky

James P. Judge  
Assistant Attorney General  
Frankfort, Kentucky