IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-190295 TRIAL NO. B-1501673(B)
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
JAMES THOMAS,	:	
Defendant,	:	
ALL AMERICAN BAIL BONDS,	:	
and	:	
ALLEGHENY MUTUAL CASUALTY CO.,	:	
Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

On March 30, 2015, James Thomas, a resident of Florida, was arrested while visiting Ohio. Appellant All American Bail Bonds ("All American") posted a surety bond in the amount of $60,000 on April 3. On April 8, Thomas was indicted on two counts of receiving stolen property, and one count of possession of criminal tools. On April 9, Thomas was personally served with the notice of his arraignment. On April 17, Thomas failed to appear for arraignment, as he had left Ohio and returned to Florida. A warrant was issued and the bond was ordered forfeited. On June 8, All American and its insurer, appellant Allegheny Mutual Casualty Co. ("Allegheny Mutual"), filed a motion to set aside the bond forfeiture because Thomas had been arrested in Florida on May 6. It appears from the record he was arrested on a probation violation. On October 15, the magistrate ordered the bond forfeited. All American and Allegheny Mutual filed objections to the order, which remained

pending for some time. Thomas was eventually sentenced to 17 years in prison in Florida. The state never sought to extradite Thomas from Florida, and the trial court overruled the objections.

In one assignment of error, All American and Allegheny Mutual claim that the trial court erred when it ordered the bond forfeited. Bail bonds are contracts between the surety and the state. *See State v. Scherer*, 108 Ohio App.3d 586, 591, 671 N.E.2d 545 (2d Dist.1995). The surety agrees to ensure the appearance of the defendant in court and the state agrees to release the defendant into the surety's custody. *Id.* If the defendant fails to appear, there is a breach of the condition of bond and the court may declare a forfeiture of the bond unless the surety can be exonerated as provided by law. *See State v. Hughes*, 27 Ohio St.3d 19, 20, 501 N.E.2d 622 (1986); *see also* R.C. 2937.35.

R.C. 2937.36 governs forfeiture proceedings, and provides that a surety may be exonerated by either producing the defendant or by showing good cause for why that cannot be done. *See Hughes* at 21, citing R.C. 2937.36(C); *see also State v. Berry*, 12th Dist. Clermont No. CA2013-11-084, 2014-Ohio-2715, ¶ 10. A surety may also be exonerated where performance of the conditions in the bond is rendered impossible by an act of law. *See Hughes* at 21-22. However, the impossibility of performance must have been unforeseeable at the time the surety entered into the contract. *See Scherer* at 592.

This court has previously addressed a similar factual situation and found that the trial court did not err when it revoked the bond. *State v. Lott*, 2014-Ohio-3404, 17 N.E.3d 1167 (1st Dist.). In that case, an Indiana resident was arrested in Ohio and subsequently posted a bond. He then voluntarily left Ohio, and he returned to Indiana where he was arrested for a probation violation and was incarcerated. The trial court revoked the bond and ordered that it be forfeited. On appeal, this court found no error.

> In leaving Ohio to report to his probation officer in Indiana without seeking the trial court's permission, Jymarcus violated one of the conditions of his bond. By entering Indiana, he increased the risk of his nonappearance to answer for his criminal charges in Ohio, the very purpose for which he was released on bail in the first place. Thus, it was foreseeable that Jymarcus's pending criminal charges in Ohio would have violated the terms of his probation in Indiana, and that he would have been arrested upon reporting to his probation officer in Indiana. As a result, we cannot say the trial court erred in forfeiting the bonds. *See State v. Sexton*, 132 Ohio App.3d 791, 794, 726 N.E.2d 554 (4th Dist.1999) (holding good cause did not exist to excuse a surety's failure to produce the defendant, who had violated a condition of his bond by voluntarily leaving Ohio without permission, and was then subsequently incarcerated in South Carolina).

Id. at ¶ 13.

In this case, the justification for forfeiture is even more apparent than it was in *Lott*. Thomas posted a bond and left the state without permission. He then arrived in Florida where he was subsequently arrested for violating his probation. The reason that this case tends even more favorably toward forfeiture is that in *Lott*, the defendant was arrested *immediately* upon arriving in the state, and had been arrested *prior* to the date of his Ohio case. *Id.* at ¶ 3. In this case, however, Thomas's arraignment hearing was set for April 17, but Thomas was not arrested in Florida until May 6. His arrest in Florida was not the reason for his failure to appear in Ohio.

All American and Allegheny Mutual argue that Thomas was not ordered to remain in Ohio. But the recognizance he signed is the standard form that says that he was "to answer unto the STATE OF OHIO upon the charge appearing above, opposite the name of said Defendant, and abide the judgment of the Court, and not

depart without leave * * *." They acknowledge that the language is identical to the language in *Lott*, but say that somehow the court *knew* that Thomas would leave because he put his Florida address on the bond form and it was the address the court used for correspondence. But there is no basis for reaching that conclusion, and nothing in the recognizance document sets that forth.

They further argue that "there was no indication in the record that the sureties in this case were aware that Thomas was on probation in his home state, or that he was likely to be arrested in Florida on a probation violation." The flight of a defendant is a business risk that a surety assumes. *State v. Sexton*, 132 Ohio App.3d 791, 762 N.E.2d 554 (4th Dist.1999).

In 1872, the United States Supreme Court held that the common-law defense to forfeiture of impossibility due to an act of law did not exonerate sureties for an accused who was incarcerated in another state after he voluntarily left the jurisdiction. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 21 L.Ed. 287 (1872). There is no reason to deviate from that rule in this case. We overrule the sole assignment of error of All American and Allegheny Mutual and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., MYERS and **WINKLER, JJ.**

To the clerk:

Enter upon the journal of the court on March 25, 2020

per order of the court _____.

Presiding Judge