

2003

Utah v. Sun Surety Insurance : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff/Petitioner,

v.

SUN SURETY INSURANCE COMPANY,
and DEFINO FERNANDEZ CADENA,

Defendants/Respondents.

Case No. 20030354-SC

REPLY BRIEF OF PETITIONER

**ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS**

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE COURT OF APPEALS LACKED JURISDICTION

A. A non-party cannot take an independent, direct appeal, even from a final order.

Petitioner contends that the court of appeals had jurisdiction because the appeal was taken from a final order. Resp. Br. at 6-11. The finality of the order appealed from, however, is irrelevant. Even assuming that the order denying respondent's motion to set aside the forfeiture was indeed final, respondent—as a non-party—could not take an independent, direct appeal from the order. *See Society of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1172 (Utah 1987) (“The very reason for seeking appellate review by writ is because the petitioner was not a party below and cannot appeal”).

Respondent cites cases from other states which purportedly hold that a non-party surety may take an independent, direct appeal from a bond forfeiture order. Resp. Br. at

8-9. A careful review of those cases, however, reveals that each involved an appeal by a party, rather than a non-party.

In *People v. Wilcox*, 349 P.2d 522, 523 (Cal. 1960), for example, it was the people who appealed from an order reinstating a previously forfeited bail bond. In *State v. Fedder*, 285 P.2d 802, 804, 806 (Idaho 1955), it was the defendant who appealed the forfeiture of his bail bond in conjunction with the direct appeal of his conviction. Likewise, in *Dunn v. State*, 166 P. 193, 193 (Okla. 1917), it was the defendant, together with the sureties on the bond, who appealed the forfeiture order.

As in *Fedder* and *Dunn*, Utah courts have recognized that a non-party surety may directly appeal a forfeiture order if the appeal is brought in conjunction with a defendant's direct appeal of his conviction. See *Heninger v. Ninth Circuit Court*, 739 P.2d 1108, 1109 (Utah 1987) ("a bond forfeiture order is reviewable on appeal from a final judgment"); *Beehive Bail Bonds, Inc. v. Fifth District Court*, 933 P.2d 1011, 1012-13 (Utah Ct. App. 1997) ("Bail forfeiture is not directly appealable where, as here, there is no appeal of the criminal convictions"). Therefore, the cases upon which respondent relies actually support the State's position that a non-party cannot bring a direct appeal unless it is brought in conjunction with an appeal by a party to the original action.

B. A bail bond surety may obtain appellate review of a forfeiture order even when a defendant does not appeal his conviction.

Respondent implies that prohibiting non-party bail sureties from taking an independent, direct appeal denies them the right to any appellate review of a bond forfeiture order in cases where a defendant does not appeal his conviction. Resp. Br. at

7-8. Respondent is mistaken, however, because if a defendant chooses not to appeal, a surety may nevertheless pursue an extraordinary writ in the appropriate appellate court and thereby obtain appellate review of a district court's forfeiture order. *See Heninger*, 739 P.2d at 1109 (holding that extraordinary writ was only means by which the non-party surety could obtain appellate review of bond forfeiture order).

C. Failure to establish appellate jurisdiction is not harmless error.

Finally, respondent argues that the court of appeal's lack of jurisdiction was harmless error. Resp. Br. at 10-11. Respondent reasons that since it could have obtained appellate review by petitioning for an extraordinary writ, its failure to do so was merely "a procedural technicality." *Id.* Establishing appellate jurisdiction, however, is never a mere "technicality." When an appellate court lacks jurisdiction it may not take any action on the case other than to dismiss it. *See Bradbury v. Valencia*, 2000 UT 50, ¶ 8, 5 P.3d 649.

II. SENDING NOTICE TO THE AGENT'S ADDRESS FULFILLED THE REQUIREMENTS OF THE BAIL FORFEITURE STATUTE

A. The term "address of the surety" is ambiguous because a surety may have more than one address.

Section 77-20b-101 requires the clerk of the court to "mail notice of nonappearance . . . to the address of the surety who posted the bond." UTAH CODE ANN. § 77-20b-101(1)(a) (2003). Respondent argues that this language plainly requires notice to be mailed to the surety's principal place of business. Resp. Br. at 11-13. Nothing in the statute, however, explicitly mandates such a requirement. Furthermore, the term "address of the surety" is ambiguous because a surety may have more than one address.

The Bail Bond Sureties and Agent's Act requires that "[e]very bail bond surety company shall have and maintain in this state a place of business." UTAH CODE ANN. § 31A-35-602(1)(a) (2003).¹ Therefore, an out-of-state surety will have at least two addresses, one in Utah and one outside of Utah. Moreover, fundamental agency law, as codified in Utah, recognizes that the acts of a bail bond agent are the acts of the surety whom he represents. *See* UTAH CODE ANN. § 31A-35-601(2) (2003) ("The acts or conduct of any bail bond producer ... are considered to be the acts or conduct of the bail bond surety for which the bail bond producer ... is acting as agent"). Therefore, a bail bond agent's address is also the surety's address because the agent represents the surety. Consequently, the term "address of the surety" in section 77-20b-101(1) is ambiguous because a surety may have several addresses.

Section 77-20b-101(3) does not clarify the ambiguity. That section states that "[i]f notice of nonappearance is not mailed to a surety ... the surety is relieved of further obligation under the bond if the surety's current name and address are on the bail bond in the court's file." UTAH CODE ANN. § 77-20b-101(3) (2003). In this case, the bail bond listed both a local address for respondent's agent and a South Dakota address for respondent. R. 11-12. As discussed above, an agent's address is effectively the address of the surety; therefore, both addresses on the bond are respondent's address for the purposes of the statute. Section 77-20b-101(3) does not specify which of those addresses

¹ A copy of the relevant portions of the Bail Bond Sureties and Agents Act, UTAH CODE ANN. §§ 31A-35-101 to 704, is attached in addendum A.

is the proper address for sending notice. Consequently, it does not resolve the ambiguity in the statute.

To resolve statutory ambiguities this Court utilizes “traditional methods of statutory construction,” including the principle that “any proposed interpretation of a statute must be compatible with its purpose and objective.” *Wills v. Heber Valley Historic R.R. Auth.*, 2003 UT 45, ¶ 5, 79 P.3d 934 (citing *O’Kefe v. Utah State Ret. Bd.*, 956 P.2d 279, 280 (Utah 1998)). Presumably, the purpose of the notice requirement in the bail forfeiture statute is to notify a surety that their bond may become subject to forfeiture. Respondent implies that this purpose is best achieved when notice is sent to a surety’s principal place of business. Resp. Br. at 17-19. Utah law, however, establishes otherwise.

Utah law creates a presumption favoring the use of a surety’s local address when serving notice of a defendant’s nonappearance. As noted above, section 31A-35-601(1)(a) requires an out-of-state surety to maintain an in-state place of business. Analyzing the analogous corporate agent requirement of section 16-10a-504, this Court held that such requirements “exist[] to benefit those desiring to conduct official business with the corporation by providing a readily discoverable corporate whereabouts.” *Wills*, 2003 UT 45, ¶ 10. If the requirement that out-of-state corporations and bail bond sureties maintain a local address is meant to benefit those who deal with the corporation, rather than the corporation itself, then use of a surety’s local address would presumably be sufficient, if not preferable.

This presumption is further strengthened by the principle that statutory service requirements exist to benefit those serving, rather than receiving notice. In *Wills*, this Court observed that “efficiency of the receiving body is not the foremost goal of any service requirement.” 2003 UT 45, ¶ 5. Consequently, the service requirement in the bail forfeiture statute should be read to allow for service on a surety’s local address, even though use of that address may be less efficient for the surety.

B. The legislature did not intend to supplant the common law of agency.

Respondent argues that the legislature’s intent to supplant the common law of agency is evident from the statute. Resp. Br. at 15-17. The provisions to which respondent cites, however, do not demonstrate such an intent.

The fact that the legislature provided separate definitions for “bail bond agent” and “bail bond surety” in section 31A-35-102 does not indicate an intent to supplant the common law. The section merely defines the various persons who participate in the bail bond process. See UTAH CODE ANN. § 31A-35-102 (2003). Nothing in that section limits the scope of a bail bond agent’s authority. See *id.* Rather, the Act actually codifies fundamental agency law principles by recognizing that “the acts or conduct of any bail bond producer ... who acts within the scope of the authority delegated to him by the bail bond surety, are considered to be the acts or conduct of the bail bond surety for which the bail bond producer ... is acting as agent.” UTAH CODE ANN. § 31A-35-601. Moreover, even though in 2003 the legislature substituted the term “bail bond producer” for “bail

bond agent,” section 31A-35-601 establishes that the “producer” nevertheless acts “as agent” for a surety. *See id.* and amendment notes.

Nor does section 31A-35-704(2) indicate the legislature’s intent to supplant common agency law. That section requires bail bond agents and sureties to “irrevocably appoint[] the clerk of the court as agent upon whom any papers affecting the bail bond surety’s or bail bond producer’s liability on the undertaking may be served.” UTAH CODE ANN. § 31A-35-704(2) (2003). Respondent claims this section “makes the entire statute confusing and arguably inoperable” because, if the court clerk is the agent for service of any papers regarding the surety’s liability, then a surety would be deemed to have notice of a defendant’s nonappearance “immediately upon the court entering a defendant’s failure to appear on the docket.” Resp. Br. at 16.

Any confusion created by section 31A-35-704(2) resolves, however, when it is read in conjunction with section 77-20b-101(1) which requires the court clerk to send notice of the nonappearance to the surety. While the court clerk is the surety’s agent for service under section 31A-35-704, the court clerk is statutorily required to forward notice to the surety.

As respondent recognizes, common agency law would impute the court clerk’s knowledge to the surety because the clerk is the surety’s statutorily designated agent. Resp. Br. at 16. Nevertheless, the legislature explicitly supplanted fundamental agency law with respect to the scope of the court clerk’s agency, by requiring the clerk to forward notice to the surety. The bail forfeiture statute does not contain a similar requirement for bail bond agents. If the legislature intended to supplant fundamental

agency law with respect to bail bond agents, it certainly could have done so, just as it did with court clerks. That the legislature did not, supports the State's reading of the statute.

Finally, the deletion of subsection (b) from section 77-20b-101(3) does not indicate the legislature's intent to alter common agency law. Subsection (b) provided that notwithstanding a failure to follow the statutory requirements for notifying a surety of a defendant's nonappearance, a surety would not be relieved of its obligation under the bond if it otherwise had "actual notice of the defendant's failure to appear." *See* UTAH CODE ANN. § 77-20b-101 amendment notes. Deletion of this subsection does indicate the legislature's intent to relieve a surety of its obligation under the bond, regardless of its actual knowledge, if the statutory requirements for notifying the surety are not satisfied. The deletion sheds no light, however, on whether those notice requirements can be fulfilled by sending notice to a surety's agent, who's knowledge is imputed to the surety under common agency law principles. Consequently, the statutory provisions that respondent cites do not indicate the legislature's intent to supplant common agency law.

C. The agent's issuance of a bond in an amount greater than authorized does not affect that validity of the notification.

Respondent argues that its agent's knowledge cannot be imputed to it because the agent acted outside the scope of his authority by issuing a bond for a greater amount than authorized. *Resp. Br.* at 14. The agent's actions, however, were within the scope of his authority.

The fact that respondent's agent, Candland, may have committed fraud does not necessarily mean that he acted outside his authority. "An agent does not cease to act

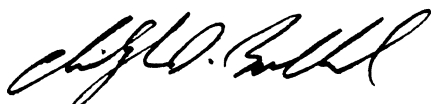
within the course of his employment merely because he engages in fraud upon a third person; it is of no consequence that he is deceiving the principal along with the third person.” *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 26, 61 P.3d 1009 (citing 37 Am.Jur.2d *Fraud and Deceit*, § 311 (1985)). By issuing a bail bond, Candland was carrying out the objectives of his agency. The use of improper methods to achieve those objectives did not place him outside the scope of his authority. *See id.* at ¶ 27. Consequently, his knowledge should be imputed to respondent. *See id.*

CONCLUSION

This Court should either vacate or reverse the court of appeals’ opinion.

Respectfully submitted this 30th day of December 2003.

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MAILING CERTIFICATE

I hereby certify that on 30 December 2003, I mailed, postage prepaid, two accurate copies of the foregoing BRIEF OF APPELLEE to:

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Addendum A

UTAH CODE ANN.

31A-35-102. Definitions.

As used in this chapter:

- (1) "Bail bond" means a bond for a specified monetary amount that is:
 - (a) executed by a bail bond producer licensed in accordance with Section 31A-35-401; and
 - (b) issued to a court, magistrate, or authorized officer as security for the subsequent court appearance of the defendant upon the defendant's release from actual custody pending the appearance.
- (2) "Bail bond producer" means an individual who:
 - (a) is appointed by:
 - (i) a surety insurer that issues bail bonds; or
 - (ii) a bail bond surety company licensed under this chapter;
 - (b) is appointed to execute or countersign undertakings of bail in connection with judicial proceedings; and
 - (c) receives or is promised money or other things of value for engaging in an act described in Subsection (2)(b).
- (3) "Bail bond surety" means a person that:
 - (a) (i) is a bail bond surety company licensed under this chapter; or
 - (ii) a surety insurer; and
 - (b) issues bonds to secure:
 - (i) the release of a person from incarceration; and
 - (ii) the appearance of that person at court hearings.
- (4) "Bail bond surety company" means any sole proprietor or entity who:
 - (a) (i) is the agent of a surety insurer that issues a bail bond in connection with judicial proceedings;
 - (ii) pledges the assets of a letter of credit from a Utah depository institution for a bail bond in connection with judicial proceedings; or
 - (iii) pledges personal or real property, or both, as security for a bail bond in connection with judicial proceedings; and
 - (b) receives or is promised money or other things of value for a service described in Subsection (4)(a).
- (5) "Bail enforcement agent" means an individual who:
 - (a) is employed or contracted with to:
 - (i) enforce the terms and conditions of a defendant's release on bail in a civil or criminal proceeding;
 - (ii) apprehend a defendant or surrender a defendant to custody; or
 - (iii) both Subsections (5)(a)(i) and (ii); and
 - (b) receives or is promised monies or other things of value for the services described in Subsection (5)(a).

- (6) "Board" means the Bail Bond Surety Oversight Board created in Section 31A-35-201.
- (7) "Certificate" means a certificate of authority issued under this chapter to allow an insurer to operate as a surety insurer.
- (8) "Indemnitor" means an entity or natural person who enters into an agreement with a bail bond surety to hold the bail bond surety harmless from loss incurred as a result of executing a bail bond.
- (9) "Liquid assets" means financial holdings that can be converted into cash in a timely manner without the loss of principal.
- (10) "Principal" means an individual or corporation whose performance is guaranteed by bond.
- (11) "Surety insurer" means an insurer that:
 - (a) is licensed under Chapter 4, 5, or 14;
 - (b) receives a certificate under this title; and
 - (c) issues bail bonds.
- (12) "Utah depository institution" is a depository institution, as defined in Section 7-1-103, that:
 - (a) has Utah as its home state; or
 - (b) operates a branch in Utah.

History: C. 1953, 31A-35-102, enacted by L. 1998, ch. 293, § 12; 2000, ch. 259, § 2; 2003, ch. 298, § 106.

Amendment Notes. - The 2000 amendment, effective May 1, 2000, added the definitions of "bail bond surety company," "liquid assets," "surety insurer," and "Utah depository institution"; deleted definitions of "Department," "insurance bail bond surety company," "letter of credit bail bond surety company," and "property bail bond surety company"; in Subsection (1)(a) substituted "bail bond agent licensed in accordance with Section 31A-35-401" for "qualified certificate holder under this chapter"; and made related and stylistic changes.

The 2003 amendment, effective May 5, 2003, substituted "producer" for "agent" in Subsections (1) and (2).

31A-35-601. Acts of agent.

- (1) As used in this section:
 - (a) "Bail recovery agent" means an individual employed by a bail enforcement agent to assist the bail enforcement agent regarding civil or criminal defendants released on bail by:
 - (i) presenting a defendant for required court appearances;
 - (ii) apprehending or surrendering a defendant to a court; or
 - (iii) keeping the defendant under necessary surveillance.

- (b) "Bail recovery apprentice" means an individual who:
- (i) is employed by a bail enforcement agent; and
 - (ii) works under the direct supervision of that bail enforcement agent or under the direct supervision of a bail recovery agent employed also by the bail enforcement agent, unless the bail recovery apprentice is conducting activities at the direction of the employing bail enforcement agent that do not require direct supervision.
- (2) The acts or conduct of any bail bond producer or bail enforcement agent, bail recovery agent, or bail recovery apprentice who acts within the scope of the authority delegated to him by the bail bond surety, are considered to be the acts or conduct of the bail bond surety for which the bail bond producer or bail bond enforcement agent, bail recovery agent, or bail recovery apprentice is acting as agent.
- (3) The acts or conduct of any bail bond producer or bail enforcement agent, bail recovery agent, or bail recovery apprentice who acts within the scope of the authority delegated to him by the bail bond producer are considered to be the acts or conduct of the bail bond producer for which the bail enforcement agent is acting as agent.

History: C. 1953, 31A-35-601, enacted by L. 1998, ch. 293, § 28; 2003, ch. 298, § 113.

Amendment Notes. - The 2003 amendment, effective May 5, 2003, substituted "producer" for "agent" throughout Subsections (2) and (3).

31A-35-602. Place of business - Records to be kept there.

- (1) (a) Every bail bond surety company shall have and maintain in this state a place of business:
- (i) accessible to the public; and
 - (ii) where the bail bond surety company principally conducts transactions authorized by its bail bond surety company license.
- (b) The address of the place of business described in Subsection (1)(a) shall appear upon:
- (i) the application for a bail bond surety company license; and
 - (ii) the bail bond surety company license issued under this chapter.
- (c) A bail bond surety company shall notify the commissioner of any change in the address required by this Subsection (1) within 20 days after the change.
- (d) This section does not prohibit a bail bond surety company from maintaining the place of business required under this section in the licensee's residence, if the residence is in Utah.
- (2) The bail bond surety company shall keep at the place of business described in Subsection (1)(a) the records required under Section 31A-35-604.

History: C. 1953, 31A-35-602, enacted by L. 1998, ch. 293, § 29; 2000, ch. 259, § 14.

Amendment Notes. - The 2000 amendment, effective May 1, 2000, substituted references to licenses for references to certificates, and made related and stylistic changes.

31A-35-704. Submission of bail bond sureties and producers to jurisdiction of court.

By applying for and receiving a license or certificate to engage in the bail bond surety insurance business in accordance with this chapter, a bail bond surety or bail bond producer:

- (1) submits to the jurisdiction of the court;
- (2) irrevocably appoints the clerk of the court as agent upon whom any papers affecting the bail bond surety's or bail bond producer's liability on the undertaking may be served; and
- (3) acknowledges that liability may be enforced on motion and upon notice as the court may require, without the necessity of an independent action.

History: C. 1953, 31A-35-704, enacted by L. 1998, ch. 293, § 39; 2000, ch. 259, § 22; 2003, ch. 298, § 122.

Amendment Notes. - The 2000 amendment, effective May 1, 2000, substituted "a license or certificate to engage in the bail bond surety insurance business" for "certification" in the introductory paragraph, and made related and stylistic changes.

The 2003 amendment, effective May 5, 2003, substituted "producer" for "agent" and "producer's" for "agent's."