

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

RICHARD JUSTIN,
JUSTIN BROS BAIL BONDS,
and INTERNATIONAL FIDELITY
INSURANCE COMPANY,

CASE NO. 67786

Petitioners,

v.

JANET J. BERRY, IN HER OFFICIAL
CAPACITY AS DEPARTMENT 1 OF
THE SECOND JUDICIAL DISTRICT
OF THE STATE OF NEVADA,

Respondent,

_____ /

THE STATE OF NEVADA,

Respondent.

_____ /

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

The facts contained in the Petition truly are undisputed. The State has presented nothing to contradict them, and Respondent did not hold an evidentiary hearing. For that matter, the State has never opposed exoneration of Bond IS30K-

162345.

The relevant statutes to consider are as follows:

NRS 178.509(1)(a) provides:

“If the defendant fails to appear when the defendant’s presence in court is lawfully required, the court shall not exonerate the surety before the date of forfeiture prescribed in NRS 178.508 unless:

The defendant appears before the court and the court, upon hearing the matter, determine that the defendant has presented a satisfactory excuse or that the surety did not in any way cause or aid the absence of the defendant; or”

NRS 178.512 provides:

“1. The court shall not set aside a forfeiture unless:

a) the surety submits an application to set it aside on the ground that the defendant:

1) has appeared before the court since the date of the forfeiture and has presented a satisfactory excuse for the defendant’s absence. . . ;
and

b) the court determines that justice does require the enforcement of the forfeiture.”

NRS 178.514 provides:

“1. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon.

2. If the Office of Court Administrator has not received an order setting aside a forfeiture within 180 days after the issuance of the order of forfeiture, the Court Administrator shall request that the court that ordered the forfeiture institute proceedings to enter a judgment of default with

respect to the amount of the undertaking or money deposited instead of bail bond with the court. Not later than 30 days after receipt of the request from the Office of the Court Administrator, the court shall enter judgment by default and commence execution proceedings thereon.”

NRS 178.522 provides:

“1. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligor and release any bail. The court shall exonerate the obligors and release any bail at the time of sentencing of the defendant, if the court has not previously done so unless the money deposited by the defendant as bail must be applied to satisfy a judgment pursuant to NRS 178.528.

2. A surety may be exonerated by a deposit of cash in the amount of the bond **or by a timely surrender of the defendant into custody.**

NRS 178.526 provides:

“1. For the purpose of the surrendering a defendant, a surety, at any time before the surety is finally discharged, and at any place with the state, may, by:

a) written authorization for the rest of the defendant attached to a copy of the undertaking; or

b) a written authority endorsed on a certified copy of the undertaking, cause the defendant to be arrest by a bail agent or bail enforcement agent who is licensed pursuant to Chapter 67 of NRS.”

Based upon these statutes as well as the undisputed facts, the only legal conclusions that the Court can reach are as follows:

1. When Dupree was remanded into custody in January of 2014, bail bond no. 1S30K-151744 was exonerated by operation of law; but additionally

2. When Dupree was remanded into custody after bailing out on the Bonafide Bail Bonds bond, the within International Fidelity Insurance bond was exonerated by operation; but additionally

3. When Dupree turned himself in to be surrendered in March of 2014, the bond should have exonerated by operation of law; but additionally

4. When Justin Bros.' bail enforcement agent caused Dupree to be remanded into custody within 180 days of the Notice of Intent to Forfeit on Bond IS30K-162345, and when Dupree thereafter plead guilty while in custody and sentence while in custody, both bail bonds absolutely, positively, unequivocally, unquestionably, and undeniably had to be exonerated by operation of law.

When a defendant is remanded to custody of the sheriff, the bail bond previously posted is exonerated by operation of law. The Court may not continue the surety's liability on the previously posted bond at that point. People v. International Fidelity Insurance Co., 138 Cal. Rptr.3d 883, 887 (Cal. App. 2012), and cases cited therein. Thus, the trial court cannot use the old bond, which should have been exonerated as the matter of law, to act as additional security for a subsequently ordered bail bond. When the Court does so, the new bond is void and is subject to attack at any time (Id. at 888)

The reason exoneration happens by operation of law in that instance is that

the responsibilities of the surety are based upon its constructive custody of the person bailed. But once that person has been remanded into formal custody, the surety cannot any longer have custody over the accused. Kiperman v. Klenshetyn, 35 Cal. Rptr.3d 178, 182 (Cal. App. 2005), and cases cited therein.

An exception to this rule may exist where the accused is returned to custody in a county where the case was not filed. In that instance, exoneration does not occur by operation of law; the bondsman must file a timely motion. But in the case where the defendant is returned to custody in the jurisdiction where his case is filed, the court must act on its own motion to exonerate the bond, and if it fails to do so exoneration is accomplished by operation of law. People v. Accredited Surety & Casualty Co., 138 Cal. Rptr.3d 370, 375 (Cal. App. 2012), citing People v. Indiana Lumbermens Mutual Ins. Co., 231 P.3d 909, 916-17 (Cal. 2010).

When a defendant appears in court, a prior order forfeiting bail is not merely erroneous. It is void. People v. Safety National Casualty Corp., 57 Cal. Rptr.3d 659, 660-62 (Cal. App. 2007).¹

¹That is, the October 23, 2014 motion actually was properly brought under NRCP 60(b)(4). Based on the above, when Dupree was remanded into custody - in this case, twice - by operation of law the within bond had to be exonerated. Any other order, or continuation of the bail, was void as a matter of law. Accordingly, the fact that Justin Bros. didn't bring this motion "as quickly as it could have" is legally irrelevant. A void order or proceeding can be challenged at any time. See: Moore v. Moore, 75 Nev. 189, 193-94, n. 2, 336 P.2d 1073 (1959).

In a case where the statute is not self-executing (as here), nevertheless a bail bond is exonerated by operation of law at the moment the defendant appears and is convicted. The trial court cannot lawfully bind a surety to a bail bond when the accused has been convicted. State v. French, 945 P.2d 752, 756-57 (Wash. App. 1997). Once the defendant appears and is sentenced, what happens afterwards is simply irrelevant; the bond is exonerated as a matter of law. People v. King Bail Bond Agency, 274 Cal. Rptr. 335, 337038 (Cal. App. 1990).

Finally, exoneration of the bail bond surety normally occurs on the return of the defendant to custody. “Custody” means that the defendant reasonably believes he is physically deprived of freedom of action in any significant way - that is, he knows he is being transferred to the control of the sheriff. See: Peiole v. Lexington National Insurance Co., 43 Cal. Rptr.3d 900, 904-06 (Cal. App. 2007).

The error in the court below’s analysis is the legal proposition that, even if the surety returned the defendant into custody, he still had to file a motion to exonerate the bond; and if he did not do so before the defendant and the court “locked eyes,” exoneration does not happen. Rather, the surety loses (forfeits) the face amount of the bond.

To the contrary: When the surety returns the defendant into the custody of the sheriff where the charge is pending, there is nothing left for him to do under

the terms of the bond. His obligation is extinguished. That being so, the district court loses jurisdiction to declare the bond to be forfeited. This is what “exoneration by operation of law “ means. See: People v. Safety Nat. Cas. Corp., 57 Cal. Rptr.3d 659, 660-62 (Cal. App. 2007); City of Tulsa v. Johnson, 238 P.3d 951, 953 (Okl. Cir. App. 2010); People v. Bankers Ins. Co., 105 Cal. Rptr.3d 844, 847 (Cal. App. 2010).

All of these authorities unquestionably inform the Court’s exercise of discretion: Refuse to enforce the judgment of October 6, 2014; set aside the forfeiture”; declare bond IS30K-162345 exonerated as a matter of law; and remit the \$25,000.00 paid under protest back to the Petitioners. There is a reason the State has not opposed this: There is no other lawful discretion for a Court to exercise. It should have been apparent before that, but it certainly is apparent now: Dupree has been remanded into custody several times within 180 days of the

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Notice of Intent to Forfeit; has plead guilty while in custody; and has been sentenced while in custody. This Petition simply has to be granted.

DATED this 9th day of April, 2015.

Respectfully submitted,

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street, Second Floor
Reno, NV 89501

By: 
Richard F. Cornell

CERTIFICATE OF SERVICE

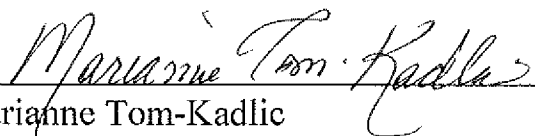
Pursuant to N.R.C.P. 5(b), I certify that I am an employee of LAW
OFFICES OF RICHARD F. CORNELL, and that on this date I caused a true and
correct copy of the foregoing document to be delivered by Reno Carson

Messenger Service, addressed to:

Keith Munro
Washoe County District Attorney's Office
Civil Division
One S. Sierra St., 7th Floor
Reno, NV 89501

The Honorable Janet J. Berry
75 Court Street, Department 1, 3rd Floor
Reno, NV 89501

DATED this 13th day of April, 2015.



Marianne Tom-Kadlic
Legal Assistant