10-8-2009

State v. Two Jinn, Inc. Appellant's Brief Dckt. 36629

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff/Respondent,

vs.

AARON KYLE HARRIS,

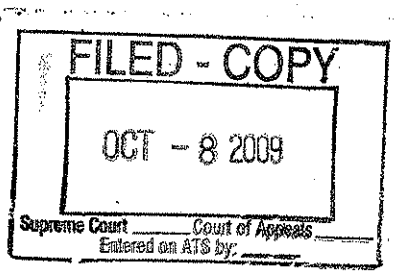
Defendant,

and

TWO JINN, INC,

Real Party in Interest-Appellant.

Supreme Court Case No. 36629



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE JOHN T. MITCHELL
Presiding Judge

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A. Nature of the Case

This is an appeal from the district court's order on intermediate appeal affirming the magistrate's order denying Two Jinn Inc.'s ("Two Jinn") Motion to Set Aside Forfeiture and Exonerate Bond ("motion to exonerate").

B. General Course of Proceedings

In February 2005, Aaron Harris was charged with misdemeanor Driving Under the Influence in violation of I.C. § 18-8004 in Coeur d'Alene, Idaho. R. 8. On May 9, 2005, Mr. Harris pled guilty and was sentenced to two years of probation. R. 37. As relevant to this appeal, the state accused Mr. Harris of violating his probation in the Spring of 2007 and the magistrate ordered Mr. Harris to appear and show cause why his probation should not be revoked on June 6, 2007. R. 59-60, 67-69, 76. Mr. Harris did not appear for court on June 6 and the court issued a warrant for his arrest setting bond at $5000. R. 77-78. After Mr. Harris was arrested on this warrant, Two Jinn posted a bond on behalf of Lincoln General Insurance Company to secure Mr. Harris' presence in the probation violation proceedings. R. 4, 110. Mr. Harris appeared in court on July 31 and September 17, 2007. R. 79-82. On October 29, 2007, Mr. Harris appeared in court and admitted violating the terms of his probation. R. 93-94.

On December 17, 2007, Mr. Harris did not appear in court for the disposition hearing but the magistrate declined to issue a warrant, indicating there may have been confusion regarding the court date. *See* R. 95-100. The court reset the disposition hearing for February 5, 2008. R. 5. The day prior to the hearing, Mr. Harris left an urgent message for his attorney requesting a continuance because he was unable to get the time off work to travel to Coeur d'Alene from

Oregon. Tr. (10-31-2008), pg. 6, ln. 10-17; *see also* R. 104. The magistrate denied the continuance and forfeited the bond posted by Two Jinn. R. 104-05; Tr. (10-31-2008),[1] pg. 7, ln.3-4.

On February 11, 2008, Two Jinn assigned an investigator to locate Mr. Harris and bring him before the court. R. 122-23. The investigator contacted Mr. Harris by telephone and he informed the investigator that he had moved to Portland, Oregon but that he would return to Idaho to address the warrant. R. 123. The investigator also contacted the co-signer on the bond, who assured the investigator that Mr. Harris would take care of the warrant or that the co-signor would personally retrieve Mr. Harris from Portland. R. 123. Despite these assurances, Mr. Harris did not voluntarily appear in Idaho. In July 2008, the investigator obtained an address for the defendant in The Dalles, Oregon. R. 123. Another investigator traveled to The Dalles, located Mr. Harris, attempted to convince him to return to Idaho, and offered him a ride. R. 126. Mr. Harris refused to return to Idaho with the investigator but indicated he would return with the co-signer in a few days. R. 126. The investigator photographed Mr. Harris and his identification and took his fingerprints. R. 126-132. Because the warrant was not extraditable and Oregon law prohibits bail agents from arresting fugitives, the investigator lacked any legal recourse to return Mr. Harris to Idaho involuntarily. R. 126.

Two Jinn filed a motion to exonerate, attaching the affidavits of the investigators, photographs of Mr. Harris and his identification and fingerprints. R. 106-132. Two Jinn argued that, although it had gone to extensive efforts to locate Mr. Harris and had indeed found him, it could not return him to the court due to the type of warrant issued and Oregon law. R. 108-09.

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[1] This transcript is an exhibit in this appeal. R. 109.

Two Jinn asserted that, therefore, justice did not require enforcement of the forfeiture. R. 109. Following a hearing on October 11, 2008, the magistrate denied Two Jinn's motion. R. 143. Two Jinn appealed to the district court, which affirmed the magistrate's decision. R. 145-47, 176. This appeal follows. R. 178-79.

III. ISSUES PRESENTED ON APPEAL

A. Did the district court err in affirming the magistrate's decision because the magistrate abused its discretion in denying Two Jinn's motion to exonerate?

B. Did the district court err in affirming the magistrate's decision because the magistrate erred in concluding the doctrine of impossibility did not require exoneration of the bond?

IV. ARGUMENT

A. Standard of Review

When reviewing a decision of the district court acting in its appellate capacity, this Court directly reviews the district court's decision. *In re Matey*, 147 Idaho 604, 607, 213 P.3d 389, 392 (2009); *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). Thus, this Court reviews the magistrate court record to determine whether there is substantial, competent evidence to support the magistrate's factual findings and whether the magistrate's conclusions of law follow from those findings. *Department of Health & Welfare v. Doe*, 147 Idaho 353, 355, 209 P.3d 650, 652 (2009); *Losser*, 145 Idaho at 672, 183 P.3d at 760. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, this Court will affirm the district court's decision as a matter of procedure. *Doe*, 147 Idaho at 355-56, 209 P.3d at 652-53; *Losser*, 145 Idaho at 672, 183 P.3d at 760.

B. The Magistrate Abused its Discretion in Concluding That the Interests of Justice Required Forfeiture of the Bond.

1. Governing legal standards

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).[2] The decision whether to set aside a forfeiture or exonerate bond under Rule 46(e)(4) is committed to the trial court's discretion. *State v. Quick Release Bail Bonds*, 144 Idaho 651, 655, 167 P.3d 788, 792 (Ct. App. 2007); *State v. Fry*, 128 Idaho 50, 53, 910 P.2d 164, 167 (Ct. App. 1994). In reviewing a trial court's exercise of discretion, this Court considers whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of such discretion and consistently with applicable legal standards; and (3) reached its decision by an exercise of reason. *State v. Rupp*, 123 Idaho 1, 3, 843 P.2d 151, 153 (1992); *Quick Release Bail Bonds*, 144 Idaho at 655, 167 P.3d at 792.

The primary purpose of bail is not punitive but, rather, to ensure the presence of the accused. *Quick Release Bail Bonds*, 144 Idaho at 655, 167 P.3d at 792. It is not the purpose of bail to collect revenue for the state. 8A Am. Jur. 2d § 2. Additionally, public policy disfavors forfeitures. *State v. Abracadabra Bail Bonds*, 131 Idaho 113, 117-18, 952 P.2d 1249, 1253-54 (Ct. App. 1998); *see also People v. Far West Ins. Co.*, 93 Cal.App.4th 791, 795 (2001) (the law traditionally disfavors forfeitures and statutes imposing them are to be strictly construed); *Board*

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[2] On June 15, 2009, the Idaho Supreme Court repealed ICR 46 in its entirety and adopted a new I.C.R. 46, which became effective July 1, 2009. Similarly, on April 1, 2009, the legislature repealed previous bail statutes and enacted the Idaho Bail Act ("the Bail Act"), which also became effective July 1, 2009. *See* 2009 Idaho Laws Ch. 90 (H.B. 184). Exoneration where justice does not require a forfeiture's enforcement is now governed by I.C.R. 46(h) and I.C. § 19-2917. However, because Two Jinn filed its motion to exonerate in 2008, the old rule governs this appeal.

of Com'rs of Brevard v. Barber Bonding Agency, 860 So.2d 10, 12 (Fla. App. 2003) ("Courts say that such statutes should be construed liberally to favor sureties, since justice does not favor forfeiture").

In deciding how much, if any, of the bond to forfeit, the court should consider: (1) the wilfulness of the defendant's violation of bail conditions; (2) the surety's participation in locating and apprehending the defendant; (3) the costs, inconvenience, and prejudice suffered by the state as a result of the violation; (4) any intangible costs; (5) the public's interest in ensuring a defendant's appearance; and (6) any mitigating factors. *Quick Release Bail Bonds*, 144 Idaho at 655, 167 P.3d at 792; *Fry*, 128 Idaho at 53, 910 P.2d at 167. Other relevant factors include whether the state exhibited any actual interest in regaining custody of the defendant through prompt efforts to extradite him, whether the bonding company has attempted to assist or persuade the defendant to expedite his return to Idaho and the need to deter the defendant and others from future violations. *Quick Release Bail Bonds*, 144 Idaho at 655, 167 P.3d at 792.

2. The magistrate and district court decisions

Here, the facts alleged in Two Jinn's motion and supporting affidavit were not disputed. However, although the magistrate acknowledged that Oregon law does not permit bail agents to apprehend fugitives, it denied the motion to exonerate because:

> There are ways to secure the attendance in the State of Idaho of somebody who's charged with a misdemeanor. There's nothing before me that anybody has ever taken any of those steps. You can invoke the extradition powers of the states on a misdemeanor, as well. It is very rarely done. But here there's been no efforts by anybody that I have seen to try and invoke that process to see if Mr. Harris can be brought back through the cooperative efforts of the Governor's Office of the State of Idaho and the Governor's office of the State of Oregon.

Tr. (10-31-2008), pg. 9, ln. 6-15. The magistrate also found that Two Jinn had the obligation to

adequately secure its bond and:

> when these bonds were forfeited, if the bonding company hadn't secured enough collateral, or co-signers, or any other security regarding the obligations, that's the bond company's responsibility. That's their obligation.
>
> And I don't find that because they have placed themselves in that situation, in this particular case, that it makes it unjust to not forfeiture the bond – or not forfeit the bond.

Tr. (10-31-2008), pg. 10, ln. 1-18.

On appeal to the district court, Two Jinn argued that the magistrate's opinion sent the message that "so long as the non-appearing defendants cross the nearby Oregon border, they will be free from the efforts of either their bail agent or the state to secure their return." Tr. (5-27-2009), pg. 16, ln. 20-25. In response to this argument, the district court indicated:

> Well, that's not the purpose of bond. The purpose of bond is as set forth in Quick Release and as noted by [the magistrate], and [Mr. Harris] didn't show. Harris didn't show. I'm not aware of any restriction that – or any statutory requirement that only the State can pursue extradition process, and even if that were true, even if a statute could be found, really the only efforts that Two Jinn brought to bear was the filing of the motion to exonerate bond and not – I'm not seeing any direct effort on the City of Coeur d'Alene, or I guess to go up the chain of command, Kootenai County Prosecutor, State of Idaho AG, so it seems to me that, you know, some other things could've been done.

Id. at pg. pg. 17, ln. 1-13.

3. Why relief should be granted

The magistrate abused its discretion in refusing to exonerate the bond because it applied the incorrect legal standard, erroneously believed that Two Jinn could request extradition and misunderstood how the purpose of bail is effectuated through relief from forfeiture. Its decision was thus inconsistent with applicable legal standards and not reached through an exercise of reason. Therefore, the district court erred in affirming the magistrate's decision.

Initially, the magistrate denied Two Jinn's motion because it concluded Two Jinn failed

to demonstrate that "it would . . .not be just to let the forfeiture stand." Tr. (10-31-2008), pg. 9, ln. 4-5; *see also* pg. 10, ln. ln. 15-18. However, Rule 46(e)(4) allows the trial court to set aside the forfeiture and exonerate the bond if "if it appears that justice does not require a forfeiture's enforcement." Thus, rather than determine whether the forfeiture was unjust, the magistrate should have determined whether justice *required* the forfeiture. The distinction between the standard utilized by the magistrate and the standard set forth in Rule 46 reflects the public policy against forfeiture. *See Abracadabra Bail Bonds*, 131 Idaho at 117-18, 952 P.2d at 1253-54 (public policy disfavors forfeitures). In determining whether the forfeiture was unjust instead of whether justice required the forfeiture's enforcement, the magistrate did not reach its decision consistently with applicable legal standards.

Additionally, the magistrate – and the district court – incorrectly weighed the state's failure to seek extradition against Two Jinn, rather than applying that factor in Two Jinn's favor. In so doing, both the magistrate and the district court erroneously believed that Two Jinn could request extradition. However, pursuant to I.C. § 19-4523(2):

> When the return to this state is required of a person who has been convicted of a crime in this state and . . . broken the terms of his . . . probation . . ., the prosecuting attorney of the county in which the offense was committed, the director of the commission of pardons and parole, or the director of the department of correction or his designee, or head of any institution or facility operated by or under contract with the department of correction, or sheriff of the county from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, and the state in which he is believed to be, including the location of the person therein at the time application is made.

I.C. § 19-4523; *see also* 1984 Idaho Op. Atty. Gen. 35, Idaho Op. Atty. Gen. No. 84-4, 1984 WL 162403, pg. 6 (Idaho A.G.) ("the decision to apply to the governor for a warrant of extradition is

committed to the discretion of the county prosecuting attorney"). Two Jinn could only notify the state of Mr. Harris's location, which it did via its motion to exonerate. It could not, itself, apply to the governor to request that Oregon return Mr. Harris for prosecution. That the state failed to exhibit any actual interest in regaining custody of Mr. Harris through prompt efforts to extradite him weighs in favor of setting aside the forfeiture. Further, to refuse to exonerate the bond in these circumstances rewards the state's lack of interest in extraditing Mr. Harris with a windfall of the forfeiture funds in its treasury.

In finding that exoneration was not warranted because Two Jinn should have secured the bond, the magistrate failed to recognize how the purpose of bail is effectuated through rules providing for relief from forfeiture. Bail is not to punish the surety or to provide the state with a windfall but to effectuate the accused's appearance in court. *Quick Release Bail Bonds*, 144 Idaho at 655, 167 P.3d at 792. Where the defendant fails to appear, as happened in this case, the purpose of bail is served by providing the surety a financial incentive to locate the defendant and return him to the court. *See County Bonding Agency v. State*, 724 So.2d 131, 133 (Fla. App. 1998) ("The purpose of [a Florida statute permitting exoneration when the surety has substantially attempted to procure or cause the apprehension or surrender of the defendant] is to create a financial incentive for sureties to locate and apprehend fugitives"); *Barber Bonding Agency*, 860 So.2d at 12 (Liberal interpretation of forfeiture statutes in favor of sureties provides incentives to sureties "to pursue those who flee the jurisdiction").

Two Jinn could have simply attempted to collect the amount of forfeiture from the co-signer on Mr. Harris's bond. However, encouraging bail bond companies to proceed in that manner by refusing to exonerate the bond in circumstances such as these is contrary to public

policy and the bail bond's purpose of effectuating the defendant's appearance in court. Rather, the purpose of bail is served by rewarding the bail bond companies' efforts to return the defendant to court instead of encouraging them to simply collect money from a co-signor.

Similarly, the magistrate and district court's conclusion that the forfeiture should stand because Mr. Harris failed to appear and the purpose of bail had thus not been met also failed to recognize the purpose underlying forfeiture. As explained by the California appellate court:

> Given the limited resources of law enforcement agencies, it is bail bond companies, as a practical matter, who are most involved in looking for fugitives from justice . . . if the bonding company has no assurance that once it has located the absconding defendant its bail will be exonerated even if the prosecutor elects not to extradite the defendant the company has no financial incentive to undertake the search.

County of Los Angeles v. American Contractors Indem. Co., 152 Cal.App.4th 661, 666 (Cal. App. 2007). Thus, disfavoring forfeiture "is not so much for the bail bond companies" but also serves the public interest in "the return of fleeing defendants to face trial and punishment if found guilty." *American Contractors Indem. Co.*, 152 Cal.App.4th at 666. These concerns even prompted California and Florida to enact laws providing for exoneration under circumstances similar to this case. *See* Cal. Penal Code § 1305(g) (providing for exoneration where a bail agent locates a fleeing defendant in another jurisdiction and secures his positive identification but the state refuses to extradite after being notified of the defendant's location); *County Bonding Agency*, 724 So.2d at 133 (discussing Florida statute that permits exoneration when the surety has substantially attempted to procure or cause the apprehension or surrender of the defendant).

It serves the public interest and the primary purpose of bail to provide the surety with an incentive to find defendants who have failed to appear. Two Jinn underwent considerable effort

to locate Mr. Harris, including obtaining his fingerprints, his photograph and a photograph of his identification. Two Jinn attempted to persuade Mr. Harris to return and offered to give him a ride. Two Jinn then filed a motion to exonerate, which informed the state of Mr. Harris's location. If such circumstances are considered insufficient to demonstrate that justice does not require enforcement of the forfeiture, bail agents such as Two Jinn will no longer undertake the expense to find defendants who have fled Idaho – particularly those who have fled to neighboring Oregon where it is unlawful for Two Jinn to apprehend and return the defendant to Idaho to face prosecution. *See State v. Epps*, 585 P.2d 425, 428-29 (Or. App. 1978) (holding that common-law doctrine giving bail agent absolute dominion over his principal is not recognized in Oregon and upholding bail agents' kidnaping convictions for arresting absconding defendant and transporting him to California).

The magistrate erroneously considered whether it was unjust to uphold the forfeiture rather than whether justice required the forfeiture's enforcement. The magistrate also incorrectly weighed the state's failure to seek Mr. Harris's extradition against Two Jinn instead of applying that factor in its favor. Further, the magistrate failed to recognize the policies underlying relief from forfeiture, including fulfilling bail's purpose by providing the surety a financial incentive to locate absconding defendants. The magistrate thus abused its discretion in failing to reach its conclusion consistently with applicable legal standards or through an exercise of reason.

Moreover, Two Jinn went to extensive efforts to locate the defendant and attempted to convince him to return to Idaho. The state failed to take advantage of Two Jinn's investigatory efforts and exhibit an interest in prosecuting Mr. Harris by seeking to extradite him. The wilfulness of Mr. Harris's failure to appear is somewhat mitigated by his efforts to contact his

attorney to obtain a continuance so that he could obtain time off from work. Accordingly, proper application of the relevant factors establishes that justice did not require the forfeiture's enforcement and the district court erred in affirming the magistrate decision to deny Two Jinn's motion to exonerate.

C. The Magistrate Erred In Concluding that the Doctrine of Impossibility Did Not Require Exoneration of the Bond.

The magistrate indicated: "I do not find that the mere fact that the defendant is unwilling to return to Oregon [sic] and the mere possible threat of being charged with a crime in Oregon creates a legal impossibility such that it would be – not be just to let the forfeiture stand." Tr. (10-31-2008), pg. 8, ln.10-19. However, because Oregon law and the state's lack of interest in prosecuting Mr. Harris made it impossible for Two Jinn to bring him before the court, the doctrine of impossibility should excuse Two Jinn's performance under the bail bond agreement.

A bail bond agreement is a suretyship contract between the state on one side and an accused and his or her surety on the other side, whereby the surety guarantees the appearance of an accused. *State v. Castro*, 145 Idaho 993, 995, 188 P.3d 935, 937 (Ct. App. 2008); *State v. Abracadabra Bail Bonds*, 131 Idaho 113, 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. *Castro*, 145 Idaho at 995, 188 P.3d at 937; *Abracadabra Bail Bonds*, 131 Idaho at 116, 952 P.2d at 1252. Because it is a contract, existing law becomes part of the bail bond agreement, as though the contract contains an express provision to that effect. *Abracadabra Bail Bonds*, 131 Idaho at 116, 952 P.2d at 1252. The primary aim in interpreting contracts is to ascertain the mutual intent of the parties at the time their contract is made. *Castro*,

145 Idaho at 995, 188 P.3d at 937

Idaho Criminal Rule 46(g) directs the court to exonerate the bond if the defendant is brought before the court within 180 days following forfeiture. Here, Two Jinn located Mr. Harris in The Dalles, Oregon within 180 days following the forfeiture, took his fingerprints and photograph, photographed his identification, offered transportation back to Idaho and attempted to persuade him to voluntarily surrender. R. 122-132. Two Jinn could not arrest Mr. Harris because Oregon law does not permit bail agents such as Two Jinn to surrender absconding defendants and instead requires use of the extradition process. *See Epps*, 585 P.2d at 429. The state had not requested an extraditable warrant that would have permitted Oregon law enforcement to arrest Mr. Harris at Two Jinn's request.

The doctrine of impossibility excuses contractual performance when: (1) a contingency occurs; (2) performance is impossible, not just more difficult or more expensive; and (3) the nonoccurrence of the contingency was a basic assumption of the agreement. *Kessler v. Tortoise Development, Inc.*, 130 Idaho 105, 108, 937 P.2d 417, 420 (1997). *Sine qua non* for application of the doctrine is that the parties must have contracted, expressly or in necessary contemplation, with reference to continued existence of the specific thing as a condition essential to performance. *Haessly v. Safeco Title Ins. Co. of Idaho*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992). The task itself must be impossible – the doctrine does not apply if a different promisor could perform. *State v. Chacon*, 146 Idaho 520, 198 P.3d 749, 752 (Ct. App. 2008).

The purpose of the bail bond agreement is to effectuate the defendant's presence in court to answer to the charges brought by the State – it is not meant to collect revenue or to punish sureties. 8A Am. Jur. 2d § 2; *see also Quick Release Bail Bonds*, 144 Idaho at 655, 167 P.3d at

792. Thus, the basic assumption of the bail bond contract and an essential component of its performance is the state's continued desire to prosecute the defendant. Here, Two Jinn did what it could under the contract by locating Mr. Harris but was unable to cause him to be brought before the court because the state did not exhibit an interest in regaining his custody. Any bail agent would be similarly unable to perform and, thus, the impossibility was not personal to Two Jinn. *Cf. Chacon*, 146 Idaho at 523, 198 P.3d at 752 (refusing to apply impossibility doctrine to defendant's inability to make drug purchases as a result of target's mistrust of defendant because the claimed impossibility was personal to the defendant and he did not argue that it was impossible for anyone to purchase drugs from the target or other dealers).

The bail bond's purpose is to effectuate the accused's presence in court and, thus, it was a basic assumption of that contract that the state would continue to desire to prosecute Mr. Harris. Because the state did not exhibit an interest in regaining custody of Mr. Harris and Oregon law does not permit Two Jinn to arrest him, it was impossible for Two Jinn to bring Mr. Harris before the court following his failure to appear. Accordingly, the doctrine of impossibility should excuse Two Jinn's performance and this Court should reverse the district court's decision affirming the magistrate's denial of Two Jinn's motion to exonerate the bond.

V. CONCLUSION

Two Jinn respectfully asks that this Court vacate the district court's order affirming the magistrate's denial of Two Jinn's Motion to Exonerate and direct that an order setting aside the forfeiture and exonerating the bond be entered.

Respectfully submitted this 8th day of October, 2009.

Robyn Fyffe
Attorney for Two Jinn, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of October, 2009, I caused two true and correct copies of the foregoing to be mailed to:

Ms. Karin Magnelli
Civil Litigation Unit
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P.O. Box 83720
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Robyn Fyffe