

5-20-2009

State v. Two Jinn, Inc. Appellant's Brief Dckt. 35772

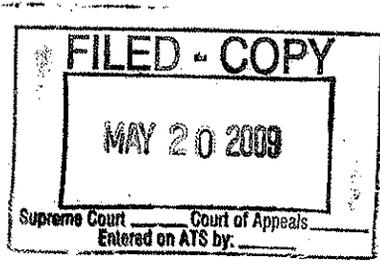
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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,
Plaintiff – Respondent,

vs.

LARRY GRANT DANA, JR.,
Defendant;

and

TWO JINN, INC., Real Party in Interest,
Appellant.

**APPELLANT'S OPENING
BRIEF**

Supreme Court No. 35772 -2008
Payette County District Court No.
CR-2007-0002897

Appeal from the Third Judicial District, Payette County, Idaho.

HONORABLE STEPHEN W. DRESCHER, Presiding Judge

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's order denying the Motion to Set Aside Forfeiture and Exonerate Bond LG5-570737 filed by Two Jinn, Inc., dba Aladdin Bail Bonds/Anytime Bail Bonds, herein after Two Jinn.

B. Standard of Review

In general, a trial court has discretion over bond forfeiture matters and this court reviews such decisions for abuse of discretion. *State v. Vargas*, 141 Idaho 485, 111 P.3d 621 (Ct. App. 2005). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and, (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

In determining whether the district court met its statutory duties, this Court exercises free review. *State v. Plant*, 130 Idaho 130, 132, 937 P.2d 442, 444 (Ct. App. 1997).

The application of Idaho Criminal Rule 46(e)(4) to the facts of this case is at issue. Where the lower court's decision turns on the interpretation of a criminal rule, this Court exercises free review. *State v. Weber*, 140 Idaho 89, 91-92, 90 P.3d 314, 316-317 (2004).

C. General Course of Proceedings

On September 6, 2007, the State filed a Criminal Complaint and a Probable Cause Affidavit alleging the defendant Larry G. Dana ("Dana") failed to register as a sex offender. Clerk's ROA, p. 63-83. A magistrate judge signed a Warrant of Arrest on this same day.

Clerk's ROA, p. 62. Dana was arraigned on November 19, 2007 in Minidoka County on the Payette County Warrant. Clerk's ROA, p. 60.

Dana was arraigned before the Payette County Court on November 27, 2007. Clerk's ROA, p. 58. Bail was set at \$20,000.00 and his preliminary hearing was set for December 3, 2007. *Id.* On November 28, 2007, Dana filed a Motion for Bond Reduction and Notice of Hearing. Clerk's ROA, p. 55. On December 3, 2007, Dana waived his preliminary hearing, was bound over to District Court and his bond was reduced to \$5,000.00. Clerk's ROA, p. 54. Two Jinn posted a \$5,000.00 bond for Dana on December 4, 2007. Clerk's ROA, p. 50-51. On December 5, 2007, the State filed Criminal Information alleging Dana failed to register as a sex offender. Clerk's ROA, p. 48-49. On December 7, 2007, Dana was arraigned in district court and his pretrial was set for January 23, 2008. Clerk's ROA, p. 46-47.

Dana failed to appear at his January 23, 2008 pretrial. Clerk's ROA, p. 45. Dana's attorney advised the court that Dana was coming from Council, Idaho and that the defendant's car was frozen. *Id.* The Court issued a bench warrant for Dana's failure to appear but stayed the execution of the Warrant until the jury trial scheduled for February 12, 2008. *Id.* A Notice of Forfeiture of Surety Bond with notice that the execution of the warrant was stayed was mailed to Two Jinn on January 25, 2008. Clerk's ROA, p. 44. The 180th day after the order of forfeiture was July 21, 2008. After receiving the January 23, 2008 Notice of Forfeiture of Surety Bond ("NOF"), employees of Northwest Surety Investigations, Inc. ("NSI"), the recovery company utilized by Two Jinn, began looking for Dana. Affidavit of Gina Turner (August 6, 2008) ("Turner Affidavit"). Clerk's ROA, p. 8-10.

On February 12, 2008, Dana again failed to appear for a scheduled hearing. Clerk's ROA, p. 43. Judge Drescher ordered the issuance of the Bench Warrant, which had been stayed,

and set bond at \$50,000.00. *Id.* The Judge signed the Bench Warrant on February 13, 2008. Clerk's ROA, p. 42. Another Notice of Forfeiture of Surety Bond was mailed on February 13, 2008. Clerk's ROA, p. 41.

On July 21, 2008, Two Jinn filed a Motion to Set Aside Forfeiture and Exonerate Bond ("Motion") supported by the Affidavit of Thomas Conger in Support of Motion filed with the Court ("Conger Affidavit"). Clerk's ROA, p. 18-23. The State filed an objection to the Motion on July 23, 2008. Clerk's ROA, p. 11-17. On August 8, 2008, Two Jinn filed a Response to State's Objection supported by the Turner Affidavit. Clerk's ROA, p. 4-10. A hearing was held on the Motion and the Motion was denied at hearing on October 3, 2008. Clerk's ROA, p. 38. This timely appeal follows.

II. ISSUES PRESENTED ON APPEAL

A. Whether the district court abused its discretion in concluding that the interests of justice did not require exoneration of the bond?

B. Whether the district court failed to meet its statutory duties when issuance of the bench warrant was stayed?

III. ARGUMENT

A. The District Court Abused its Discretion in Concluding that the Interests of Justice Did Not Require Forfeiture of the Bond.

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and, (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). The court concluded it is the surety's obligation to fulfill their promise to deliver the defendant at all court proceedings without relying

upon law enforcement to effect an apprehension of the defendant and that a warrant did issue. Tr. P. 8-9, L12-2. The lower court did not indicate it perceived the request to set aside forfeiture and exonerate the bond as one of discretion. The lower court did not act within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it. The lower court did not reach its decision by an exercise of reason.

Public policy underlying the bail system allows an accused party to not be deprived of their liberty while they enjoy the presumption of innocence and, at the same time, spares citizens the expense of confining all defendants while they await trial. *See Lee v. Thorpe*, 2006 UT 66, 147 P.3d 443, 447 (2006). The primary purpose of bail is not punitive but, rather, to ensure the presence of the accused. *Quick Release Bail Bonds*, 144 Idaho, 651, 655, 167 P.3d 788, 792 (Ct. App. 2007).

When a defendant fails to appear before the court upon any occasion when his presence has been ordered the court must immediately direct the fact to be entered upon its minutes, order the forfeiture of the undertaking of bail and order the issuance of a bench warrant for the arrest of the defendant. I.C. § 19-2927. In this case, the court immediately ordered the forfeiture of the bail bond but did not immediately issue the bench warrant because execution of the warrant was stayed. Clerk's ROA, p. 44. A judge did not execute the Bench Warrant until February 13, 2008, 21 days after the order forfeiting the bond was entered. Clerk's ROA, p.42. Thus, there was not an immediate issuance of a bench warrant as required by I.C. § 19-2927 when the court enters an order of forfeiture.

The court's conclusion that the bench warrant was immediately issued but then stayed was not reached by an exercise of reason because a judge did not sign the Bench Warrant until February 13, 2008. If a bench warrant is not signed by a judge, it could not have been issued in

January when the court ordered the bond forfeited. The court's decision to not immediately issue the bench warrant is not consistent with applicable legal standards, specifically I.C. § 19-2927.

The effect of the failure to immediately issue a bench warrant for the arrest of Dana allowed him a head start to flee the State, prejudicing Two Jinn's efforts to return Dana to the court. Conger Affidavit, ¶¶ 8-9, Clerk's ROA, p. 22. In addition, if law enforcement encounters Dana, it is not on notice that Dana was avoiding prosecution, which creates a concern about safety of the officer and defeats the ultimate goal of getting Dana back before the court, whether it is by law enforcement encounter or apprehension by Two Jinn.

There is not a remedy for the untimely issuance of a bench warrant as there is for the untimely mailing of the notice of forfeiture unless I.C.R 46 (e)(4) is applied to these facts. The court failed to address this provision. If it appears that justice does not require a forfeiture's enforcement, the court that forfeited the bail may direct that it be set aside. I.C.R. 46(e)(4). The delay in issuance of the bench warrant limited NSI's ability to investigate this case. Turner Affidavit, ¶¶ 6-10, Clerk's ROA, p. 9. The more time that passed prior to the issuance of a warrant for the arrest of Dana allowed him more time to flee the area. *Id.* at ¶ 9. The court's remarks at Tr. p. 8, LL 20-23 that it is the obligation of the surety to apprehend the defendant and surrender him to the State of Idaho ignores the fact that its failure to immediately issue the bench warrant hindered Two Jinn in its efforts to apprehend Dana.

Because the district court failed to reach its conclusion by an exercise of reason, the order denying Two Jinn's motion to set aside forfeiture and exonerate the bond represented an abuse of discretion.

B. The Court Failed to Meet Its Statutory Duties When Issuance of the Bench Warrant Was Stayed.

A bail bond agreement is a suretyship contract between the state on one side and an accused and his surety on the other side, whereby the surety guarantees the appearance of an accused. *State v. Abracadabra Bail Bonds*, 131 Idaho 11, 116, 952 P.2d 1249, 1252 (Ct.App.1998). The extent of the surety's undertaking is determined by the bond agreement and is subject to the rules of contract law and suretyship. *Id.* Because the bail bond agreement is a contract, existing law becomes part of the contract, as though the contract contains an express provision to that effect. *Id.* I.C. § 19-2927 requiring the immediate issuance of a bench warrant is a part of the bail contract.

A breach of contract is non-performance of any contractual duty of immediate performance. *Idaho Power Co. v. Cogeneration*, 134 Idaho 738, 746, 9 P.3d at 1212 (2000). The failure to immediately issue the warrant for the Defendant's arrest as required by I. C. § 19-2927 due to the stay of execution is a breach of the bail bond contract and a failure of the court to meet its statutory obligations.

Two Jinn was prejudiced in seeking to apprehend Dana. The effect of the failure to immediately issue a bench warrant for the arrest of Dana allowed him a head start to flee the state, prejudicing Two Jinn's efforts to return Dana to the court. Conger Affidavit, ¶¶ 8-9, & 11. Clerk's ROA, p. 22-23. Also see Turner Affidavit, ¶¶ 8-10. Clerk's ROA, p. 9.

CONCLUSION

For the foregoing reasons, Two Jinn respectfully asks that the order denying Two Jinn's Motion be vacated and that an order exonerating the bond partially or in full be entered.

DATED THIS 20th day of May, 2009.

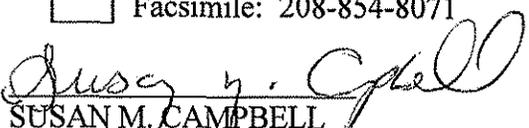

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May, 2009, I caused to be served a true and correct copy of the foregoing by the following method to:

Office of the Attorney General
Karen Magnelli
P.O. Box 83720
Boise, ID 83720-0010

- U.S. Mail, postage prepaid
- Hand Delivery
- Court House Basket
- Certified Mail, Return Receipt Requested
- Overnight Mail
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