

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

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0749

STATE OF MONTANA)
Plaintiff/Appellee)
v.)
CHALON MICHAEL KINHOLT)
Defendant,)
v.)
ASAP BAIL BONDS,)
Defendant/Appellant.)

APPEALLANT'S REPLY 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:

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TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	2
<u>SATEMENT OF THE ISSUES</u>	3
<u>STANDARD OF REVIEW</u>	3
<u>SUMMARY OF THE ARGUMENT</u>	3
<u>ARGUMENT</u>	5
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?	5
II. Did the District Court err by abusing discretion through excessive forfeiture?	8
<u>CONCLUSION</u>	13
<u>CERTIFICATE OF SERVICE</u>	14
<u>CERTIFICATE OF COMPLIANCE</u>	15

TABLE OF AUTHORITIES

Cases

In re Marriage of Wilson, 198 Mont. 147, 645 P.2d 393.

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

State v. Newman, 2005 MT 348, 330 Mont. 160, 127 P.3d 374.

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

Sun Mt., Inc. v. Gore, Mont. 196, 85 P.3d 1286 (2004).

Statutes & Rules

M.C.A. §46-16-201.

M.C.A. § 46-9-503.

M.C.A. § 46-16-201.

M.C.A. 46-9-503(3).

M.C.A. § 46-9-510.

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?**

STANDARD OF REVIEW

Appellants rely upon the standard of review stated in the opening brief. 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

The State's answer relies heavily on an argument that counsel for ASAP Bail Bonds has failed to cite the record and has failed to present case law to support the position presented in Appellant's opening brief. However, a review of the record in this case shows the limited documentation in which to rely upon. The course of the events in this case is laid out in the Court's Order forfeiting the bond. This is specifically cited as the *Order RE: Objection to Entry of Judgment and Entry of Forfeiture, and Motion for Hearing*, (D.C. Doc. 62). In this case, the only available items are the court minutes, client affidavits, briefs filed after the forfeiture, and the Court's Order denying Defendant's Rule 60(b) motion.

Rule 23(a)(3), M.R.App.P., requires that an appellant's brief contain a statement of the facts which includes citations to the record. Rule 23(a)(4), M.R.App.P., requires that the argument section of an appellant's brief contain citations to the pages of the record relied on. The statement of facts in Appellant's brief contains a verbatim recitation of the contested portions of the Court's Order in this case, accompanied by accurate citations to the corresponding documents such as court minutes, client affidavits, briefs filed after the forfeiture, and the Court's Order denying Defendant's Rule 60(b) motion. The argument section of Appellant's opening brief refers to these same excerpts. All hearing transcripts have been filed with the Court. As such, the requirement of Rule 23(a)(4), M.R.App.P. has been satisfied. *State v. Newman*, 2005 MT 348, 330 Mont. 160, 127 P.3d 374.

More importantly, the analysis in this case begins with whether or not three additional days should have been considered for the notice requirement in this case. §46-16-201 MCA and 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 *State v. Seybert*, Mont. 183, 187, 745 P.2d 687.

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?

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.) Title 25, Ch. 20, Rule 6, MCA.

For purposes of determining timeliness of subsequent action where Mont. R. Civ. P. 6 applies, service is not effective until three days after notice of entry of judgment is mailed. *In re Marriage of Wilson*, 198 Mont. 147, 645 P.2d 393 (1982). Pursuant to Mont.R.Civ.P. Rule 6, when an individual or party is given notice through mail, one is entitled to an additional three days for mailing. The Rules of Civil Procedure do apply to criminal proceedings pursuant to §46-16-201 MCA.

It is ASAP Bail Bonds' position that the defendant was still apprehended within the 90 days set forth in §46-9-503 MCA and the bond should have been

exonerated. The defendant was apprehended in Denver, Colorado and placed in the Arapahoe County Detention Facility on September 9, 2017. According to §46-16-201 MCA , 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 by the District Court. Applying the 3 days, the expiration of the 90 period occurred on Sunday, September 10, 2017. The defendant's apprehension fell within the 90 day window and therefore, bail should not have been forfeited and should have been exonerated.

The State has argued that the 3 day notice of mailing pursuant to Rule 6 of the Montana Rules of Civil Procedure does not apply to the forfeiture discharge statute as set forth in §46-9-503 MCA. (Appellee Brief, Pg. 13). The State has cited Rule 6(a) Montana Rules of Civil Procedure that specifically provides:

“Rule 6. Computing and Extending Time; Time for Motion Papers.

(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.”

The State is arguing that §46-9-503 MCA specifies a method of computing time.

The State is in err. §46-9-503 MCA only provides:

“If at any time within 90 days after the forfeiture the defendant's sureties surrender the defendant pursuant to §46-9-503 MCA . . .”

This is a general statute and does not specify any method of computing time.

The State fails to understand that when the court Order was served by mail, ASAP

was given an additional 3 days pursuant to Rule 6(d) of the Montana Rules of Civil Procedure.

The State makes this argument without any citation to statutory or case law. Based upon the State failing to cite relevant supporting authority, the Court should disregard their argument regarding this issue. It is clear pursuant to the plain meaning of Rule 6(d) of the Montana Rules of Civil Procedure. When a party is required to do some act 3 days shall be added to the prescribed period. Rule 6(e), 5(2)(c) Montana Rules of Civil Procedure, *InRe Marriage of Wilson*, 198 Mont. 147.

Based upon the defendant being apprehended within the 90 day period and being incarcerated out of state, it was impossible for ASAP to comply with §46-9-503 MCA that required them to surrender the Defendant pursuant to §46-9-510 MCA to the court, a police officer or correctional facility within the State of Montana.

Interpreting §46-9-503 MCA, is clear when plain meaning of the words is used.

“When a court assesses the validity of an agency rule, it must begin with an examination of the statute itself. The court's objective in interpreting a statute is to implement the objectives the Legislature sought to achieve. The legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used. If the intent of the Legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls and the court need go no further nor apply any other means of interpretation. In determining the statutory mandate given to a statute by the Legislature, it is important to remember that the court's role is simply to ascertain and declare what

is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *Clark Fork Coalition v. Tubbs*, 2016 MT 229, 384 Mont. 503, 380 P.3d 771.

Therefore, if these three days for mailing are added, the Defendant was apprehended were accounted for, then the Defendant was apprehended within the 90 day period as set forth in §46-9-503 MCA.

Pursuant to 46-9-503(4) MCA, 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). Clearly, the arrested defendant in this case met this time requirement when being held out of state.

According to §46-16-201 MCA Rule 6 of the Montana Rules of Civil Procedure gives 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, bail should have been exonerated. In turn, the entry of judgment should be reconsidered and overturned.

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

Title 25, Ch. 20, Pt. VII, Rule 60(b)(1) states that on motion and just terms the Court may grant relief from the final order in this matter for mistake, inadvertence, surprise, or excusable neglect. In this case, a mistake was made by the Court both

when the 90 day window was miscalculated, and when the Court was not presented with several factors of consideration when entering the forfeiture of bond in the face of objection. *Order RE: Objection to Entry of Judgment and Entry of Forfeiture, and Motion for Hearing*, (D.C. Doc. 62).

The Supreme Court of Montana has set aside default judgments on grounds of excusable neglect in cases where pro se defendants have either misunderstood communications from the opposing attorney, where opposing counsel took advantage of pro se defendants, or where pro se defendants made errors that would not typically have been made by counsel. *Sun Mt., Inc. v. Gore*, Mont. 196, 85 P.3d 1286 (2004).

Equity calls for consideration of the chain of events in this case. In this case, the defendant missed his court date on April 24, 2017. A warrant was issued for the defendant's arrest the next day, April 25, 2017. (D.C. Doc. 35). ASAP Bail Bonds was not given notice. *Id.* The County Attorney failed to file a Petition to Forfeit Bond, (D.C. Doc. 36), 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 Kinholz.

The court entered an order forfeiting bond on June 7, 2017, the same date the Petition for Forfeiture was filed. (D.C. Doc. 38) Michael Nicholson had no chance

to respond or present any satisfactory excuse to the court prior to the court entering its forfeiture order.

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 has elapsed, (D.C. Doc. 52). On the same day Michael Nicholson called the County Attorney's Office and left the same message for Kevin Peterson. *Id.* Michael Nicholson started to actively pursue the defendant and had information that the defendant was hiding in Las Vegas, NV and ND. 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 11, 2017 Michael Nicholson was informed defendant was arrested on September 9, 2017 and placed in the Arapahoe County Detention Facility by Denver, Colorado. 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 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.*

The Defendant was incarcerated in a foreign jurisdiction. Michael Nicholson could not arrest or present the Defendant to the Court or law enforcement of the State of Montana within the 90 day period as set forth in 46-9-503(3) MCA. 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 MCA **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 the 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.

In this case, Mr. Nicholson was in contact with the county attorney's office, the Clerk of Court, and the Judge's Clerk within the 90 day time limit as set forth in 46-9-503(3) MCA. In fact, Mr. Nicholson was informed to appear at the defendant's next court appearance. (Nicholson Affidavit, D.C. Doc. 52) Mr. Nicholson was never informed of the defendant's court date and could not appear and excuse the

defendant's failure to appear. Additionally, when the defendant did appear, the Court did not inquire why the defendant failed to appear. (Tr. October 2, 2017, Defendant's initial appearance)

According to established case law the several factors outlined need to be analyzed by this Court. *State v. Seybert*, (1987), 229 Mont. 183,187. 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.

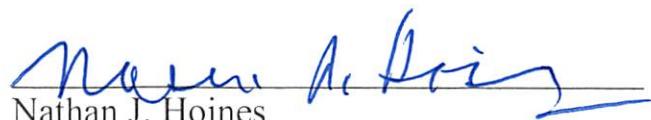
In this case, the State did not spend \$40,000 to bring this Defendant back into the jurisdiction of the Court. The Defendant was found and the Court was notified as to where he was being held. The District Court did not consider any of the factors in *Seybert*. Forfeiture of the entirety of both amounts is clearly excessive in this case. The court should have set a hearing on this matter and consider the *Seybert* factors to make an equitable determination on the discharge of bail.

CONCLUSION

§46-16-201 MCA and 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 and the bail should have been exonerated. 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. A failure to consider the peculiar relevant factors pursuant to *Seybert* constituted an improper and an excessive forfeiture.

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.

DATED this 11th day January, 2019.


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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:

1 Hand Delivery
2, 3 Mail
____ Facsimile
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1. Clerk, Montana Supreme Court
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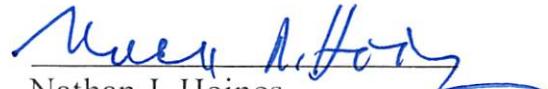
Dated this 11th day of January, 2019.


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:

Document line spacing Double
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