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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN RE ARIZONA RULE OF CRIMINAL PROCEDURE, RULE 7.6	)	No.
	)	PETITION TO AMEND ARIZONA RULE OF CRIMINAL PROCEDURE, RULE 7.6

Comes now Clifford Sherr, a member of the Arizona State Bar since October, 1974 and hereby submits this Petition For Amendment of Rule ("Petition") pursuant to the Rules of the Arizona Supreme Court, Rule 28. This Petition includes supporting documentation pursuant to the Rules of the Arizona Supreme Court, Rule 28(A)(2).

I

INTRODUCTION

In 1997 undersigned counsel, on behalf of the then existing Association of the Professional Bail Agents of Arizona ("PBAA"), submitted its first Petition to Amend Arizona Rules of Criminal Procedure, Rule 7.6. Said Rule, as this Court is aware, deals primarily with the procedures surrounding the posting, forfeiture and exoneration of appearance (bail) bonds.

This Court did adopt certain of the proposals

submitted by the PBAA, and the updated Rule went into effect on December 1, 1998. (For a discussion surrounding the 1997 Petition see State v. Old West Bonding Company, 203 Ariz. 468, 56 P.3d 42 (Ct. of Appeals, Div. 1, 2002). It was hoped by the bonding community that Rule 7.6, as updated, would, among other things, create more "balanced" superior court rulings as they related to bond forfeiture matters and that the judges would use their new-found grants of discretion to foster real reform of the bonding system and to bring Arizona "into the 21st century," as it were.

Sadly, after almost 15 years since the first Petition for the updating of Criminal Rule 7.6 was proposed and later implemented, it appears that "old habits" have been, in undersigned counsel's experience, "too hard to break," and the hoped for reforms permitted by Rule 7.6 [especially Rule 7.6(d)(2)] simply have not been fully embraced by the lower courts. Moreover, time and again, these "unembraced" decisions, when challenged and appealed, have routinely been upheld by the Court of Appeals as not being "an abuse of discretion."

Given this background, a consortium of surety companies doing business in the State have solicited the help of undersigned counsel to "re-petition" this Court with the hope of fulfilling the promises that the current

version of Rule 7.6 has failed to achieve.

II

UPDATING ARIZONA RULE OF CRIMINAL PROCEDURE RULE 7.6(d)(2), OR, THIS TIME LET'S GET IT RIGHT AND FINALLY ENTER THE 21ST CENTURY

The current version of Arizona Rule of Criminal Procedure Rule 7.6(d)(2) states:

> "If the surety, in compliance with the requirements of A.R.S. Section 13-3974, surrenders the defendant to the sheriff of the county in which the prosecution is pending, or delivers an affidavit to the sheriff to the sheriff stating that the defendant is incarcerated in this or another jurisdiction, and the sheriff reports the surrender or status to the court, the court may exonerate the bond."

It was the hope of the bonding community that this current version of the Rule would eliminate the historical problem of the complete or virtually complete forfeiture of a bond when either (1) the defendant was physically surrendered back to the sheriff by the bondsman [c.f. State v. Rogers 117 Ariz. 258, 571 P.2d 1054 (App. Div. 1, 1977) and its progeny including State v. Old West Bonding Company, supra 203 Ariz. at 473, 56 P.3d at 47, "[A] surety does not meet its obligation pursuant to Rule 7.6 merely by surrendering a nonappearing defendant before entry of a forfeiture judgment" or (2) when the

defendant's failure to appear was due to his incarcerated status in another jurisdiction [c.f. State ex. rel Ronin v. Superior Court, 96 Ariz. 229, 393 P.2d 919 (1964), State v. Rocha 117 Ariz. 294 572 P.2d 122 (App. 1977) and State ex. rel Corbin v. Superior Court, 2 Ariz.App. 257, 407 P.2d 938 (1965)].[Incarceration is not "good cause" or considered a valid "explanation or excuse" pursuant to (the current version of) Arizona Rule of Criminal Procedure, Rule 7.6(c)(1).]

Unfortunately, even after the adoption of Rule 7.6(d)(2) in its current form the aforementioned problems remain unresolved to this day.

For instance, one of the most egregious examples of forfeiture, notwithstanding rapid apprehension and surrender by the bondsman of the defendant, occurred quite recently in the case of State v. Woodward, Yavapai County Superior Court cause CR2011-80098; appealed as State of Arizona v. Banker's Insurance Company and Fitzgerald All State Bail Bonds, 1 CA-CV 11-0815. Briefly, the defendant, Eric Woodward, failed to appear for a hearing and a bench warrant issued on March 29, 2011. The sureties apprehended Mr. Woodward in northern California and transported him back to Arizona and surrendered him to the Yavapai County Sheriff about a month after the issuance of the bench warrant. A motion to exonerate was

filed, and then the court set the matter for a bond forfeiture hearing. (More about this aspect of the case, infra, Argument III). The trial court ultimately decided to forfeit $12,500.00 of the $20,000.00 bond. That decision was upheld on appeal [Memorandum Decision filed 10/30/12], notwithstanding the two (2) most recently reported cases dealing with this issue, State v. American Bail Bond Agency, 129 Ohio.App.3d 708, 719 N.E.2d 13 (Ohio App. 1998) and State v. Storkamp, 656 N.W.2d 539 (S.Ct. Minn. 2003), supported the sureties' position that under the circumstances too much of the bond was forfeited.

For instance, in Storkamp, the trial court decided that the entire bond of $5,000.00 should be forfeited under Minnesota law because of the defendant's willful failure to appear on April 6, 2001. This was true notwithstanding the bondsman/surety apprehended the defendant and returned him to custody on June 3, 2001, (about a month longer than it took the sureties in Woodward). At the forfeiture hearing the trial court commended the surety on its efforts and further found that no prejudice to the State occurred, yet the court forfeited the entire bond. That decision was upheld by the Minnesota Court of Appeals.

In reversing the Supreme Court of Minnesota determined that the trial court abused its discretion and remanded

the matter to the trial court with directions to exonerate the bond in full. As stated in Storkamp, 656 N.W.2d at 541-542:

> "If the defendant fails to appear and the bond goes into default the court may forgive or reduce the penalty if, based upon the circumstances of the case and the situation of the parties, it determines that such action is just and reasonable [citing statute]. The court may not treat bail as a way to increase revenue of the state or to punish the surety [citing cases].
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> x x x
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> It also serves to encourage sureties to locate, arrest, and return defaulting defendants to the authorities to facilitate the timely administration of justice. State v. Midland Ins. Co. 208 Kan. 866, 890, 494 P.2d 1228, 1232 (1972) (noting that '[t]here would be small incentive for the surety to run down and return its principal at its own expense if no part of the penalty could be remitted under equitable circumstances,); State v. Amador 98 N.M. 270, 648 P.2d 309 at 312-313 (1982) (stating that a statutory provision providing for mitigation upon a surety's production of a defendant creates incentive for the surety to track down and apprehend fleeing defendants.)"

It was also argued at the trial level and on appeal that had this identical situation occurred in Maricopa County the total amount of forfeiture would have been $150.00! This was so because Maricopa County, as a consequence of State v. Old West Bonding Company, supra,

determined as a matter of "unwritten rule" or policy, that if a bondsman timely surrenders the defendant to the sheriff the court forfeits a flat rate "administrative fee" of $150.00; no matter what the size of the bond. The proposed Rule endeavors to codify Maricopa County's enlightened policy for statewide application, so as to avoid tragic situations (at least tragic to the bonding community) as the one demonstrated in Woodward.

Unfortunately, even Maricopa County's "enlightenment" has gone only so far. When it comes to forfeiture because of incarceration in another jurisdiction, Maricopa County generally, "clings to the past" by ignoring the Rule 7.6 affidavit of surrender--coupled with an offer to pay the related transportation and extradition costs--see State v. Amador 98 N.M. 270, 648 P.2d 309 (S. Ct. New Mexico 1982), and forfeits the entire bond. (n.b. This practice of ignoring the dictates of Rule 7.6(d)(2) seems also to be the norm in other jurisdictions in which undersigned counsel routinely appears on bond forfeiture matters--including Pima, Pinal and Yavapai County Superior Court.)

Two of the most recent examples of the "ignoring" of Rule 7.6 and the "unfairness" it created are State v. Elms, Maricopa County Superior Court cause CR2009-111811 appealed as State v. International Fidelity Insurance Co. and Eazy Bail Bonds, 1-CA-CV 10-0268, and State v. Brown,

Maricopa County Superior Court cause CR2010-151602 appealed as State v. Lexington National Insurance Co. and Ameribail Bail Bonds, 1-CA-CV 11-0661.

In Brown, defendant was apprehended in Chicago and was returned to participate at the bond forfeiture hearing. The sureties, knowing of Brown's incarcerated status had, at a previously set bond forfeiture hearing, notified the court of its filed surrender affidavit and also offered to pay extradition and transportation costs. (n.b. this is not required under current Rule 7.6 but is under the proposed version). Notwithstanding that, the court forfeited the entire $22,000.00 bond, even though Brown waived extradition and the amount to transport was roughly $2,500.00.

To the same effect was the Elms case. In that matter however, the amount of the bond was a "whopping" $150,000.00, and the entire amount was forfeited. As pointed out to the trial court (when Elms was returned to Arizona from California prior to the judgment of forfeiture even being entered); and because Elms also waived extradition at the behest of the sureties; the cost to transport him back from California was, roughly, two percent (2%) of the face of the bond. On appeal, the appellate court was "not offended" by the size of the forfeiture, c.f. Young Candy & Tobacco Company v.

Montoya, 91 Ariz. 363, 372 P.2d 703 (1962) "damages are excessive if they are so manifestly unfair, unreasonable, and outrageous, as to shock the conscience of the court." The bonding community believed and continues to believe that the decision in Elms and cases like it under the circumstances were "unfair" and wrong, and cry out for the reforms the proposed Rule would create.

It was further pointed out both in Elms and in Brown that in most jurisdictions which have ruled on this issue the public policy enforcement aims of the state are better met when you get the defendant returned by the surety at its expense instead of forfeiting the entire amount of the bond. As noted in State v. Amador, supra, 98 N.M. at 73, 648 P.2d at 312:

> "Bail is not a source of revenue for the state. (emphasis added) The purpose of the bond or security is to secure a trial, its object being to combine the administration of justice with the convenience of the person accused, but not proved, to be guilty. If the accused does not appear the bail may be forfeited not as punishment to the surety or to enrich the Treasury of the State but as an incentive to have the accused returned or be returned to the jurisdiction of the court." (emphasis added)

Accord: State v. Storkamp, supra, State v. Darwin, 70 Wash.App. 875, 877, 856 P.2d 401, 403, (Wash. App. Div. 1, 1993) citing State v. Jackshitz, 75 Wash 253, 136 P.

132 "[B]ail is not a revenue measure in lieu of a fine or a method to punish sureties." (See also State v. Old West Bonding Company, supra, which indicates that one of the factors to be utilized by a court to determine if and how much of a bond to forfeit is "the public's interest in ensuring defendant's appearance," 203 Ariz. at 475, 56 P.3d at 49.) That public policy argument is also routinely ignored (see discussion, infra).

It was the hope of the bonding community that the "new language" of Criminal Rule 7.6 would be utilized by the trial courts to "modernize" the system and avoid situations like Elms and Brown. As obviously understood by this Court when adopting the current version of Criminal Rule 7.6(2)(d), the language was in keeping with the modern trend in this area of the law. See Annotation, 33 A.L.R. 4th, 633 (1985), Bail, effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. As noted on pages 667 and 668 of said Annotation:

> "Based primarily on the Taintor case the majority of jurisdictions in the early cases adopted the general rule that the incarceration of the defendant in another jurisdiction provided no basis for relief. Although many courts still refer to the above as the 'majority' rule, much of its support has been eroded. Courts appear to be increasingly willing to recognize that modern society is very mobile and that a defendant out on bail is quite likely to cross state lines

> prior to his next court appearance. And, while it may have been difficult in the past for the bailing state to reobtain the custody of the defendant who is incarcerated in another jurisdiction, the modern system of detainers against a defendant held in another jurisdiction has greatly simplified the process of reobtaining custody. Thus, while some jurisdictions continue to follow the general rule, that incarceration in another jurisdiction provides no basis for relieving the surety from liability on the bail bond (Section 3, infra,) many other jurisdictions, including some that have previously followed the rule denying relief have enacted statutes which provide for relief to the surety when the defendant's appearance was prevented by incarceration in another jurisdiction. (Section 7, infra). Some jurisdictions have adopted the same rule by judicial decision (Section 8, infra)."

As pointed out earlier herein, the dictates of Criminal Rule 7.6(d)(2) can, lawfully, be ignored by the trial court because its application is not mandated. Rather, it can be applied only if the court chooses to ("the court may exonerate the bond.") By use of the word may, it has meant that there wouldn't be, and hasn't been, any "abuse of discretion" if the court decided not to apply Rule 7.6(d)(2) and forfeited the bond pursuant to State ex. rel Ronin v. Superior Court, supra, State v. Rocha, supra, and State ex. rel Corbin v. Superior Court, supra. In the proposed version of the Rule the "modern trend" would be required to be followed, as is the case in Maryland whose criminal rule our proposal is modeled

after, (c.f. Rule 4-217, Maryland Rules of Criminal Procedure) and the cases from the 60's (and one (1) from the 70's) would finally no longer be a barrier to 21st century realities regarding incarcerated defendants and their return to Arizona--and the impact on the bond.

Before leaving this facet of this Petition, undersigned counsel wishes to restress the "public policy" argument touched upon earlier in the Petition. When times are tough, as they have been for the past few years, Arizona counties inevitably end up "catching" what undersigned counsel has labeled "bond forfeiture fever." Bond forfeiture money is prized because a county does not have to share any forfeited money with the State, or any municipalities within its borders. As such, it is in a county's financial interest to have its superior court ignore the dictates of the current version of Rule 7.6(d)(2) be it when a defendant is surrendered, or especially when a defendant is incarcerated in a sister state. Time and again undersigned counsel has advanced the "bail is not a source of revenue or method to punish sureties" public policy argument, but this argument, too has fallen on deaf ears. It appears that only a rule change, as the type proposed herein, will bring Arizona into alignment with its sister states on this issue.

Additionally, before leaving this facet of the

Petition, this Court will note one final proposed amendment to Rule 7.6(d)(2). The Petition proposes to eliminate that part of the Rule conditioning the sheriff's notification of the filing of the affidavit in order to obtain exoneration. Undersigned counsel is unaware of the practice of all the sheriffs in this State, but as to Maricopa County the sheriff never has bothered to notify the court of any defendant's "surrendered status." Requiring the surety to notify the court directly, as the proposed language does, simply injects the actual practice (at least in Maricopa County) into the Rule.

III

ARIZONA RULE OF CRIMINAL PROCEDURE
RULE 7.6(c)(1), ALSO NEEDS UPDATING
AND CLARIFICATION

The current version of Arizona Rule of Criminal Procedure Rule 7.6(c)(1) states:

> "(1) Notice and Hearing. If at any time it appears to the court that the released person has violated a condition of an appearance bond it shall issue a bench warrant for the person's arrest. Within 10 days after the issuance of the warrant the court shall notify the surety in writing or by electronic means, that the warrant was issued. The court shall also set a hearing within a reasonable time, not to exceed 120 days, requiring the parties and any surety to show cause why the bond should not be forfeited. The court shall notify the parties and any surety of the hearing in writing or by electronic means.

As with Criminal Rule 7.6(d)(2), there are two

facets of this subpart of the Rule which need updating. The first changes the "not to exceed 120 days" for the setting of the hearing to "not less than 60 nor more than 120 days." The reason for this proposed change is that once again, the 1998 amendment did not solve the problems it was meant to solve.

Arizona, by the language of Rule 7.6 is a State that gives a bondsman or surety time to locate, apprehend and surrender the defendant before entering a forfeiture judgment. It was hoped that the current version would solve the problems of the prior version of the Rule which gave the bondsman only ten (10) days notice before a bond forfeiture hearing could be set.

Unfortunately, because the current version of the Rule does not mandate a minimum amount of time for a bondsman to endeavor to locate and surrender the defendant, there have been instances where the court has been particularly niggardly in affording a bondsman an adequate amount of time to find and surrender an absconding defendant before forfeiting the bond. The revised version endeavors to correct this problem to a degree.

Finally, the proposed version of the Rule endeavors to clarify a problem highlighted in State v. Bail Bonds USA, 223 Ariz. 394, 397, 224 P.3d 210, 213 (App. 2009)

wherein is stated:

> "Under Rule 7.6(c)(1) of the Arizona Rules of Criminal Procedure, a trial court must issue a bench warrant and set a bond forfeiture hearing 'if it appears to the court that a released person has violated a condition of the appearance bond."

It was argued to the court in the Woodward matter, that in light of the above quoted language, since the court did not set a bond forfeiture hearing one had to assume that no violation occurred. The court sided with the State's argument that you could still be in compliance with the Rule even if you set a bond forfeiture hearing long after the issuance of the warrant (and in the Woodward matter setting a bond forfeiture hearing even after the defendant was back in custody!) The proposed language, mandating the setting of a bond forfeiture hearing at the same time as the issuance of the warrant (as is the practice in other counties of the State that undersigned counsel is aware of) will eliminate any confusion created by this "bifurcated" action.

For all of the foregoing reasons it is respectfully requested that Criminal Rule 7.6 be amended as requested in the attached, proposed version of the Rule.

Respectfully submitted this 5th day of December _, 2012.

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Attorney at Law

ARIZONA RULE OF CRIMINAL PROCEDURE, RULE 7.6
(NEW LANGUAGE IN CAPITALS)

Rule 7.6 Transfer and disposition of bond

(a) no change

(b) no change

(c) Forfeiture Procedure.

(1) Notice and Hearing. If at any time it appears to the court that the released person violated a condition of an appearance bond, it shall issue a bench warrant for the person's arrest, AND SET A HEARING REQUIRING THE PARTIES AND ANY SURETY TO SHOW CAUSE WHY THE BOND SHOULD NOT BE FORFEITED. Within ten days after the issuance of the warrant AND THE SETTING OF THE HEARING the court shall notify the surety in writing or by electronic means that the warrant was issued AND THE HEARING SET. THE COURT SHALL SET THE HEARING NOT LESS THAN 60 DAYS NOR MORE THAN 120 DAYS FROM THE DATE OF THE ISSUANCE OF THE BENCH WARRANT.

(2) no change

d. Exoneration

(1) no change

(2) (a) If the surety, in compliance with the requirements of A.R.S. Section 13-3974, surrenders the defendant to the sheriff of the county in which the prosecution is pending, OR TO THE SHERIFF OF ANY COUNTY IN THIS STATE IN WHICH THE DEFENDANT IS LOCATED; AT THE HEARING ON THE BOND SCHEDULED PURSUANT TO SUBSECTION (c)(1) OF THIS RULE, THE COURT SHALL FORFEIT THE SUM OF ONE HUNDRED FIFTY DOLLARS AND EXONERATE THE REMAINDER OF THE BOND.

(b) IF THE SURETY, IN COMPLIANCE WITH THE REQUIREMENTS OF A.R. S. SECTION 13-3974, FILES AN AFFIDAVIT WITH THE COURT IN WHICH THE PROSECUTION IS PENDING STATING THAT THE DEFENDANT IS INCARCERATED IN ANOTHER JURISDICTION AND FURTHER PAYS THE COSTS OF THE EXRADITION AND TRANSPORTATION OF THE DEFENDANT FROM THE JURISDICTION OF INCARCERATION TO THE COUNTY IN WHICH THE PROSECUTION IS PENDING, THE COURT SHALL ASCERTAIN SUCH COSTS, AND, UPON DEPOSIT OF SUCH AMOUNT WITH THE CLERK, THE COURT SHALL EXONERATE THE BOND.

(3) no change

(c) no change