047

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FILED
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JUL 1 1993
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POLAKOFF BAIL BONDS, as Surety
for Defendant, ROSE JOSEPH,

Petitioner,

vs.

ORANGE COUNTY, FLORIDA,
ETC.

Respondent.

Case No. 81,763
District Court of Appeal
5th District - Nos. 92-1814
92-1815
92-2295

* * * * * * * * * * * * * * *

APPEAL FROM THE CRIMINAL COURT OF THE NINTH
JUDICIAL CIRCUIT, ORANGE COUNTY, FLORIDA
AND
APPEAL FROM THE CIRCUIT CIVIL COURT OF THE NINTH
JUDICIAL CIRCUIT, ORANGE COUNTY, FLORIDA
AND
APPEAL FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA FIFTH DISTRICT

RESPONDENT'S AMENDED BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA STATUTES:

CASES:

PRELIMINARY STATEMENT

Respondent, ORANGE COUNTY, FLORIDA, a political subdivision of the State of Florida, was defendant-appellee below; it will be referred to in this brief as "the COUNTY." Petitioner POLAKOFF BAIL BONDS, as Surety for Defendant ROSE JOSEPH and AMERICAN BANKERS INSURANCE was the plaintiff-appellant below and they will be referred to as "the SURETY."

Various record materials referenced in this brief are reproduced in the Appendix and cited as "A. (tab number)." Other references to the record are designated as "R.___." A copy of the decision sought to be reviewed is included in the Appendix at Tab 1.

All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

It is the statutory duty of a SURETY to produce a Defendant (principal on the bond) in Court on the dates and times appointed for the Defendant to appear. Florida Statute §903.045 is quite clear where it states:

> It is the public policy of this state and the intent of the Legislature that a criminal surety bail bond, executed by a bail bondsman licensed pursuant to Chapter 648 in connection with the pretrial or appellate release of a criminal defendant, shall be construed as a commitment by and an obligation upon the bail bondsman to ensure that the defendant appears at all subsequent criminal proceedings and otherwise fulfills all conditions of the bond. The failure of a defendant to appear at any subsequent criminal proceeding or the breach by the defendant of any other condition of the bond constitutes a breach by the bail bondsman of this commitment and obligation." (Emphasis supplied). (A.Tab 2)

A bail bond is a three-party contract between the State, the accused, and the SURETY, whereby the SURETY guarantees appearance of the accused. Pinellas County v. Robertson, 490 So.2d 1041 (Fla. 2d DCA 1986).

The SURETY claims that based upon a provision in its personal written bond agreement with the Defendant, as well as its own interpretation of Florida Statute §903.31, (which is at variance with two prior Florida District Courts of Appeal decisions), that the SURETY was under no obligation to produce

the Defendant for sentencing and adjudication of guilt in the criminal cases.

The COUNTY argues that Florida Statute §903.31 is quite clear regarding the conditions of the bond and reads as follows:

> Within 10 business days after the conditions of a bond have been satisfied or the forfeiture discharged or remitted, the court shall order the bond canceled and, if the surety has attached a certificate of cancellation to the original bond, shall furnish an executed certificate of cancellation to the surety without cost. 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, appearance during or after presentence investigation, appearance during or after appeals, conduct during or appearance after remission of a pretrial intervention program, payment of fines, or attendance at educational or rehabilitation facilities the court otherwise provides in the judgment. (Emphasis supplied) (A.Tab 3)

The Criminal Court, the Circuit Civil Court and the District Court were all correct when they upheld Florida Statute §903.31 and the findings contained in Battles v. State of Florida, 595 So.2d 183, (Fla. 1st DCA 1992) and State v. Fisher, 578 So.2d 746 (Fla. 2d DCA 1991) in that when there has been no adjudication of guilt or innocence of a defendant on a criminal charge then the conditions of the bail bond have not been met and judgment should be entered against the Surety.

SUMMARY OF THE ARGUMENT

Florida Statute §903.045 can be construed as a commitment and an obligation by the Surety to ensure the appearance of a criminal defendant at all subsequent criminal proceedings. The failure of a Surety to produce a defendant at a required criminal proceeding constitutes a breach of this commitment and obligation.

The mere provision of certain language in a bond agreement between a Surety and a Defendant, does not obviate the statutory responsibility of a Surety to produce a defendant at all subsequent criminal proceedings.

Florida Statute §903.31 requires that only an adjudication of guilt or innocence of a defendant will satisfy the conditions of a bond. The failure of a Surety to produce a defendant after adjudication of guilt has been withheld, and prior to an entry of judgment and imposition of sentencing, constitutes a breach by the Surety of his commitment and obligation.

The Criminal Court, the Circuit Civil Court and the Fifth District Court of Appeal have all affirmed the above arguments. The Fifth District Court of Appeal certified, and posed the following question to the Florida Supreme Court:

> **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 PRESENTENCE INVESTIGATION?**

ARGUMENT I.

THE CRIMINAL COURT WAS CORRECT IN FORWARDING FOR FILING AND ENTRY OF JUDGMENT "ORDER OF FORFEITURE OF BAIL BONDS" IN CASE NOS. CR91-2221 AND CR91-2222 WHERE DEFENDANT FAILED TO APPEAR IN COURT FOR ADJUDICATION AND SENTENCING AND WHERE THE DEFENDANT HAD NOT YET BEEN RETURNED TO ORANGE COUNTY.

Petitioner POLAKOFF BAIL BONDS posted surety bonds in the total amount of $25,000.00 to secure the release of the Defendant, ROSE JOSEPH, on or about March 2, 1991.

On November 13, 1991, the Defendant ROSE JOSEPH, entered a plea of guilty to delivery of cocaine and possession of cocaine in Case Numbers CR91-2221 and CR91-2222. On that date, the Criminal Court accepted defendant's plea of guilt; made a finding of guilt; ordered a pre-sentence investigation; and set a sentencing date of January 22, 1992 on both cases. The court minutes of November 13, 1991 (A.Tab 4) confirm that the court ordered "Adjudication of guilty withheld, finding of guilty entered," (R.VOL.1-28 and R.VOL.2-29) (A. Tab 4) and that the "STATUS" of the Defendant ROSE JOSEPH, was "BOND." Clearly the Court reserved adjudication for the sentencing hearing on January 22, 1992.

When the Defendant ROSE JOSEPH, failed to appear for sentencing on January 22, 1992, the Criminal Court issued a capias; estreated the bonds; and ordered a "no bond" status for Defendant. (R.VOL.1-30 and R.VOL.2-30) On the same day the

Clerk to the Criminal Court filed its Certificate of Forfeiture of Bail Bond pursuant to Florida Statute §903,26(2)(a).

At the request of the SURETY, and without giving notice to the COUNTY, on February 27, 1992 the Criminal Court granted a nunc pro tunc Order giving the SURETY an additional 90 days extension to pay the forfeitures. (R.VOL.1-40 and R.VOL.2-39) (A. Tab 5) On May 27, 1992, the Criminal Court again issued an Order granting the SURETY an additional 30 days from May 27, 1992 for the Court to consider a Motion for Exoneration. (R.VOL.1-46 and R.VOL.2-45) (A. Tab 6)

On June 26, 1992 the Criminal Court finally denied the Amended Motions to Set Aside Estreature and Toll Payment of Estreature and according to the record quoted:

> "It appears to me the Battles case is precisely on point, but no judgment was entered, and that therefore the estreature should not be set aside.
> I will deny your motions."

On July 2, 1992 and July 8, 1992 the Criminal Court issued Orders on Case No. CR91-2221 and CR91-2222 denying the Amended Motions to Set Aside Estreature and Toll Payment of Estreature. (R.VOL.2-77 and R.VOL.1-80) (A.Tab 7)

The Criminal Court was correct in denying the Motions to Set Aside Estreature and Toll Payment of Estreature when SURETY failed to either pay the estreature or produce the Defendant ROSE JOSEPH.

ARGUMENT II.

THE CIRCUIT CIVIL COURT WAS CORRECT IN ENTERING JUDGMENT AND DENYING THE MOTION TO SET ASIDE JUDGMENTS IN CASE NOS. CI-5344 AND CI92-5345 WHEN NO ADJUDICATION OF GUILT; NO IMPOSITION OF SENTENCE; AND NO FINAL JUDGMENT OR ORDER WAS ENTERED CONCERNING THE DISPOSITION OF THE CRIMINAL CHARGES.

On August 31, 1992 upon an appeal to the Circuit Civil Court on a Motion to Set Aside Judgment, the SURETY claimed that according to Florida Statute §903.31, the SURETY had no obligation to produce the Defendant ROSE JOSEPH for court appearances past the entry of her guilty plea on November 13, 1991.

The COUNTY argued that the lower court properly estreated the SURETY'S bonds when the Defendant ROSE JOSEPH failed to appear for sentencing in both Case Numbers CR91-2221 and CR91-2222. In the case of Accredited Surety and Casualty Co., Inc. v. State, 318 So.2d 554 (Fla. 1st DCA 1975), an appellate court first held that the conditions of a bail bond were not met by the mere entry of a guilty plea. At that time, Florida Statute §903.31 stated that: "Conviction or acquittal of the defendant will satisfy a bond unless the court otherwise provides in the judgment." The First District Court of Appeal reasoned as follows:

> "The judgment referred to in the above emphasized phrase can only mean the judgment of conviction - the adjudication of guilt (or the judgment putting the accused on probation if adjudication of guilt is withheld). **A plea or verdict is not judgment**. It would be incongruous to say that the court could provide in the judgment that the bond is not satisfied if it had already been automatically discharged." (Emphasis supplied).

Subsequent to Accredited, the Legislature amended Florida Statute §903.31 on three separate occasions, Laws of Florida Chapters 80-230, 86-151, and 89-360, such that it now reads:

> Within 10 business days after the conditions of a bond have been satisfied or the forfeiture discharged or remitted, the court shall order the bond canceled and, if the surety has attached a certificate of cancellation to the original bond, shall furnish an executed certificate of cancellation to the surety without cost. **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, appearance during or after presentence investigation, appearance during or after appeals, conduct during or appearance after remission of a pretrial intervention program, payment of fines, or attendance at educational or rehabilitation facilities the court otherwise provides in the judgment. (Emphasis supplied)

According to Webster's Third New International Dictionary, the word "Adjudicate" is "to settle finally (the rights and duties of the parties in a court case)". It is clear from the Court Minutes on November 13, 1991, that the Court was simply

accepting the defendant's guilty plea and reserving final adjudication as to the "rights and duties" of the defendant for the sentencing hearing on January 22, 1992. (R.VOL.1-28; R.VOL.2-29)

The SURETY'S interpretation of Florida Statute §903.31 and the limiting language contained in the bond, does not relieve the bondsman from the statutory requirement that he produce the defendant until such time as there is an adjudication of guilt or innocence. In Battles v. State of Florida, 595 So.2d 183, Fla. 1st DCA 1992) the district court stated as follows:

> "In 1986 the legislature amended §903.31 to provide that the original appearance bond shall not be construed to guarantee "appearance during or after a presentence investigation, appearance during or after appeals, (or) conduct during or appearance after admission to a pretrial intervention program . . . the court otherwise provides in the judgment." Thus, even though the statute has been amended, the entry of judgment is still required as a predicate to satisfaction of the bail bond. Indeed, the Second District has expressly held that Accredited Surety and American Druggists' retain their vitality under the current version of §903.31. State v. Fisher, 578 So.2d 746 (Fla. 2d DCA 1991). Entry of a nolo contendere plea is not tantamount to a judgment so as to satisfy the condition of an appearance bond." (Emphasis supplied).

In the case of State v. Fisher, 578 So.2d 746 (Fla.2d DCA 1991) a similar situation was addressed when the defendant Fisher failed to appear for sentencing and the Court of Appeal ruled as follows:

> "Since there had been no adjudication of guilt and no sentence imposed, the bond had not been satisfied or cancelled and was subject to estreature for Fisher's failure to appear for sentencing"
> (Emphasis supplied)

SURETY argued that Battles and Fisher, were distinguishable from the instant case on the basis that in this case, a plea of guilty was entered as opposed to a plea of nolo contendere.

The COUNTY strongly disagred with this argument and maintained that in both Battles and Fisher, the courts clearly upheld the legislative intent behind the statute which is to ensure the appearance of a criminal defendant "at all subsequent criminal proceedings" (Fla. Stat. §903.045)

The entry of a guilty plea in the instant case (as compared to the entry of a nolo contendere plea in the Fisher case), does not satisfy the obligation of the SURETY to produce a defendant for adjudication of guilt and sentencing. Only the entry of judgment is sufficient to satisfy the bail bond.

Finally, in American Druggist's Insurance Company v. State of Florida, 410 So.2d 627 (Fla.2nd DCA 1982), the court held that the mere provision of certain language in the bond agreement between the defendant and the surety:

> "may have some efficacy at least as between client and bonding company, but does not effectuate automatic termination of bond application to state or to court."

The fact that the SURETY included language in the bond to the effect that it was not valid for pre-sentence investigations, did not obviate the statutory responsibility of the bondsman to produce the defendant until such time as there was an adjudication of guilt or innocence.

As the court stated in American Druggist:

> "We construe this statute to mean that a bond can only be automatically canceled as a matter of law when there is either an adjudication of guilt or innocence. This achieves a desired goal of uniformity and helps preserve the function of bail which is to secure the attendance of the accused to answer the charge against him." (Emphasis supplied)

On August 31, 1992 the Circuit Civil Court was correct when it denied the Motions to Stay Judgment and upheld the ruling of the criminal court when it correctly interpreted Florida Statute §903.31 and upheld the decisions in Battles and Fisher. According to the transcript of the hearing the Court ruled:

> "Well, I think that the Court would have to go along with Battles and Fisher. And in looking at these Court minutes here, it's clear to the Court that he entered a plea of guilty, and the Court accepted that plea and entered a finding of guilt but withheld adjudication of guilt. And that's clearly what this form means. He was not adjudicated guilty pursuant to the statute."

ARGUMENT III.

THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN AFFIRMING THE CIRCUIT COURT'S ORDER REFUSING TO SET ASIDE A BOND ESTREATURE IN CASE NOS. 92-1814; 92-1815 and 92-2295

On April 16, 1993 at oral argument, the District Court correctly applied the requirements of Florida Statute §903.31 which required that an adjudication of guilt or innocence of the defendant is required in order to satisfy the conditions of a bond.

The District Court held that as with Battles and Fisher, there had been no adjudication of guilt, no imposition of sentence, and no final judgment or order entered concerning the disposition of Defendant Rose Joseph's criminal charges, the bonds had not been satisfied and were subject to estreature for the Defendant Rose Joseph's failure to appear for sentencing.

The District Court certified, and as a matter of great public importance, posed a similar question to the Florida Supreme Court as in the case of Battles, the following question:

> 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, WITH WITHHOLDS ADJUDICATION AND JUDGMENT AND CONTINUES THE CASE FOR SENTENCING UNTIL THE COMPLETION OF THE PRESENTENCE INVESTIGATION?

CONCLUSION

Respondent ORANGE COUNTY concludes that on November 13, 1991, the conditions of the bail bond had not been satisfied as the criminal trial court merely accepted a plea of guilty and directed the Defendant ROSE JOSEPH to return to court for sentencing. At that time, the conditions of the bond had not been satisfied; an adjudication had not been made; and a judgment had not been entered in the instant case.

Respondent ORANGE COUNTY also concludes that the Defendant's failure to appear on January 22, 1992 for entry of judgment and imposition of sentencing, constituted a breach by the bail bondsman of his commitment and obligation under Florida Statute §903.045.

It is respectfully submitted that this Court uphold the Criminal Court, the Circuit Civil Court and the District Court's decisions and reply in the affirmative that under §903.31, Florida Statutes, only an adjudication of guilt or innocence of the defendant shall satisfy the conditions of the bond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished to Stuart I. Hyman, Esquire, NeJame & Hyman, P.A., 1520 East Amelia Street, Orlando, Florida 32802 and the Office of the State Attorney, 250 N. Orange Avenue, Orlando, Florida 32801, by U.S. Mail this 29th day of June, 1993.

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