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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2291-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHANNEL CUTLER,

Defendant,

and

ACCREDITED SURETY &
CASUALTY CO.,

Defendant-Appellant.

Submitted May 7, 2024 – Decided June 7, 2024

Before Judges Rose and Smith.

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Indictment No. 16-06-
1128.¹

¹ Although not reflected in the trial court's order, during the motion hearing, the judge stated the matter also included Indictment No. 16-09-1414.

Richard P. Blender, attorney for appellant.

Thomas F. Kelso, Middlesex County Counsel, attorney
for respondent (Mariam Matta, Deputy County
Counsel, on the brief).

PER CURIAM

Defendant Accredited Surety & Casualty Co. appeals from a March 17, 2023 Law Division order denying its motion to vacate bail forfeiture and discharge defendant Channel Cutler's nonappearance for a April 7, 2020 court hearing on the violation of probation (VOP) charge for which the surety had posted bond. Accredited Surety argues: (1) Cutler's \$20,000 bail was discharged when she was "sentenced" to inpatient drug rehabilitation on the VOP pursuant to a September 30, 2019 order as a condition of her release from jail; (2) the additional rehabilitation requirement and consolidation of Cutler's VOP with her "four other pending cases" in two counties increased the surety's risk, thereby discharging the bond; and (3) the motion judge erroneously applied the remission of bail guidelines to determine the \$17,000 forfeiture amount. We reject these contentions and affirm.

I.

We begin our review by observing Accredited Surety failed to satisfy its obligation to support its application before the motion judge – and its appeal to

this court – with a complete record of the documentary evidence, including the surety agreement. Although these deficiencies ordinarily might prompt us to dismiss the appeal, see Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 2:5-3 (2024); R. 2:8-2 (providing an appellate court may, at any time and on its own motion, dismiss an appeal), we are confident we have a sufficient record to undertake meaningful appellate review, see Soc. Hill Condo. Ass'n, Inc. v. Soc. Hill Assoc., 347 N.J. Super. 163, 177-78 (App. Div. 2002) (permitting an appellate court to consider and affirm an order under review if the "necessary documents" are not appended). The sufficiency of the record is due, in large part, to the judge's methodical synopsis of the electronic case jacket filed on the Judiciary's eCourts system. Moreover, neither party requested a remand for further development of the record.

We therefore unravel the pertinent events in chronological order from the record before the motion judge. In February 2018, Cutler pled guilty to third-degree and fourth-degree shoplifting, charged in Middlesex County Indictment Nos. 16-06-1128 and 16-09-1414 (2016 shoplifting indictments), and was sentenced to a two-year probationary term conditioned upon various requirements, including random drug testing. At some point, supervision was transferred to Monmouth County.

In October 2018, the Monmouth County Probation Department filed a VOP. According to the statement of charges, Cutler failed to: report to her probation officer, comply with court-ordered evaluations, and provide proof of employment. The statement also noted Cutler had violated probation on July 9, 2018, but the judge continued supervision.

A warrant for Cutler's arrest issued in November 2018. Following her arrest on the bench warrant, on March 4, 2019, Cutler was released on a \$20,000 bond posted by Accredited Surety. The surety agreement was not included in support of Accredited Surety's present motion.

Apparently, Cutler was thereafter detained at the Middlesex County Adult Correction Center on an unspecified charge. There is no indication in the record that her bail was revoked or that a VOP issued at that time.

On September 30, 2019, Cutler appeared in court. On her attorney's motion, the court ordered Cutler's release to an inpatient drug rehabilitation program with certain conditions, including successful completion of the program and compliance with Level 3 pretrial supervision and probation. The order reflects both 2016 shoplifting indictments. The order does not reflect that probation was completed or terminated. Nor is there any indication that bail

was discharged. Notably, Accredited Surety did not provide the transcript of the hearing in support of its present motion.

Five months later, on February 27, 2020, an order consolidating pending "matters" against "Cutler in . . . Monmouth County, under System No. 18-2511" with a 2019 Middlesex County indictment was issued by the trial courts in both counties "for the purposes of sentencing [Cutler] into the Drug Court Program."² Although the caption of the order lists Cutler's 2016 shoplifting indictments and a 2020 Middlesex County accusation, the record is silent as to why those three cases were not included in the paragraph ordering consolidation for Drug Court sentencing purposes. Further, the record neither reveals the nature of the "matters" pending in Monmouth County nor an explanation of the term, "System No. 18-2511."

According to the certification of counsel in support of Accredited Surety's present motion: Cutler failed to appear in court on March 4, 2020, "a bench warrant was issued for her arrest[,] and the bail was forfeited"; and on March 9, 2020, the court released Cutler, "the warrant was vacated," and "bail was not reinstated." However, there is no documentation in the record supporting

² Effective January 1, 2022, the Drug Court Program was renamed the New Jersey Recovery Court Program.

Accredited Surety's claim that the bail was forfeited on March 4 and not reinstated on March 9.

Instead, the record reveals bail was forfeited on April 7, 2020, when Cutler again failed to appear in court and a bench warrant issued. The parties do not dispute that the Middlesex County Finance Division issued a notice of the bail forfeiture on December 17, 2020. See R. 3:26-6(a) (requiring the finance division manager to "forthwith send notice of the forfeiture" following "breach of a condition of recognizance"). Shortly thereafter, Accredited Surety moved to vacate the bail forfeiture and discharge the bail. See *ibid.* (providing "the court shall not enter judgment until the merits of any objection are determined").

Cutler remained a fugitive until February 4, 2021, when she was arrested on the bench warrant. Apparently, the following month, a bench warrant issued for Cutler's arrest on an Essex County aggravated manslaughter charge, which prompted the issuance of another VOP and vacation of the February 27, 2020 consolidation order. The aggravated manslaughter charging document was not included in the motion record.

During colloquy with counsel at the present motion hearing, the judge read from a January 13, 2022 "addendum to a [VOP]," which listed the aggravated manslaughter charge and referenced the "original [VOP] statement of charges

dated October 25, 2018." According to the judge, the addendum suggested the VOP at issue "[wa]s still outstanding" at that time and there was "nothing in eCourts addressing this [VOP]." The judge noted the surety's motion rested solely on the September 30, 2019 order, which neither addressed the present VOP nor memorialized Cutler's sentence. Counsel for Accredited Surety acknowledged he had not listened to the September 30 hearing on CourtSmart or submitted the transcript of the hearing in support of the surety's motion. The motion judge thus concluded Cutler's case was not adjudicated on September 30.

Later during the hearing, the court clerk informed the judge the computerized criminal case information management system, known as PROMIS/Gavel, indicated that on August 30, 2022, Cutler's "VOP [was] withdrawn per amended plea agreement stated on the record." The clerk also located the memorializing judgment of conviction (JOC), issued on September 1, 2022. According to the judge, the JOC stated: "Indictment 20-11-459 is dismissed as per amended plea agreement placed on the record on August 30th, 2022. The [VOP] on Indictment [No.] 16-06-1128 has been withdrawn."

Immediately following oral argument, the judge denied Accredited Surety's motion. The judge first rejected the surety's contention that the

September 30, 2019 order transferring Cutler to an inpatient drug rehabilitation program was a "sentence" that otherwise constituted a final disposition on Cutler's VOP. Instead, the judge found the VOP was "finally addressed" and "withdrawn" as part of Cutler's guilty plea entered August 30, 2022, and memorialized in the ensuing JOC. The judge also rejected Accredited Surety's contention that the consolidation order increased the surety's risk, finding instead consolidation "was a procedural mechanism to allow [Cutler] to apply to Drug Court in Middlesex County [and] that those cases existed in Monmouth County."

Turning to the amount of forfeiture, the motion judge recognized pursuant to the bail forfeiture remission guidelines, he was obligated "to remit between one and nineteen percent" of the bail amount. Addressing Accredited Surety's argument concerning the eight-month delay in notice of the forfeiture, the judge noted Accredited Surety has an "obligation as a surety to make sure [its] client shows up in court." After the parties' efforts to resolve the issue failed, the judge awarded a fifteen percent remission to Accredited Surety, based on the 303 days Cutler was at large. This appeal followed.

II.

A.

Well-established principles guide our review. "A bail bond is essentially a surety agreement in which the defendant is the principal and the State is the creditor." State v. Calcano, 397 N.J. Super. 302, 305 (App. Div. 2007). "The primary purpose of the surety agreement is to ensure that the defendant will appear at all required court appearances until a final disposition of charges against him [or her] is reached." State v. Ceylan, 352 N.J. Super. 139, 143 (App. Div. 2002). "[T]he agreement is subject to the same legal principles applicable to the construction and consequences of surety agreements in general." Calcano, 397 N.J. Super. at 305. "The nature of the surety's undertaking must therefore be determined in accordance with the terms of [its] agreement subject only to applicable provisions of law." State v. Vendrell, 197 N.J. Super. 232, 236 (App. Div. 1984); see also State v. Weissenburger, 189 N.J. Super. 172 (App. Div. 1983).

Further, "[t]he requirements of law are prescribed by Rule 3:26-4(a)." Vendrell, 197 N.J. Super. at 236. Pursuant to Rule 3:26-4(a), the recognizance is "conditioned upon the defendant's appearance at all stages of the proceedings until final determination of the matter, unless otherwise ordered by the court."

(Emphasis added). We have held the term, "'final determination' has the same meaning as 'final judgment,' and it is well-settled that final judgment in the context of criminal proceedings is the [JOC]." Vendrell, 197 N.J. Super. at 236.

As stated, the surety agreement was not included in the motion record. However, Accredited Surety's argument rests not on the terms of its agreement, but rather on its claim that the September 30, 2019 order memorialized Cutler's "sentence" as a "final determination" within the meaning of the court rule and interpretive case law. We disagree.

The September 30 order did nothing more than release Cutler from custody on certain conditions, including the completion of a specific inpatient drug program.³ Cutler's probationary term neither was completed nor terminated under the order. Rather, we agree with the motion judge that the VOP ultimately was withdrawn on August 30, 2022, as memorialized in the September 1, 2022 JOC. Accordingly, the September 30 order was not a "final determination" of Cutler's VOP within the meaning of Rule 3:26-4(a).

³ To the extent the order added compliance with Level 3 pretrial release, this condition was consistent with N.J.S.A. 2A:162-18(a)(1) (acknowledging "bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required").

B.

"The surety will be discharged as a matter of law where the agreement has been modified without notice and consent and where the modification 'materially increases [the surety's] risk.'" Calcano, 397 N.J. Super. at 306 (quoting Vendrell, 197 N.J. Super. at 237); see, e.g., State v. Clayton, 361 N.J. Super. 388, 395 (App. Div. 2003) (holding "the court's unilateral decision to reinstate [the defendant] to bail" after the defendant's failure to appear without notice to the surety constituted an "increased risk" warranting discharge of the bail). However, "not every modification or change in conditions of pretrial release will materially increase the surety's risk, or impose on the surety fundamentally different obligations than those originally undertaken." State v. Tuthill, 389 N.J. Super. 144, 149 (App. Div. 2006).

To support its argument that the September 30, 2019 court-ordered inpatient drug program increased its risk, Accredited Surety cites our decision in Weissenburger, where we held a cooperation agreement between the defendant and the prosecutor, permitting the defendant to flee the jurisdiction without notice to the court or the State if he feared for his life, constituted an impermissible modification of the surety agreement, materially increasing the risk to the surety. 189 N.J. Super. at 177. We reasoned, "the risk created by the

agreement was in fact the cause of [the] defendant's nonappearance and of the consequent bail forfeiture." Ibid.

Accredited Surety argues Weissenburger is on all fours with the present matter because Cutler "left the facility, a bench warrant was issued for her arrest[,] and the bail was forfeited." But there is no evidence in the record that Cutler "left the facility" without authorization. Assuming arguendo those circumstances were true, Accredited Surety was well aware when it posted bail in March 2019, Cutler had already violated her probationary sentence eight months earlier in July 2018. Moreover, the statement of charges indicated that Cutler "reported once to [her probation] officer since being placed on supervision" and had not complied with court-ordered evaluations, including substance abuse. Accordingly, Accredited Surety was fully aware when it posted bond that Cutler presented a risk of non-appearance and non-compliance with drug screening and treatment. Inpatient rehabilitation thus was a foreseeable requirement.

Nor are we persuaded, on this record, the February 27, 2020 consolidation order increased the surety's risk. Because the motion record does not include the underlying complaints or indictments, it is not clear from the record which "matters" were included in the consolidation order. Without the surety

agreement, we are unable to determine the scope of Accredited Surety's obligations thereunder, especially in view of Accredited Surety's failure to articulate how its obligation to ensure Cutler's appearance in court was impaired by the consolidation order. Based on the governing legal principles, however, we discern no error in the motion judge's decision that the consolidation order operated as a means to permit Cutler's application to the former Drug Court program and did not materially increase the surety's risk. See Vendrell, 197 N.J. Super. at 237; Weissenburger, 189 N.J. Super. at 176.

C.

Rule 3:26-6(b) authorizes the trial court to remit a bail forfeiture, in whole or in part, in accordance with the court rules and Administrative Directive #22-17, "Bail and Bail Forfeitures – Revisions to Procedures and Forms" (Aug. 7, 2017) (Directive #22-17); see also State v. Ventura, 196 N.J. 203, 213 (2008). "The decision whether to remit and the amount of the remission 'lies within the equitable discretion of the court to be exercised in the public interest.'" State v. Ramirez, 378 N.J. Super. 355, 364 (App. Div. 2005) (quoting State v. de la Hoya, 359 N.J. Super. 194, 198 (App. Div. 2003)). We review the trial court's determination under an abuse of discretion standard. Ventura, 196 N.J. at 206.

Directive #22-17 sets forth the factors the court should consider when determining whether to set aside an order forfeiting bail. Those factors are: (1) the length of time the defendant is a fugitive; (2) the prejudice to the State and the expense incurred by the State due to the defendant's non-appearance, recapture, and enforcement of the forfeiture; (3) the detriment to the State and the public interest where a defendant deliberately fails to make an appearance in the criminal case; (4) whether a non-appearing defendant was imprisoned out-of-state; (5) the State's knowledge of a defendant's imprisonment; and (6) whether the defendant was deported while on bail. The administrative directive thus provides judges "with a helpful starting point" for making remission determinations. State v. Harris, 382 N.J. Super. 67, 71-72 n.5 (App. Div. 2005); see also de la Hoya, 359 N.J. Super. at 198-99.

"[I]f a surety seeks a partial or total remission of a forfeiture of bail, it bears a heavy burden to show that it has satisfied its essential obligation under the recognizance to secure the defendant's return to custody, and in the absence of this showing, the trial court may determine that the forfeiture should stand." State v. Mercado, 329 N.J. Super. 265, 271 (App. Div. 2000). In Mercado, where each defendant had been apprehended and returned to court after failing to appear, their return was due to the action of law enforcement rather than the

surety. Id. at 272-73. We held the trial court did not abuse its discretion by ordering a ninety percent bond forfeiture, reasoning the surety "failed to show that it made any active efforts to locate, apprehend and return the defendants to court." Id. at 272; see also State v. Hyers, 126 N.J. Super. 259, 260 (App. Div. 1973) (finding partial remission appropriate where the guarantors "made all reasonable efforts to locate defendant which ultimately bore fruit, and the State suffered no prejudice").

Accredited Surety asserts the motion judge erroneously applied Directive #22-17 by calculating Cutler's fugitive status from issuance of the April 7, 2020 bench warrant to her February 4, 2021 arrest, i.e. 303 days. Instead, the surety argues the judge should have calculated Cutler's fugitive status from April 7, 2020 to December 17, 2020 – which the surety inexplicably calculates as forty-nine days – thereby triggering the forfeiture amount within the eleven to twenty percent range. The State counters the eighty-five percent forfeiture amount was warranted because Accredited Surety "offered no proof of any efforts or attempts to locate or return [Cutler]." In essence, the State argues it was prejudiced by "the surety's failure to supervise."

Because there is no evidence in the record to suggest Accredited Surety located – or attempted to – locate Cutler, remission was "entirely appropriate"

here because she remained a fugitive under the surety's supervision. See Ventura, 196 N.J. at 215. Although under Directive #22-17, the "primary factor . . . to determine the amount to remit is the 'length of time that [the] defendant is a fugitive, rather than the supervision efforts provided by the surety,'" Directive #22-17 (emphasis omitted) (quoting Directive #13-04), Accredited Surety has not cited, nor has our research revealed, any New Jersey authority supporting its argument that the clock runs when the surety is notified of the bench warrant or forfeiture. Rather, Directive #22-17 provides the defendant's fugitivity "is calculated from the date of the defendant's failure to appear in court and the court's issuance of a bench warrant."

Because Accredited Surety demonstrated no significant "efforts to secure [Cutler's] return," see Mercado, 329 N.J. Super. at 271, the "public interest," see Ramirez, 378 N.J. Super. at 364, weighs in favor of the forfeiture amount determined by the motion judge. We therefore discern no basis to disturb the March 17, 2023 order.

Any arguments not addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION