

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Cause No. DA 17-0749

STATE OF MONTANA

Plaintiffs/Appellees

v.

CHALON MICHAEL KINHOLT

Defendant,

v.

ASAP BAIL BONDS,

Defendants/Appellants.

## APPEALLANT'S OPENING BRIEF

On Appeal from the District Court of the Fourteenth Judicial District  
Musselshell County, State of Montana  
District Court Judge Randal Spaulding  
Cause No. DC-16-09

## APPEARANCES:

Nathan J. Hoines Zachary D. Kitchin Hoines Law Office, P.C. 401 3 <sup>rd</sup> Avenue North P.O. Box 829 Great Falls, MT 59403 Attorneys for Defendants/Appellants	Kevin R. Peterson Musselshell County Attorney 506 Main Street Roundup, MT 59072 Attorney for Plaintiff /Appellees	Tim Fox 215 N. Sanders St. Helena, MT 59601 Attorneys for Plaintiffs /Appellees
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## **TABLE OF AUTHORITIES**

### **Cases**

*State v. Musgrove* (1983), 202 Mont. 516, 659 P.2d 285.

*State v. Seybert* (1988), 231 Mont. 372, 374, 353 P.2d 285.

### **Statutes & Rules**

M.C.A. §46-16-201.

M.C.A. § 46-9-503.

M.C.A. § 46-16-201.

M.C.A. § 46-9-510 (1)(b).

Rule 6 of Mont. R. Civ. Pro.

## **STATEMENT OF THE ISSUES**

- I. Did the District Court err by failing to consider Rule 6 of the Montana Rules of Civil Procedure, and failing to account for 3 days for mailing notification of the bail forfeiture?**
- II. Did the District Court err by abusing discretion through excessive forfeiture?**

## **STATEMENT OF THE CASE**

On July 15, 2016, the District Court entered its Warrant of Arrest (Violation of Bail Conditions) for the Defendant allegedly violating conditions of release on bail previously set by the Court. *Judgement of Forfeiture*.

On August 8, 2016, a final pretrial hearing was conducted which the Defendant was ordered to personally attend. The Defendant failed to appear. The District Court then entered an additional warrant of Arrest (Violation of Bail Conditions) for the Defendant for violating the Court's court ordered conditions of release by failing to appear at the final pretrial conference and failing to remain in contact with his attorney. *Judgement of Forfeiture.*

On or about December 22, 2016, the Defendant posted a surety bond in the amount of \$40,000 and was, presumably, released from custody. The bond was issued by ASAP Bail Bonds and underwritten by United States Fire Insurance Company. *Judgement of Forfeiture.*

The matter came before the District Court for a second final pretrial hearing on April 24, 2017 and the Defendant again failed to personally appear as ordered by the District Court. *Judgement of Forfeiture.*

On June 7, 2017, the State filed its "Petition to Forfeit Bond" requesting that the District Court forfeit the \$40,000 surety bond posted by the Defendant and his sureties on December 22, 2016 for the Defendant's failure to appear at the final pretrial hearing on April 24, 2017. *Judgement of Forfeiture.*

On June 7, 2017, the District Court entered its "Order and Notice of Forfeiture" declaring the \$40,000 bail posted by the Defendant and his sureties

forfeited for the Defendant's failure to appear at the April 24, 2017 final pretrial hearing as ordered by the Court. *Judgement of Forfeiture.*

On September 7, 2017 the State filed its "Motion for Default Judgment on the Bail Forfeiture" requesting that the District Court enter its judgment of forfeiture against the Defendant's bondsman and surety for failing to satisfactorily discharge the forfeiture previously declared by the Court within the time permitted. *Judgement of Forfeiture.*

On October 5, 2017 the District Court entered its Judgment of Forfeiture.

On October 26, 2017 ASAP Bail Bonds filed an Objection to Notice of Entry of Judgment and Entry of Forfeiture, and requested a hearing on the matter based upon application of Rule 60.

On December 14, 2017 the District Court entered its Order Re: Objection to Entry of Judgment and Entry of Forfeiture, and Motion for Hearing in which the District Court denied any remedy for ASAP Bail Bonds.

On December 26, 2017 a Notice of Appeal was filed.

### **STATEMENT OF FACTS**

Michael Nicholson is the owner of ASAP Bail Bonds. *Affidavit of Michael Nicholson, filed Oct 26, 2017.* On December 22, 2016 Michael Nicholson bonded the defendant, Chalon Michael Kinholt, out of jail on a \$40,000 security bond. *Id.* A

day or two before April 24, 2007, Michael Nicholson was informed that somebody had called the Public Defender's office, stating the defendant, Chalon Kinholt, died in a horse accident in Mexico. *Id.*

On April 24, 2007, the defendant failed to appear at his pre-trial hearing. In June, 2017 the Musselshell County Attorney filed a petition to forfeit bond requesting that the \$40,000 security bond be forfeited for failure to show on the April 24, 2007 hearing. *Id.* On June 7, 2017 the district court entered an "Order & Notice of Forfeiture" on the \$40,000 bail forfeited for defendant's failure to appear on the April 24, 2007 pre-trial hearing. *Id.* On June 7, 2017 the court "Order & Notice of Forfeiture" was mailed to Michael Nicholson. However, Michael Nicholson was out of town and did not receive the notice until June 19, 2007. *Id.*

On June 20, 2007 Michael Nicholson called the clerk of courts and talked to Barb Halverson, and stated that he thought the county attorney only had 10 days to notify him of the forfeiture and the 10 days had lapsed. *Id.* On the same day Michael Nicholson called the County Attorney's Office and left the same message for County Attorney Kevin Peterson. *Id.*

Michael Nicholson started to actively pursue the defendant and had information that the defendant was hiding in Las Vegas, NV and/or ND. *Id.* Michael Nicholson also received communication from one of the defendant's victims in order

to find him. *Id.* Michael Nicholson also contacted the defendant's mother about his whereabouts. *Id.*

On September 7, 2017 Musselshell County Attorney, Kevin Peterson, filed a motion for default judgment on the bail for forfeiture. *Id.* On September 11, 2017 Michael Nicholson received notice by mail from the County Attorney's Office that his 90 days were up and that he wanted the \$40,000 bond proceeds. *Id.* On September 11, 2017, Michael Nicholson immediately called Kevin Peterson's office and informed him about the conversation he had on June 20, 2007 with Barb Halverson. *Id.* Kevin Peterson told Michael Nicholson he did not know what he was talking about and stated that he can decide whenever he wants to forfeit a bond. *Id.*

On September 11, 2017, Michael Nicholson was informed defendant was arrested on September 9, 2017 and placed in the Arapahoe County Detention Facility by Denver, Colorado. *Id.* On September 12, 2017 Michael Nicholson called Judge Spalding's office and spoke to his clerk, Derinda Hazelton and informed her the defendant was incarcerated in Colorado. *Id.* Michael Nicholson talked to Derinda and was told he needed to appear at the defendant's next court appearance. *Id.*

On September 12, 2017 Michael Nicholson faxed the clerk of court a copy of bond revocation form along with all printed communication and where the defendant was being held. *Id.* On September 12, 2017 the County Attorney's office filed a

petition to revoke and set a place and time for defendant's arraignment. *Id.*

On September 21, 2017 Michael Nicholson called the Judge's office and informed them Arapahoe Detention Facility started processing the defendant to send him to Montana. *Id.*

On October 4, 2017 the court entered a judgment on the \$40,000 bond. *Id.* On October 6, 2017 a notice of entry judgment was entered by Kevin Peterson, the County Attorney in Musselshell. *Id.* On October 9, 2017 Michael Nicholson received the entry of notice of entry of judgment. *Id.*

On October 10, 2017 Michael Nicholson contacted the judge's secretary and was informed he missed the defendant's court hearing that was on October 2, 2017. *Id.* Michael Nicholson never received the order setting the court date. *Id.* Therefore, he was never given an opportunity to be heard or to justify the failure to appear under applicable Montana law.

### **STANDARD OF REVIEW**

The Montana Supreme Court reviews a District Court's decision to forfeit a bond for abuse of discretion. The test is whether the court acted arbitrarily. *State v. Seybert* (1988), 231 Mont. 372, 374, 353 P.2d 285.

### **SUMMARY OF THE ARGUMENT**

MCA §46-16-201 rule 6 of the Montana Rules of Civil Procedure gave an



additional three days for mailing, those days were not accounted for, defendant's apprehension fell within the 90 day window, and therefore the Petition should not have been filed or granted.

Most importantly, the Court's refusal to discharge the forfeiture must be based upon terms as may be just as required under the statute. The District Court failed to consider the factors as laid out in *Seybert*.

Last, the surety in this case was denied due process when he did not receive notice of the hearing the District Court Clerk specifically told Michael Nicholson he would have an opportunity to be heard at.

### **ARGUMENT**

#### **I. Did the District Court err by failing to consider Rule 6 of the Montana Rules of Civil Procedure, and failing to account for 3 days for mailing notification of the bail forfeiture?**

MCA § 46-9-503 Violation of release condition – forfeiture provides:

1) If a defendant violates a condition of release, including failure to appear, the prosecutor may make a written motion to the court for revocation of the order of release. A judge may issue a warrant for the arrest of a defendant charged with violating a condition of release. Upon arrest, the defendant must be brought before a judge in accordance with 46-7-101.

(2) If a defendant fails to appear before a court as required and bail has been posted, the judge may declare the bail forfeited. Notice of the order of forfeiture must be mailed to the defendant and the defendant's sureties at their last-known address within 10 working days or the bond

becomes void and must be released and returned to the surety within 5 working days.

(3) If at any time within 90 days after the forfeiture the defendant's sureties surrender the defendant pursuant to 46-9-510 or appear and satisfactorily excuse the defendant's failure to appear, the judge shall direct the forfeiture to be discharged without penalty. If at any time within 90 days after the forfeiture the defendant appears and satisfactorily excuses the defendant's failure to appear, the judge shall direct the forfeiture to be discharged upon terms as may be just.

(4) The surety bail bond must be exonerated upon proof of the defendant's death or incarceration or subjection to court-ordered treatment in a foreign jurisdiction for a period exceeding the time limits under subsection (3).

(5) A surety bail bond is an appearance bond only. It cannot be held or forfeited for fines, restitution, or violations of release conditions other than failure to appear. The original bond is in effect pursuant to 46-9-121 and is due and payable only if the surety fails, after 90 days from forfeiture, to surrender the defendant or if the defendant fails to appear on the defendant's own within the same time period.

Rule 6 of Mont.R.Civ.P. – Computing and Extending Time; Time for Motion Papers provides:

(a) Computing Time. The following rules apply in computing any time period specified in these rules, or court order, or in any statute that does not specify a method of computing time.

(d) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), or (E), or (F), **3 days are added after the period would otherwise expire** under Rule 6(a). (Emphasis added.)

§ 46-16-201, MCA - Applicability of rules of evidence and civil rules provides:

The Montana Rules of Evidence and the statutory rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided.

In this case, the defendant missed his court date on April 24, 2017. The County Attorney failed to file a notice until June 7, 2017. This was 44 days after the defendant failed to appear. The late filing of the notice hindered ASAP Bail Bonds from finding the defendant, Chalon Michael Kinholt.

It is ASAP Bail Bonds' position that the defendant was apprehended within the 90 days set forth in §46-9-503 MCA.

Pursuant to Mont.R.Civ.P. Rule 6, when an individual or party is given notice through mail, one is entitled to an additional 3 days for mailing. The Rules of Civil Procedure do apply to criminal proceedings pursuant to §46-16-201 MCA. The defendant was apprehended in Denver, Colorado and placed in the Arapahoe County Detention Facility on September 9, 2017. According to MCA §46-16-201 rule 6 of the Montana Rules of Civil Procedure gave an additional three days for mailing in this case. Those days were not accounted for. The defendant's apprehension fell within the 90 day window and therefore, the Petition should not have been filed. In turn, the entry of judgment should have been reconsidered and was improper.

Pursuant to MCA § 46-9-510 (1)(b) the Defendant was surrendered to ‘any peace officer’ as the Defendant was incarcerated in a foreign jurisdiction. Montana’s Code Annotated sets clear guidelines for sureties to justify non-appearance in order to prevent forfeiture. If at any time within 90 days after the forfeiture the defendant’s sureties surrender the defendant pursuant to 46-9-510 or appear and satisfactorily excuse the defendant’s failure to appear, the judge shall direct the forfeiture to be discharged without penalty. In this case, Mr. Nicholson was in contact with Court staff. Mr. Nicholson immediately began seeking the Defendant, and within the 90 day time limit, notified the Court of the Defendant’s incarceration. Further, Mr. Nicholson took the necessary steps in order to either have the Defendant appear or to be mobilized. In this case, Mr. Nicholson took several steps in order to ensure compliance with MCA 46-9-510.

The surety was within the 90 day time limit because mailing days were not calculated. Mont.R.Civ.P. Rule 6, when an individual or party is given notice through mail, one is entitled to an additional 3 days for mailing. The Rules of Civil Procedure do apply to criminal proceedings pursuant to §46-16-201 MCA. The defendant was apprehended in in Denver, Colorado and placed in the Arapahoe County Detention Facility on September 9, 2017. According to MCA §46-16-201 rule 6 of the Montana Rules of Civil Procedure gave an additional three days for mailing in

this case. Those days were not accounted for. The defendant's apprehension fell within the 90 day window and therefore, the Petition should not have been filed. In turn, the entry of judgment should be reconsidered and ultimately overturned.

## **II. Did the District Court err by abusing discretion through excessive forfeiture?**

Most importantly, the Court's refusal to discharge the forfeiture must be based or made upon terms as may be just as required under the statute. The statute provides for discharge of a forfeiture, upon such terms as may be just, "if... the defendant's sureties appear and satisfactorily excuse the defendant's failure to appear." It is not necessary that a reasonable excuse be provided for the failure to appear in order to justify discharging a forfeiture of bond. *State v. Musgrove* (1983), 202 Mont. 516, 659 P.2d 285. Instead, a justifiable and partial excuse is sufficient. In this case, the bondsmen was not notified for 44 days of Defendant's failure to appear. Further, he was apprehended with the 90 day time limit. For these reasons alone there is justified reason to discharge the forfeiture of the bond in the above referenced matter.

In *State v. Seybert*, the Court outlined several factors that should have been considered by the court when analyzing the discharge of the forfeiture. The court violated the due process rights of ASAP Bail Bonds by failing to provide notice of a hearing and allowing Mr. Nicholson to justify his position under M.C.A. § 46-9-

503. This hearing was the only opportunity for the District Court to analyze the factors under *Seybert*. Those factors are:

1. The willfulness of the Defendant's violation of bail conditions;
2. The surety's participation in locating or apprehending the defendant;
3. The cost, inconvenience, and prejudice suffered by the State because of the violation;
4. Any intangible cost;
5. The public interest in ensuring the defendant's appearance; and,
6. Any mitigating factors.

*State v. Seybert*, (1987), 229 Mont. 183,187.

In this case, these criteria call for the consideration of the chain of events leading to the forfeiture of the bond in this matter. First, the county attorney that filed for the revocation in this matter did not inform the affiant/bail bondsmen until 44 days after the Defendant failed to appear. This severely disadvantages the surety in apprehending the Defendant, which is the second factor to consider. Here, ASAP bail bonds was almost prevented from the opportunity of apprehension due to the fact that so much time had passed before anything was done to ensure the Defendant's appearance by the State.

Second, the surety in this case has done everything possible to assist in ensuring the Defendant's presence. Immediately upon notification, ASAP began the process of locating the Defendant, and ensued all costs of locating him and notifying

the State as to his location. This significantly assisted with the cost and inconvenience the State faced which is factor 3 and 4 to consider under *Seybert*.

Further, equity calls for consideration of the chain of events in this case. Even after not being informed for 44 days of the Defendant's failure to appear, ASAP Bail Bonds did everything in their power to locate the Defendant. ASAP informed the State as to Defendant's location within the 90 day time limit, when the 3 days for mailing is considered within the calculation. The public policy behind each of the assurances addressed in this brief are to ensure personal appearance by Defendant's in order to ensure accountability. In this case, those same policies are soiled in the event the court denies the discharge of the forfeiture.

The order from the District Court forfeiting the bail in this case constitutes an excessive forfeiture. In *Seybert*, this Court stated, "In making this determination the court should consider not only evidence relating to damage but also the other factors and circumstances peculiar to each case. No clear rule can be set down which will guide the trial court in every case since the facts and circumstances of each individual case must be considered in their totality. No one factor will be determinative in all cases. However, it is not the purpose of bail to punish a defendant or surety, nor to increase the revenue of the state." *Seybert*, at 187.

A consideration of the peculiar facts in this case call for a just interpretation of the factors. The bond should not have been forfeited and it was an abuse of discretion by the District Court to do so.

### **CONCLUSION**

MCA §46-16-201 rule 6 of the Montana Rules of Civil Procedure gave an additional three days for mailing, those days were not accounted for, defendant's apprehension fell within the 90 day window, and therefore the Petition should not have been filed or granted. More importantly, the District Court erred by failing to provide notice of the Hearing the Court Clerk instructed ASAP they would have an opportunity to be heard at. A failure to consider the peculiar relevant factors in this case constituted an improper and an excessive forfeiture.

DATED this 16<sup>th</sup> day April, 2018.

A handwritten signature in blue ink, appearing to read "Zachary D. Kitchin" or similar, written over a horizontal line.

Nathan J. Hoines  
Zachary D. Kitchin  
Hoines Law Office, P.C.  
P.O. Box 829  
Great Falls, Montana 59403  
Attorneys for Appellants




## CERTIFICATE OF SERVICE

I hereby certify that a true and copy of the foregoing document was served on the following persons by the following means:

<u>1</u>	Hand Delivery
<u>2, 3</u>	Mail
_____	Facsimile
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1. Clerk, Montana Supreme Court  
P.O. Box 203003  
Helena, MT 59620-3003
  
2. Kevin R. Peterson  
Musselshell County Attorney  
506 Main Street  
Roundup, MT 59072  
Attorney for Plaintiff/Appellees
  
3. Tim Fox  
215 N. Sanders St.  
Helena, MT 59601  
Attorneys for Plaintiffs /Appellees

Dated this 16th day of April, 2018.

  
\_\_\_\_\_  
Hoines Law Office, P.C.

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing document meets with Rule 27, M.R.App.P. as follows:


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Nathan J. Hoines  
Zachary D. Kitchin  
Attorneys at Law