

DA 17-0749

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 64N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHALON MICHAEL KINHOLT,

Defendant,

v.

ASAP BAIL BONDS,

Appellant.

APPEAL FROM: District Court of the Fourteenth Judicial District,
In and For the County of Musselshell, Cause Nos. DC 16-09 and
DV 17-036
Honorable Randal I. Spaulding, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Nathan J. Hoines, Zachary D. Kitchin, Hoines Law Office, P.C.,
Great Falls, Montana

For Appellee:

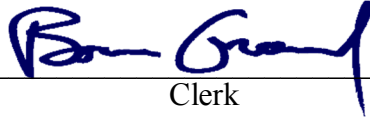
Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant
Attorney General, Helena, Montana

Kevin R Peterson, Musselshell County Attorney, Roundup, Montana

Submitted on Briefs: February 13, 2019

Decided: March 19, 2019

Filed:


Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 ASAP Bail Bonds (ASAP) appeals from an order of the Fourteenth Judicial District Court, Musselshell County, denying its request to discharge a judgment of forfeiture. We affirm.

¶3 On July 15, 2016, the District Court issued an arrest warrant for Chalon Kinholt (Kinholt) for violation of his bail conditions and set bail at \$15,000.¹ On August 8, 2016, Kinholt failed to appear at a final pretrial hearing, which the Court had ordered him to personally attend. Consequently, the District Court issued an additional arrest warrant for failure to appear at the hearing and for failing to maintain contact with his attorney. Bail was set at \$25,000 to ensure Kinholt's appearance and compliance with the Court's conditions of release on bail.² On December 22, 2016, Kinholt posted a surety bond in

¹ The underlying criminal case began on February 24, 2016, when the State charged Kinholt with felony criminal endangerment, aggravated DUI, and obstructing a peace officer, among several other charges. Kinholt was served with the warrant while at Hill County Detention Center on December 1, 2016.

² Kinholt was also served with this warrant while at Hill County Detention Center on December 1, 2016.

the amount of \$40,000 and was released from custody. The bond was issued by ASAP and underwritten by United States Fire Insurance Company (USFIC).

¶4 A second final pretrial hearing was scheduled for April 24, 2017. Despite an order requiring Kinholt to personally attend, Kinholt failed to appear. On June 7, 2017, the State filed a petition requesting the District Court to forfeit the \$40,000 surety bond. That same day, the District Court entered its Order and Notice of Forfeiture declaring the \$40,000 bond posted by Kinholt and his sureties forfeited for Kinholt's failure to appear at the April 24, 2017 final pretrial hearing. The order and notice were mailed to Kinholt, ASAP, and USFIC on June 7, 2017.

¶5 On September 7, 2017, ninety-two days after the petition to forfeit was filed and after the District Court received no response from either ASAP or USFIC, the State moved for a default judgment and mailed the motion to ASAP and USFIC. Neither ASAP nor USFIC responded to the State's motion. On October 4, 2017, the District Court entered a Judgment of Forfeiture in favor of the State and against ASAP and USFIC for \$40,000, noting, "no basis for discharge has been provided by [Kinholt], his bondsman, or his surety. The time for discharge of the forfeiture previously declared by this Court has lapsed without satisfactory cause for discharge having been presented by [Kinholt] and/or his sureties." On October 6, 2017, the State filed a Notice of Entry of Judgment and served a copy of the judgment on ASAP and USFIC.

¶6 On October 26, 2017, ASAP filed an objection to the entry of judgment and forfeiture and requested a hearing. Briefing was submitted and on December 14, 2017,

the District Court denied ASAP's objection and request for a hearing. This appeal follows.

¶7 This Court reviews a trial court's decision to forfeit bond for an abuse of discretion. *State v. Seybert*, 229 Mont. 183, 184, 745 P.2d 687, 688 (1987).

¶8 On appeal, ASAP argues the District Court incorrectly applied the law and miscalculated the ninety-day window allotted for response to the petition.

¶9 Sections 46-9-501 to -512, MCA, set forth specific substantive and procedural requirements for bail forfeiture. If a defendant fails to appear before a court as required and bail has been posted, the judge may declare the bail forfeited. Section 46-9-503(2), MCA. If at any time within ninety days after the forfeiture the defendant's sureties surrender the defendant, or appear and satisfactorily excuse the defendant's failure to appear, the forfeiture will be discharged without penalty. Section 46-9-503(3), MCA.

¶10 ASAP asserts it should have been given ninety-three days, instead of the statutory ninety days, to respond to the petition because Rule 6 of the Montana Rules of Civil Procedure applies. Pursuant to M. R. Civ. P. 6(d), when an individual or party is given notice through mail, that party's opportunity to respond is automatically extended by three days. According to ASAP, because Kinholt was incarcerated in Colorado on September 9, 2017, ASAP would have been able to excuse Kinholt's absence within those three additional days. To support its contention that the Rules of Civil Procedure apply to a criminal proceeding, ASAP cites to § 46-16-201, MCA, which 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." As the District Court

pointed out, a plain reading of the statute indicates only that the *rules of evidence* applicable to civil actions will also control in criminal proceedings. ASAP fails to explain how § 46-16-201, MCA, which makes no mention of the Montana Rules of Civil Procedure, can incorporate Rule 6's addition of three days into the rules of criminal procedure. M. R. Civ. P. 2 states: "There is one form of action—the civil action." Because this action is criminal, ASAP's argument is unpersuasive and it was not entitled to an additional three days. Furthermore, not only was Kinholt's September 9 incarceration outside the statutory ninety-day window, it was also outside the ninety-three days to which ASAP asserts it was entitled. Kinholt's incarceration occurred *ninety-four* days after the forfeiture was entered.

¶11 The District Court entered its Order and Notice of Forfeiture on June 7, 2017. ASAP had ninety days, or until September 5, 2017, to either surrender Kinholt or appear and satisfactorily excuse Kinholt's absence; ASAP did neither. Section 46-9-503(3), MCA. The District Court did not miscalculate the ninety-day time period.

¶12 ASAP next argues that the District Court improperly failed to consider the factors enunciated in *Seybert*. In *Seybert*, this Court provided a list of six factors for district courts to consider when determining the amount of forfeiture. The factors include: the willfulness of the defendant's violation of bail conditions, the surety's participation in locating the defendant, and the cost to the State, among others. *Seybert*, 229 Mont. at 187, 745 P.2d at 689. We agree with the District Court that *Seybert* is factually distinguishable. Unlike ASAP, the bondsman in *Seybert* appeared within the statutory period and attempted to excuse the defendants' absence. ASAP, however, did not appear

before the Court until well after the ninety-day window expired. Moreover, in *Seybert*, this Court held, “[T]he defendant or surety has the burden of demonstrating ‘satisfactory excuse’ before any discharge may be ordered.” *Seybert*, 229 Mont. at 186, 745 P.2d at 688. Because ASAP failed to present a satisfactory excuse and it did not appear within the ninety-day window, the District Court was not required to contemplate the *Seybert* factors.

¶13 Section 46-9-510, MCA, provides that if the surety surrenders the defendant, or the defendant surrenders himself, to “any peace officer” within ninety days after forfeiture, the bail will be exonerated. ASAP argues that Kinholt was surrendered to “any peace officer” within the meaning of § 46-9-510(1)(b), MCA, when he was arrested in Colorado. We disagree. The statute explicitly provides “any peace officer” *of this state*. Section 46-9-510, MCA. Moreover, this Court held in *Seybert* that “incarceration by a foreign sovereign is not a per se satisfactory excuse” and a defendant “cannot avail [himself] of [his] own wrong to escape accounting with the State.” *Seybert*, 229 Mont. at 186, 745 P.2d at 688. “Nor can the surety avail itself of an excuse not available to the defendant[.]” *Seybert*, 229 Mont. at 186, 745 P.2d at 689.

¶14 Finally, ASAP asserts the District Court reached the wrong result because ASAP was not notified of Kinholt’s failure to appear until forty-four days after the fact and argues it was the county attorney’s responsibility to alert it of Kinholt’s absence. However, ASAP cites no authority, statutory or otherwise, which requires the county attorney to notify a bondsman of a defendant’s failure to appear. This Court has held: “Section 46-9-503 requires only that notice of the forfeiture be mailed to an accused and

his surety. It does not require a court to notify the surety of a defendant's non-appearance." *State v. Sunday*, 224 Mont. 340, 344, 729 P.2d 1319, 1322 (1986). ASAP also argues the forfeiture should be discharged because the court clerk told ASAP it could appear at Kinholt's court appearance that occurred on October 2, 2017. However, the court never informed ASAP of the date, and ASAP missed the hearing. Again, ASAP cites no authority entitling it to notice of such a hearing. ASAP was notified of the order and notice of forfeiture and the motion for default judgment. ASAP failed to respond to either. The District Court was under no obligation to inform ASAP of Kinholt's hearing date.

¶15 Section 46-9-503(3), MCA, imposes two conditions on a surety to discharge a forfeiture: (1) appear within ninety days of the forfeiture; and (2) satisfactorily excuse the bail-jumper's failure to appear as ordered by the court. Here, ASAP failed to meet either requirement. The District Court did not err when it denied ASAP's objection to the forfeiture and request for a hearing.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶17 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ DIRK M. SANDEFUR

/S/ BETH BAKER

/S/ LAURIE McKINNON

/S/ JIM RICE