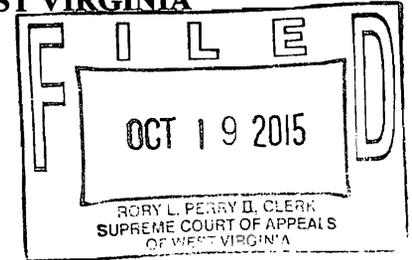


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0409



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

DAVID D. GRIFFY, SR.,

Defendant below.

SUMMARY RESPONSE

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STATEMENT OF THE CASE

The matter before this Court only tangentially concerns the Defendant Below, David D. Griffy, Sr. (hereinafter the “Defendant”). The real party in interest here is the surety below, Ervin Page, Jr. (hereinafter the “Petitioner”). As a result of the Defendant’s repeated failure to meet the conditions of his bond, the Petitioner stands to lose his real property that was encumbered by the bond.

The Defendant faced multiple charges in two different cases in the Boone County Circuit and Magistrate Courts, and for the purpose of bond, these cases were combined. Bond in the amount of \$120,000 justification of surety was posted on behalf of the Defendant by Edna Griffy and the Petitioner. (Appendix at pages 8-11, hereinafter “App. 8-11”). One of the

conditions placed on the bond was that the Defendant had to report to the Home Confinement Office within 24 hours of his release from jail upon the posting of the bond on his behalf. (App. 1). It is undisputed that the Defendant had not, at the time of the proceedings at issue herein, personally appeared at the Home Confinement Office or at any of the Court proceedings thereafter. (App. 2-3). Additionally, the Defendant apparently has a history of fleeing from law enforcement and violating bond conditions. While on bond in May/June 2014, the Defendant was charged with shoplifting and possession of a stolen vehicle; he was also charged with felony fleeing from an officer in a vehicle in May 2014; and he was charged and indicted for grand larceny, possession of a stolen vehicle, obstructing, and fleeing from an officer on foot in February 2014. (App. 2). In fact, the Circuit Court initially revoked the Defendant's bond in this case after the Court received notice of a violation; the Court later re-set the bond, which the Petitioner herein posted. (App. 2).

By Order entered September 22, 2014, the Circuit Court found that the Defendant had violated the current bond as well as previous bonds, with no apparent excuse, and pursuant to Rule 46(e) of the Rules of Criminal Procedure and West Virginia Code § 62-1C-9, the Court ordered a judgment of default against the bond posted by the Petitioner. (App. 6-7). The Court further scheduled a hearing for the Petitioner to show cause as to why the judgment should not be executed, and the Clerk was directed to send notice by certified mail to the Petitioner of the same. (App. 7). The Petitioner claims he never received notice of this October 16, 2014 hearing, despite three attempts to serve him. (App. 12). The Petitioner did, however, have counsel at the time of the hearing and, in fact, his counsel filed a "Motion to Set Aside Bond Forfeiture" within days of the Court's entry of the Order of execution of bond forfeiture. (App.

11-15). The notion that the Petitioner had no knowledge of the default and subsequent hearing is therefore suspect at best.

By Order entered December 4, 2014, the Circuit Court entered an Order of Execution of Bond Forfeiture, a result of the October 16, 2014 hearing that the Petitioner claims he did not have notice of. (App. 15-18). The Court explicitly acknowledged that it had made all the necessary findings pursuant to Rule 46(e) of the Rules of Criminal Procedure and West Virginia Code § 62-1C-9, and found that the Defendant had willfully failed to appear in Court and/or to the Home Confinement Office when ordered, and that the bond was lawfully declared forfeit. (App. 15-16). Significantly, the Court also found that the Petitioner left unclaimed the certified notice of hearing that was sent to him with regards to the October 2014 hearing. (App. 16). Since the Petitioner did not appear at the October hearing and since, at the time of that hearing the Defendant was still at large with regard to the State of West Virginia and, in any case, willfully absconded from its jurisdiction, the judgments of default could be executed by the State against the Petitioner's property. (App. 17).

The Petitioner, for his part, claims that "there is no evidence [that he] was ever served with certified mail notice" of the October hearing, despite the clear evidence that the Petitioner left such mail unclaimed. (App. 12). The Petitioner also claims that the reason that the Defendant failed to appear at his hearings is that he was incarcerated in South Carolina at the time. (App. 12). As a result, the Petitioner claims that the Court should use its discretion to exonerate him on his bond conditions.

The Petitioner presented these claims to the Circuit Court and the Court ruled on them by Order dated April 7, 2015. Ironically, the Petitioner was not present for the hearing because he himself was incarcerated at the time. (App. 29). After considering the Petitioner's

arguments with regard to due process and exoneration, the Court left intact its Order to execute on the forfeited bond property. The Court specifically found that the Defendant had willfully failed to appear when required and left the State of West Virginia; his incarceration in one of the Carolinas (the record is not clear) occurred well after the date of the last hearing in October 2014 and therefore he was not prevented from appearing by authorities. (App. 29-30). The Court further found that the Petitioner had been served at the address(es) he left with the Court himself, and that the notice procedure was properly observed. (App. 30). Additionally, the Court found that the Petitioner did nothing affirmative to ensure the Defendant's appearance at the Home Confinement Office or the hearings, and had no role in the subsequent arrest of the Defendant in another state. (App. 30-31). Finally, the Court found that the Petitioner had the opportunity to file a bail piece, withdrawing his bail posting, prior to the State's Motion to Revoke the bond, but failed to do so. (App. 31). As a result, the Court found no merit in the Petitioner's due process or discretionary claims, and left its Order of execution intact. The instant appeal followed.

SUMMARY OF THE ARGUMENT

The Petitioner essentially brings forth two assignments of error, although his Petition lists three such assignments, where two are really the same thing. First, the Petitioner claims the trial court abused its discretion in not exonerating the Petitioner's bond; the Petitioner claims that the Court did not properly consider the strictures of the Rules and Code sections, as well as the limited case law in this area. Second, the Petitioner claims that he was denied due process because he did not receive notice of the October hearing at which the execution of the forfeiture was entered. There is no merit to either of these claims.

With regard to the first, this Court reviews the lower Court decision on an abuse of discretion standard, and the Petitioner bears the burden of establishing that abuse of discretion. The statutes, Rules, and cases all provide great latitude to the Circuit Courts in determining whether to execute or exonerate forfeited bonds. The Petitioner is unable to muster enough support for his argument that the Court abused its discretion, when it is clear that the Defendant willfully fled from the jurisdiction and the Petitioner did nothing to stop him or secure his return to custody. The Petitioner essentially made a lousy bet that the Defendant would follow the Court's Orders, despite that fact that the record shows that Defendant has no qualms about defying Court Orders and bond conditions.

Secondly, there is nothing to base a claim of denial of due process on other than the supposed failure of the Petitioner to receive notice of the October 2014 hearing. The Petitioner left the address(es) with the Court and then left unclaimed one of the notices sent to him; a party cannot defeat service of process by refusing to claim his mail. Additionally, the Petitioner had counsel that should have known of the existence and dates of any hearings, and a prudent person who had so much money riding on the appearance of the Defendant should have taken more interest in the proceedings from the beginning. Finally, any defect in notice was cured by the February 2015 hearing that resulted in the April 2015 Order, which effectively made findings of fact pursuant to the same standards that this Court requires, and considered the Petitioner's Motion to set aside the forfeiture. The fact that the Petitioner did not prevail does not mean he did not have notice and his day in Court. The Petitioner knew, or should have known, what was going on that might affect his property. His failure to properly keep aware of events that might jeopardize his property – such as the flight of the Defendant from justice, which the Petitioner surely was aware of – cannot now be shoehorned into some kind of due

process or abuse of discretion claim. The Petitioner bears the burden in this case, and he cannot meet this burden.

ARGUMENT

I. Standard of review.

This Court has said that a “trial court’s decision on whether to remit, under Rule 46(e)(4) of the West Virginia Rules of Criminal Procedure, a previously forfeited bail bond will be reviewed by this Court under an abuse of discretion standard.” Syl. Pt. 1, *State v. Hedrick*, 204 W. Va. 547, 514 S.E.2d 397 (1999). Further, the “surety bears the burden of establishing that the trial court abused its discretion in refusing to remit, pursuant to Rule 46(e)(4) of the West Virginia Rules of Criminal Procedure, all or part of a previously forfeited bail bond.” Syl. Pt. 2, *Hedrick*.

With regard to determining whether to remit all or part of a previously forfeited bail bond, the trial courts must consider a wide range of non-exhaustive factors, weighing each as the circumstances demand. In Syllabus Point 3 of *Hedrick*, this Court stated:

When a trial court is asked to remit all or part of a previously forfeited bail bond, pursuant to Rule 46(e)(4) of the West Virginia Rules of Criminal Procedure, the court shall consider the following criteria to the extent that they are relevant to the particular case under consideration: (1) the willfulness of the defendant's breach of the bond's conditions; (2) the cost, inconvenience and prejudice suffered by the government as a result of the breach; (3) the amount of delay caused by the defendant's default and the stage of the proceedings at the time of his or her disappearance; (4) the appropriateness of the amount of the bond; (5) the participation of the bondsman in rearresting the defendant; (6) whether the surety is a professional or a friend or member of the defendant's family; (7) the public interest and necessity of effectuating the appearance of the defendant; and (8) any explanation or mitigating factors presented by the defendant. These factors are intended as a guide and do not represent an exhaustive list of all of the factors that may be relevant in a particular case. All of the factors need not be resolved in the State's favor for the trial court to deny remission in full or in part. Moreover, it is for the trial court to determine the weight to be given to each of these various factors.

With these standards in mind, we turn to the case at hand.

II. The Petitioner's assignments of error are without merit.

A. The circuit court did not abuse its discretion.

If there is one thing that *Hedrick* makes clear, it is that a trial court has wide latitude in determining whether or not to remit all or part of a forfeited bail bond. After all, the trial court is closest to the case and principals at hand, and is in the unique position to apply and weigh the factors espoused by *Hedrick*, and to employ any other factors that might be appropriate. This Court will only review those factors and their application for any abuse of discretion, but this Court has espoused that the discretion accorded the Circuit Courts in these matters is near plenary.

It should be noted that the Petitioner relies almost entirely on the imprisonment of the Defendant in North or South Carolina as an excuse for his failure to follow the conditions of his bond. This argument would be more convincing had the Defendant not fled the State of West Virginia of his own volition; the out of state authorities did not come here to apprehend him. Further, the aforementioned other violations of bond shows that he Defendant has no respect for the authority of the Courts over his person. Most importantly, the record shows and the Court found that the Defendant was not incarcerated in another state at the time of his required visit to Home Confinement or his October 2014 hearing. The Defendant suckered the Petitioner into posting his bond, and then acted in the same manner as he had before; he absconded from the jurisdiction of the Circuit Court and then the State of West Virginia entirely. Whether he is back in Boone County at this point is irrelevant; he secured his own absences from the hearings and other important events. Indeed, the State had secured its witnesses and was ready to proceed with his trial in September 2014, and the Defendant was nowhere to be found. (App.

29-31). He was not yet in custody anywhere, so he was not prevented from attending these events by anything other than his own selfish disrespect for the law.

In *State v. Arrington*, 147 W. Va. 753, 131 S.E.2d 382 (1963), this Court stated that “[a]s a general rule, upon default of the principal in a recognizance conditioned upon his appearance before a court, the surety will be excused from liability on such recognizance only where the default of the principal is caused by the public enemy, the oblige, the law or an act of God.” Syl. Pt. 3, *Arrington*. Additionally, the surety can be relieved of his obligations by an “act of the State” such as incarceration in another jurisdiction. Syl. Pt. 4, *Arrington*. Contrary to what the Petitioner states, *Arrington* is still good law; its tenets are simply expanded by the factors espoused in *Hedrick*. To address *Arrington* first, however, it can clearly be dismissed as a defense for the Petitioner, since the only possible excuse listed therein is the “act of the State” of one of the Carolinas in arresting him. It has been established in the record that this incarceration occurred well after the most significant dates had passed – the Home Confinement, the hearings, and the trial. *Arrington*, then, is no help to the Petitioner.

The Petitioner leans on *Hedrick* and the list therein, but primarily accuses the Circuit Court of failing to apply these factors to the present case. This is simply not true; the April 7, 2015 Order clearly shows that the Court considered such factors as the culpability of the Defendant, the role of the Petitioner in his capture, the cost to the State, and so forth. While the Court might not have directly cited *Hedrick*, it clearly followed its precepts in its analysis, and came to the conclusion that the forfeiture should stand. The Petitioner simply points to the Defendant’s custody in the Carolinas and rests there; the Petitioner does not, in fact, apply the factors in *Hedrick* with any particularity.

Turning to those factors, the balance clearly favors the State as opposed to the Petitioner or the Defendant. First, the Defendant's breach – his flight from prosecution in Boone County – was willful and conniving. Second, the State suffered quite a loss as a result of the Defendant's flight; the State had transported witnesses to the Court and was prepared to go to trial, and the Defendant was nowhere to be found – and was not in anyone's custody at the time. Third, the delay of the proceedings is considerable, since the Defendant had not, as of April 2015, answered in the Court for his crimes. Fourth, the amount of the bond is quite reasonable given the Defendant's history of fleeing from authority and violating conditions of bond. The fact that the Court would give this bail-jumper bond once again is actually staggering; clearly the Court acted in good faith and set the bond at an amount that it believed would serve as a deterrent to flight.

Fifth, the Petitioner had no part in the re-arrest of the Defendant; in fact, despite the Petitioner's relationship with the Defendant, there is nothing in the record to indicate that he helped locate the Defendant at all. Sixth, the relationship of the Petitioner to the Defendant is not clearly defined in the record, but some family association can be assumed because of the role of Edna Griffy in the bonding as well. Seventh, there is considerable public interest in getting the Defendant off the street; he has been charged in a short span of time with numerous crimes, ranging from possession of stolen automobiles to grand larceny, and clearly has committed those crimes in multiple jurisdictions. A reversal of the forfeiture would be a slap in the face of the community, which deserves justice. Eighth, there are no significant mitigating factors presented by the Petitioner on behalf of the Defendant. Other than the irrelevant incarceration in one of the Carolinas, the Petitioner offers no argument or other mitigating

factor. The Petitioner bets all his chips on this single assertion, and the record makes clear that the Defendant was not in custody at the time of most of the events discussed herein.

Although these factors are only a guide and perhaps others might apply, the considerable weight in favor of the State, along with the Petitioner's failure to put forth any other factors, suggests that there is no abuse of discretion here. The Court considered these factors, listed them in its findings of fact in its Orders, and found for the State. The Petitioner got a raw deal, to be sure, but that is the result of placing trust in – and not keeping an eye on – a habitual criminal and flight risk. Of course, the fact that the Petitioner himself was incarcerated at the time of the 2015 hearing suggests that the Petitioner and the Defendant may have deeper connections than the record shows. In any case, there is clearly no abuse of discretion by the Circuit Court in affirming the execution of this forfeiture.

B. There is no violation of the Petitioner's due process rights.

The Petitioner barely addresses this argument, and for good reason. There is no support in the record for the assertion that the alleged failure of the Petitioner to receive one of the three notices that were mailed to the addresses he himself gave the Court somehow violates the Constitutional protections. The Petitioner clearly contemplated avoiding service of process in this case; one of the notices was simply not claimed. A party cannot defeat service of process by refusing to pick up his mail.

Moreover, the Petitioner should have been, and may have indeed been, on top of this situation from the beginning. It is his property that is at the mercy of the Defendant, a known flight risk. The Petitioner knew the dates of the trial and initial hearings, as well as the Home Confinement issue; he simply claims he did not know about the forfeiture hearing in the fall of 2014. This is disingenuous at best; willful ignorance is probably more accurate. The Petitioner

is not a stranger to the criminal justice system, and clearly must have known that the Defendant failed to show up for his Home Confinement placement. Indeed, the Defendant's attorney even contacted the Petitioner to ensure compliance on the part of the Defendant. (App. 30-31). There is simply no chance that the Petitioner was caught off guard by the forfeiture, and his refusal to take notice that is directly in his face does not create a Constitutional issue.

CONCLUSION

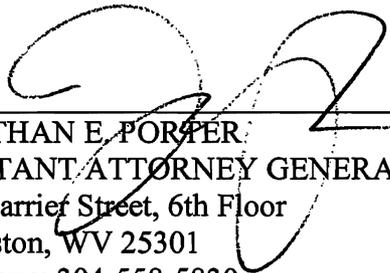
The Petitioner certainly has found himself at a considerable loss as a result of his perhaps, with the benefit of hindsight, poor decision to encumber his property to secure the release of the Defendant from jail pending his trial. Given the Defendant's history and proclivities, the Petitioner, if he knew the Defendant at all (which he clearly does), would have taken a more pro-active role in assuring his compliance with the Court's orders, thus protecting his investment. The State is clearly entitled to the forfeiture, as the Petitioner and Defendant effectively conspired to keep the Defendant out of jail just a little bit longer. This *de facto* conspiracy resulted in a bad deal for the Petitioner, but it did not violate any principles espoused by this Court. The judgment of the Circuit Court should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



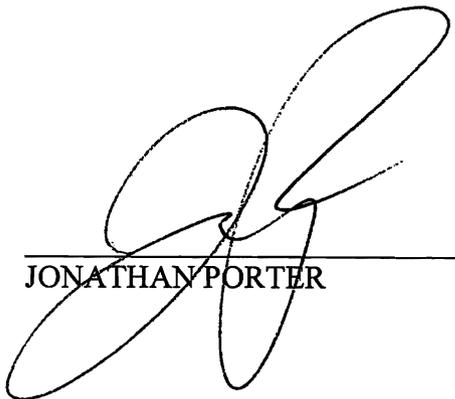
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CERTIFICATE OF SERVICE

I, JONATHAN PORTER, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *SUMMARY RESPONSE* upon the Petitioner's counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 19th day of October, 2015, addressed as follows:

Timothy J. LaFon
1219 Virginia St. East, Suite 100
Charleston, WV 25301



JONATHAN PORTER