STATE OF MINNESOTA
IN COURT OF APPEALS
A10-331

State of Minnesota,
Respondent,

vs.

Dane Eugene Nelson,
Defendant,
Minnesota Surety & Trust Company,
Appellant.

Filed August 17, 2010
Affirmed
Stoneburner, Judge

Wright County District Court
File No. 86CR073623

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Tom Kelly, Wright County Attorney, Lee Martie, Assistant County Attorney, Buffalo, Minnesota (for respondent)

Frank Arend Schulte, St. Paul, Minnesota; and

Kelly L. Meehan, Plunkett & Associates, Inc., Austin, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant bail-bonding company challenges the district court's imposition of a $2,500 penalty on reinstatement and discharge of a $5,000 bail bond that was forfeited for nonappearance. Because the penalty does not constitute an abuse of discretion, we affirm.

FACTS

Appellant Minnesota Surety & Trust Company (MSTC), a bail-bonding company, through its agent Freedom Bail Bonds, posted a $5,000 bail bond for the release of defendant Dane Eugene Nelson. When Nelson, who was charged in Wright County with felony theft, failed to appear at a pretrial hearing on January 11, 2008, the district court issued a warrant for his arrest and ordered the bond forfeited. Nelson was apprehended by law enforcement on March 12, 2008.

MSTC moved the district court for reinstatement and discharge of the bond. Hearings on the motion took place on May 14 and July 15, 2008. Concluding that MSTC's failure to personally serve Nelson with notice of the reinstatement hearing violated court rules, the district court ordered that the bail bond be reinstated and discharged, subject to a $2,500 penalty. MSTC appealed. This court reversed, holding that Minn. Rule Gen. Pract. 702(f) does not require that a petition and affidavit filed in support of a bond-reinstatement motion be personally served on the principal of the bond. *State v. Nelson*, 773 N.W.2d 330, 331 (Minn. App. 2009). We remanded for such proceedings as the district court deemed necessary to revisit its forfeiture determination

in light of the factors set forth in *In re Application of Shetsky*, 239 Minn. 463, 60 N.W.2d 40 (1953). *Id*. at 332–33.

On remand, without an additional hearing, the district court issued an order imposing the same penalty based on the *Shetsky* factors, concluding that the penalty is appropriate because "[Nelson] absconded for two months, willfully and without excuse, and [MSTC] did not make good faith efforts to apprehend him." In this appeal, MSTC argues that, on remand, the district court abused its discretion by: (1) failing to hold a hearing to address the *Shetsky* factors and (2) improperly analyzing the factors.

D E C I S I O N

I. Standard of Review.

By agreeing to act as surety, a bail-bonding company promises that the defendant will personally appear to answer the state's charges. *State v. Williams*, 568 N.W.2d 885, 888 (Minn. App. 1997), *review denied* (Minn. Nov. 18, 1997). If the defendant fails to appear, the court may forfeit, forgive, or reduce the bond on terms that are "just and reasonable." Minn. Stat. § 629.59 (2008). The surety bears the "burden of proof to establish a justification for a mitigation of forfeited bail." *Shetsky*, 239 Minn. at 472, 60 N.W.2d at 46.

A bail-bond-forfeiture decision will not be reversed absent an abuse of discretion. *State v. Vang*, 763 N.W.2d 354, 357 (Minn. App. 2009). "A district court abuses its discretion when its ruling is based on an erroneous view of the law." *State v. Storkamp*, 656 N.W.2d 539, 541 (Minn. 2003). To determine whether a district court abused its discretion in reinstating or refusing to reinstate a bail bond, a reviewing court analyzes

factors set out in *Shetsky*. *Williams*, 568 N.W.2d at 888 (citing *Shetsky*, 239 Minn. at 471, 60 N.W.2d at 46). Those factors include:

> (1) the purpose of bail, the civil nature of the proceedings, and the cause, purpose, and length of the defendant's absence; (2) "the good faith of the surety as measured by the fault or willfulness of the defendant"; (3) "the good-faith efforts of the surety—if any—to apprehend and produce the defendant"; and (4) any prejudice to the state in its administration of justice.

Storkamp, 656 N.W.2d at 542 (quoting *Shetsky*, 239 Minn. at 471, 60 N.W.2d at 46). The supreme court has recently explained the fourth factor as "relat[ing] to the adverse effect, if any, the defendant's absence has on the state's prosecution of the defendant." *State v. Askland*, 784 N.W.2d 60, 60 (Minn. 2010).

II. The district court did not abuse its discretion by failing, on remand, to hold a hearing to address the *Shetsky* factors.

MSTC contends that the district court proceedings on its petition focused exclusively on the issue of personal service such that (1) the merits of the motion for reinstatement were never substantively addressed and (2) no evidence as to the *Shetsky* factors was provided to the district court. MSTC argues that, therefore, the district court abused its discretion by failing, on remand, to hold a hearing to take evidence on the *Shetsky* factors. We disagree.

MSTC's ability to submit evidence supporting its motion was not restricted prior to or at the May and July 2008 hearings. To support its motion for reinstatement, MSTC submitted only the affidavit of its attorney, Frank Schulte, stating that on receiving notice of Nelson's nonappearance and the bond forfeiture, MSTC immediately began inquiring

into Nelson's whereabouts. The transcript of the July 15, 2008 hearing reflects that both the state and MSTC were given the opportunity to present evidence and arguments on the reinstatement motion. MSTC argued that although Nelson failed to appear at the pretrial hearing, he was subsequently arrested and the arrest warrant was quashed, precluding MSTC from taking "any further action" to facilitate Nelson's appearance. MSTC also argued that Nelson had subsequently appeared in court and was scheduled to go to trial on August 4, 2008.

This court did not mandate an additional hearing on remand, but left to the discretion of the district court how to proceed. The district court was not required to give MSTC "a second bite at the apple" by allowing it to introduce evidence and argument it failed to introduce in the first instance. *State v. Her*, 781 N.W.2d 869, 879 (Minn. 2010). Moreover, MSTC has not identified what evidence it would have introduced or what arguments it would have made had the district court held a hearing on remand. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (concluding that to prevail on appeal, an appellant must show both error, and *prejudice resulting from the error*). We conclude that the district court did not abuse its discretion by failing to hold an additional hearing on remand.

III. The district court did not abuse its discretion by concluding that the *Shetsky* factors support a $2,500 penalty.

MSTC argues that the district court erroneously applied the evidence in the record in light of the *Shetsky* factors and abused its discretion by failing to order reinstatement and discharge of the $5,000 bail bond without penalty. We disagree. The district court,

citing *Shetsky*, noted MSTC's burden to prove that mitigating factors entitled it to reinstatement. 239 Minn. at 471, 60 N.W.2d at 46. And the district court addressed each of the *Shetsky* factors.

A. Purpose of Bail, Civil Nature of Proceedings, and Cause, Purpose, and Length of Defendant's Absence

The district court, citing *Shetksy*, noted that "[t]he primary purpose of bail in a criminal case is not to increase the revenue of the state or to punish the surety but to insure the prompt and orderly administration of justice without unduly denying liberty to the accused whose guilt has not been proved." 239 Minn. at 471, 60 N.W.2d at 46. But the district court also correctly noted that bail is intended to encourage sureties to "locate, arrest, and return defendants who have absconded," citing *Storkamp*, 656 N.W.2d at 543.

MSTC failed to present any evidence concerning the cause and purpose of Nelson's nonappearance at the pretrial hearing and affirmatively notified Nelson that he did not need to appear at the reinstatement hearing. MSTC argues that the district court "placed too much emphasis" on the unknown cause and purpose of Nelson's pretrial absence because the district court faulted MSTC for not revealing the circumstances of the absence and fault is to be considered under a separate *Shetsky* factor. But, the order reflects that the district court correctly found that MSTC offered no evidence as to the circumstances of Nelson's absence, and notified Nelson that he need not appear, even though he might have been able to provide evidence at that hearing of the circumstances of the earlier nonappearance. The record supports the district court's conclusion that MSTC failed to demonstrate that this factor weighs in favor of reinstatement.

B. Good Faith of Surety as Measured by Fault or Willfulness of Defendant

The district court cited *State v. Vang*, for the proposition that a defendant's willfulness or bad faith is attributable to the surety and weighs against forgiveness of a bond penalty. 763 N.W.2d at 358. Absent any evidence to the contrary, the district court logically inferred that Nelson's nonappearance at the pretrial hearing, which was his *third* nonappearance in this matter, was willful and attributable to MSTC. The district court did not abuse its discretion by weighing this factor against reinstatement without penalty.

C. Good-Faith Efforts of Surety to Apprehend and Produce Defendant

MSTC argues that the record does not support district court's statements that "[MSTC's c]ounsel conceded that [Nelson] was arrested two months [after he failed to appear in court] through no efforts of the surety" and that "[MSTC] made no good faith efforts to apprehend and produce [Nelson]." But the record reflects that, at the May hearing, the district court asked MSTC's counsel whether Nelson's reappearance was due to the efforts of MSTC and counsel responded: "no," noting that MSTC looked for Nelson but that he was arrested before the bonding agency was able to apprehend him. And even when bondsmen have exerted effort to retrieve an absent defendant, this court has upheld the refusal of the district court to reinstate the bond. *See, e.g.*, *Williams*, 568 N.W.2d at 888 (stating that bonding agency's assistance in defendant's untimely apprehension does not mandate forgiveness of a bond penalty); *State v. Rodriguez*, 775 N.W.2d 907, 913–14 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010).

According to Schulte's affidavit, which the state does not dispute, MSTC received notice four days after Nelson failed to appear in court "and immediately began inquiring into [Nelson's] whereabouts." The affidavit states that "despite [MSTC']s best efforts, . . . [MSTC] was unable to locate Mr. Nelson before he was arrested by law enforcement officers on March 12, 2008." Because MSTC relied on the general assertion that it made "best efforts" without specifying any specific effort made to apprehend Nelson beyond "inquiries into Nelson's whereabouts," the district court concluded that MSTC failed to meet its burden of showing that this factor weighs in favor of reinstatement without penalty. The district court did not abuse its discretion.

D. Prejudice to State in Administration of Justice

MSTC contends that the while the district court was "quick to penalize [MSTC] for a lack of evidence as to the other *Shetsky* factors, the district court seemingly gives the state the benefit of the doubt [with regard to the prejudice factor]." We disagree. There is nothing in the record that would indicate that the district court improperly penalized MSTC. The district court stated that the record is devoid of any evidence of whether or not the state was prejudiced by the approximately two-month delay in returning Nelson to court, and implicitly did not weigh this factor in favor of or against imposition of a penalty. The district court specifically did *not* include prejudice to the state as a reason for its decision to instate a $2,500 penalty: it stated that "[t]he bond may be reinstated and discharged subject to a $2,500 penalty because [Nelson] absconded for

two months, willfully and without excuse, and the surety did not make good faith efforts to apprehend him."[1]

The district court considered and weighed the *Shetsky* factors as directed by this court. The record supports the district court's conclusion that three of the four *Shetsky* factors weigh against reinstatement of the bond without penalty.

MSTC argues that the penalty will serve only to increase the revenue of the state or to punish the surety. On remand the district court did not explain how it arrived at the amount of the penalty other than to state that the amount imposed is a penalty for the defendant having willfully absconded for two months without excuse and the surety's failure to make good faith efforts to apprehend him. Although the *primary* purpose of bail is not to punish the surety, *Shetsky*, 239 Minn. at 471, 60 N.W.2d at 46, MSTC has not cited any authority that a district court abuses its discretion by imposing a penalty, in part, for a surety's failure to demonstrate that it made a good-faith effort to apprehend a defendant.

Affirmed.

[1] At oral argument, counsel for MSTC argued that the supreme court's recent decision in *Askland*, 784 N.W.2d 60, supports its argument that this case must be remanded for an evidentiary hearing at which evidence on the *Shetsky* factors—particularly lack of prejudice to the state—may be presented by MSTC. But *Askland* has no application to this case because here the district court already properly concluded (implicitly) that the state did not suffer any prejudice. *See id.* at 63, 64 (reversing the denial of appellant's petition and remanding to the district court for reinstatement and discharge of the bail bond where the district court improperly applied the prejudice-to-the-state prong of the *Shetsky* factors to conclude that the state was prejudiced).