

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-60475  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO LOPEZ,

Defendant,

versus

OCTAVIO CASTANEDA, Agent, and  
ERNESTO C. CASTANEDA, Agent of  
International Fidelity Insurance Co.,

Movants-Appellants.

---

Appeal from the United States District Court for the  
Southern District of Texas  
(94 CR 6 2)

---

(September 18, 1995)

Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:\*

An indictment charged Roberto Lopez with committing three drug offenses. Following his arrest, a \$100,000 cash or surety bond was set. Lopez signed a \$100,000 corporate surety appearance bond, and agreed in writing to abide by certain prescribed conditions of

---

\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

release. Octavio Castaneda signed the \$100,000 appearance bond for Lopez on behalf of the surety, International Fidelity Insurance Company.

Lopez failed to appear at the final pretrial conference. The district court declared him to be a fugitive and issued a bench warrant for his arrest. Thereafter, the government filed a motion for judgment of default on the \$100,000 bond, requesting that the court notify the corporate surety of the hearing and to declare a forfeiture of Lopez's bail as a result of his failure to appear.

After receiving notice of the forfeiture hearing, Ernesto Castaneda, acting on behalf of Octavio Castaneda and the surety, filed a motion for a continuance, which the court granted. Ernesto, again on behalf of Octavio and the surety, filed a motion to set aside the forfeiture of the bond. He alleged that, according to Lopez's family, Lopez had been kidnapped while en route to the court on the day of the pretrial conference and that the he was being held captive in Mexico.

At the hearing on the default, Ernesto Castaneda appeared and requested an additional fifteen days in which to return Lopez to the court. Ernesto stated that his investigators had located Lopez in an armed camp in Mexico and that his men would be able to return Lopez to the court within fifteen days. The court granted the continuance and set June 27, 1994, as the date that judgment would be entered. The court explained repeatedly that it would consider

a partial remission of the forfeited amount only if Lopez appeared by June 27.

On June 27, 1994, Octavio Castaneda advised the courtroom deputy that it was his understanding that Lopez was dead. He offered no documentation to support his allegation. The court entered a judgment of default the following day.

The movants-appellants, Octavio and Ernesto Castaneda, timely appealed the judgment of forfeiture. Their appeal was dismissed for want of prosecution, but it was later reinstated.

I

The appellants first argue that they were not given notice of the hearing for the final pretrial conference that Lopez failed to attend. They argue that had they known of the hearing they would have ensured Lopez's safe arrival to the court. They argue that the lack of notice denied their right to due process because it resulted in their loss of property, to wit, the \$100,000 surety bond. We are unconvinced.

It is the duty of the surety to advise himself of scheduled appearances, "and the court need not notify them of either the setting, or the principal's failure to appear." United States v. Roher, 706 F.2d 725, 727 (5th Cir. 1983). Fed. R. Crim. P. 46(e) requires only notice of a motion for judgment of forfeiture. Roher, 706 F.2d at 727. The district court gave notice of the motion as required under Rule 46(e). The court had no other duty

of notice to the appellants and, thus, committed no error when it did not advise them of Lopez's pretrial conference date.

## II

The appellants next argue that the district court abused its discretion when it refused to set aside or remit the forfeiture. The appellants contend that Lopez failed to appear because he was kidnapped, and that his kidnapping does not constitute a willful breach of the conditions of the bond. They contend that his kidnapping and their numerous efforts to recover him should weigh in favor of setting aside the judgment or at least in remitting a substantial portion of the bond. These arguments are not persuasive.

An accused's release is conditioned upon the execution of a bail bond in order to ensure his presence. 18 U.S.C. § 3146; United States v. Skipper, 633 F.2d 1177, 1180 (5th Cir. 1981). When there is a breach of a condition of the bond by the defendant, the court is required to declare a forfeiture of the bail. Fed. R. Crim. P. 46(e)(1). Thereafter, the court may set aside or remit the forfeiture, in whole or in part, if the surety subsequently surrenders the absent defendant into custody or if justice does not require forfeiture. Fed. R. Crim. P. 46(e)(2) & (4). The party moving to set aside the forfeiture bears the burden of proof. Roher, 706 F.2d at 727. A district court's refusal to remit part of all of a bond forfeiture is reviewed for an abuse of the court's

wide discretion. United States v. Terrell, 983 F.2d 653, 656 (5th Cir. 1983).

When Lopez failed to appear for his final pretrial conference, he violated a condition of the bond. The appellants offer nothing more than bare allegations, which in turn are based only on unverified representations from Lopez's family, that he was kidnapped and later died. Their alleged good faith efforts to locate Lopez are irrelevant to the issue before us. As surety for Lopez, the appellants contracted with the court to ensure his appearance. Their failure to do so, through no fault of the court, does not militate in favor of the appellants. Absent any corroborating documentation of his death, and given that he remains a fugitive, the court's refusal to set aside or remit the forfeiture plainly was not an abuse of its wide discretion. Skipper, 633 F.2d at 1180 n.6.

The appellants' reliance upon Smaldone v. United States, 211 F.2d 161 (10th Cir. 1954), is misplaced. In Smaldone, the defendant entered the hospital under the direction of his physician and was diagnosed with appendicitis. Id. at 165. The appellants argue that Smaldone's surgery is less willful than Lopez's kidnapping. In theory, neither illness nor kidnapping are the fault of "will" of the defendant. In Smaldone, the defendant's need for medical attention was established with reliable evidence. In contrast, there has been no proof offered to substantiate the allegations of Lopez's kidnapping and death.

### III

Finally, the appellants argue that the \$100,000 bond is excessive and seek a \$75,000 "remission" of the bond amount. They note that they have incurred sizeable expenses in their good faith efforts to apprehend Lopez.

The government contends that this issue is raised for the first time on appeal and argues that it should not be addressed by this court. Lopez, however, did file a motion before the district court asking that the court reconsider the amount of the bond because allegedly he was unable to satisfy the bond. The court did not rule on the motion. Although the issue may not have been raised for the first time here, there is a serious question whether the issue has been timely raised. See Skipper, 633 F.2d at 1179. Nevertheless, even if properly before the court, the issue is without merit. As in Skipper, with the aid of hindsight, it is clear that the amount of the bond was actually insufficient to ensure his appearance in court, and thus hardly can be called excessive. See id.

### IV

For the reasons stated, the judgment of the district court is

A F F I R M E D.