
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 23-398

STATE OF WEST VIRGINIA,

Respondent,

v.

LARRY GLENN WOOTEN,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the May 30, 2023, Order
Circuit Court of Webster County
Case No. 22-F-47

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INTRODUCTION

Respondent State of West Virginia responds to the brief filed by A-Four-Dable Bonding, LLC. (Petitioner)¹ in its appeal from the Webster County Circuit Court's forfeiture of bond order entered May 30, 2023. The court did not abuse its discretion in choosing to remit back a significant portion of the bail posted by Petitioner in the criminal proceedings against Larry Wooten Jr., after the \$10,000.00 bail posted by Petitioner was forfeited as a result of Defendant Wooten's failure to appear for a court hearing in violation of his bond conditions. Because procedures and determinations involving bail forfeiture and remittance of all or a portion of the forfeited amount are within the lower court's discretion pursuant to Rule 46 of the West Virginia Rules of Criminal Procedure, Petitioner cannot demonstrate error in the court's decision to forfeit defendant Wooten's bail, and remitting back all but \$1,000.00 of the forfeited amount. Accordingly, this Court should affirm the Webster County Circuit Court's ruling.

ASSIGNMENT OF ERROR

Petitioner asserts one assignment of error: Whether the Circuit Court of Webster County, West Virginia improperly forfeited \$1,000.00 of the bond posted by the Petitioner when the bonding company was not given statutory notice of the defendant failing to appear and when the State of West Virginia was not responsible for taking the defendant into custody and suffered no expenses. Pet'r's Br. 3.

STATEMENT OF THE CASE

Petitioner is a bondsman doing business as "A-Four-Dable Bonding." App. 12. Petitioner posted a \$10,000.00 bond for defendant Larry Wooten, Jr., who was charged with Failure to

¹ The Scheduling Order entered by this Court on July 12, 2023, captions the case as *State of West Virginia v. Larry Glenn Wooten*, but A-Four-Dable Bonding, LLC. is identified in the order as the Petitioner, and the brief is filed on behalf of A-Four-Dable Bonding, LLC.

Register as a Sex Offender, 2nd or Subsequent Offense. App. 6, 12. The circuit court set a pretrial hearing for December 1, 2022, and a trial date of December 13, 2022. App. 8. On November 30, 2022,² defendant Wooten’s counsel filed a Motion to Appear Telephonically stating that defendant Wooten could not find transportation for the hearing scheduled the next day. App. 2, Resp’t’s App. 1. The court rejected this motion. App. 2. On December 1, 2022, defendant Wooten failed to appear for the scheduled pretrial hearing. App. 10. Representations made by defendant’s counsel on the record indicated defendant Wooten “could not find a ride.” App. 19, Resp’t’s App. 1. The court continued the pretrial hearing to the following day, December 2, 2022, at 10:30 a.m. to give the defendant an opportunity to appear. App. 10. Defendant again failed to appear, and the court entered its Bench Warrant Order for defendant Wooten on December 2, 2022. App. 10. The court also set a “show cause” hearing for December 16, 2022, to show why defendant’s bail should not be forfeited. App. 10. Contained in the Bench Warrant Order was a directive for the State to notify Petitioner of the December 16, 2023, show cause hearing. App. 10. The State called Petitioner the morning of Monday, December 5, 2022, and left a voicemail notice of the defendant’s failure to appear and the show cause hearing. App.19-20, Tr. 8. The State also served notice to Petitioner through the e-file system on that date, as well as mailing a hard copy to Petitioner. App. 15. Upon receiving notice the morning of December 5, 2022, Petitioner discovered defendant Wooten had already surrendered himself to the Harrison County Sheriff’s Department that same morning of December 5, 2022. App. 15, Tr. 9.

Petitioner appeared at the December 16, 2022, show cause hearing and moved to dismiss the show cause order because Petitioner was not given notice by the court of the defendant’s failure

² This motion was not filed within the forty-eight hour time frame under Rule 6.01 of the West Virginia Trial Court Rules for filing a motion prior to a hearing; therefore, the lower court was under no obligation to consider said motion.

to appear within the required twenty-four hour period pursuant to West Virginia Code § 51-10-5a(d). App. 23. Petitioner's motion to dismiss was denied and the court ordered all parties to submit briefs on the issue. App. 23. Petitioner and the State both submitted briefs. App. 15, 19. Petitioner's brief alleged the court failed to abide by West Virginia Code § 51-10-5a(d), arguing "[w]hen a bond is to be forfeited, the court is to give notification to the bail bondsman within twenty-four hours of the failure to appear." App. 15. Petitioner stated he received notice on December 5, 2022, that defendant Wooten had failure to appear for the December 1, 2022, hearing and argued the purpose of the twenty-four hour notice is to permit Petitioner a chance to locate the defendant and place him into custody. App. 15-17. Further, Petitioner argued defendant Wooten turned himself in to the Harrison County Sheriff's Department on December 5, 2022, and the State incurred no expense. App. 15-17.

The State asserted in its brief that the Bench Warrant Order was entered by e-file on December 2, 2022 at 2:21 p.m., which was a Friday. App. 19. The State prepared and placed a notice of the show cause hearing in the mail at 8:30 a.m. on Monday, December 5, 2022, and left a voicemail message on Petitioner's voicemail. App. 19-20, Tr. 8. Petitioner also acknowledged in its memorandum of law that it received the e-filed notice on December 5, 2022, as well. App. 15. The State argued that since the court only entered the Bench Warrant Order Friday afternoon, the next business day would be Monday, December 5, 2022, and the twenty-four hour period would extend to December 5, 2022, according to the computation of time provided in West Virginia Code § 2-2-1. App. 19-21. Therefore, Petitioner was provided notice within the twenty-four hour time frame as calculated pursuant to West Virginia Code § 2-2-1. App. 21. The State, however, offered no position regarding the forfeiture of bond, noting such decision is within the full discretion of the court. App. 21.

The court conducted a hearing on this issue on May 1, 2023. App. 25. Petitioner provided testimony that defendant Wooten checked in with Petitioner every Monday. Tr. 8.³ Petitioner testified he received notice of defendant Wooten's failure to appear for the December 1, 2022, pretrial hearing by a phone call from the State the morning of December 5, 2022. Tr. 8. When Petitioner took action to locate defendant Wooten, Petitioner learned he was already in custody after turning himself in. Tr. 9. After hearing testimony from Petitioner, the court noted the factors for consideration contained in *State v Hedrick*⁴ and determined defendant Wooten's failure to appear for the hearing was willful, a delay occurred causing the court to re-schedule the pretrial hearing, a delay occurred in the resolution of the case, the surety is a professional bonding company, and it is in the public's best interest to ensure a defendant is compliant with the terms of bond. Tr. 12-13. Although Petitioner alleged he could not find transportation to be present at the hearing, the court did not find this reason to be compelling and determined no mitigating factors were presented as to why the defendant failed to appear for the hearing in violation of his bond. Tr. 12-13. Based on the court's findings, it ordered Petitioner to pay the amount of \$1,000.00 to the clerk of the court for defendant Wooten's failure to appear. Tr. 13. The court entered its hearing order on May 30, 2023. App. 25. Petitioner appeals from this order.

SUMMARY OF THE ARGUMENT

Petitioner's claim demanding reversal of the circuit court's order forfeiting \$1,000.00 of the bail funds posted by Petitioner after defendant Wooten's failure to appear for a hearing is wholly misplaced. Petitioner's support for such claim is the alleged non-compliance by the court

³ Petitioner does not include Appendix pagination for the May 1, 2023, hearing transcript. Therefore, Respondent refers to the transcript by its internal page numbers.

⁴ *State v. Hedrick*, 204 W. Va. 547, 551, 514 S.E.2d 397, 401 (1999).

of a twenty-four hour notice to Petitioner after defendant Wooten's failure to appear. This argument misses the mark, fails to cite the relevant authority governing the issue, and fails to recognize the court's discretionary powers in such determinations.

By posting defendant Wooten's bail, Petitioner undertook the duty of ensuring defendant Wooten's appearance for every scheduled hearing. It is not relevant whether defendant Wooten checks in with Petitioner, it is only relevant whether defendant Wooten actually appears for his hearings. When defendant Wooten failed to appear for the December 1, 2022 hearing, he violated his bond conditions and the court properly forfeited his bail. The decision of whether to set aside a forfeited bail, or remit a portion of the funds back to Petitioner, is within the sole discretion and authority of the lower court. Therefore, Petitioner has failed to demonstrate any error or abuse of discretion in the court's ruling, and this Court should affirm the Webster County Circuit Court's order entered May 30, 2023.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is not necessary because the facts and legal arguments are adequately presented in the briefs and the record. Thus, this case is appropriate for resolution by memorandum decision.

ARGUMENT

A. Standard of Review

"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).

B. The trial court did not abuse its discretion by requiring a portion of the bond be forfeited pursuant to Rule 46 of the West Virginia Rules of Criminal Procedure.

Petitioner argues the court's decision to forfeit \$1,000.00 of defendant Wooten's bail when he failed to appear for a hearing should be reversed. Pet'r's Br. 7. Petitioner's understanding of the procedures for the forfeiture of bail is misplaced, and a review of the appropriate mechanism governing this issue reveals the court did not abuse its discretion in its ruling.

This Court has advised that "the purpose of bond is to assure a defendant's appearance in court and, when a surety fails in its duty to insure that the defendant appears for trial, the bond is necessarily forfeited." *State v. Bonding*, No. 16-0396, 2017 WL 2210143, at *4 (W. Va. Supreme Court, May 19, 2017) (memorandum decision) (citation omitted). Therefore, when a bondsman posts bond for a defendant, the bondsman is guaranteeing the court that it will be responsible for the defendant's appearance at all hearings. "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (internal citation omitted). "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* at 5. Therefore, it is clear the primary purpose of a bondsman when posting a bail is to assure the appearance of a defendant in court.

In determining the primary authority for addressing the forfeiture of bail based on a defendant's failure to appear for a hearing, "[t]he West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect." Syl. Pt. 5, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999). Specifically, Rule 46 of the Rules of Criminal Procedure is the governing authority for

the forfeiture of bail in the event a defendant breaches the conditions of bond, and provides in relevant part:

(e) Forfeiture.

(1) *Declaration.* If there is a breach of condition of a bond, the circuit court shall declare a forfeiture of the bail.

(2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

...

(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

Subsection (e)(1) unequivocally states that the court *shall* forfeit bail if there is a breach of the conditions of bond. Pursuant to this subsection, the court is obligated to forfeit a defendant's bail when the conditions of bond are breached. The remaining determination as to whether the forfeiture of bail funds should be set aside, or whether all or a portion of the funds should be remitted back, is purely a discretionary decision for the court. "The legislators' choice of the term 'may' leaves no doubt that availment of particular identified procedures delineated in statute being addressed by court was intended to operate in a discretionary, rather than an obligatory, manner." *Hedrick*, 204 W. Va. at 552, 514 S.E.2d at 402 (quoting *Powers v. Union Drilling, Inc.*, 194 W.Va. 782, 786, 461 S.E.2d 844, 848 (1995)). Because subsections (e)(2) and (e)(4) of Rule 46 utilize the term "may" in connection with a circuit court's authority to remit previously forfeited bail, a determination of remission is within the full discretion of the court.

In relation to the discretionary determination of whether to set aside all or a portion of forfeited funds pursuant to Rule 46(e)(4), this Court in *Hedrick* provides non-exhaustive guideline factors for consideration, which may be supplemented by other relevant factors specific to each particular case. These include:

(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.

Syl. Pt. 3, *Hedrick*, 204 W. Va. 547, 514 S.E.2d 397. *Hedrick* instructs that the lower court also has discretion to decide the relevance and weight given to various factors, and the court is not required to consider all factors in favor of the State in order to deny remission of bail funds in full or in part. *Id.* A review of these factors proves no error was committed by the lower court.

In applying the *Hedrick* factors to the current matter, the court recognized *Hedrick* as the relevant authority for a determination of bail remission after forfeiture, and found five relevant factors that warranted a partial forfeiture. First, the court determined Petitioner's failure to appear was willful, explaining that defendant Wooten failed to appear the day before the forfeiture was issued and the court gave him an additional twenty-four hours to appear. Tr. 12. He failed to appear again the next day, and the bail forfeiture was issued. Tr. 12. Second, the court determined a delay occurred because the court could not conduct the pretrial hearing on the scheduled day, the hearing had to be reset for a later date, and this also caused a delay in resolving the case. Tr. 12-13. Third, the court noted Petitioner is a professional bonding company. Tr. 13. Inherent in this notation by the court is the presumption that a professional bonding company should know its duties and responsibilities when posting bail. Fourth, the court determined that it is always in the public's interest that defendants appear for their court hearings. Tr. 13. Finally, the court determined that although defendant Wooten's explanation for his failure to appear was that he could not secure transportation, the court gave no weight to this expressed reason and found there

were no mitigating factors supporting defendant Wooten's failure to appear. Tr. 13. After reciting five relevant factors from *Hedrick* that apply to this case, and assessing the weight and importance of each factor, the court determined a partial forfeiture of defendant Wooten's bail funds was warranted as a consequence for his violation of bond conditions. Tr. 12-13.

This Court was presented with a similar fact pattern in *State v Ratliff*, No. 11-1468, 2012 WL 4448751 (W. Va. Supreme Court, Sept. 24, 2012) (memorandum decision). The defendant in *Ratliff* failed to appear for a hearing and a show cause hearing notice was sent to petitioner, the bondsman. *Id.* at *1. State Police located and arrested the defendant pursuant to the capias issued by the court. *Id.* Petitioner argued it should be entitled to the return of all forfeited bail funds because West Virginia Code § 61-1C-12 is ambiguous and does not specify whether the bondsman has to physically take the defendant into custody, or if the recovery of defendant is sufficient no matter who brings the defendant into custody. *Id.* at *2.

The *Ratliff* Court noted 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.” *Ratliff*, 2012 WL 4448751, at *1 (quoting Syl. Pt. 1, *Hedrick*, 204 W.Va. 547, 514 S.E.2d 397). *Ratliff* also cited Syllabus Point 2 of *Hedrick* stating “[t]he 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.” *Id.* The *Ratliff* Court held that upon examination of the *Hedrick* factors, “this Court finds no error in the circuit court’s denial of petitioner’s request to remit bond. Petitioner is a professional bond company and admits that it failed to rearrest the defendant.” *Id.* at *4. “Moreover, it is for the trial court to determine the

weight to be given to each of these various factors” enunciated in *Hedrick*. *Id.* at *3. (quoting Syl. Pt. 3, *Hedrick*, 204 W.Va. 547, 514 S.E.2d 397).

Here, as in *Ratliff*, the court properly considered relevant *Hedrick* factors and provided both the importance the court gave each factor on the record, as well as the ramifications each factor caused to the current case. The weight given each of these factors for potential remission is solely “for the trial court to determine,” and the court in the present matter gave weight to five relevant factors: willfulness of non-appearance by defendant, delay of the proceedings and resolution of the case, the court’s recognition that Petitioner is a professional bonding company, public interest in guaranteeing a defendant appears for court, and no meritorious mitigating circumstances. Tr. 12-13. Since the court was not required to resolve all *Hedrick* factors in favor of the State to justify a denial of remission in whole or in part, there is no abuse of discretion in the court’s ruling after its examination and assessment of what the court deemed as relevant *Hedrick* factors. Therefore, Petitioner has failed to meet its burden of establishing the trial court abused its discretion in refusing remission of the entire amount of defendant Wooten’s forfeited bail funds.

Similarly, this Court in *Bonding* affirmed the factors in *Hedrick* by holding the circuit court did not abuse its discretion in the manner in which it considered the factors in *Hedrick*, and in refusing to remit the forfeited bond.⁵ 2017 WL 2210143, at *4. In *Bonding*, the circuit court determined defendant’s bond violation was substantial by intentionally and willfully remaining at large for more than a year to avoid prosecution; the State suffered costs, inconvenience and prejudice from a fourteen month delay in the proceedings; and the court experienced disruption

⁵ The forfeited amount of bail in *State v. Bonding* was \$50,000. *Bonding*, WL 2210143, at *1.

and delay of the circuit court's docket. *Id.* This Court held that petitioner's unsuccessful efforts to apprehend defendant did not satisfy its obligation such that petitioner "should be entitled to full remission of the forfeited bond. To find otherwise would be to diminish the duty of a bonding company or other surety to act diligently to assure that its bailees conform to the conditions of their bonds in order to avoid forfeiture." *Id.* (quoting *Hedrick*, 204 W. Va. at 558, 514 S.E.2d at 408).

The instant matter presents much the same discretionary determination as *Bonding*. Petitioner failed to ensure defendant Wooten's appearance, as well as failed to bring defendant Wooten into custody because defendant Wooten voluntarily surrendered himself to the nearest Sheriff's department first thing Monday morning. App. 15, 20, Tr. 9. Although defendant Wooten was in custody only a few days after his failure to appear, and his self-surrender did not cause any cost the State, this turn of events was not due to any participation from Petitioner and does not satisfy or excuse Petitioner's failure to perform its obligation and duties as a bondsman. Therefore, the court believed this failure to carry out Petitioner's primary duties warranted a partial forfeiture of bail because, as in *Bonding*, to find otherwise would be to "diminish the duty of a bonding company or other surety to act diligently to assure that its bailees conform to the conditions of their bonds in order to avoid forfeiture." *Bonding*, 2017 WL 2210143, at *4. The court properly utilized its discretion in determining Petitioner's failure to perform its primary duties required some form of monetary consequence. Moreover, the court used its discretion in Petitioner's favor by declining to forfeit the entire amount of bail funds, opting instead to forfeit only a small ten percent portion to encourage diligence in performing these duties in the future.

Petitioner posted defendant Wooten's \$10,000.00 bail after Wooten was charged with the offense of Failure to Register as a Sexual Offender, 2nd or Subsequent Offense. App. 6, 12.

Defendant Wooten failed to appear for the scheduled pretrial hearing on December 1, 2022, which is a violation of his bond conditions, App. 10, and also a failure by Petitioner to perform its primary purpose as a bondsman-- guaranteeing the appearance of the defendant. The court noted defendant Wooten did not appear on December 1, 2022, and the court continued the pretrial hearing until 10:30 a.m. the next day to give defendant Wooten the opportunity to appear. App. 26, Tr. 12. When defendant Wooten failed to appear the next day as well, the court issued a bench warrant and a notice to show cause why bail should not be forfeited App. 10.

Pursuant to Rule 46(e)(1) wherein the court *shall* declare a forfeiture of the bail upon breach of a condition of bond, the court acted in full accordance with this Rule when ordering Petitioner's bond forfeited. The court directed the State and Petitioner to submit briefs on the issue, and conducted an evidentiary hearing on May 1, 2023, to hear testimony and arguments pertinent to its discretionary determination of setting aside the forfeiture, or whether remittance of bail in whole or in part was warranted. App. 25-26, Tr. 12-13. The court properly examined relevant *Hedrick* factors and determined Petitioner's failure to perform its obligation justified a monetary consequence of partial forfeiture of bail funds in the amount of \$1,000; thus, remitting back to Petitioner \$9,000 of the \$10,000 forfeited bail amount. App. 25-26, Tr. 12-13.

Petitioner may seek to rebut or nullify its obligations by pointing out defendant, through his counsel, notified the court of defendant's inability to appear the day before the hearing. Resp't's App. 1. Unfortunately, this argument fails for two reasons: one, such notice to the court does not relieve Petitioner of his duty to ensure the defendant's appearance; and two, Rule 6.01 of the West Virginia Trial Court Rules provides: "(c) *Time for Filing*. Except by permission or order of the court, no pleading shall be filed less than forty-eight (48) hours prior to oral presentation or argument of a proceeding." W.Va. Trial Ct. R. 6.01. Therefore, the court was under no obligation

to consider the motion for defendant to appear telephonically at the December 1, 2022, hearing, and the court rejected said motion according to the record. App. 2. Thus, Petitioner's obligation to ensure defendant's appearance remained in effect. Consistent with the guidelines in *Hedrick* stating the court need not resolve all factors in favor of the State to warrant a denial of remission of bail funds in whole or in part, the court made relevant findings determining that it was appropriate to forfeit \$1,000.00 of the \$10,000.00 bail, which is wholly within the court's discretion. Tr. 13. Therefore, Petitioner cannot demonstrate the court abused its discretion in any fashion regarding this discretionary decision.

C. Petitioner incorrectly claims West Virginia Code § 51-10-5a(d) as the controlling authority for review of a forfeiture proceeding but this statute only governs how a bondsman must conduct his business, not the procedure for a bail forfeiture determination.

Petitioner's asserts in its brief that West Virginia Code § 51-10-5a "provides the procedures to be utilized by bonding companies when they receive their fee for bonding a Defendant from jail." Pet'r's Br. 7. While Respondent agrees West Virginia Code § 51-1-5a governs the mandatory requirements for a bondsman in conducting his surety business, Petitioner fails to identify the proper authority for the issue at hand which is the forfeiture and remittance of bail funds, governed by Rule 46 of the West Virginia Rules of Criminal Procedure. This miscue becomes more evident when Petitioner does, however, accurately cite *Hedrick* as the controlling case regarding the factors a court should consider in its discretionary decision regarding remission of bail funds after forfeiture. In fact, Petitioner identifies as much by stating the *Hedrick* Court provides the factors as a "guide for the Court to consider on whether to forfeit a Defendant's bond." Pet'r's Br. 9.

Thus, Petitioner is requesting the full remission of the entire forfeited bail amount but fails to present the correct analysis for this request. As shown above, Rule 46(e)(1) dictates that once a defendant breaches bond conditions by failing to appear, the court *shall* forfeit bond. All

subsequent considerations relate to mitigating the amount of bail funds that will be forfeited or remitted; in other words as related to this case, damage control after defendant Wooten failed to appear for his hearing. Because Petitioner incorrectly alleges that West Virginia Code § 51-10-5a(d) is the controlling authority for a forfeiture of bond claim when the conditions of bond are breached, Petitioner's assertion and argument wholly miss the mark of the relevant authority and procedures pertaining to this matter.

The main purpose of West Virginia Code § 51-10-5a is to set out the mandatory parameters by which a bondsman must comply to conduct business. In fact, Article 10 is titled *Professional Bondsmen in Criminal Cases*, and section 5a referred to by Petitioner is titled *Bonding Fee And Collateral Security Required By Bail Bondsmen*. Thus, this section is not for the purpose of outlining any mandatory conduct required by the court in relation to forfeiture of bond actions; rather, it provides the mandatory requirements with which a *bondsman* must conduct business. West Virginia Code § 51-10-5a specifically uses the word "shall" in several subsections governing a bondsman's conduct: "(a) . . . bonding fee . . . *shall* be at least ten percent of the amount of bond . . . [and] *shall* not . . . exceed the amount of the bond." Further, subsection (c) provides that ". . . a receipt *shall* be furnished . . . all receipts issued *shall* be kept by the bail bondsmen for minimum of five years," and all receipts "*shall*" include the criteria enunciated in subsection (c).

Subsection (d) provides "[w]hen a bond is to be forfeited, the court is to give notification to the bail bondsman within twenty-four hours of the failure to appear." W. Va. Code § 51-10-5a(d). This subsection (d) does not include the mandatory language "shall" and does not provide a remedy for a court's noncompliance, nor does it provide a mechanism regarding how such notice is to be given. Thus, the Legislators purposely declined to make such notice mandatory, and provides no remedy for a court's "non-compliance." Rather, this statute must be read in concert

with other related statutes for a full understanding of these procedures. West Virginia Code § 62-1C-12 designates the purpose for notice to a bondsman.

Notwithstanding any provision of this code to the contrary, when a bail bondsman, as defined in article ten, chapter fifty-one of this code, has a surety bond forfeited because of the failure of a defendant to appear before a court or magistrate, that bail bondsman shall be reimbursed the full amount of the bond forfeiture, be it cash or surety, *if the bail bondsman returns the defendant to the custody of the court or magistrate*, within two years of the forfeiture of the bond.

W. Va. Code § 62-1C-12(b) (emphasis added). Pursuant to Rule 46(e)(1), once a defendant fails to appear in violation of bond conditions, the bail *shall* be forfeited by the court. Thus, the purpose of West Virginia Code § 62-1C-12 and § 51-10-5a(d) is to give a bondsman the opportunity to mitigate the forfeited bail losses by returning the defendant to the custody of the court after failing in the bondsman's primary duty of ensuring the defendant appears in court.

In this case, defendant Wooten failed to appear at the pretrial hearing, and Petitioner failed it its duty to ensure defendant Wooten's appearance. Petitioner testified that defendant Wooten checked in on a regular basis, Tr. 8, however, bond is granted with the assurance of a defendant's *appearance*, not that a defendant checks in with his bondsman. In fact, defendant Wooten filed a Motion to Appear Telephonically the day before the hearing because he knew he would not be able to appear. Resp't's App. 1. While it is a defendant's responsibility to appear for court, it is also Petitioner's duty and obligation as the bondsman to guarantee defendant's appearance, especially in this circumstances where defendant Wooten knew a day before that he was not going to be present at the hearing.

Defendant Wooten surrendered himself to the Harrison County Sheriff's Department the following Monday, December 5, 2022. App. 15, 20, Tr. 9. Thus, it is undisputed that not only did Petitioner fail to uphold its primary duty and responsibility as a bondsman to ensure Petitioner's

appearance, Petitioner also did not cause defendant Wooten to be brought into custody. App. 15, 20, Tr. 9. The court has full discretion to give whatever weight and deference it deems appropriate, both positive and negative, to any relevant factors for its determination of bail forfeiture and remission pursuant to *Hedrick*. Petitioner wholly failed in his primary duty and obligation to the court, and the court weighed the aforementioned relevant factors and failures of responsibility negatively against Petitioner; ultimately determining a partial forfeiture was an appropriate consequence for these failures.

Petitioner also argues the court failed to comply with the twenty-four hour time frame provided in West Virginia Code § 61-10-5a(d) and fashions its own remedy for non-compliance with this provision—dismissal of the forfeiture proceeding. This remedy has no basis in the law. As presented above, the purpose of this provision is for *mitigation* by the bondsman of losses from a forfeited bail due to the defendant’s failure to appear, and the remedy provided in Rule 46(e)(2) and (4), *at the court’s sole discretion*, is for a forfeiture to be set aside if it appears that justice does not require the enforcement of the forfeiture, or remit bail in whole or in part under the conditions applying to the setting aside of a forfeiture. W.Va. R. Crim. P. 46.

Notwithstanding this purpose, Petitioner’s argument still fails because notice was given to Petitioner of defendant Wooten’s failure to appear within the recommended twenty-four hours consistent with the computation of time stated in West Virginia Code § 2-2-1(d) and (e). The computation of time pursuant to West Virginia Code § 2-2-1(d) provides that when computing a period of time prescribed by statute the “the day of the act, event, default or omission from which the applicable period begins to run is not included.” Further, the last day of the designated time period is included, “unless it is a Saturday, a Sunday, a legal holiday or a designated day off in which event the prescribed period of time runs until the end of the next day that is not a Saturday,

Sunday, legal holiday or designated day off.” Additionally, pursuant to West Virginia Code § 2-2-1(e) if the particular date designated falls on a Saturday, Sunday, legal holiday or designated day off, “the date on which the act, event, default or omission is required or allowed to occur is the next day that is not a Saturday, Sunday, legal holiday or designated day off.”

In the instant matter, the court’s intent to forfeit bond was memorialized by the entry of the December 2, 2022, order at 2:21 p.m. on Friday. App. 10. After review of the statute alleged by Petitioner to support its argument that the State failed to give timely notice, as well as the memorandum of law from each counsel on the issue, the circuit court determined the notice provided by the State on Monday, December 5, 2022, was “sufficient notice.” Tr. 6.

According to the computation of time set out in West Virginia § 2-2-1(d), the court had until at least Monday, December 5, 2022, at 2:21 p.m. to notify Petitioner of defendant Wooten’s failure to appear and the court’s intent to forfeit bail because that was “the next day that is not a Saturday, Sunday, legal holiday or designated day off.” W. Va. Code § 2-2-1(d) and (e). Alternatively, even if the date of the “event” of non-appearance could be deemed to be the hearing on December 1, 2022, according to subsection (d) the “the day of the act, event, default or omission from which the applicable period begins to run is *not included*.” Thus, the twenty-four hour period did not begin until Friday, December 2, 2022, which according to the proper computation of time in West Virginia Code § 2-2-1(d) also supports the twenty-four hour timeframe being properly met on Monday, December 5, 2022.⁶ The court directed the State to notify Petitioner of defendant

⁶ Also alternatively, it is plausible the date of entry of the Bench Warrant Order on December 2, 2022, is considered the “day of the act”, and this day is not included in the time calculation pursuant to West Virginia Code § 2-2-1(d); thus Monday would be the start of the twenty-four hour period and the court would have had until Tuesday, December 6, 2022, to provide notice. Nonetheless, Petitioner’s argument still fails.

Wooten's failure to appear and provide Petitioner with the date of the show cause hearing, which the State accomplished the morning of Monday, December 5, 2022. App. 19-20, Tr. 8. Petitioner acknowledged receipt of said notice in the morning of December 5, 2022, which as shown here was well within the twenty-four hour timeframe. Thus, by all possible applications of the proper computation of time, and aside from the fact that this determination is wholly irrelevant to the forfeiture of bond determination as demonstrated above, Petitioner, nonetheless, had proper and timely notice.

In summary, defendant Wooten failed to appear for a hearing in violation of his bond conditions. Petitioner was responsible for preventing this from happening by virtue of posting defendant Wooten's bail, and Petitioner failed in his obligation as a bondman to ensure defendant Wooten's appearance at the December 1, 2022, hearing. The court properly forfeited the posted \$10,000.00 bail pursuant to Rule 46(e) of the Rules of Criminal Procedure. Notice of defendant Wooten's failure to appear and the court's intent to forfeit bond was provided to Petitioner within twenty-four hours of the court's entry of the Bench Warrant Order at 2:21 p.m. on December 2, 2022. Petitioner received proper notice the morning of December 5, 2022, well within a twenty-four hour period according to the computation of time in West Virginia Code § 2-2-1. Defendant Wooten had already turned himself in to the Harrison County Sheriff's Department the morning of December 5, 2022; therefore, Petitioner did not bring the defendant into custody.

The decision to forfeit the entire bail amount, set aside the forfeiture, or remit a portion of the bail funds back to Petitioner, is wholly within the discretion of the court. The court made findings on the record after considering the factors enunciated in *Hedrick* in support of its decision to remit \$9,000.00 back to Petitioner, and forfeit \$1,000.00 of the \$10,000.00 bond; all of which

is well within the court's province and authority to decide. Therefore, Petitioner has failed to demonstrate any error or abuse of discretion by the court, and the court's ruling should be affirmed.

CONCLUSION

Respondent respectfully requests this Court affirm the order entered May 30, 2023, by the Webster County Circuit Court forfeiting \$1,000.00 of bail funds posted by Petitioner due to defendant Wooten's failure to appear for the December 1, 2022, court hearing.

Respectfully Submitted,
STATE OF WEST VIRGINIA
Respondent,

By counsel,

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/s/ Gail V. Lipscomb

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-398

STATE OF WEST VIRGINIA,
Respondent,

v.

LARRY GLENN WOOTEN,
Petitioner.

CERTIFICATE OF SERVICE

I, Gail V. Lipscomb, do hereby certify that on the 13th day of November 2023, I served a true and accurate copy of the foregoing ***“Respondent’s Brief”*** on the below-listed individuals *via* the West Virginia Supreme Court of Appeals E-filing System, File & ServeXpress, pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure; and further, a courtesy copy was mailed through the United States mail, postage prepaid, to the following at the addresses below:

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/s/ Gail V. Lipscomb

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