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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

THE NORTH RIVER
INSURANCE CO.,

Defendant and Appellant;

BAD BOYS BAIL BONDS,

Real Party in Interest and
Appellant.

B269231

(Los Angeles County
Super. Ct. No. SJ1760)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kerry Bensinger and Peter Espinoza, Judges. Affirmed.

Jefferson T. Stamp for Defendant and Appellant and Real Party in Interest and Appellant.

Mary C. Wickham, County Counsel, Ruben Baeza, Jr.,
Assistant County Counsel, and Joanne Nielsen, Deputy County
Counsel, for Plaintiff and Respondent.

* * * * *

Appellants North River Insurance Company (North River) and Bad Boys Bail Bonds (Bad Boys) appeal from a grant of summary judgment against them on a forfeited bail bond. They argue that the trial court should have continued the hearing on their motions for relief from forfeiture under Penal Code section 1305, subdivision (j),¹ and, alternatively, should have vacated forfeiture under section 1305, subdivision (f) because the criminal defendant was in “constructive custody” in Mexico. We reject these arguments and affirm the judgment.

BACKGROUND

In March 2014, Bad Boys posted a \$100,000 bail bond on behalf of criminal defendant Edgar Gonzalez. North River was the surety on the bond. Gonzalez signed an “Agreement for Bail Bond” provided by Bad Boys, which stated that, should he leave the jurisdiction of the court, he agreed to waive extradition proceedings and consent to the use of reasonable force to bring him back.

Gonzalez failed to appear in court. On May 16, 2014, the court mailed a notice to appellants informing them that the bail had been ordered forfeited, and they had 185 days to surrender the defendant or otherwise move to set aside the forfeiture.

On December 12, 2014, the court on Bad Boys’ motion extended the deadline by 180 days to June 10, 2015.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On June 8, 2015, Bad Boys filed an ex parte petition for a writ of mandate, asserting that Gonzalez had been located in Mexico and asking the court to compel the district attorney to agree to toll the forfeiture deadline under section 1305, subdivision (h) to allow time to bring Gonzalez back to California. Bad Boys purported to have learned Gonzalez's location based on information from the cosigner of the bail bond, a Facebook page, and Bad Boys' investigator.

At the hearing on the ex parte petition on June 9, Bad Boys informed the court that it intended to seek a court order in Mexico enforcing the bail bond agreement signed by Gonzalez and requested additional time to do so. The court extended the deadline an additional 30 days, stating, "I am interested in getting him back."

On July 6, 2015, Bad Boys filed a supplemental motion to toll time under section 1305, subdivision (e), arguing that Gonzalez was effectively "restrained" by virtue of a civil action Bad Boys had filed against him in Mexico to enforce the bail bond agreement. In the alternative, Bad Boys requested the court continue the hearing under section 1305, subdivision (j), to allow completion of the civil action. Bad Boys supported its motion with documents regarding the lawsuit in Mexico, along with additional information from investigators and Facebook regarding Gonzalez's location.

The court ordered further briefing on the motion and continued the hearing until July 17. Respondent filed an opposition. In its reply, Bad Boys asserted an additional claim for relief under section 1305, subdivision (f), again arguing that Gonzalez was detained by virtue of the terms of the bail bond agreement that Bad Boys was seeking to enforce.

At the hearing, the trial court denied the motion to toll time and the writ of mandate, stating that it lacked jurisdiction to

extend the time further. Summary judgment on the forfeited bond was entered against appellants. Appellants' motion to set aside summary judgment was denied. Appellants timely appealed.

DISCUSSION

1. Statutory framework

“If a criminal defendant out on bail fails to appear when lawfully required to do so, the trial court must declare bail forfeited. (§ 1305, subd. (a).) The clerk must mail notice of forfeiture to the surety for bonds greater than \$400. Adding in five days for mailing, the surety then has 185 days to bring the defendant in to court. (§ 1305, subds. (b)-(c).) If the defendant appears within that period the court must vacate the forfeiture and exonerate the bond. (§ 1305, subd. (c)(1).)” (*People v. Tingcungco* (2015) 237 Cal.App.4th 249, 253 (*Tingcungco*).) The 185-day period is sometimes referred to as the “appearance” or “exoneration” period. (See, e.g., *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657; *People v. Ranger Ins. Co.* (2007) 150 Cal.App.4th 638, 641 (*Ranger II*).)

“Upon a showing of good cause the surety may seek an extension [of the appearance period] of up to another 180 days. (§ 1305.4.) If that motion is granted, the defendant’s appearance during the extension period also requires vacating the forfeiture and exonerating the bond.” (*Tingcungco, supra*, 237 Cal.App.4th at p. 253.) Important to this case, section 1305.4 does not permit an additional extension beyond 180 days. (*People v. Financial Casualty & Surety, Inc.* (2016) 2 Cal.5th 35, 46, fn. 2 (*Financial Casualty*) [“Allowing an unlimited series of extensions, each lasting up to 180 days, would be contrary to the text and purpose of section 1305.4, which clearly was intended to provide for a limited extension period of 180 days, not an indefinite one.”].) Thus, as a

general matter, a court cannot extend an appearance period beyond 365 days (the original 185 days plus the 180-day extension under section 1305.4).²

Section 1305 allows tolling of the appearance period under certain circumstances. Subdivision (e) allows tolling if a defendant is “temporarily disabled by reason of illness, insanity, or detention by military or civil authorities,” and therefore unable to appear in court. (§ 1305, subd. (e)(1)(A).) Subdivision (h) allows tolling in the event the defendant is beyond the jurisdiction of the state, but has been detained by the bail agent and positively identified in an affidavit signed by a law enforcement officer in the jurisdiction where the defendant is located, and both the bail agent and the prosecuting agency agree that more time is needed to return the defendant to the jurisdiction of the court.

Section 1305 also provides certain circumstances in which the court must exonerate the bond and vacate the forfeiture, such as when the court determines that a defendant is “permanently unable to appear in the court” because the defendant is deceased, ill, insane, or detained by military or civil authorities. (§ 1305, subd. (d).) The court must also vacate the forfeiture if the prosecuting agency chooses not to seek extradition after being informed either that the defendant is in custody in another jurisdiction (*id.*, subd. (f)), or has been detained by the bail agent in another jurisdiction

² In the case here, the trial court extended the deadline an additional 30 days past the 365 days that had already elapsed. The court later acknowledged this was an error. For purposes of this appeal, it does not matter if we deem the appearance period to be 365 days or 395 days; as will be discussed below, no grounds for relief arose even during the longer period.

and positively identified by a law enforcement officer of that jurisdiction in a signed affidavit (*id.*, subd. (g)).

2. Section 1305, subdivision (f)

Appellants' main argument focuses on section 1305, subdivision (j), discussed below. However, in their reply brief they raise an additional argument that the trial court erred in not granting relief under subdivision (f). Because our resolution of this claim is pertinent to our resolution of appellants' claim under subdivision (j), we address it first.

As discussed above, section 1305, subdivision (f) requires the court to vacate forfeiture and exonerate the bond if the criminal defendant is in custody outside the jurisdiction of the court, and the prosecuting agency opts not to seek extradition. Appellants argue that this provision should apply because Gonzalez was in "constructive custody" by virtue of his bail bond agreement with Bad Boys, which stated that he waived his right to an extradition proceeding and consented to the use of reasonable force to effect his return if he left the court's jurisdiction. We reject this argument.

As a matter of fairness we generally will not consider arguments raised for the first time in a reply brief.³ (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372, fn. 11, declined to follow on another ground, *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 382, fn. 6.) But even were we to consider

³ We note that in the trial court appellants *also* waited until a reply brief to raise their argument under section 1305, subdivision (f). The trial court did not specifically address the argument; however, the court made clear that it did not consider Gonzalez "detained" for purposes of section 1305, subdivision (e), thus also barring application of subdivision (f), which requires that the defendant be in custody.

appellants' argument on the merits, we would reject it. The self-evident principle behind section 1305, subdivision (f) is that a surety should not be held accountable when a criminal defendant is detained in another jurisdiction and the prosecuting agency refuses to seek extradition, the only lawful means by which the defendant can be returned to the court's jurisdiction. Under those circumstances, in which it would be impossible for the surety to return the defendant to court despite its best efforts, the law grants the surety relief and exonerates the bond. (See *People v. American Surety Insurance Co.* (2000) 77 Cal.App.4th 1063, 1064 (*American Surety*) ["'The law never requires impossibilities.' (Civ. Code, § 3531.)"].)

Appellants' case presents the exact opposite circumstance: the agreement appellants cite as putting Gonzalez in "constructive custody" in fact makes it *easier* to return him to the court's jurisdiction, at least theoretically. Indeed, the whole point of appellants enforcing the agreement in the Mexican courts was not to trap Gonzalez in Mexico, but to force him to return to California. Thus, the rationale behind section 1305, subdivision (f) does not apply in this case.⁴

Appellants cite *People v. Villa* (2009) 45 Cal.4th 1063, 1070, a case concerning a writ of habeas corpus, to claim that a defendant should be deemed in custody if he is " 'subject to restraints not shared by the public generally' " such that he " 'may later lose his liberty and be eventually incarcerated.' " *Villa* stated that a writ of habeas corpus was available to those in " 'constructive custody' " by

⁴ Moreover, it cannot have been the Legislature's intent to allow sureties to insulate themselves from forfeiture simply by including an extradition waiver in their standard bail bond agreements.

virtue of being on parole, probation, bail, or released on their own recognizance. (*Id.* at p. 1069.) *Villa* has no application here, where the question is not under what circumstances a criminal defendant can seek to challenge restraints on his liberty, but under what circumstances a criminal defendant can be deemed indefinitely beyond the reach of a California court. Gonzalez may have been in constructive custody for purposes of habeas corpus law, but he was not in custody such that appellants could not return him to California as required under section 1305, subdivision (f).

Appellants also cite *American Surety* for the proposition that a person can be detained without being in actual physical custody, but that case does not support their argument. (*American Surety*, *supra*, 77 Cal.App.4th at p. 1065.) In *American Surety*, the Court of Appeal held that a criminal defendant was “detained” in Mexico as required under section 1305, subdivision (d) because he had been deported by immigration authorities and was barred from reentry to the United States under federal law. (*American Surety*, at p. 1066.) Although the defendant was free in Mexico, the surety “c[ould not] produce [the defendant] without committing a federal crime.” (*Id.* at p. 1067.)

In the case here, appellants do not dispute that Gonzalez is a United States citizen who left the country voluntarily, and there is no evidence that he was barred from returning. Whatever operation of law “detained” the defendant in *American Surety* is not present here.

Thus, we reject the argument that Gonzalez was in constructive custody in Mexico. Appellants cannot seek relief under section 1305, subdivision (f).⁵

3. Section 1305, subdivision (j)

Appellants also argue that the trial court should have granted them a continuance under section 1305, subdivision (j), to give appellants time to enforce their agreement with Gonzalez through the Mexican courts. This argument lacks merit.

Section 1305, subdivision (j) addresses the timing of hearings on motions filed within the appearance period. It allows “[a] motion filed in a timely manner within the 180-day period [to] be heard within 30 days of the expiration of the 180-day period. The court may extend the 30-day period upon a showing of good cause.” (§ 1305, subd. (j).) Importantly, “[h]olding the hearing after the [appearance] period has expired *does not extend that period . . .*” (*People v. Granite State Insurance Co.* (2003) 114 Cal.App.4th 758, 768 (*Granite State*), italics added.) Thus, section 1305, subdivision (j) “does not extend the time for establishing the facts upon which the motion is based, i.e., the facts must be in existence within the exoneration period.” (*Granite State, supra*, at p. 768.)⁶ In other words, a surety may not move to vacate a forfeiture or toll or extend the appearance period based on facts that came into existence after the period has ended, even if the motion itself was filed during the period.

⁵ Because section 1305, subdivision (f) does not apply, we decline to address appellants’ argument that the provision is not subject to the 180-day appearance period.

⁶ At the time *Granite State* was decided, the language in what is now subdivision (j) was located in former subdivision (i) of section 1305. (See *Granite State, supra*, 114 Cal.App.4th at p. 762, fn. 5.)

This principle has been applied in numerous decisions by the Court of Appeal. (See, e.g., *Ranger II*, *supra*, 150 Cal.App.4th at p. 649; *People v. Seneca Ins. Co.* (2004) 116 Cal.App.4th 75, 82-83; *People v. Ramirez* (1976) 64 Cal.App.3d 391, 401-402.) In *Ranger II*, for example, a trial court denied a surety's motion to extend the appearance period under section 1305.4, finding that the surety "had not demonstrated much effort" during the appearance period to return the criminal defendant from Mexico. (*Ranger II*, *supra*, at pp. 642-643.) On appeal, the surety claimed that its diligence was "amply demonstrated" by the fact that a representative of the bail agent had managed to detain the defendant in Mexico, an event that took place after the appearance period ended, but before the trial court heard the motion to extend. (*Id.* at pp. 642, 644.) The surety argued that the trial court's continuance of the hearing past the end of the exoneration period (pursuant to a precursor to section 1305, subdivision (j), with identical language) served also as an implicit extension of the appearance period, and therefore the surety's diligence, even if late, should still have been taken into consideration. (*Ranger II*, at pp. 642, fn. 2, 648.) The Court of Appeal rejected this argument, stating, "[T]he fact that [the defendant] was [detained by the surety] while the court still had jurisdiction to hear the motion does not entitle [the surety] to relief from the order of forfeiture." [Citation] 'Indeed, the court lacked jurisdiction to grant the motion based on facts occurring after the initial 185-day period had expired.' " (*Id.* at p. 649.)

We agree with the court's conclusion in *Ranger II*, especially in light of the Supreme Court's recent holding that section 1305.4 does not allow indefinite extensions of the appearance period beyond 180 days. (*Financial Casualty*, *supra*, 2 Cal.5th at p. 46, fn. 2.) It would be anomalous to hold that a court cannot extend the

appearance period indefinitely under the statute expressly addressing extension of the appearance period, yet can do so implicitly by indefinitely continuing a hearing on a motion filed during the appearance period. The holdings of *Ranger II* and similar cases readily resolve this inconsistency.⁷

Based on the above, it is clear that section 1305, subdivision (j) is of no help to appellants. The facts that would have supported a motion for tolling or exoneration were not in existence at the time appellants requested the continuance. Gonzalez was not ill, insane, deceased, or detained as required under section 1305, subdivisions (d) and (e). He was not in custody beyond the jurisdiction of the court, as required under section 1305, subdivision (f). And although appellants had provided some evidence of Gonzalez's location in Mexico, they had not provided the required affidavit from a Mexican law enforcement official positively identifying Gonzalez, as required under section 1305, subdivisions (g) and (h). As in

⁷ Appellants' cited cases do not hold to the contrary. In *People v. Ranger Ins. Co.* (2002) 99 Cal.App.4th 1229 (*Ranger I*), disapproved on another ground by *People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at page 663, footnote 7, the Court of Appeal held that the trial court's internal scheduling needs were good cause for a hearing continuance. (*Id.* at p. 1235.) In *County of Los Angeles v. Nobel Ins. Co.* (2000) 84 Cal.App.4th 939, the opinion does not state precisely why continuances were granted, other than "to accommodate the parties and to allow for a full presentation of appellant's motion." (*Id.* at p. 944.) The case does not suggest that a continuance is permitted to allow more time to detain or extradite a criminal defendant. Finally, although in *Ranger II* the trial court granted a continuance based on a stipulation that the surety needed more time to detain the defendant, the Court of Appeal expressly rejected this stipulation as a means to extend the appearance period. (*Ranger II*, *supra*, 150 Cal.App.4th at p. 649.)

Ranger II, appellants were taking steps to detain Gonzalez, but had not done so by the end of the appearance period. Thus, because appellants had not brought a motion for relief during the appearance period supported by facts then in existence, there was nothing to which the court could apply the continuance permitted under section 1305, subdivision (j). The trial court properly granted summary judgment to respondent.⁸

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

⁸ Because section 1305, subdivision (j) is inapplicable, we need not address appellants' arguments that good cause existed for a continuance under that provision. Briefly, however, we see no indication of bad faith on the part of the district attorney in the record. Also, accepting that a prosecuting agency's delay in seeking extradition may result in a violation of a defendant's Sixth Amendment right to a speedy trial under the United States Constitution, it does not follow that the prosecuting agency is constitutionally bound to seek extradition when requested by a surety wishing to avoid forfeiture of a bail bond.