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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0905

State of Minnesota,
Respondent,

vs.

Daniel Isaac Blanco,
Defendant,

Minnesota Surety and Trust Company,
Appellant.

Filed May 26, 2009
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-K3-06-002340

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Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Crippen, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant argues that the district court abused its discretion in denying its motion to reinstate and discharge a $75,000 bail bond. We affirm.

FACTS

In June 2006 respondent State of Minnesota charged defendant Daniel Isaac Blanco, a national from El Salvador, with first- and second-degree assault in Ramsey County. After Blanco made his first court appearance, All-State Bonding (ASB), agent of appellant Minnesota Surety and Trust Company (Minnesota Surety), issued a $75,000 bail bond to secure his release. In September 2006 the district court forfeited the bond when Blanco failed to appear for his pretrial hearing. ASB asked the court to extend the time within which to remit the penalty payment. The court granted the request, extending the time limit by an additional thirty days. ASB requested a further sixty-day time extension after the thirty-day period expired. The court denied the request, and ASB brought a formal motion for a stay, which the court construed as a motion for reconsideration, and the court denied the request. ASB appealed to this court and, by order opinion, this court dismissed the appeal on the ground that it was taken from a non-appealable order. *State v. Blanco*, No. A07-319 (Minn. App. Mar. 12, 2008).

During the pendency of ASB's appeal, ASB became insolvent and Minnesota Surety became responsible for ASB's open forfeitures and continued to investigate Blanco's whereabouts. In late November 2007, on the basis of information discovered by its investigators, Minnesota Surety informed the Ramsey County Attorney's Office that

Blanco was residing in El Salvador with his wife and sister, provided Blanco's address, and requested that the Ramsey County Attorney's Office institute extradition proceedings to return Blanco from El Salvador to Minnesota. After the Ramsey County Attorney's Office declined to institute extradition proceedings for Blanco, Minnesota Surety moved the district court for reinstatement and discharge of the $75,000 bail bond on the ground that it had located Blanco. The district court denied Minnesota Surety's motion. This appeal follows.

D E C I S I O N

Minnesota Surety argues that the district court abused its discretion in denying Minnesota Surety's motion for reinstatement and discharge of the $75,000 bail bond because: (1) Blanco's bad-faith conduct should not outweigh Minnesota Surety's "extraordinary" good-faith efforts to locate him; (2) the prosecution has not suffered any prejudice as a consequence of Blanco's absence; and (3) the prosecution acted in bad faith by refusing to extradite Blanco from El Salvador. We disagree.

This court reviews a bail-bond reinstatement and discharge decision for an abuse of discretion. *State v. Williams*, 568 N.W.2d 885, 887 (Minn. App. 1997), *review denied* (Minn. Nov. 18, 1997). The district court has broad discretion in determining whether to reinstate and discharge a forfeited bail bond. Minn. Stat. § 629.59 (2006) (providing that the district court "may" forgive or reduce penalty); Minn. R. Gen. Pract. 702(f) (providing that "[r]einstatement may be ordered on such terms and conditions as the court may require"). The applicant bears the burden of proving that reinstatement and

discharge of a bail bond is justified. *In re Application of Shetsky*, 239 Minn. 463, 472, 60 N.W.2d 40, 46 (1953).

Here, in denying reinstatement and discharge of the $75,000 bond, the district court found: (1) Blanco's "willful and unjustifiable default as a principal of the bond is chargeable to [Minnesota Surety]"; (2) the good-faith efforts of Minnesota Surety to locate Blanco have not resulted in Blanco's return to face his criminal charges; and (3) Blanco's absence has caused delay of the trial and the expense of resources, resulting in prejudice to the state. Although recognizing Minnesota Surety's good-faith efforts to locate Blanco, the court found that the effort "[did] not outweigh the other factors."

In determining whether the district court abused its discretion, a reviewing court considers the following factors:

> (1) the purpose of bail, the civil nature of the proceedings, and the cause, purpose, and length of the defendant's absence; (2) "the good faith of the surety as measured by the fault or willfulness of the defendant"; (3) "the good-faith efforts of the surety—if any—to apprehend and produce the defendant"; and (4) any prejudice to the state in its administration of justice.

State v. Storkamp, 656 N.W.2d 539, 542 (Minn. 2003) (quoting *Shetsky*, 239 Minn. at 471, 60 N.W.2d at 46).

Purpose of Bail, Civil Nature of Proceedings, and Cause, Purpose, and Length of Defendant's Absence

"The primary purpose of bail in a criminal case is not to increase the revenue of the state or to punish the surety but to insure the prompt and orderly administration of justice without unduly denying liberty to the accused whose guilt has not been proved."

Shetsky, 239 Minn. at 471, 60 N.W.2d at 46. But bail is also used to encourage sureties to "locate, arrest, and return defendants who have absconded." *Storkamp*, 656 N.W.2d at 543. And one purpose of a bail bond is to encourage sureties to voluntarily pay the penalty for failing to ensure the presence of the accused without requiring that the state undergo the expense of litigation to recover the defaulted amount. *Id*. at 542. This court has previously held that:

> By accepting a premium and agreeing to act as surety, [the bonding company] undertook to ensure [the defendant] would personally appear to answer the charge against him. As such, [the bonding company] cannot absolve itself of blame when it did not monitor [the defendant's] appearances and thus failed to timely learn of his nonappearance.

State v. Due, 427 N.W.2d 276, 278 (Minn. App. 1988) (citation omitted), *review denied* (Minn. Sept. 28, 1988).

Here, Blanco, an El Salvadoran national, is charged with a violent crime—two counts of assault for allegedly shooting someone, circumstances that Minnesota Surety either knew or should have known before issuing its bond for Blanco's release. More than two years have passed since Blanco failed to appear for his pretrial hearing, and Minnesota Surety has failed to produce him. Given the seriousness of the charges against Blanco and the substantial $75,000 bond, we conclude that by accepting a premium and agreeing to act as surety, Minnesota Surety assumed the risk that Blanco might not appear and that ensuring his appearance might require more effort than in a typical case.

Good Faith of Surety as Measured by Fault or Willfulness of Defendant

A willful and unjustifiable default by the defendant weighs against forgiveness of a bond penalty. *Shetsky*, 239 Minn. at 473-74, 60 N.W.2d at 47-48. And under Minnesota law, even an untimely apprehension and return of a defendant does not require that a forfeited bail bond be fully reinstated and discharged. *See Williams*, 568 N.W.2d at 888 (holding that a surety's assistance in a defendant's untimely return to custody does not mandate forgiveness of the penalty on a forfeited bail bond).

Here, although Minnesota Surety claims to have located Blanco in El Salvador, it concedes that he is located in El Salvador due to his willful actions of evading justice in Minnesota. But Minnesota Surety argues that Blanco has not been returned to Minnesota only because of the state's bad faith in refusing to extradite him. In response to the state's argument that El Salvador has a policy against extraditing its nationals and that no El Salvadoran national has ever been extradited by El Salvador to the United States, Minnesota Surety argues that the United States-El Salvador treaty allows for extradition at the discretion of the El Salvadoran government and that a 2000 amendment to the El Salvador Constitution permits the extradition of El Salvadoran nationals. We disagree.

First, the record supports the state's argument that El Salvador does not extradite its own nationals. The 1911 treaty between El Salvador and the United States specifically states that "neither of the Contracting Parties shall be bound to deliver up its own citizens." Treaty of Extradition art. VIII, U.S.-El Sal., Apr. 18, 1911, 37 Stat. 1521 [hereinafter U.S.-El Sal. Extradition Treaty]. And while the 2000 constitutional amendment may permit the extradition of El Salvadoran nationals, it does not change the

language of the United States-El Salvador treaty, which does not affirmatively obligate either party to extradite its nationals. U.S. Dep't of State, *Third Report on International Extradition Submitted to Congress Pursuant to Section 3203 of the Emergency Supplemental Act* (2000), *available at* http://www.state.gov/s/l/16164.htm). Further, as noted by the district court, a U.S. marshal testified that he spoke with diplomatic security officers at the United States Embassy in El Salvador who told him that El Salvador "will not extradite their nationals, specifically on a case like this," and that no one has ever been successful in extraditing an El Salvadoran citizen such as Blanco to the United States.

Second, Blanco is charged with assault offenses, which are not extraditable offenses under the treaty. U.S.-El Sal. Extradition Treaty, art. II, 37 Stat. 1517-19. Minnesota Surety's response to this circumstance is to argue that the state could easily amend the assault charges to attempted murder, which is an extraditable offense. But it is entirely within the prosecutor's discretion to decide what to charge in any given case. *See State v. Lussier*, 695 N.W.2d 651, 655 (Minn. App. 2005), *review denied* (Minn. July 19, 2005) (concluding that a prosecutor's charging decision may not be interfered with absent evidence of improper exercise of prosecutorial discretion); *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996) (determining that "a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion"); *State v. Herme*, 298 N.W.2d 454, 455 (Minn. 1980) (stating that, "[a]s a general rule, the prosecutor's decision . . . [of] what charge to file is a discretionary matter which is not

subject to judicial review" absent proof of deliberate discrimination). Because the state has lawfully exercised its discretion in declining to charge Blanco with attempted murder, Minnesota Surety's argument that the state is acting in bad faith is precluded.

The facts in this case do not mandate that the bond be discharged on the grounds that the state has taken action that prevents Minnesota Surety from producing Blanco in Minnesota. *See Due*, 427 N.W.2d at 278 (citing *State v. Liakas*, 86 N.W.2d 373, 378 (Neb. 1957) (as a case where a surety was exonerated on a bond obligation where the state surrendered the prisoner to another sovereign, thus preventing the surety's performance)). Blanco alone has made it impossible for Minnesota Surety to produce him. The district court concluded that Blanco's "willful and unjustifiable default as a principal of the bond is chargeable to [Minnesota Surety]" acting as the surety. We agree.

Good-Faith Efforts of Surety to Apprehend and Produce Defendant

Minnesota Surety argues that its efforts to locate Blanco were "extraordinary" and weigh heavily in favor of full reinstatement and discharge of the bond. Minnesota Surety also argues that its good-faith efforts to return Blanco to Minnesota have been stalled by the state's bad faith in refusing to extradite Blanco. Minnesota Surety relies on two Florida cases to support its argument.

In *County Bonding Agency v. State*, the Florida Court of Appeals overturned a district court's denial of a surety's motion for remission and discharge of its bail bond, concluding that the surety was entitled to remission after it located the defendant in Jamaica and had her arrested. 724 So. 2d 131, 133 (Fla. Dist. Ct. App. 1998). The court

concluded that Florida's refusal to extradite the defendant did not defeat the otherwise meritorious remission, i.e. reinstatement, claim. *Id.* But the court also held that remission was permitted only if there was no prejudice to the prosecution because of the delay resulting from the defendant's escape. *Id.* Likewise, in *Surety Continental Heritage Ins. Co. v. Orange County*, the Florida Court of Appeals reversed a district court decision denying a discharge and reinstatement of a bail bond request by a surety, holding that the reasoning in *County Bonding Agency* controlled. 798 So. 2d 837, 840 (Fla. Dist. Ct. App. 2001). The court determined that because the surety had "substantially attempted to procure [the] defendant" it should not "be prevented from seeking remission . . . because the State [of Florida] refuses to cooperate." *Id.* In the Florida cases, Jamaica was willing to extradite the defendants to the United States. *Surety Continental Heritage Ins. Co.*, 798 So. 2d at 838; *County Bonding Agency*, 724 So. 2d at 132. Because the defendant could have been extradited from Jamaica to Florida, the court determined that the state's refusal to do so was the reason for the defendant's absence. *Id.; see also Surety Continental Heritage Ins. Co.*, 798 So. 2d at 840 (concluding that the state's refusal to extradite should not prevent the surety from seeking remission).

Although Minnesota appellate courts have not addressed the circumstance now before us, Florida courts have determined that the rule established in *County Bonding Agency* and *Surety Continental Heritage Ins. Co.* is inapplicable if the defendant is not subject to extradition. *See Curlycan Bail Bonds, Inc. v. State*, 933 So. 2d 122, 123 (Fla. Dist. Ct. App. 2006) (holding that the surety was not entitled to relief of the bail bond

where the surety had located the defendant in Venezuela but the defendant could not be extradited because Venezuela refused to extradite its nationals); *Allegheny Cas. Co. v. State*, 850 So. 2d 669, 671-72 (Fla. Dist. Ct. App. 2003) (concluding that a surety is not relieved of its obligations to pay the forfeited bond when "the [s]urety's inability to perform its obligation is due to its own fault in permitting the defendant to leave the State").

Here, Blanco is charged with the non-extraditable offenses of first- and second-degree assault. *See* U.S.-El Sal. Extradition Treaty, art. II, 37 Stat. 1517-19 (enumerating all of the extraditable offenses). The record supports the district court's conclusion that El Salvador's policy is to decline to extradite its nationals and that the policy is echoed by the State Department. *See* U.S. Dep't of State, *Third Report on International Extradition Submitted to Congress Pursuant to Section 3203 of the Emergency Supplemental Act* (2000), *available at* http://www.state.gov/s/l/16164.htm (determining that because the United States-El Salvador treaty does not contain an affirmative obligation to extradite nationals, "a new treaty must be negotiated, ratified, and enter[ed] into force before the United States can seek the extradition of any Salvadoran nationals").[1]

[1] We find unpersuasive Minnesota Surety's argument that, based on an El Salvadoran newspaper article that reported on extradition proceedings relating to an El Salvadoran citizen, El Salvador may be willing to extradite the defendant. First, the article does not state whether extradition was permitted and, more significantly, the defendant referred to in the article was both an American citizen and an El Salvadoran citizen.

We conclude that the district court properly considered Minnesota Surety's actions and that although Minnesota Surety acted in good faith in allegedly *locating* Blanco, its failure to apprehend him is not attributable to the state's refusal to extradite him.

Any Prejudice to State in Administration of Justice

Minnesota Surety argues that the state has failed to show that it has suffered any prejudice as a result of Blanco's evasion, and that the evidence against him is still available to the state. We disagree.

In agreeing to act as a surety for a defendant, a bonding company assures the district court that the defendant will personally appear to answer the charges against him. *Due*, 427 N.W.2d at 278. In this case, Blanco remains at-large and the state is prevented from prosecuting the serious charges against him. This case is distinguishable from *Storkamp*, in which the state eventually gained custody of the defendant, yet the district court still denied reinstatement of the bond. 656 N.W.2d at 540-41. Here, the state has expended resources to apprehend Blanco to no avail after he failed to appear at his pretrial hearing. The adverse effect on the prosecution because of Blanco's unexcused absence "weigh[s] heavily against the remittance of the forfeited bond." *Id.* at 542. Finally, the main witness against Blanco is a child who was six years old at the time of the district court's order in May 2008, whose memory may fade over time, especially given that the crime occurred more than two years ago. *See* Minn. Stat. § 595.02, subd. 1(n) (2008) (stating that "[a] child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember . . . facts respecting which the child is examined").

The district court considered the expenses incurred by law enforcement to apprehend Blanco, the public safety concerns arising out of Blanco's fugitive status, and the prejudice that a two-year absence could have on the state's case against Blanco. These types of concerns are related to the administration of justice in the broad sense of the term.

The district court properly considered and weighed the *Shetsky* factors in denying Minnesota Surety's motion to reinstate and discharge the $75,000 bail bond. Because the *Shetsky* factors weigh in favor of the denial of Minnesota Surety's motion, we hold that the district court did not abuse its discretion.

Affirmed.