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The State Of Utah v. Norbert Nelson Aka Carl Douglas : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

NORBET NELSON, aka CARL
DOUGLAS,

Defendant,

DEWEY L. SANONE, Bondsman,

Appellant.

Case No.
10912

BRIEF OF RESPONDENT

Appeal from judgment of the Seventh Judicial District Court,
Carbon County, Utah
Honorable Henry Ruggeri, Judge

FILED

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Clerk, Supreme Court, Utah

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Plaintiff-Respondent,

vs.

NORBET NELSON, aka CARL
DOUGLAS,

Defendant,

DEWEY L. SANONE, Bondsman,

Appellant.

Case No.
10918

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

Appellant appeals from the entry of judgment against him as bail for the defendant herein by the Seventh Judicial District Court, Carbon County, Utah.

DISPOSITION IN LOWER COURT

Bail posted by appellant for his principal, Norbet Nelson, aka Carl Douglas, was ordered forfeited No-

vember 28, 1966, by the Honorable Henry Ruggeri, upon motion of the District Attorney. On January 11, 1967, appellant herein filed a motion to set aside the forfeiture which motion was heard February 2, 1967, and denied February 8, 1967, by the Honorable F. W. Keller. Upon motion of the District Attorney, judgment against appellant and Sam Sanone, on their undertaking of bail, was entered May 3, 1967, by the Honorable Henry Ruggeri.

RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of the Seventh Judicial District Court be affirmed.

STATEMENT OF FACTS

The respondent fundamentally agrees with the chronology of events and facts as recited in the statement of facts submitted in appellant's brief.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SET ASIDE BAIL FORFEITURE.

On October 31, 1967, appellant and Sam Sanone filed an undertaking of bail with the Carbon County Clerk, ex officio clerk of the Seventh District Court of

Carbon County, Utah (R-8), in which the appellant and Samuel Sanone jointly and severally thereby undertook that their principal, Norbet Nelson, aka Carl Douglas, would appear and answer the charges in whatever court they may be presented and, by the provisions of such undertaking, did agree to make payment within ten days after the forfeiture of said bond as provided by statute, and did further agree that if their principal failed to perform any of the conditions of the undertaking, that the sureties would pay to the State of Utah the sum of \$1,000; further, that if they did not make payment within ten days after the forfeiture of said bond, a judgment would be entered on motion of the prosecuting attorney, with or without notice, in favor of the State of Utah and against such sureties for said amount.

On the 10th day of November, 1966, the defendant was required to appear before the District Court of Carbon County for arraignment for the charge of grand larceny. The defendant failed to appear (TR-4). The matter was continued to the 28th day of November, 1966, at which time he again failed to appear (TR-8). Upon motion of the District Attorney (TR-9), the bail was ordered forfeited (R-10). The reason given for nonappearance of the principal at the arraignment was his arrest and incarceration in Tennessee (Bondman's Exhibit 1).

On the question of the liability of sureties where arrest and imprisonment in another jurisdiction for

a second and different offense prevents the appearance of the defendant as required by bail bond, the rule is general that relief will be refused where the defendant was at large on the date of the default and was arrested in another state after the default and forfeiture of the bond. See 8 Am. Jur. 2nd, *Bail and Recognizance*, § 187.

Generally, the decisions hold that sickness, insanity, or death of a principal will relieve the surety from forfeiture of bail bond. The majority rule seems to be that a trial court has no jurisdiction to relieve the surety from liability except on grounds generally recognized by the law as excusing the performance of the undertaking, and that such grounds exist only when the appearance of the accused is made impossible by an act of God, an act of state which is the beneficiary of the bond, or an act of law. Illustrative of these categories is the statement contained in *State v. Pelley*, 222 N.C. 684, 24 S.E.2d 635, 637 (1943):

The appellant herein, Carrie Trash Dorsett, is not entitled to the relief she seeks unless she can show that the performance of her undertaking has been rendered impossible or excusable by (a) an act of God; (b) by an act of the obligee; or (c) by an act of law. Where the principal in a bail bond dies before the day of performance or is prevented by illness from appearing, the case is within the first category. Where the principal in a bail bond is imprisoned within the state, pursuant to a judgment of a court of competent jurisdiction of the state, the case comes within the second category. *State v. Eller*,

218 N.C. 365, 11 S.E.2d 295; 6 Am. Jur. § 139, P102. Where the party has been turned over to the federal court within the state by a prior bondsman and is serving a sentence imposed by that court, or if the party has been arrested in the state where the obligation is given and sent out of the state by the governor upon requisition by another state or foreign jurisdiction, the case falls within the third category. *State v. Wellborne*, 205 N.C. 601, 172 S.E.174; *United States v. Marrin*, DC, 170 Fed. 476; 6 Am. Jur., § 40, P103; 8 C.J.S., *Bail*, § 77 P148.

Among the reasons assigned for denying relief to the sureties are that the performance of the contract has not been prevented by an act of the obligee state, or the law of that state; that the removal of the principal to another jurisdiction and his falling into the custody of the law are the result of his own voluntary act, and that the sureties are at fault for permitting the accused to go into another jurisdiction instead of keeping him under their control. A further reason given is that if the rule were otherwise, a person accused of a serious offense in one jurisdiction and released under heavy bail could secure the release of his bail by committing in another jurisdiction a minor offense for which he would be arrested and detained. (See 8 Am. Jur. 2d, op. cit.)

In the instant case, it is apparent that the non-appearance of the principal was not the result of an act of God, an act of the State of Utah as beneficiary of the bond, or an act of law.

The common law definition of bail is simply put by Blackstone in his Commentaries as a "delivery of bailment of a person to his sureties upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail." See Blackstone's *Commentaries*, Chase Ed. Book Ed. Book IV, ch. XXII, p. 1002; Hale's *Pleas of the Crown*, 5th Ed. (1916) p. 9.

The taking of the undertaking of bail (R-8) by the district court constituted an acceptance by that court of the undertaking for the appearance of the defendant according to the terms thereof in that the sureties would pay to the state a specified amount if the principal did appear. The undertaking and the acceptance appear to conform with the provisions of Utah Code Ann. §§ 77-43-2 and 77-43-13 (1953).

Under the common law rule that sureties will be exonerated or relieved where the appearance of their principal is rendered impossible by an act of law, the question has often arisen whether imprisonment by another state will release bail given in a state court. Such imprisonment has generally been held not to excuse the production of the principal. See Annot. 4, A.L.R.2d 440, 446 (1949).

In recognizing the common law rule that sureties will not be exonerated or relieved from performance of their bond by reason of the imprisonment of their principal by another state, the United States Supreme Court

affirmed a Connecticut decision holding the bail sureties liable for the nonappearance of their principal who was imprisoned in Maine for another offense. See *Taylor v. Taintor*, 16 Wall 336, 21 L.Ed. 287 (1872).

Bail was forfeited in *State v. Clark*, 234 Iowa 338, 11 N.W.2d 722 (1943), *cert. den.*, 325 U.S. 739, 89 L.Ed. 592 (1944), although it was shown that on the appearance date the defendant was imprisoned in the Nebraska State Penitentiary for a separate offense. Even where the principal had been abducted from Kentucky to the state of Tennessee by police officers, and later imprisoned there on other charges at the time of his default in Kentucky, such abduction did not discharge the sureties from performance of their obligation under the bail in *Beck v. Commonwealth*, 254 Ky. 160, 71 S.W.2d 1 (1934).

Where a motion to vacate a judgment of forfeiture on the ground of imprisonment by a sister state, the Arizona Supreme Court has held that such is not a reasonable or sufficient excuse for nonappearance of the principal. The court acknowledged that where there are circumstances which when proved would be valid grounds for vacating the judgment of forfeiture, this is clearly not one of them. See *State v. Superior Court*, 96 Ariz. 229, 393 P.2d 914 (1964); *Burd v. Commonwealth*, Ky. App. 335 S.W.2d 945 (1960); and 8 C.J.S., *Bail*, § 97.

In the case of *Ward v. State*, 200 Okla. 51, 196 P.2d 856, 4 A.L.R.2d 436 (1947), it was held that

where an accused charged with a felony was admitted to bond and released to appear for trial in the district court where he was charged, and he was thereafter arrested and held in custody by federal authorities for an offense committed after his release upon bond, the fact that he was held in custody and unable to appear for trial when required neither excused his failure to appear nor exonerated the securities upon the bond.

Imprisonment by the federal government does not excuse appearances under bail given to the state, since it has been held that where a defendant gives bond for his appearance in the state court and is liberated thereon, and thereafter while at liberty on said bond commits another crime in another jurisdiction, whether a federal jurisdiction within or without the state or within the jurisdiction of another state, and is restrained therein and thereby, such facts neither constitute a defense to an action on the bond in the state court nor are they grounds for the vacation of an order of bond forfeiture made in the said court. See *United States v. Weber*, 32 F.2d 110 (8th Cir. 1929) ; *Ricks v. State*, 189 Okla. 598, 119 P.2d 51 (1941). See also cases cited at 4 A.L.R.2d 440, 451 (1949).

It has also been held that subsequent imprisonment in the same state for different offenses does not excuse default. See *Persons v. Summers*, 274 Ala. 673, 151 So.2d 210 (1963).

Other cases holding that imprisonment by the United States government will not excuse production

of the principal in the state court include *Public Service Mutual Ins. Co. v. State*, Fla. App., 135 So.2d 777 (1961); *United Bonding Ins. Co. v. State*, Okla. 373 P.2d 64 (1962).

Appellant bondsman contends that the district court is vested with the discretion to set aside a forfeiture and stay further proceedings until the principal can be produced by his sureties. Although the district court may have the inherent discretion to suspend the actual entry of the order of forfeiture until the court has been fully informed as to the excuses and defenses which may be available to the surety in relation to the nonappearance of the principal, when it is established that there has not been only a breach of the surety obligation but also that there is an absence of sufficient excuse for such nonappearance, the trial court loses its judicial discretion and it then becomes the obligation of the court amounting to a ministerial duty to enter the appropriate order of forfeiture. See *State v. Superior Court*, 2 Ariz. App. 262, 407 P.2d 943 (1965).

Utah Code Ann. § 77-43-5 (1953) provides:

If, without sufficient excuse, the defendant neglects to appear for arraignment . . . the court must *direct* the fact to be entered upon its minutes, and the undertaking of bail, . . . *shall* thereupon be declared forfeited. But if at any time before the final judgment of the court, the defendant or his bail appears and satisfactorily excuses his neglect, the court *may* direct the forfeiture of the undertaking . . . to be dis-

charged upon such terms as may be just. (Emphasis added.)

Whatever discretion lies with the trial court to direct the discharge of the forfeiture depends upon the satisfactory excuse for the nonappearance of the principal. Respondent submits that, in this instance, the only satisfactory excuse available to the trial court upon which it may exercise its discretion would be within one of the three categories previously mentioned: (1) act of God, (2) an act of the obligee, (3) an act of law by the state appearing as beneficiary of such undertaking.

Respondent submits that in this case neither the defendant nor his bail have provided an excuse which would fall within one of the three categories referred to above, and that the excuse offered by the appellant herein is not sufficient to set aside the order of forfeiture and vacate the judgment on the undertaking of bail.

Appellant appears to be seeking the following relief: (1) vacation of the judgment, or (2) modification of the judgment to an amount yet to be determined and which cannot be determined until such time as the defendant is released by Tennessee and returned to the State of Utah, and then in such amount as will defray the costs and expenses of the State of Utah in effecting the return of the defendant.

As to the first form of relief sought, respondent submits that neither the law nor the cases cited herein would allow such relief. As to the second form of relief

sought, respondent submits that such relief would violate the provision of Utah Code Ann. § 77-43-2 (1953) that, “. . . the sureties will pay to the state a *specified* sum if he (defendant) does not so appear.” (Emphasis added). Such sum is the amount fixed by the court pursuant to Utah Code Ann. § 77-43-8 (1953), which sum must appear on the form of undertaking required by Utah Code Ann. § 77-43-13 (1953).

Although there appears to be some authority for granting the second form of relief sought by appellant, as indicated by the cases cited in appellant's brief, respondent submits that there exists no such precedent or authority in this state. In no instance has this court modified the judgment or forfeiture of an undertaking of bail. To the contrary, this court has repeatedly denied relief to the sureties as to their liability. See *State v. Sorenson*, 48 Utah 663, 160 P. 1181 (1916); *People v. Tremoyne*, 3 Utah 331, 3 Pac. 85 (1884); *State v. Foxley*, 68 Utah 41, 249 Pac. 125 (1926) (reversed on other grounds); and *United States v. Eldredge*, 5 Utah 161, 13 Pac. 673 (1887).

With respect to Point II of appellant's argument as contained in his brief, respondent submits that the only defenses available to appellant are the three previously mentioned herein.

CONCLUSION

Respondent respectfully submits the appellant has shown no basis upon which this court could grant the relief he seeks. Accordingly, respondent respectfully submits that the judgment of the district court be affirmed.

Respectfully submitted,

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