PEOPLE v. ACCREDITED SUR. & CAS. CO.

S229271

Supreme Court of California

September 15, 2015

Reporter
2015 CA S. Ct. Briefs LEXIS 2545

THE PEOPLE, Plaintiff and Respondent, v. ACCREDITED SURETY & CASUALTY COMPANY, Defendant and Appellant.

Type: Petition for Appeal

Prior History: Court of Appeal Third District Nos. C075960 & C076314. Superior Court of California Shasta County No.s 179179, 14CV0086. Hon. Monica Marlow.

Counsel

[*1] John M. Rorabaugh (SBN # 178366), Santa Ana, CA, Attorney for Defendant and Appellant Accredited Surety & Casualty Company.

Title

Petition for Review

Text

TO HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.500, Accredited Surety & Casualty Company respectfully petitions for review the following opinion of the Third Appellate District, which was partially published and filed on July 10, 2015, which was certified for full publication on August 6, 2015. In the alternative it is requested that this opinion be de-published. A copy of the opinion authored by Associate Justice M. Kathleen Butz, is attached as Exhibit 1 to this petition.

III. STATEMENT OF THE CASE

On April 13, 2013, Accredited Surety and Casualty Company, Inc., bail bond Numbers A25-00672323 and A100-00672323 were posted for the release on bail of defendant Cale Brian Maisano in Shasta County criminal action Number CRF12-6931 and CRF10-5222. (CT Al; [1] Slip Op. 2)

On May 13, 2013, Maisano failed to appear in court, and both bail bonds were declared forfeited. (CT A2; Slip Op. 2.) A notice of forfeiture was mailed to the surety and bail agent on May 13, 2013. (*Ibid*.) The 185th day after such mailing was November 14, 2013.

On November 13, 2013, a motion to extend the period for exoneration was filed. (CT A3-20; Slip. Op. 2.) The motion **[*7]** was set for hearing on December 2, 2013. (*Ibid*.)

---

[1] By order of September 16, 2014, the Court of Appeals ordered the record corrected to include the documents attached to appellant's motion to augment. Those documents will be referred to herein as ″A,″ followed by the page number of the location of the document in the Motion to Augment.

The motion was supported by the declaration of bail agent Sheri D'Angelo. (CT A9-20; Slip Op. 3.) Page 3 of the Opinion of the Court of Appeals correctly characterizes the facts and information contained in this declaration.

On November 25, 2013 the County Counsel filed an opposition to the motion to extend time. (CT A22.) That opposition was served on the bail agent's counsel by mail. (CT A28) Because of the Thanksgiving holiday, there were only two court days between the service of this opposition by mail and the Monday morning hearing on December 2. 2013. The County Counsel did not fax, e-mail, or otherwise attempt to expedite the service of this opposition. (*Ibid.)*

On December 2, 2013 the bail agent appeared in court on the motion. The bail agent received the opposition on the morning of the December 2, 2013 prior to the hearing. (CT A48:16-18) The hearing on the motion set for December 2, 2013, was continued to December 9, 2013 (Slip Op. 4) for the purpose of giving the bail agent time to reply to the opposition and to give counsel opportunity to appear. (CT A48:30-49:12)

In accordance with this instruction, the bail **[*8]** agent filed a supplemental declaration in reply to the opposition including important events which had occurred after the filing of the original motion, but before the expiration of the 185 days. (CT A29-33) This information included two telephone calls between the bail agent and the defendant on November 12, 2013 and November 14, 2013 (the 183rd and 185th day) during which the defendant agreed to speak with an attorney and turn himself in. (CT A31:4-24; Slip op. 4) The declaration also detailed extensive efforts to locate the defendant which were made after the expiration of the appearance period, with the last entry dated November 27, 2013. (CT A29-33) This supplemental declaration was filed by the clerk on December 9, 2013, but then improperly unfiled based on a belief that it was untimely. (CT A29; A53:18-20; Slip Op. 4)

On December 9, 2013, the trial court denied the motion for an extension. (CT A57:10; Slip. Op. 5). The trial court admitted that the bondsman's ″efforts to locate and bring [the defendant] in are reasonable″ (CT A 55:18-19; Slip Op. 4) but went on to say ″It's just so far with the information I have, that tends to tell me that this individual is fairly sophisticated **[*9]** in not coming in.″ (Ibid). The judge believed that the information provided by the bail agent ″just don't seem to make a dent in whether or not in a reasonable timeframe, a likelihood of his apprehension has been shown.″ (CT A55:26-27; Slip Op. 4)

On December 20, 2013, based on the investigative efforts of the bondsman, the defendant was surrendered to custody in Washington State. (Slip. Op. 5)

On February 4, 2014, a summary judgment was entered on the forfeiture under Shasta County civil case No. 179179. (CT 1-2.) This appeal followed on March 3, 2014. (CT 5-7.)

On July 10, 2015 the Third District Court of Appeals affirmed the trial court's ruling denying the motion. This opinion was certified for full publication on August 6, 2015.

On September 3, 2015 a petition for re-hearing was denied.

IV. ARGUMENT

A. The Heightened Good Cause Standard Adopted by the Court of Appeals Does Not Comport with the Public Policy Goals of Penal Code section 1305.4 of Encouraging the Return of Fugitive Defendants to Custody

The vagrancies of incorporating a prognostication element into the good cause standard is clearly demonstrated by this case. Here the trial judge dismissed the **[*10]** possibility of the bondsman capturing the defendant, but the bail agent nonetheless surrendered the defendant to custody within a few short weeks of the hearing.

The term good cause has been defined in a number of contexts. Good cause is always dependent on the underlying public policy, and changes hue with the goals of the policy.

> 'Of course, 'good cause' and 'personal reasons' are flexible phrases, capable of contraction and expansion, and by construction, all meaning can be compressed out of them or they may be expanded to cover almost any meaning.

> Reducing them to a fixed, definite and rigid standard, if desirable, is necessarily difficult, if not impossible. However, in whatever context they appear, they connote, as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith. When related to the context of the statute, 'good cause' takes on the hue of its surroundings, and it, and 'personal reasons,' must be construed in the light reflected by its text and objectives.

[*11]

(*California Portland Cement Co., v. California Unemployment Ins. Appeals Bd. (1960) 178 Cal.App.2d 263, 272-73.)*

Where the underlying policy favors a finding of good cause, courts have shifted the burden to the other side to produce evidence to show why there is not good cause.

> [I]n view of the policy favoring an Indian child's placement according to statutory placement preferences, the party opposing the placement has the burden to show there is good cause not to follow the preferences. ([Pen. Code, § 361.31, subd. (j)]; BIA Guidelines, *[44 Fed.Reg. 67584, 67594, 67595],* § F.1, 3 (Nov. 26, 1979).)

(*In re Anthony T. (2012) 208 Cal.App.4th 1019, fn. 6.)*

In *People v. Alistar Ins. Co., supra, 115 Cal.App.4th 122,* as modified Jan. 23, 2004, the court noted that the People failed to provide any evidence refuting the good cause showing by the bondsman.

> The People, on the other hand, failed to provide any evidence refuting that good cause existed for granting an extension. There was thus no reasonable justification for not allowing Alistar additional time to locate defendant, particularly **[*12]** since the law disfavors forfeitures and favors returning to custody fleeing defendants. Sections 1305 and 1306 are to be strictly construed in favor of the surety to avoid harsh results. [Fn. omitted.]

(*People v. Alistar Ins. Co., supra, 115 Cal.App.4th at p. 129.)*

Therefore, since the policies underlying Penal Code section 1305.4 favors granting extensions, the burden of refuting good cause should fall upon the People. Here, like in *Alistar*, no evidence was presented by the County which would refute the good cause established by the bondsman's declarations.

In the *Ranger* and *Alistar* cases, the court phrased the necessary showing for good cause as requiring ″(1) an explanation of what efforts the surety made to locate the defendant during the initial 180 days, and (2) why such efforts were unsuccessful.″ (*People v. Alistar Ins. Co., supra, 115 Cal.App.4th at p. 127.)* In the present case, the court borrowed the standard from the *Accredited 1, supra, 137 Cal.App.4th 1349,* which required a showing of a ″reasonable likelihood of success.″ This standard requires inappropriate prognostication. An explanation of why **[*13]** efforts were unsuccessful goes more toward the competency of the investigation than a forecast of its outcome. There is no explanation of why bail agents should stop diligent investigations that the court believes are unlikely to succeed. There is no policy served by stopping a competent and diligent, but unlikely to succeed investigation. As noted in *Accredited 1* it is often impossible to know why efforts are unsuccessful. The diligence of the effort is the more important inquiry.

> While the reasons why efforts were unsuccessful are relevant to determine whether good cause has been shown, as Accredited points out, an effort to capture a defendant is often unsuccessful simply because the defendant was not captured. A surety cannot always know how or why a defendant avoids location and capture. It is more vital to the good cause inquiry, and therefore essential, that the surety shows it has been diligently attempting to capture the defendant during the 180 days.

(*Accredited 1, supra, 137 Cal.App.4th at p. 1356.)*

It is hard to see how the policy of returning fugitive defendant's to custody is served by stopping diligent, competent investigations. **[*14]** As noted by another court, ″[t]here is a public interest at stake here as well-the return of fleeing

defendants to face trial and punishment if found guilty. 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." (*People v. Am. Contractors Indem. Co. (2007) 152 Cal.App.4th 661, 666.)* Thus, the State is a primary beneficiary of an ongoing diligent investigation to return a fugitive to custody. Even a small chance of success is beneficial. There can be circumstances where this might be inappropriate to grant such an extension, such as when a defendant has voluntarily fled to a country without an extradition treaty with the United States. But, in a situation like that, the bondsman has nothing left that they can reasonably do. As long as there is activity that the bondsman can diligently perform, public policy favors continuing that activity. The burden should be on the People to demonstrate that further efforts would be unproductive.

The *Owens v. Superior Court of L.A. Cty. (1980) 28 Cal.3d 238* case relied upon in *Accredited 1* to establish **[*15]** the reasonable likelihood of success standard involves getting a witness before trial. In that case, the countervailing interest in not continuing the trial was to conserve judicial resources. Here, conversely, the State's resources are best preserved by bail agents continuing ongoing and diligent investigative efforts. This case shows that an unlikely investigation can produce results. Despite the judge's doubts that the defendant could be caught, the bondsman in fact caught the defendant within a short time of the hearing. Had the parties been operating under the holding of this case, those additional efforts by the bondsman would not have taken place, and the defendant-who clearly was skilled at evading capture-could still be in the community committing additional crimes. Therefore the original standard requiring an explanation of why the initial investigation was unsuccessful, as established in *Ranger* and *Alistar* and requiring the People to demonstrate a lack of good cause fits more closely with the policies underlying extensions and the court should adopt that standard.

B. The Analysis of Reasonable Likelihood of Success should include those efforts that occurred after [*16] the end of the appearance period but prior to the date of the hearing.

If a forward looking reasonable likelihood of success is an element of good cause, it only makes sense to present the events that occurred up to time of the hearing to determine whether or not an investigation is reasonably likely to succeed. In the case of *People v. Seneca Ins. Co. (2004) 116 Cal.App.4th 75,* there was no showing of diligence because the bail agent did not start the investigation for five months after receiving the notice. *Seneca* is not authority for the proposition that reasonable likelihood of success must be established within the 185-days, just that diligence must be established within that timeframe. The legal standard must comport with reality, and in reality if a bail agent is conducting a diligent investigation, the investigation does not stop while the motion is pending.

When determining the likelihood of success, all of the events that have occurred up to the date of the hearing based on the diligent investigation conducted within the 185-day period should be considered. As demonstrated in this case, the efforts that had been put out had been bearing fruit, increasing **[*17]** the likelihood of success. What public policy is being promoted by stopping the investigation? This holding encourages bondsman to artificially stop their investigation at a point half way between the time that the legislature has given them. If the goal of likelihood of success is to get the defendant back, what purpose is served by causing the bondsman to artificially stop the investigation early?

Here the trial judge ruled that a sophisticated defendant's ability to to evade capture should be held against the bail agent. At common law, the bail agent stood in the place of the defendant, and the defendant would only be excused for involuntary failures to appear. California used to require an excuse for the defendant's failure to appear. The current statute does not require that. It prioritizes bondsman actually searching for and returning fleeing defendant's to custody. The policies underlying getting an extension shouldn't cut the bondsman's time short for those defendants who are more difficult to catch.

Therefore if a court is required to predict the future of a bondsman's investigation, it should be allowed to use all of the information available to the court at the time it **[*18]** makes its decision.

C. The District Attorney, as the Prosecuting Agency in this Case is the Proper Party to Respond to Motions to Extend Time Under Penal Code Section 1305.4, and the County Counsel Lacked Jurisdiction to Respond to the Motion.

The issue of standing can be raised at any time. (*Common Cause of California v. Bd. of Supervisors of Los Angeles Cnty. (1989) 49 Cal.3d 432, 438.)*

Pursuant to Government Code section 27642, the County Counsel can do anything the District Attorney can, with the exception of performing prosecutorial functions. In *People v. Hadley (1967) 257 Cal.App.2d 871* and *Cnty. of San Bernardino v. Ranger Ins. Co. (1995) 34 Cal.App.4th 1140,* the court found that responding to motions to vacate forfeiture is ″inextricably a part of the prosecution process.″ (*Id. at p. 1145.)* The court went on to comment:

> [A]s a further direction to the trial court it is our opinion that the district attorney's office, as distinguished from the county counsel's office, is the proper representative of the People to receive notices in forfeiture proceedings. We are directed to that view by practical **[*19]** considerations as well as statutory interpretation. Section 26521 of the Government Code provides that the district attorney shall prosecute all actions regarding fines, penalties and forfeitures. [Government Code section 2762] provides that the county counsel shall discharge all duties of the district attorney except those of public prosecution. It seems clear that the existence of bail and its influence to ensure the presence of the defendant is inextricably a part of the prosecution process, and thus becomes the concern of the district attorney. [6] . . . *When, however*, the state or the county require legal representation *for the collection of an obligation created by a bail bond, such a proceeding is wholly unrelated to the prosecution procedure and should be accomplished by the county counsel's office*.″ ([Citation].) ″It seems, therefore, the practical and rational concept that the district attorney should be charged with all matters relating to bail *up to the point where a civil suit is to be instituted*.″ ([Citation].)

(*Cnty. of San Bernardino v. Ranger Ins. Co., supra, 34 Cal.App.4th at pp. 1144-45.)*

At the time of the *San Bernardino* **[*20]** case, pursuant to Penal Code section 1305 the board of supervisors could annually designate the county counsel or district attorney to respond to bail related matters. (*Cnty. of San Bernardino v. Ranger Ins. Co., supra, 34 Cal.App.4th at p. 1146.)* The statute has since been modified to require service solely on the prosecuting agency, the county counsel has been removed from Penal Code section 1305, and their sole responsibility is to collect judgment under Penal Code section 1306, subdivision (e). The only other mention of the county counsel in the statute is to allow them to collect for costs for collecting such judgment under Penal Code section 1305.3. Therefore the county counsel was a stranger to the proceedings before the trial court for the motion to extend time, and the trial court should not have considered its opposition. The District Attorney, the prosecuting agency in this case, was served but did not make any objections to the extension motion.

The District Attorney is the prosecuting agency in this case. Although bail is a civil matter, collateral to the criminal proceeding, the District Attorney generally has the duties to respond to civil matters which **[*21]** are a part of a criminal proceeding.

> Thus, even in counties where there is a county counsel, ″[i]t is … clear that the district attorney's duties as public prosecutor embrace more functions than the prosecution of criminal actions.″ *(64 Ops.Cal.Atty.Gen. 418, 422 (1981).)* If such functions, though civil in nature, are closely related to and in furtherance of criminal law enforcement, then the district attorney may properly perform them. ([Citation]; see *64 Ops.Cal.Atty.Gen. 826, 831 (1981).)* For example, in [*People v. Superior Court (Aquino) (1988) 201 Cal.App.3d 1346 [248 Cal.Rptr. 50]],* this court held that the investigation and gathering of evidence relating to criminal offenses is a responsibility inseparable from the district attorney's prosecutorial functions, even though no criminal charges have been filed. ([Citation].)

(*Rauber v. Herman (1991) 229 Cal.App.3d 942, 948.)*

The District Attorney did not oppose this motion, and unopposed motions should generally be granted. The County Counsel is concerned primarily with the financial interests of the county and is given the duty of collecting **[*22]** a judgment once it is final, but not to oppose the efforts of a bondsman to return a defendant to custody. The statute only requires service on the prosecuting agency. Therefore the County Counsel did not have standing to respond to this motion, and as a stranger to the action their response should be stricken and the case remanded for re-hearing.

Despite the change in the statute to specify service solely upon the prosecuting agency, numerous Counties still employ the County Counsel to respond to motions to extend time or vacate forfeiture prior to the entry of judgment. Because the

County Counsel's concerns are more focused on financial matters, they are objecting to motions that a prosecutor would be more likely to agree. Prosecutors are more familiar with the defendant's and the crimes they have committed, as well as any victims of those crimes. The prosecutor's input is therefore more relevant to a court's decision about whether or not to grant relief. This Court should establish the roles of the County Counsel and the Prosecuting Agency in responding to bail motions.

V. CONCLUSION

For all of the above reasons it is requested that the Supreme Court grant review of this **[*23]** matter. In the alternative, it is requested that this opinion be ordered decertified for publication.

Dated: 9/14/2015

Respectfully submitted,

By: /s/ John M. Rorabaugh

John M. Rorabaugh

Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **4,114** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by rule 8.204(b) and contains fewer words than permitted by rule 8.204(c), rule 8.360(b), or by Order of this Court.

Dated: 9/14/2015

By: /s/ John M. Rorabaugh
John M. Rorabaugh
Attorney for Defendant and Appellant

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is **801 Parkcenter Dr Ste 205, Santa Ana, CA 92705**.

I served document(s) described as **PETITION FOR REVIEW** as follows:

By mail

I enclosed a copy of the document(s) identified above in an **[*24]** envelope and **deposited** the sealed envelope(s) with the US Postal Service with the postage fully prepaid.

The envelope(s) were mailed on **9/14/2015** and addressed as follows:

James R. Ross, deputy
Office of the County Counsel
1450 Court Street, Ste 332
Redding, CA 96001

E. Alan Nunez
Attorney at Law
1410 E. Fallbrook Ave
Fresno, CA 93720

Shasta County Superior Court
1500 Court Street, Room 319
Redding, CA 96001

Third District Court of Appeal
(By electronic delivery)

Accredited Surety & Casualty Company
Attn: John Savage

I am a resident of or employed in the county where the mailing occurred. The mailing occurred from **Santa Ana, CA**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 9/14/2015

By: /s/ John M. Rorabaugh

John M. Rorabaugh

Attorney for Defendant and Appellant

MAILING LIST

Copies of this document have been sent to the individuals checked below:

James R. Ross
Office of Shasta County Counsel
1450 Court Street, Suite 332
Redding, CA 96001

John Mark Rorabaugh
Attorney at Law
801 Parkcenter Drive, Suite 205
Santa **[*25]** Ana, CA 92705

E. Alan Nunez
Attorney at Law
1410 e. Fallbrook Avenue
Fresno, CA 93720

Honorable Monica Marlow
Judge of the Shasta County Superior Court - Main
1500 Court Street, Room 319
Redding, CA 96001

[SEE ATTACHMENT IN ORIGINAL]

[SEE ATTACHMENT IN ORIGINAL]