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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

INTERNATIONAL FIDELITY INSURANCE
COMPANY,

Defendant and Appellant.

F062999

(Super. Ct. No. F10901037)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. D. Tyler Tharp, Judge.

E. Alan Nunez for Defendant and Appellant.

Robert Tomlin White for Aladdin Bail Bonds as Amicus Curiae on behalf of Defendant and Appellant.

Kevin B. Briggs, County Counsel and Michael R. Linden, Deputy County Counsel, for Plaintiff and Respondent.

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In this bail forfeiture action, appellant, International Fidelity Insurance Company (International Fidelity), moved to vacate the forfeiture and exonerate bail on the ground that the prosecutor elected to not extradite the criminal defendant who had fled to Mexico. Under Penal Code¹ section 1305, subdivision (g), the court must vacate the forfeiture and exonerate bail when the bail agent locates and positively identifies the defendant in a foreign jurisdiction and the prosecuting agency elects not to seek extradition.

The trial court denied International Fidelity's motion on the ground that extradition was not feasible. International Fidelity argues that substantial evidence does not support the trial court's ruling. We disagree. Further, International Fidelity failed to present either relevant or admissible evidence to the contrary. The trial court ruled that the evidence that International Fidelity did present was inadmissible and International Fidelity has not challenged the trial court's evidentiary rulings on appeal. Accordingly, we will affirm the judgment.

BACKGROUND

In March 2010, International Fidelity posted a \$400,000 bond for the release of defendant Gus Ramos from custody. Ramos was charged with transporting approximately 10 pounds of methamphetamine. However, Ramos failed to appear for his arraignment on March 15, 2010, and the bail was declared forfeited by the trial court.

International Fidelity moved the court for an extension of the bond exoneration period to enable it to locate Ramos. The court granted the motion and ordered the period for exoneration extended to December 31, 2010.

On December 30, 2010, International Fidelity filed a second motion to extend the exoneration period. International Fidelity supported this motion with a declaration from

¹ All further statutory references are to the Penal Code.

the bail agent, Dorry Plotkin. According to Plotkin, Ramos had been located in Guadalajara, Mexico. Plotkin also declared that he had received an e-mail from FBI Special Agent Alba Lorena Sierra. In this e-mail, attached to the declaration as an exhibit, Sierra stated that she had been in contact with a duty agent who had communicated with Chief Deputy District Attorney Douglas E. Hass and that Hass told the duty agent that “he had previously reviewed the case several months ago, and that he decided extradition is not worth the time and expenses based on the crime committed by Ramos.” The duty agent further told Sierra that Hass also stated that “in Fresno they let people out of jail right away so [Ramos] would be released almost as soon as he gets locked up.” According to Sierra, she was unable to open a formal FBI case due to this information from the duty agent.

On December 31, 2010, Ramos was located by International Fidelity’s agent in Mexico and was temporarily detained and positively identified by a local law enforcement officer. International Fidelity thereafter filed a supplemental memorandum of points and authorities in support of its motion to extend the exoneration period. International Fidelity argued that the bail forfeiture should be vacated under section 1305, subdivision (g). According to International Fidelity, it had complied with all the procedural requirements and, as stated in the e-mail from FBI Agent Sierra, the district attorney had elected not to extradite Ramos.

The trial court denied International Fidelity’s motion to vacate the forfeiture and exonerate bail. The court found that International Fidelity failed to establish that the district attorney elected not to seek Ramos’s extradition *after* it was informed by International Fidelity that Ramos had been located and positively identified. Nevertheless, the court extended the exoneration period to March 16, 2011.

On March 15, 2011, International Fidelity filed a second motion to vacate the forfeiture and exonerate bail. Respondent, the People of the State of California, opposed the motion on the ground that it was not feasible to extradite Ramos from Mexico.

In support of its position, the People submitted a declaration from Hass. Hass declared that he had reviewed the Ramos case and was familiar with the applicable treaty between Mexico and the United States. Hass explained that he had participated in a webinar/seminar that presented an overview of the extradition process with Mexico. Hass stated that, at this seminar, he learned that while Mexico will now extradite its own nationals and United States citizens with Mexican ties, Mexico limits the process to serious and violent offenders and “narcotics ‘kingpins’ or offenders functioning at the cartel level.” Hass also learned through the California District Attorney’s Association Extradition and Foreign Prosecution Committee that all of the existing requests for extradition in 2010 involved either homicide, crimes of extreme violence, or sexual assault and that extradition had not been requested on narcotics cases unless the defendant was classified as a major narcotics kingpin. Hass further heard from the Associate Director of the Office of International Affairs in the United States Department of Justice that, as of January 2011, there were 115 pending provisional arrest warrants that needed to be approved by a Mexican judge and that it was becoming more difficult to obtain extradition in voluntary manslaughter and aider and abettor homicide cases. Further, it is very difficult to initiate extraditions on fugitives that live in rural areas versus those that can be located in the greater Mexico City area. Finally, Hass spoke to the United States Department of Justice liaison to California prosecutors who relayed that she had one narcotics case pending out of Arizona where the fugitive was part of a multiple member conspiracy to traffic marijuana. Based on this knowledge and his experience, Hass opined that “there is no indication from Mexico’s current pattern of extradition that Mexico would extradite [Ramos] in this case.” After examining the facts, Hass concluded that Ramos’s case did not come within the categories or types of cases subject to extradition from Mexico and therefore it was not feasible for the district attorney’s office to elect to extradite Ramos.

In response, International Fidelity's counsel submitted his own declaration. Counsel included declarations and supporting documents from prosecutors in Los Angeles County regarding various cases where the office had elected not to pursue extradition. Counsel also included a declaration regarding one case where extradition was not sought in Fresno County. Additionally, counsel described his conversations with a deputy district attorney in Riverside County, a United States Marshal, and a Mexican attorney who all told counsel that there is no current policy or practice of denying extraditions of Mexican nationals on drug charges. Finally, counsel included press releases and articles regarding defendants on drug charges being extradited from Mexico.

The People objected to International Fidelity's counsel's declaration on hearsay grounds. The People also objected to the admissibility of the e-mail sent by FBI Agent Sierra on the ground that it was not in the form of a declaration submitted under penalty of perjury. The court sustained these objections and appellant has not raised these evidentiary rulings on appeal.

Following a hearing, the court denied International Fidelity's motion to vacate the forfeiture and exonerate bail.

DISCUSSION

1. *Standard of review.*

On appeal of an order denying a motion to set aside a bail forfeiture, we review the trial court's decision under the abuse of discretion standard. (*People v. Lexington National Ins. Corp.* (2010) 181 Cal.App.4th 1485, 1489.) However, "[t]he abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

This case revolves around the feasibility of extraditing a defendant charged with narcotics violations from Mexico. Whether extradition is feasible in a particular case is a question of fact. (*County of Los Angeles v. Fairmont Specialty Group* (2009) 173 Cal.App.4th 538, 544.) Accordingly, we review the trial court’s finding that extradition of Ramos was not feasible under the substantial evidence test. (*Id.* at p. 543.) Therefore, we must determine whether, based on the entire record, there is any substantial evidence, contradicted or uncontradicted, that supports the trial court’s infeasibility finding. We must accept as true all evidence that tends to establish the correctness of this finding and resolve every conflict in favor of the trial court’s decision. (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822-823.)

2. *The trial court’s infeasibility finding is supported by substantial evidence.*

When a criminal defendant for whom a bail bond has been posted fails to appear, the trial court must declare the bond forfeited in open court. (§ 1305, subd. (a).) Thereafter, the surety that posted the bond has a statutory “appearance” period in which to either produce the accused in court and have the forfeiture set aside or demonstrate other circumstances requiring the court to vacate the forfeiture. (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657.)

In the factual circumstance presented here, i.e., the criminal defendant has fled to a foreign country but is not in custody, section 1305, subdivision (g) applies. That section provides:

“In all cases of forfeiture where a defendant is not in custody and is beyond the jurisdiction of the state, is temporarily detained, by the bail agent, in the presence of a local law enforcement officer of the jurisdiction in which the defendant is located, and is positively identified by that law enforcement officer as the wanted defendant in an affidavit signed under penalty of perjury, *and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant*, the court shall vacate the forfeiture and exonerate the bond” (§ 1305, subd. (g), italics added.)

The surety seeking to set aside the forfeiture has the burden to establish by competent evidence that its case falls within the four corners of these statutory requirements.

(*People v. American Surety Ins. Co.* (1999) 75 Cal.App.4th 719, 725.)

“Under section 1305, subdivision (g), the prosecuting agency is merely required to elect whether to seek extradition.” (*County of Orange v. Ranger Ins. Co.* (1998) 61 Cal.App.4th 795, 801 (*County of Orange*.) However, the term “elect” implies a choice of options. (*Id.* at p. 802.) “When extradition is not feasible, there can be no meaningful election whether to seek extradition, and the conditions for forfeiture relief have not been satisfied.” (*Ibid.*) Accordingly, if the record shows extradition is not feasible, the prosecutor has no real choice in deciding whether to seek extradition. Thus, the terms of section 1305, subdivision (g), have not been met. Under these circumstances, it is proper for the trial court to deny the surety’s motion to vacate the forfeiture order. (*County of Orange, supra*, at pp. 804-805.)

When the host country, as a matter of policy or practice, refuses to grant extradition requests in the category of cases involved in the controversy at issue, extradition will be deemed infeasible. (*County of Orange, supra*, 61 Cal.App.4th at p. 803.) Here, based on the Hass declaration, the trial court found extradition of Ramos was infeasible.²

As noted above, Hass stated that he had learned that Mexico would not extradite defendants charged with narcotics violations unless they were “narcotics ‘kingpins’” or were functioning at the cartel level. Rather, Mexico was limiting extradition to serious and violent offenses. The charge against Ramos, while not insignificant, was not a

² International Fidelity objected to this declaration on the grounds that Haas did not state his qualifications or basis of knowledge and relied on hearsay. However, the trial court overruled International Fidelity’s evidentiary objections and International Fidelity has not challenged that ruling on appeal.

serious crime of violence or a narcotics transaction involving a Mexican cartel or a multi-defendant conspiracy. When applied to the facts of this case, the evidence of Mexico's extradition policy with respect to narcotics offenders as set forth in the Hass declaration supports the trial court's infeasibility finding.

Based on Hass's statements allegedly made to the FBI duty agent and then relayed by the duty agent to FBI Agent Sierra, International Fidelity argues that Haas made an election not to pursue extradition. International Fidelity further contends that, based on the fact that the FBI agents were willing and able to assist with Ramos's extradition and that they did not do so only because Haas believed the extradition was not worth the time and expense, it cannot be said that extradition was not feasible.³

However, as found by the trial court, Haas made these alleged statements *before* International Fidelity met the section 1305, subdivision (g) requirements. International Fidelity had not yet temporarily detained Ramos in the presence of local law enforcement and thus had not yet informed Haas of Ramos's location following the detention. Therefore, in speaking to the FBI duty agent, Haas did not make an election not to pursue extradition under section 1305, subdivision (g). Moreover, this evidence is incompetent in that it is based on hearsay. (*County of Los Angeles v. American Contractors Indemnity Co.* (2007) 152 Cal.App.4th 661, 667.) Accordingly, International Fidelity did not meet its burden to establish by competent evidence that its case fell within the four corners of the statutory requirements.

Further, International Fidelity failed to present either relevant or admissible evidence to contradict the People's claim that extradition was not feasible. The court ruled that International Fidelity's evidence, presented through counsel's declaration, was

³ International Fidelity's request that this court take judicial notice of the article from the U.S. Department of Foreign Affairs Manual regarding the purpose of provisional arrest is granted.

inadmissible because the documents were not properly authenticated and counsel's conversations with various people were hearsay. International Fidelity has not challenged this ruling on appeal. Moreover, the declarations and supporting documents from various prosecutors regarding cases where their respective offices elected not to pursue extradition are irrelevant to the issue of whether extradition was feasible in this case.⁴

In sum, the People presented substantial evidence in support of their position that extradition of Ramos was not feasible and International Fidelity did not present any credible evidence to the contrary.

3. *The amicus curiae brief in support of International Fidelity.*

Aladdin Bail Bonds (Aladdin) filed an amicus curiae brief in support of International Fidelity. Aladdin argues that the trial court made a legal error when it mistakenly shifted the burden to International Fidelity to prove that extradition was feasible. According to Aladdin, the burden should have been placed on the People to prove that extradition was not feasible.

In support of its position, Aladdin relies on the following exchange between the court and International Fidelity's counsel at the hearing on the motion to vacate the forfeiture:

“MR. RORABAUGH: Thank you, your Honor. And if I may ask for just one more clarification, if I may.

“Did the Court -- there was a dispute over the evidentiary standard on who had the burden of proof. Did the Court make a ruling on who had the burden of proving Mexico's extradition policies?

“THE COURT: I did not.

⁴ International Fidelity's request that this court take judicial notice of a declaration from a Monterey County deputy district attorney regarding extradition from Ireland and Uruguay is denied on the ground that it is irrelevant.

“MR. RORABAUGH: Could I ask the Court to make that finding?

“THE COURT: I don’t think that’s necessary....”

In *County of Orange*, the court placed the burden on the prosecution to establish that the defendant’s extradition was not feasible. (*County of Orange, supra*, 61 Cal.App.4th at pp. 802-803.) Nevertheless, whether or not the trial court erroneously shifted the burden of proving feasibility of extradition to International Fidelity, we will not consider this issue on appeal because it was not raised by International Fidelity.

An amicus curiae accepts a case as it finds it. (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274.) Accordingly, an amicus curiae must accept the issues made and propositions urged by the appealing parties. Any additional questions presented in a brief filed by an amicus curiae will not be considered. (*Lance Camper Manufacturing Corp v. Republic Indemnity Co.* (2001) 90 Cal.App.4th 1151, 1161, fn. 6.) At this point, interjecting new issues is inappropriate. (*California Assn. for Safety Education v. Brown, supra*, 30 Cal.App.4th at p. 1275.)

Aladdin also echoes International Fidelity’s argument that the evidence does not support the trial court’s finding that extradition was not feasible. In making this argument, Aladdin requests this court to take judicial notice of *People v. Elizandro Vizcarra* (Sup. Ct. Fresno County, 2012, No. F09905689), a Fresno County Superior Court case where a different trial judge found that extradition of the defendant from Mexico in a narcotics violation case was feasible. Aladdin states that the People asserted the same evidence as it did in this case. Aladdin also notes that the court in *Vizcarra* had “the aid of a more thorough record, including a declaration from a Mexican legal expert.”

However, an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters that were before the trial court for its consideration. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Thus, we are reviewing the record that was presented to the court and upon which it based its ruling in the matter underlying this appeal. Therefore, our only concern is whether this trial court was presented with

substantial evidence that supports its infeasibility finding. Accordingly, the *Vizcarra* case is irrelevant to this appeal. Therefore, Aladdin's request for judicial notice is denied. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089, fn. 4.)

DISPOSITION

The judgment is affirmed. The People are awarded costs on appeal.

LEVY, J.

WE CONCUR:

WISEMAN, Acting P.J.

GOMES, J.