OFFICIAL OPINION NO. 94-06, Out-of-state Bail Bondsman Authority

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Michael A. Jackley
Meade County State's Attorney
1425 Sherman St.
Sturgis, SD 57785

OFFICIAL OPINION NO. 94-06

Out-of-state bail bondsman authority

Dear Mr. Jackley:

You have asked for an official opinion of this Office regarding the following factual situation:

FACTS:

An agent for a Colorado bail bondsman arrived at the Meade County Jail and requested that an inmate be released to his custody for return to Colorado. The inmate had apparently "jumped bond" in Colorado. The inmate was not being held on the Colorado warrant. He was arrested on a bench warrant out of Meade County for failure to comply with a Meade County DWI sentence.

The agent for the bail bondsman insisted that the inmate be released to his custody after release from Meade County custody. The inmate was ultimately released on an unsecured bond. He was not released into the custody of the agent. The Meade County State's Attorney's Office could find no statutory authority giving an agent for an out-of-state bail bondsman the right to have an inmate--arrested on a local charge--released directly to his custody for allegedly jumping bond in the foreign state. For that matter, you could not find any statutory authority allowing that even for an "in-state" bail bondsman. SDCL ch. 23A-43 is silent on this issue.

The inmate, upon release from Meade County custody, refused to go back to Colorado with the agent. The agent returned to Colorado without the inmate.

Based on these facts, you asked the following questions:

QUESTIONS:

1. Does a civilian agent for an out-of-state bail bondsman have any legal authority to have a local county inmate (arrested on local charges) released directly to his custody for return to the foreign state to face charges there?

2. Does SDCL 23A-43-29 allow a civilian agent for an out-of-state bail bondsman to arrest a person in South Dakota for alleged bail-jumping in the foreign state and forcibly transport the person to the foreign state without first delivering the person to a South Dakota law enforcement officer for an appearance before a South Dakota committing magistrate?

3. How much force can an agent for a bail bondsman use to arrest a "bail-jumper"?

IN RE QUESTION NO. 1:

Under the facts as presented at the time of your opinion request, the Meade County inmate had not yet resolved all charges pending against him in South Dakota. Therefore, South Dakota authorities at that time were under no legal obligation to turn the inmate over to the Colorado bail bondsman prior to resolution of the South Dakota charges. U. S. Const. art. IV, <185> 2; SDCL 23-24-21. "When arresting a principal in another jurisdiction, there can be no interference with the interests of other persons who have arrested the principal." Reese v. United States, 76 U.S. 13, 19 L.Ed. 541 (1869).

While a bail bondsman cannot take the principal from the custody of officers of another state, he can request the officer to hold the principal following termination of such custody. Campbell v. Board of Comm'rs, 103 Kan. 329, 175 P. 155 (1918); 73 A.L.R. 1365. If a principal is being held by authorities from another state, a surety may obtain an order in the court of the other state to hold the principal at the termination of the detention therein, and the principal then may be rearrested and returned to the jurisdiction of the first state. Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931).

Under the facts presented here, South Dakota was under no legal obligation to turn the inmate over to a Colorado bail bondsman. This is particularly true in light of the fact the inmate had unresolved charges pending in South Dakota; had South Dakota authorities released the inmate to the Colorado bail bondsman, South Dakota would have arguably lost jurisdiction over the individual. In State v. Liakas, 86 N.W.2d 373 (Neb. 1957), an obligee on a bail bond successfully argued that he was exonerated of any obligation or liability on

the bond because the state voluntarily surrendered its jurisdiction over him by allowing his extradition to another state.

It is the duty of the Governor of a state to have arrested and delivered to the executive authority of any other state of the United States any person charged in the latter state with treason, felony, or other crime, who has fled from justice and is found in the former state. Art. IV, <185> 2, Constitution of the United States; 29-702, R.R.S. 1943. However, under the circumstances of this case, when requisition for appellant was made on the executive of Nebraska, this State had exclusive jurisdiction of appellant until the demands of its laws were satisfied. There was no authority that could compel the State to waive or surrender its jurisdiction of him but the Governor of Nebraska could voluntarily elect to waive such urisdiction by the State and surrender appellant to Iowa. This the Governor did. His act was that of Nebraska and it was bound thereby. The effect was that Nebraska then lost jurisdiction of appellant.

Id. at 377.

Under this reasoning, had South Dakota authorities turned the inmate over to the Colorado bondsman, South Dakota would have voluntarily lost jurisdiction over the inmate. The law does not so require.

The answer to your first question is a qualified "Yes."

IN RE QUESTION NO. 2:

A bail bondsman's authority to arrest and surrender a principal derives from three overlapping sources: (1) the common law principles enunciated by the Supreme Court in the classic case of Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 21 L.Ed. 287 (1872); (2) statutory authorization; and (3) the contract between the surety and the principal. State v. Tapia, 468 N.W.2d 342, 343 (Minn. App. 1991).

The United States Supreme Court in Taylor v. Taintor, supra, defined a bondsman's arrest rights as follows:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at

once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest [sic], by the sheriff, of an escaping prisoner * * *. [I]t is said: "[t]he bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge."

83 U.S. at 371, 372, 21 L.Ed. at 290.

In addition to the common law rights discussed in Taylor, SDCL 23A-43-29 provides a surety with arrest powers over a principal. That statute provides:

Any defendant who is released on the execution of an appearance bail bond with one or more sureties may, if he violates the conditions of his release, in vacation, be arrested by his surety, delivered to a law enforcement officer, and brought before any committing magistrate. At the request of such surety, the committing magistrate shall recommit the defendant to the custody of the law enforcement officer, and endorse on the recognizance, or certified copy thereof, the discharge and exoneretur of the surety. The person so committed shall be held in custody until discharged by due course of law.

(Emphasis added.) Further, in State v. Helgerson, 241 N.W. 325, 326 (S.D. 1932), the South Dakota Supreme Court held that a bondsman can arrest a principal and surrender him to authorities at any time. Id. The case law agrees with the tenor of the statute.

In McCaleb v. Peerless Insurance Co., 250 F.Supp. 512, 515 (1965), a federal district ruled, "There is no doubt that a bondsman has the power to arrest and may do so in any state into which his principal may have fled in the absence of any statute denying that right." In addition,

The obligation of the bail bondsman is to ensure his principal's appearance in court; State v. Ohayon, 12 Ohio App. 3d 162, 163, 467 N.E.2d 908 (1983); and he may use whatever reasonable means are necessary to fulfill that obligation. Absent a statute, he requires no legal process, judicial or administrative, to effect that purpose. The right of the surety to apprehend his principal arises from the furnishing of the bail bond. "The right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond. (Citations omitted.) It is not the right of state but of the surety." Fitzpatrick v. Williams, supra, 40. Further, "[t]he giving of security

is not the full measure of the bail's obligation; it is hornbook law that the accused is delivered into the custody of the bail and the bail is bound to redeliver him so far as he can. It does not discharge the bail from that duty merely to abandon the security. The bail must assist in arresting the convict so far as possible; security is no substitute." United States v. Field, 190 F.2d 554, 555 (2d Cir. 1951). "The condition of the bond is the appearance of the principal in court on demand. The bail may arrest principal at any time." Field v. United States, 193 F.2d 86, 90 (2d Cir. 1951). "Professional Bondsmen in the United States enjoy extraordinary powers to capture and use force to compel preemptory return of a bail jumper. They may do so not only in the state where the bail was granted, but in other states as well, without resort to public authorities, either to the police to effect arrest or the appropriate state officials to bring about extradition." Kear v. Hilton, 699 F.2d 181, 182 (4th Cir. 1983).

State v. Nugent, 508 A.2d 728, 732 (Conn. 1986).

Based upon the above-cited common law and statute, it is clear that an out-of-state bail bondsman has the power to seize a person in South Dakota for bail jumping in another state. Based upon the controlling language of SDCL 23A-43-29 (see McCaleb, supra), however, an out-of-state bail bondsman does not have the authority to forcefully transport that person to the foreign state without first delivering that person to a South Dakota law enforcement officer for an appearance before a South Dakota committing magistrate.

The answer to your second question is "No."

IN RE QUESTION NO. 3:

The authority of a bail bondsman in relationship to the principal is broad. Taylor, 83 U.S. at 369-372; Frasher v. State, 8 Md. App. 439, 446, 260 A.2d 656 (1970); Wharton's Criminal Procedure 324 (14th ed. 1986); Shifflett v. State, 560 A.2d 587 (Md. App. 1989). The Connecticut Supreme Court, for example, has stated in Nugent, 508 A.2d at 731-732:

This right has been upheld when a bondsman forcibly entered his principal's home in the middle of the night; Read v. Case, supra, 170; when a bondsman pursued his principal beyond state lines; Fitzpatrick v. Williams, 46 F.2d 40, 41 (5th Cir. 1931); and when the bondsman used physical force in the act of apprehending his principal; Nicolls v. Ingersoll, 7 Johns. 145 (N.Y. Sup. Ct. 1810); see "The Hunters and The Hunted: Rights and Liabilities of Bailbondsmen," 6 Fordham Urb. L.J. 333 (1978).

Nonetheless, the "reasonable means" test is applied to the actions of the bondsman. In Curtis v. Peerless Insurance Co., 299 F.Supp. 429, 435 (1969), the court stated,

[A] surety on a bail bond, or his appointed deputy, may take his principal into custody wherever he may be found, without process, in order to deliver him to the proper authority so that the surety may avoid liability on the bond. So long as the bounds of reasonable means needed to effect the apprehension are not transgressed, and the purpose of the recapture is proper in light of the surety's undertaking, sureties will not be liable for returning their principals to proper custody. [Citations omitted.]

Thus, while courts have acknowledged that "fundamental interests of justice and society require that a surety in a criminal case be given greater authority than the other types of sureties and bondsmen" (McCaleb, supra), courts have also cautioned:

[W]henever a bondsman takes undue advantage of his justly granted and needed authority in violation of his duty to the granting court and such undue advantage results in injury or damage to his principal or another party, that bondsman should and will be rendered liable for any damage caused as a result of an act or acts which would render liable any other person who was not vested with such authority.

McCaleb, 250 F. Supp. at 515.

In sum, a bondsman's authority is broad, but it is contained by the "reasonable means" test; in addition, a bondsman who takes "undue advantage" of his authority will be liable for the damage or injury he causes to the same extent as a person who causes such damage or injury, but is not a bondsman.

The preceding case law summary answers your third question.

These are my opinions; of course, a circuit judge may see it otherwise.

MB/SSW/db