

App 107
FILED

SID J. WHITE

JUN 4 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT
OF FLORIDA

POLAKOFF BAIL BONDS, ETC., ET. AL.

Petitioner,

v.

CASE NUMBER: 81,763

ORANGE COUNTY, FLORIDA, ETC.

Respondent.

INITIAL BRIEF

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STATEMENT OF CASE AND FACTS

This case concerns the denial by the lower courts of amended motions to set aside estreature and toll payment of estreature in the trial court cases CR91-2221 and CR91-2222 and motions to set aside judgments, pursuant to Florida Statute 903.27 and/or Florida Rule of Civil Procedure 1.540(b).¹ Defendant, ROSE JOSEPH, had two criminal cases pending in the Circuit Court, in and for Orange County, Florida, respectively known as case numbers CR91-2221 and CR91-2222. Both cases involved pending drug charges against Defendant, ROSE JOSEPH.

On March 4, 1991, Appellant, POLAKOFF BAIL BONDS, as surety for Defendant, ROSE JOSEPH, filed separate bail bond agreements in case numbers CR91-2221 and CR91-2222 in the amounts of fifteen thousand (\$15,000.00) dollars and ten thousand dollars (\$10,000.00), respectively (R21-22, 34-35). The bond agreements provided in part:

This bond is not valid for pre-sentence investigation, pre-trial intervention, or counter measure program unless specifically authorized by surety.

On November 13, 1991, Defendant, ROSE JOSEPH, signed a plea form for case numbers CR91-2221 and CR91-2222, wherein she plead guilty to the charges of sale of cocaine and purchase of cocaine (R3).

The court minutes from the plea on November 13, 1991, in case number CR91-2221, indicate that Defendant, ROSE JOSEPH, withdrew

¹ References to the record on appeal is symbolized by (R).

her original plea of not guilty and that she was sworn and plead guilty to Count I. The minutes also state "adjudication of guilt was withheld, finding of guilt entered" (R45) (emphasis added). The court minutes from the plea on November 13, 1991, in Case Number CR91-2222 indicate that Defendant, ROSE JOSEPH, withdrew her plea of not guilty (R44). The court minutes also state adjudication of guilt withheld, finding of guilt entered (R44). A pre-sentence investigation was ordered and sentencing was set for January 22, 1992, at 10:00 a.m. (R44-45). The court minutes were signed by the presiding judge (R44-45).

The court minutes from case numbers CR91-2221 and CR91-2222, for the sentencing date January 22, 1992, state that Defendant, ROSE JOSEPH, failed to appear for the sentencing, a capias was issued and that her bonds were estreated. (R3). On January 24, 1992, the clerk sent notices to Appellant, POLAKOFF BAIL BONDS, as surety for Defendant, ROSE JOSEPH, advising Appellant that the bail bonds had been forfeited and that payment of the forfeitures was due within thirty-five days from the date of the notification (R19, 24, 28, 29). The clerk also filed a certificate of mailing to this effect (R20, 31).

On February 27, 1992, the lower court entered nunc pro tunc orders granting Appellants an additional ninety days from February 26, 1992, to pay the forfeitures in case numbers CR91-2221 and CR91-2222 (R4). On May 27, 1992, the lower court again granted a motion to toll payment of estreatures for a

period of an additional thirty days in case numbers CR91-2221 and CR91-2222 (R4).

Appellants filed an Amended Motion to Set Aside Estreature and Toll Payment of Estreature in case numbers CR91-2221 and CR91-2222 (R12). A hearing was held on the motions on June 26, 1992 (R12).

The lower court denied the motion (R12). An appeal of these orders to the Fifth District Court of Appeal, which were case numbers 92-1814 and 92-1815, in the Fifth District Court of Appeal, then timely followed.

In the meantime, the clerk placed the bonds that were posted in lower case numbers CR91-2221 and CR91-2222 into judgment. (R25, 32) They then became lower court case numbers CI92-5344 and CI92-5345. Appellants subsequently filed motions to set aside the judgments pursuant to Florida Statute 903.27 and/or Florida Rule of Civil Procedure 1.540(b). (R36-59)

A hearing was held on these motions on August 31, 1992. (R1-17) An order denying these motions was rendered on August 31, 1992. (R68) The court also denied a Motion to Strike filed by Orange County. (R64-67) An appeal to the Fifth District Court of Appeal timely followed. (R69-70, 73-74)

On April 16, 1993, the Fifth District Court of Appeal rendered it's opinion, in the aforesaid cases, and certified to this court the following question as a matter of great public importance:

Under Section 903.31, Florida Statutes (1991), is the condition of an appearance bond satisfied when the court accepts a plea of guilty and enters a finding of guilt, but

withholds adjudication and judgment and continues the case for sentencing until the completion of the pre-sentence investigation.

Following the aforesaid certification, Petitioner timely filed a Notice to Invoke the Discretionary Jurisdiction of this court.

SUMMARY OF ARGUMENT

Section 903.31 of the Florida Statutes exonerates a surety from liability on a bond upon an adjudication of guilt or innocence and further provides that the original appearance bond shall not be construed to guarantee appearance either during or after a pre-sentence investigation. In addition, the bond agreements between the surety and ROSE JOSEPH expressly state that the bonds were not valid for pre-sentence investigation, pre-trial intervention or counter measure program unless specifically authorized by surety.

Since a finding of guilt was entered and a presentence investigation was ordered by the court on November 13, 1991, Appellants' bonds fell within the provisions of Section 903.31 of the Florida Statutes and the express language of the bond agreements. The lower courts were precluded by the foregoing from estreating and forfeiting and failing to set aside the judgments concerning Appellant's bonds when Defendant, ROSE JOSEPH, failed to appear for sentencing on January 22, 1992. The lower court orders denying the motions made by Appellant in the lower court was error and the decision of the Fifth District Court of Appeal to uphold those rulings was likewise error.

ARGUMENT

THE APPELLANT'S BOND AGREEMENTS AND SECTION 903.31 OF THE FLORIDA STATUTES REQUIRED THE LOWER COURT TO GRANT

APPELLANTS' MOTION TO SET ASIDE JUDGMENT PURSUANT TO
FLORIDA STATUTE 903.27 AND/OR FLORIDA RULE OF CIVIL
PROCEDURE 1.540(b).

The Certified Question should be answered in the affirmative. The lower courts had no authority to estreat, forfeit and send into judgment, Appellants' bail bonds upon Defendant, ROSE JOSEPH'S, failure to appear for sentencing on January 22, 1992. Specifically, the bail bond agreements between Appellants and Defendant, ROSE JOSEPH, which were filed and accepted by the court, expressly state "this bond is not valid for pre-sentence investigation, pre-trial intervention or counter measure program unless specifically authorized by surety" (R21-22, 34-35) (emphasis supplied). Additionally, Section 903.31 Florida Statutes (1991) provides in part:

An adjudication of guilt or innocence of the Defendant shall satisfy the conditions of the bond. The original appearance bond shall not be construed to guarantee deferred sentences, appearances during or after a pre-sentence investigation, appearance during or after appeals, conduct during or appearance after admission to a pre-trial intervention program, payment of fines, or attendance at educational or rehabilitation facilities the court otherwise provides in the judgment.

(emphasis supplied).

The Appellant's should have the right to rely upon plain statutory language in drafting their bond agreements. The Fifth District Court of Appeal decision constitutes a rewriting of the statute by the court and impairs and dilutes Appellant's bond contracts after the fact.

On November 13, 1991, Defendant, ROSE JOSEPH, entered pleas

of guilty in case numbers CR91-2221 and CR91-2222 (R3). Following her pleas, the court minutes in these cases reflect "adjudication of guilt withheld, finding of guilt entered" (emphasis supplied) (R44-45). The court minutes were signed by the presiding judge (R44-45).

Based upon the foregoing, adjudications of guilt occurred on November 13, 1991, thereby relinquishing any obligation on the part of Appellants to produce Defendant, ROSE JOSEPH, for sentencing on January 22, 1992 in either case number CR91-2221 or CR91-2222. Even though the court set sentencing for January 22, 1992, and a pre-sentence investigation was ordered during the interim, both the bail bond contracts and Section 903.31, Florida Statutes provided that the bonds were not in effect for purposes of pre-sentence investigations.

Appellants had no obligation to produce Defendant, ROSE JOSEPH, for sentencing on January 22, 1992, and the lower courts estreature, forfeiture and entry of judgment on the bonds was error. It was error for the lower court to deny Appellants' motion to set aside judgment pursuant to Florida Statute 903.27 and/or Florida Rule of Civil Procedure 1.540(b) verbally, and in writing on August 31, 1992. Contrary to the district court ruling, Appellants' bonds were discharged on November 13, 1991, the plea date, for two reasons. First, the lower court entered findings of guilt and second, pre-sentence investigations were subsequently ordered.

Since a pre-sentence investigation will always precede a final

judgment of guilt or innocence, it is clear that the legislature intended the bond to terminate and cancel upon the happening of either an adjudication of guilt or innocence at the time of plea or the subsequent ordering of a pre-sentence investigation, assuming no adjudication has occurred at the time of the plea. If the legislature had intended the bond to remain in force up through sentencing, they surely would not have included the statutory language canceling the bond upon the ordering of a pre-sentence investigation. If such were the intent of the legislature, Section 903.31 would have merely provided that an adjudication of guilt or innocence of the defendant shall satisfy the conditions of the bond. The extra language would have been unnecessary.

Under the district courts' interpretation, the language of the statute which states that "the original appearance shall not be construed to guarantee ... appearances during or after pre-sentence investigation..., unless the court otherwise provides in the judgment" would constitute surplusage. Operative language in a statute may not be regarded as surplusage. City of Pompano Beach v. Capalbo, 455 So.2d 468, 469 (Fla. 4th DCA 1984).

At first blush, Battles v. State, 595 So.2d 183 (Fla. 1st DCA 1992), would appear to control the instant case. Appellant submits however that there is an important distinction between the case at bar and the Battles case. In Battles, there is no mention that the lower court, at the time of the plea, made a finding of guilt, as the lower court did in the instant case. At the time of the pleas in the instant case, the lower court stated "adjudication of guilt

withheld, finding of guilt entered" (emphasis supplied). As such, according to the court minutes in case numbers CR91-2221 and CR91-2222, the court did indeed make a finding of guilt. This fact clearly distinguishes the instant case from Battles.

State v. Fisher, 578 So.2d 746 (Fla. 2d DCA 1991) is likewise distinguishable. In Fisher, the defendant plead guilty and adjudication of guilt was withheld until sentencing. No pre-sentence investigation was requested and there was an agreed upon plea bargain sentence. The defendant failed to appear for sentencing and his bond was ordered estreated. In the present case, a pre-sentence investigation was ordered. Even though adjudication of guilt was withheld, the court made a finding of guilt which thereby distinguishes the instant case from Fisher.

In the realm of statutory construction, a statute which is unambiguous on its face must be given its plain and obvious meaning. Bewick v. State, 501 So.2d 72 (Fla. 5th DCA 1987). A court should not engage in conjecture to extend or restrict the plain meaning of the statutory words. State v. Swope, 30 So.2d 748 (Fla. 1947). Where a statute is clear and unambiguous, it is not the function of a court by judicial fiat to declare a different intent. Foley v. State, 50 So.2d 179 (Fla. 1951).

The language of Section 903.31 of the Florida Statutes is clear on its face. The language unequivocally states that the original appearance bond shall not be construed to guarantee "appearances during or after a pre-sentence investigation...". The lower courts in this case, Battles, supra, and Fisher, supra, with

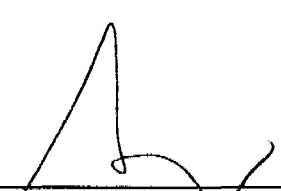
all due respect to those courts, improperly distort the plain and obvious meaning of the statutory language. The cases ignore the apparent legislative intent behind the statute. As such, the lower courts erred in denying the amended motions to set aside estreature and toll payment of estreature in case number CR91-2221 and CR91-2222 and in denying Appellant's motion to set aside the judgments pursuant to Florida Statute 903.27 and/or Florida Rule of Civil Procedure 1.540(b). As such, the district court erred in affirming the denial of Appellants Motion to Set Aside Judgment Pursuant to Florida Statute 903.27 and/or Florida Rule of Civil Procedure 1.540(b).

CONCLUSION

The district courts erred when it affirmed the denial of Appellant's amended motions to set aside estreature and toll payment of estreature and the motions to set aside judgment pursuant to Florida Statute 903.27 and/or Florida Rule of Civil Procedure 1.540(b).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, 250 North Orange Avenue, Orlando, Florida, 32801; Belle Turner, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447 Daytona Beach, Florida 32114 and the Joseph Passiatore, Esquire, Office of the Orange County Attorney, 201 South Rosalind Avenue Orlando, Florida, 32802 by mail this 3rd day of JUNE, 1993.



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