Buffalo Law Review

Volume 3 | Number 1 Article 36

12-1-1953

Criminal Law—Bail

Myron Siegel

Bail

In *People v. Wirtschafter,*[49] the Court of Appeals held a bail bond taken in a criminal case to be void as a statutory recognizance, where defendant's release was prohibited by statute. The court followed the majority view[50] that where a bail bond is taken without authority of law it cannot be enforced as a common law obligation and a surety cannot be estopped from denying liability for voluntarily issuing it. Thus the surety escapes liability on the bond.

The defendant in the instant case was released on bail pending appeal of his second felony conviction, in contravention of the applicable bail statute.[51] He failed to appear and a forfeiture was entered in 1945 and for some unstated reason again in 1951. After the second judgment had been entered the surety moved to vacate the forfeiture contending that the taking of bail, by the court, without authority of law was void and therefore unenforceable.

The Appellate Division[52] denied the motion to vacate the forfeiture on a procedural point, indicating that the application was one for remission of a forfeiture, and, not having been made within one year, was untimely.[53]

The Court of Appeals negated the procedural difficulty by finding that the surety's motion was not one for remission after forfeiture, but a challenge to the inherent power of a court to declare void an act done by it without authority of law.

Judge Desmond, dissenting,[54] felt that in the public interest, the surety should be estopped from denying liability. His determination was founded on a previous New York case[55] which held a surety unable to escape liability on a bond, where it had been exacted from an athletic club without authority, by the Athletic Commission for securing payment of the club's debts. Since the insurance company received a premium for the bond and did not condition its liability on the bond's valid issuance, it was estopped from denying liability. Likewise in the instant case, a surety who took a premum for writing the bond should get no benefit from a judicial mistake of fact in accepting it. However the case on which the dissent was based was distinguished by the majority

49. 305 N. Y. 515, 114 N. E. 2d 18 (1953).
50. See Note, 34 A. L. R. 609, 612.
51. Code Crim. Proc. § 555 (2) and § 552.
52. *People v. Wirtschafter,* 280 App. Div. 900, 115 N. Y. S. 2d 661 (2d Dep't 1952).
53. Code Crim. Proc. § 598.
54. Fuld, J., concurring.
55. *McClare v. Massachusetts Bonding and Insurance Co.,* 266 N. Y. 371, 195 N. E. 15 (1935).

on the ground that in the prior case there was reliance on the bond, by an innocent third party plaintiff.

It appears that New York is now in accord with the generally recognized principle that a bail bond or recognizance taken without authority is void and cannot be enforced against either principal or surety.

Violation of Condition of Probation

A probationer charged with violating a condition of his probation, is provided by statute[56] with an "opportunity to be heard", before possible imposition of his original suspended sentence. The meaning of the phrase, in regard to the procedural safeguards it affords a probation violater, was expressed for the first time by the Court of Appeals in *People v. Oskroba.*[57] Both the majority and dissent agree that the probationer should be provided with at least a right to notice of the conditions allegedly violated, and an opportunity to attack or deny the charge.[58]

The disparity in the opinions relates to whether the safeguards provided were afforded probationer in the instant circumstances. At the hearing, defendant failed to refute the charge of which he had been notified, but extraneous material concerning violations not previously charged were admitted by witnesses. Probationer's request for an adjournment to bring in a witness to refute these accusations was denied. The majority found that denial of the adjournment was a matter of discretion and as such was not a denial of Oskroba's "opportunity to be heard". The dissent believed that a failure to allow a probationer time to defend against new matter, brought out for the first time at the hearing was a denial of procedural due process.

It is unfortunate that the procedural safeguards provided by the phrase were not more precisely defined. However, the general procedural requirements of notice and an opportunity to attack the charge, give the probationer a fair degree of protection, and provide the lower courts with an adequate guide to follow in future determinations.

---

56. CODE CRIM. PROC. § 935 provides: "Whenever within the period of probation any probationer shall violate his probation, the court may issue a warrant for his arrest and may commit him without bail. On his being arraigned and after an opportunity to be heard the court may revoke, continue or modify his probation. If revoked, the court may impose any sentence it may have originally imposed."

57. 305 N. Y. 113, 111 N. E. 2d 235 (1953).

58. See *People* ex rel *Benacquista v. Blanchard,* 267 App. Div. 663, 48 N. Y. S. 2d 22 (3d Dep't 1944); *People v. Hill,* 164 Misc. 370, 300 N. Y. Supp. 532 (Co. Ct. 1937).