

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 05 2016 08:54 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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

Petitioners,

vs.

Case No. 67786

THE SECOND JUDICIAL
DISTRICT COURT OF THE STATE
OF NEVADA, IN AND FOR THE
COUNTY OF WASHOE; AND THE
HONORABLE JANET BERRY,
DISTRICT JUDGE,

Respondents,

_____ /

THE STATE OF NEVADA,

Real Party in Interest.

_____ /

ANSWER TO PETITION FOR REHEARING

Respondents, the Second Judicial District Court and the Hon. Judge Janet J. Berry, and Real Party in Interest, the State of Nevada, answer the petition for rehearing filed in the above entitled matter. This answer is made and based upon the attached points and authorities and all other pleadings, papers, and exhibits on file in the above-entitled matter.

The petition for writ of mandamus presented an issue of statutory interpretation, namely whether provisions of NRS Chapter 178 required the district court to exonerate Justin Bros' bail bond or to set aside the forfeiture judgment. This Court denied the writ petition determining that NRS 178.509 was the controlling statutory provision and that Justin Bros failed to meet the requirements of this provision.

Justin Bros, in the petition for rehearing, argues that this Court should have applied another statute, NRS 178.522, and ruled in its favor. This argument is meritless because the factual findings and legal conclusions of this Court and the district court were accurate and should therefore be upheld. Additionally, Justin Bros' argument regarding NRS 178.522 was not timely presented in the district court and was not argued until its reply brief in this proceeding. Further, applying NRS 178.522 in the manner argued by the Justin Bros would create precedent that would disrupt ancillary bail proceedings in this State.

Another preliminary observation must be made, namely, that the tone of the rehearing petition is outright insulting and demeaning to this Court's panel and to the Court's published opinion. The rehearing petition boldly asserts, twice, that the opinion "makes no sense." Petition for Rehearing at 5-6. The rehearing petition then asserts that "facts do not matter to the Court." Petition for Rehearing at 5. The rehearing petition repeatedly scolds the Court, in a rather derogatory manner,

for not explaining NRS 178.522 more thoroughly, arguing three times that the Court “must explain” itself better. Petition for Rehearing at 3.

In a rather astounding footnote, the rehearing petition asserts entirely new facts that are not in the district court record and never previously argued in this writ proceeding. Petition for Rehearing at 10-11, fn. 2. This is a flagrant and sanctionable violation of appellate rules that prohibit references to facts not in the record and prohibit arguments raised for the first time on rehearing. Counsel’s only excuse for his flagrant violation of the rules is his bald assertion that the law seemed clear to him, and he therefore did not see a need to mention the facts he now asserts in the footnote. *Id.* Of course, the rehearing petition cites no law even remotely supporting the bizarre idea that over-confidence in a party’s legal position is an excuse for omitting a contention and then raising it for the first time on rehearing. This Court should ignore the footnote in its entirety.

The improper footnote then repeats the insulting and derogatory tone of the rehearing petition. The footnote asserts that the opinion included a comment that Justin Bros was “aiding and abetting” the Defendant. *Id.* (quotation marks in Petition for Rehearing). The rehearing petition states that this comment in the opinion was “factually 100% wrong.” *Id.* But the opinion never actually used the “aiding and abetting” phrase that the rehearing petition quotes. In any event, the facts speak for themselves. Justin Bros had been in contact with the Defendant

while he was evading law enforcement. Pet. Appx. 18. And this fact was relied on by both the district court and this Court in resolving the bond issue. The footnote then says: “This court needlessly impugned the integrity of a long-time ethical bondsman!” Apparently Justin Bros wants an apology from the Court. Such advocacy is, to be blunt, rather outrageous.

The improper footnote ends with a final derogatory comment about this Court’s opinion: “So, the law in California is: Exoneration is automatic. The law in Nevada is: No good deed goes unpunished.” What good deed by Justin Bros is established by evidence in the record? There is none.

For the reasons set forth in this Answer, the petition for rehearing should be denied.

Dated this 4th day of August, 2016.

CHRISTOPHER J. HICKS
District Attorney

By /s/ Keith G. Munro
KEITH G. MUNRO
Deputy District Attorney
ATTORNEYS FOR REAL PARTIES
IN INTEREST

LEMONS GRUNDY & EISENBERG

By /s/ Robert L. Eisenberg
ROBERT L. EISENBERG
ATTORNEYS FOR RESPONDENTS

ARGUMENT

A. Standard of Review

The grounds for a petition for rehearing are extremely limited. Under NRAP 40(a)(2) and 40(c)(2), rehearing is only available when the Court misapprehends or overlooks a material point of law or fact, or when the Court overlooks, misapplies, or fails to consider a statute or decision directly controlling a dispositive issue in the case. A rehearing petition may not simply reargue matters that were already argued in the briefs. NRAP 40(c)(1). Nor may a rehearing petition raise new points for the first time on rehearing. *Id.*

The rehearing petition in this case fails to recognize or satisfy these portions of NRAP 40. Instead, the rehearing petition launches a shotgun-style attack on the opinion, contending only that Justin Bros should have prevailed, and that Justice Douglas and the other justices of this Court were wrong by not granting relief.

B. Statement of Facts

The facts set forth by this Court, in the FACTS section of the Advance Opinion, are adopted. Two separate facts should be highlighted for this Court in considering the petition for rehearing.

In the initial motion to exonerate filed in the district court, Justin Bros admitted, “The decision to grant exoneration or discharge of a bond rests within the discretion of the trial judge . . .” *See* Petition for Writ of Mandamus, Exhibit 4

at p.4. This Court, in denying the writ petition, also made the following factual finding, “Thus, according to the undisputed facts, and in contrast to Justin Bros’ argument, the district court would have abused its discretion by proceeding to exonerate Justin Bros’ bond.” *Justin Bros v. Second Judicial Dist. Ct*, 132 Nev., Adv. Op. 47, at p.10 (2016).

These facts are compelling. Justin Bros knew the district court had some discretion when considering the motion to exonerate bail and only changed its argument regarding discretion after the district court exercised its discretion against Justin Bros’ interests. Further, this Court made a dispositive factual determination that the district court would have abused its discretion if it had ruled in favor of Justin Bros.

The rehearing petition misrepresents important facts. For example, the petition asserts that the Defendant was taken into custody “after making his scheduled court appearances.” Rehearing Petition at 3. The petition then asserts that the Defendant’s arraignment was continued to March 18, 2014, and: “Once again, Dupree complied; he showed up.” Rehearing Petition at 4 (emphasis in original). In truth, the Defendant missed three court appearances while out on bail. Justin Bros’ own district court motion to exonerate the bond expressly conceded: “On the 18th day of March, 2014, Defendant again fails to appear at the scheduled arraignment.” Pet. Appx. 16:24-25. Justin Bros’ motion then conceded that the

arraignment was continued to June 10, 2014, and “Defendant again failed to appear on that date . . .” Pet. Appx. 17:21. And the Defendant failed to appear in court a third time on July 22, 2014. Pet. Appx. 89. There is simply no factual basis for the rehearing petition’s suggestion that the Defendant satisfied court appearance requirements while free on bail.

C. Statement of the Case

The procedural history set forth by this Court, in the FACTS section of the Advance Opinion, is adopted. One procedural aspect is highlighted for the Court in considering the rehearing petition. Justin Bros is now shifting legal theories in hopes of obtaining relief by presenting an argument outside the petition for writ of mandamus. This Court should reject this effort to litigate a second petition for writ of mandamus. *See* NRAP 40(c)(1)(“no point may be raised for the first time on rehearing”).

As noted above, Justin Bros initially admitted that a district court has some discretion in deciding whether to grant a motion to exonerate. When Justin Bros’ initial effort to exonerate its bond failed, its legal theory changed in hopes of obtaining relief. In the third motion to exonerate bail filed in the district court, Justin Bros alleged that the Defendant’s remand into custody on January 31, 2014, automatically triggered the exoneration of the bail bond at issue in this case. *Justin Bros*, 132 Nev., Adv. Op. 47 at 6. In denying the writ petition, this Court held that

the district court “denied the motion, finding that Justin Bros did not timely address the forfeiture of bond number one.” *Id.*

Justin Bros now again argues its untimely and procedurally defaulted argument that the district court lacked discretion when considering the motion for exoneration. Justin Bros states that, “As made very clear at page 3 and pages 8-11 of the Reply filed herein on or about June 22, 2015, as well as to Judge Berry as PA: at 72, the governing statute is **NRS 178.522**.” Petition for Rehearing at p. 2. (emphasis in the original). The rehearing petition then states: “Sadly, Advanced Opinion 47 mentions the statute only in passing. This above all is why rehearing must be granted.” *Id.* In other words, the rehearing petition’s primary focus is on NRS 178.522, which this Court’s opinion “sadly” mentioned only in passing.

In the district court, Justin Bros filed a motion to exonerate the bond. The motion never discussed or even cited NRS 178.522. Pet. Appx. 15-18. When the district judge denied the motion, Justin Bros filed a motion for reconsideration. The motion’s primary statutory focus was NRS 178.509 (which is the statute on which this Court’s opinion focused). Pet. Appx. 35-39. The motion for reconsideration never even cited NRS 178.522. *Id.* Justin Bros filed a reply in support of its reconsideration motion, and again, it did not cite or discuss NRS 178.522. Pet. Appx. 57-58.

Justin Bros then filed a third motion requesting exoneration of the bond. Pet. Appx. 64. This motion cited NRS 178.522 for the first time, but even then only in passing, buried with a list of other statutes, and with no analysis or discussion. Pet. Appx. 71-76. Accordingly, in the entire district court record, Justin Bros only cited NRS 178.522 once; and even then, it was cited in passing, with no analysis or meaningful discussion.

After the district court denied relief, Justin Bros sought a writ from this Court. Notably, the writ petition only mentions NRS 178.522 in passing and even more notably, the points and authorities submitted by Justin Bros in support of the writ petition only cited NRS 178.522 in passing, one time (at page 3), and even then, the statute was merely cited within a list of five statutes lumped together and quoted in the points and authorities. Although the statute was more thoroughly discussed for the first time in Justin Bros reply, this Court's opinion can hardly be faulted for mentioning the statute only "in passing." And, if the fact that the opinion mentioned the statute only "in passing" is "above all" why rehearing is being sought (as the petition for rehearing states at p. 2), then rehearing should be summarily denied. The fact that the opinion cited the statute shows that the court considered the provision.

Additionally, Justin Bros' own words reveal it is seeking rehearing on an argument that was only presented in its reply brief and which had also been

procedurally barred by the district court. Petition for Rehearing at p.2. The rehearing petition is an effort to litigate a second petition for writ of mandamus. Such an effort should be rejected by this Court. Even if this Court were to consider the petition, it should be denied because this Court properly sets forth the facts, legal posture of the case, and then decides the case upon the law governing the proceeding.

D. This Court and The District Court Properly Relied Upon NRS 178.509

Facts can be stubborn things. Justin Bros overlooks obvious facts and the applicable law because it wishes and hopes for its bond to be exonerated. This Court sits and the district court sat in a much different position and rightfully did not ignore the relevant facts and applicable laws. The facts of this case and the law governing ancillary bail proceedings overwhelming support this Court's conclusion that NRS 178.509 governs this dispute and that Justin Bros failed to meet the requirement of that provision.

This Court has upheld the factual findings of the district court that the Defendant breached a condition of his bail when he failed to appear at his arraignments. Specifically, this Court held that,

Respondent Second Judicial District Court Judge Janet Berry denied Justin Bros' motion, observing that: (1) Justin Bros did not attempt to exonerate bond number one while [the Defendant] was in custody from January 31 through February 3 or after Bonafide surrendered [the Defendant] to custody on May 14, but instead posted bond number three; (2) [the Defendant] failed to appear for his

arraignments, had yet to be arraigned, and remained out of custody despite Justin Bros' acknowledgment that it had been in contact with [the Defendant]; and (3) a bench warrant had been issued. The court concluded that, because [the Defendant] had not appeared before it since January 30, 2014, bond number one could not be exonerated.

Justin Bros, 132 Nev., Adv. Op. 47, at p. 4.

Justin Bros does not challenge these factual findings or the factual findings made the district court. The relevant facts and law are devastating to Justin Bros' rehearing petition. A bail bond was posted on behalf of the Defendant, and the Defendant breached a condition of his bail by failing to appear in the district court as required. The Defendant's bail bond had not been exonerated by the district court when the breach occurred, and pursuant to NRS 178.502(2)(b), a bail bond remains in effect until exonerated by a district court. Pursuant to NRS 178.506, a district court "shall" declare a forfeiture of the bail if there is a breach of condition of the bond and after finding a breach, NRS 178.506 directs the district court to follow NRS 178.508 and 178.509. NRS 178.508 sets the duties for how a district court shall proceed as a result of a breach and directs that the "bail bond is forfeited 180 days after the date on which the notice is mailed." NRS 178.509 sets the requirements for exonerating a bail bond that has been breached, and Justin Bros cannot meet those requirements.

These unchallenged facts and law support the conclusion that this case was governed by an interpretation of NRS 178.509. See *Justin Bros*, 132 Nev., Adv.

Op. 47, at p. 8-11. The district court faithfully followed the bail statutes after it determined there had been a breach of condition of bail and when it concluded the bail bond would be forfeited because the requirements set forth in NRS 178.509 had not been satisfied. This Court evidenced a clear understanding of the facts and the law governing this case when it denied the writ petition.

E. District Courts Administer Ancillary Bail Proceedings

Justin Bros overlooks the basics of Nevada's ancillary bail process. A bail bond is a contract between the State and the surety of the accused. *All Star Bonding v. State*, 119 Nev. 47, 49, 63 P.3d 1124, 1125 (2003). The statutes governing bail bonds are incorporated into the bail agreement of the parties. *All Star Bail Bond, Inc. v. Eighth Judicial District Courts*, 130 Nev. Adv. Op. 45, 326 P.3d 1107, 1110 (2014). The Nevada Legislature clearly places the trust in district court judges to administer the ancillary bail process in their courtrooms so as to ensure a criminal defendant answers the criminal charge pending against him or her.

A district court has the discretion to set reasonable bail conditions before releasing a person on bail. *State v. Second Judicial District Court*, 121 Nev. 413, 419, 116 P.3d 834, 838 (2005). A district court may release a criminal defendant without bail. NRS 178.4851. If bail is necessary, a district court has the discretion to set an amount which will reasonably ensure the appearance of the defendant and

the safety of other persons and of the community. NRS 178.498. After being admitted to bail, a district court then has the discretion to increase the amount of bail if necessary. NRS 178.499. Pursuant to NRS 178.502(2)(b), after a bail bond is posted, the bond “remains in effect until exonerated by the Court.”

A district court has the discretion to determine if the conditions of a bail bond have been satisfied. If the court determines the conditions have not been satisfied, the court “shall declare” a breach of the conditions of the bond. NRS 178.506. Once a breach has been declared, there are strict limitations in granting bail exonerations. *All Star Bail Bond*, 326 P.3d at 1110. However, after a date of forfeiture has been established, a district court has the discretion to extend the date of forfeiture. NRS 178.508(3). If the court determines the conditions have been satisfied, the court shall exonerate the bond. NRS 178.522.

This Court then affords great deference to district courts in administering ancillary bail bond proceedings. *All Star Bail Bonds*, 326 P.3d at 1109. In relation to bail forfeiture proceedings, a writ of mandamus may only issue to compel the performance of an act required by the law, or to control a manifest abuse of discretion by a district court. *Id.*

The terms and conditions of Justin Bros’ bail contract with the State were breached. Justin Bros, unfazed by this breach, argues the Nevada legislature, empowered it, through a legislative enactment, to decide when the terms of its bail

contract were satisfied and then empowered it to then terminate its bail contract with the State. While Justin Bros' goal is to have its bond exonerated and seems willing to allege almost anything, the Nevada Legislature did not establish such a process. Moreover, the ramifications of such a ruling would be considerable.

If such an implausible scenario were true, the orderly administration of criminal proceedings would be disrupted. A bail company would decide if a criminal defendant had successfully appeared to answer a criminal charge pending in a district court and would then have unfettered discretion to terminate its contract with the State. District court judges would lose control of their courtrooms if this were true. This implausible scenario is not true however. The statutes governing bail proceedings place district court judges in charge of administering the bail provisions so that criminal defendants answer the criminal charges pending against them.

F. NRS 178.522 Does Not Apply To This Case

The petition for rehearing repeatedly scolds this Court for not giving an adequate explanation regarding NRS 178.522. For example, in one paragraph, the petition asserts, three times, that this Court "must explain" various things about the statute. Petition for Rehearing at p.3. No law states that this Court "must explain" the statute. Justin Bros might not like the fact that this Court did not dwell on the statute as much as Justin Bros would have preferred, but this does not establish a

ground for rehearing. Moreover, as discussed earlier, Justin Bros' presentation of their argument regarding NRS 178.522 was less than admirable.

Justin Bros cannot and does not dispute there was a breach in a condition of bail. When there is a breach, NRS 178.506 states that, "the court shall declare a forfeiture . . ." See *Johnson v. Eighth Judicial District Court*, 124 Nev. 249-250, 182 P.3d 94, 97 (2008)("Shall" is mandatory and does not allow for judicial discretion). NRS 178.506 then directs the forfeiture process to NRS 178.508 and NRS 178.509. *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008)(When the plain language of a statute establishes the Legislature's intent, this Court "will give effect to such intention."). NRS 178.506 does not direct the forfeiture process to NRS 178.522.

Consistent with the shotgun approach to the petition for rehearing, Justin Bros does not explain how the two distinct sections of NRS 178.522 apply to its argument. First, NRS 178.522(1) states that, "When the condition of the bond has been satisfied or the forfeiture has been set aside or remitted, the court shall exonerate the obligors and release any bail." In this case, the bail bond was not set aside or remitted, nor were the conditions of the bond satisfied. NRS 178.522(1) clearly requires the conditions of bail to have been satisfied before a bond can be exonerated under this provision.

The conditions of bail in this case clearly were not satisfied and the forfeiture was not set aside or remitted. As noted above, this Court and the district court expressly found the conditions of bail were violated when the Defendant failed to appear. Justin Bros does not challenge the accuracy of these findings nor does it make any argument the forfeiture was set aside or remitted. Therefore, these findings are not clearly erroneous and must be afforded deference. *Int'l Fid. Ins. Co. v. Blackjack Bonding*, 122 Nev. 39, 41, 126 P.3d 1133, 1134 (2006). Accordingly, NRS 178.522(1) does not apply.

Second, NRS 178.522(2) provides that, “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.” Justin Bros overlooks that this statute uses the words “may be exonerated”. “‘May’ is to be construed as permissive, unless the clear intent of the legislature is to the contrary.” *Sengbusch v. Fuller*, 103 Nev. 580, 582, 747 P.2d 240 (1987). This statute provides a district court with discretion, something Justin Bros alleges that the district court did not have in this case. Therefore, the district court retained discretion as to whether to exonerate the bail bond while the Defendant was briefly remanded to custody.

Justin Bros seems to forget that the defendant’s conduct related to his bail was egregious. As noted above, this Court made a finding that the district court would have abused its discretion if it had exonerated the bail bond. This may be

why Justin Bros does not explain how NRS 178.522 applies in this case. More importantly, the district court would have also abused its discretion if it had exonerated the defendant's bail pursuant to NRS 178.522(2).

NRS 178.522 would never apply in this case because the Defendant breached a condition of his bail while his bond was in effect – he failed to appear in court as required. As this Court noted in the Advance Opinion at pages 9-10, “Exoneration is, in fact prohibited after a defendant fails to appear, save certain limited circumstances. *All Star Bail Bonds*, 130 Nev., Adv. Op. 45, 326 P.2d P.3d at 1110 (noting that NRS 178.509(1)'s use of the words ‘shall not’ demonstrates the Legislature’s intent to prohibit the district court’s discretion to exonerate a bond for any reasons other than the five conditions listed in the statute).”

Existing Nevada case law also does not support Justin Bros’ argument. Only two other published cases appear to cite NRS 178.522. *See Martinez v. Nevada*, 120 Nev. 200, 88 P.3d 825 (2004), and *Int’l Fid. Ins. Co. v. Blackjack Bonding*, 122 Nev. 39, 126 P.3d 1133 (2006). Neither case supports the arguments made in the rehearing petition.

The district court and this Court correctly did not apply NRS 178.522 to this case.

//

//

G. Conclusion

In denying the writ petition, this Court did not misapprehend or overlook a material point of law or fact, or overlook, misapply or fail to consider a statute or decision directly controlling a dispositive issue in this case. This Court properly sets forth the facts, legal posture of the case, and then decided the case upon the law governing the proceeding. As this Court noted, the district court would have abused its discretion by proceeding to exonerate Justin Bros' bond. This Court should reject this effort to litigate a second petition for writ of mandamus and

//

//

//

//

//

//

//

//

//

//

//

//

should be extremely wary of the consequences of adopting the legal theory advocated in the petition for rehearing. The effect on our criminal justice system would be lasting.

Dated this 4th day of August, 2016.

CHRISTOPHER J. HICKS
District Attorney

By /s/ Keith G. Munro
KEITH G. MUNRO
Deputy District Attorney
Nevada Bar No. 5074
P.O. Box 11130
Reno, NV 89520-0027
(775) 337-5700

ATTORNEYS FOR STATE OF NEVADA

LEMONS GRUNDY & EISENBERG

By /s/ Robert L. Eisenberg
ROBERT L. EISENBERG
Nevada Bar No. 950
6005 Plumas Street, 3rd Floor
Reno, NV 89519
(775) 786-6868

ATTORNEYS FOR THE HONORABLE
JANET BERRY, DISTRICT JUDGE and
THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer to petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14.

2. I further certify that this answer to petition for rehearing complies with the page or type-volume limitations of NRAP 40 or 40A because it does not exceed 4,667 words. It contains 4,054 words.

Dated this 4th day of August, 2016.

CHRISTOPHER J. HICKS
District Attorney

By /s/ Keith G. Munro
KEITH G. MUNRO
Deputy District Attorney
ATTORNEYS FOR REAL PARTIES
IN INTEREST

LEMONS GRUNDY & EISENBERG

By /s/ Robert L. Eisenberg
ROBERT L. EISENBERG
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I certify that I am an employee of the Office of the District Attorney of Washoe County, over the age of 21 years, and not a party to nor interested in the within action. I certify that on this date, the foregoing was electronically filed with the Supreme Court of the State of Nevada by using the ECF System. Electronic service of the foregoing document shall be made in accordance with the Court's service list as follows:

Richard Cornell, Esq., for Petitioner

Adam Laxalt, Esq.

Terrence McCarthy, Deputy D.A.

Dated this 4th day August, 2016.

/s/ C. Mendoza

C. Mendoza