

S218712

In the
Supreme Court
of the
State of California

CRC
8.25(b) SUPREME COURT
FILED
SEP 25 2014

Frank A. McGuire Clerk
Deputy

THE PEOPLE,

Plaintiff and Respondent,

v.

SAFETY NATIONAL CASUALTY INSURANCE CO.,

Defendant and Appellant.

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. B243773
SUPERIOR COURT OF LOS ANGELES · HON. MARTIN HERSCOVITZ · NOS. LA066432 AND SJ3732

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND CASE

On or about November 3, 2010 Safety National Casualty Corporation, through its agent High Five Bail Bonds posted bond number S25-1934104 for the release of the defendant from custody. (CT 11)

On April 5, 2011 the defendant was present in court. The case was continued to April 29, 2012 for a pre-trial conference. (CT 16-17) A transcript of the hearing has been prepared. The transcript reflects that the defendant was not ordered to appear in court on April 29, 2011. (CT 20-22)

On April 29, 2011 the defendant was not present in court for the pre-trial conference. The record reflects that bail was ordered forfeited. (CT 17)

On May 3, 2011 the clerk of the court mailed a notice of forfeiture to the parties. (CT 27)

On November 14, 2011 the court granted an extension of time through May 2, 2012. (CT 18)

On January 13, 2012 the Surety filed a Motion to vacate forfeiture and exonerate bail. (CT 4)

The District attorney did not file an opposition to this motion.

On February 7, 2012 the Court conducted a hearing on the motion and denied the motion. (CT 28; RT p. 3-4)

A notice of appeal was filed May 9, 2012. (CT 29)

On April 9, 2014 The Appellate Court issued a published decision reversing the judgment.

QUESTION PRESENTED

May Penal Code section 977, subdivision (b)(1), be utilized to determine whether a proceeding at which a defendant charged with a felony failed to appear was a proceeding at which the defendant was "lawfully required" to appear for purposes of forfeiting bail under Penal Code section 1305, subdivision (a)(4)?

ARGUMENT

INTRODUCTION

Penal Code section 1305, subdivision (a) requires a court to declare a forfeiture of bail when the defendant fails to appear at specified hearings and (4) "...if the defendant's presence in court is lawfully required." A trial court must declare a forfeiture of bail at the defendant's first unexcused failure to appear or the court loses jurisdiction over the bond. (*People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898.) Penal Code section 977 is a general statute designed to implement a defendant's due process right to be present at criminal proceedings against him. (*People v. North Beach Bonding Co.*, (1974) 36 Cal.App.3d 663, 669.)

Penal Code section 977, subdivision (b)(1) provides that a defendant that has not executed a signed waiver "shall be personally present at all other proceedings." Nevertheless a long line of authority has held that Penal Code section 977 only requires a defendant's personal presence at fundamental hearings, necessary to protect the defendant's constitutional rights. (*People*

v. Bradford (1997) 15 Cal.4th 1229; *People v. Jackson* (1980) 28 Cal.3d 264; *People v. Waidla* (2000) 22 Cal.4th 690; *People v. Clark* (2011) 52 Cal.4th 856; *People v. Virgil* (2011) 51 Cal.4th 1210; *People v. Castaneda* (2011) 51 Cal.4th 1292.)

Penal Code section 1305 explicitly provides that the court must forfeit bail if the defendant fails to appear at certain specified occasions, to wit: (1) arraignment (2) trial (3) judgment and (5) to surrender himself or herself in execution of the judgment after appeal. The defendant's presence may also be required at other fundamental hearings by specific statutes or rules of court. (*See e.g.*, Penal Code section 1043, section 1043.5, Rule of Court 4.112.) These specified hearings are those hearings that are necessary for a defendant to be personally present to assure a fundamentally fair trial, consistent with the authorities cited above.

The Court may also forfeit bail if the defendant is specifically ordered to appear at a non-mandatory hearing. (*People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304; *People v. Classified Insurance Corp.* (1985) 164 Cal.App.3d 341, 344; *People v. Ranger Ins. Co.* (2005) 135 Cal.App.4 820.)

In this case the appellate court correctly held that the trial court was without jurisdiction to declare a forfeiture of bail because the defendant was not lawfully required to appear at the pretrial hearing. The general provision of Penal Code section 977, subdivision (b)(1) did not lawfully require the

defendant to appear, because that section does not require a defendant's presence, or a written waiver at a pretrial hearing.

a. The Law is Interpreted to Avoid Forfeitures

In assessing bail forfeiture questions, a reviewing court is guided by certain established principles. The law disfavors forfeitures, and bail forfeiture statutes must be strictly construed in favor of the surety in order to avoid the harsh results of a forfeiture. (*People v. Wilshire Ins. Co.* (1975) 46 Cal.App.3d 216, 220; *see also Burnett v. King* (1949) 33 Cal.2d 805, 807; *People v. Black* (1966) 55 Cal.2d 275, 277; *People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 904, 906; *People v. North Beach Bonding Co.* (1974) 36 Cal.App.3d 663, 673.)

The purpose of bail is to ensure the appearance of the defendant, and it is not to make money for the state nor to punish the surety or the defendant. (*See People v. Wilcox* (1960) 53 Cal.2d 651, 656; *People v. Calvert* (1954) 129 Cal.App.2d 693, 698; *People v. North Beach Bonding Co.* (1974) 36 Cal.App.3d 663, 675.)

Moreover, courts have recognized an obligation to construe the law so as to protect those who ultimately bear the burden of a bail forfeiture. One court said:

“In adopting a rule of strict construction the courts; concern is not so much for the bail bond companies, to whom forfeiture is an everyday risk of doing business, but for those who bear the ultimate weight of the forfeiture, family members and friends

who have pledge their homes and other financial assets to the bonding companies to secure the defendant's release." (*County of Los Angeles v. American Contractors Indemnity Co.*, (2007) 152 Cal.App.4th 661, 666; see also *County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58, 62; *People v. Lexington National Ins. Co.*, (2010) 181 Cal.App.4th 1485, 1489.)

It is the protection of innocent parties that the law aims to procure, and the courts should incline toward a construction that avoids the forfeiture and protects those citizens.

In view of these policies, and authorities, a court should be disposed to an interpretation that avoids the forfeiture and affords the surety and innocent citizens the benefit of the law.

"Although it is often said that section 1305 must be strictly construed "in favor of the surety" (see *People v. Indiana Lumbermen's Mutual Ins. Co.* (2010) 49 Cal.4th 301, 307), the gravamen of the rule is that the forfeiture statutes are to be strictly construed to avoid forfeiture. (*People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 906)." (*People v. Indiana Lumberman's Insurance Company* (2011) 194 Cal.App.4th 45, 51.)

b. The Court must declare a forfeiture of bail at the defendant's first unexcused failure to appear

Under the decision of *People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, a court must declare a forfeiture of bail on the defendant's first unexcused failure to appear. However, in several opinions the appellate courts have upheld a trial court's decision not to declare a forfeiture of bail at hearings that those courts determined that the hearings were not

mandatory. (*People v. National Automobile and Casualty Ins. Co.* (2004) 121 Cal.App.4th 1441; *People v. National Automobile and Casualty Ins. Co.* (1977) 77 Cal.App.3d Supp. 7, 9 and *People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304.)

c. Bail Can Be Ordered Forfeited If The Court Orders The Defendant To Appear

A defendant's lawful presence in court can be established by an express or specific order that he appear at a date and time certain.

“A defendant's presence is ‘lawfully required’ when there is ‘a specific court order commanding his appearance at a date and time certain’ (*People v. Classified Ins. Corp.*, (1985) 164 Cal.App.3d 341, 344), or when a defendant has notice because he or she is present when the date and time for a mandatory appearance are set, even though the court did not specifically order his or her personal presence (*People v. American Bankers Ins. Co.*, (1990) 225 Cal.App.3d 1378, 1383).” (*People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304.)

In *People v. Ranger Insurance Company* (2005) 135 Cal.App.4th 820 the Court found that a defendant's presence was lawfully required at a pretrial hearing because the trial court “expressly ordered” the defendant to appear.

“In *People v. Classified Corp.*, supra, 164 Cal.App.3d 341, the court forfeited bail when the defendant did not appear for a hearing on a section 995 motion. The bond company argued defendant had not been lawfully required to appear at the hearing and the appellate court agreed. (164 Cal.App.3d. at p.347.) However, the trial court had not expressly ordered the bailee to appear for the hearing on the section 995 motion. Here, as noted above, the trial court specifically ordered defendant to appear on February

2, 2004.” (*People v. Ranger Ins. Co.* (2005) 135 Cal.App.4th 820, 825.)

The Appellate court correctly held that the defendant was not expressly ordered to appear at the pretrial hearing at issue in this case.

d. Existing Case Law Provides That Penal Code 977(b)(1) Does Not Provide Authority To Forfeit Bail Pursuant To Penal Code 1305(A)(4)

The Court of Appeals correctly found that current case law has rejected the general provisions of Penal Code section 977, subdivision (b)(1) as a basis to lawfully require the defendants presence in court for the purpose of forfeiting bail. The decision cited *People v. National Automobile & Casualty Ins. Co.*, (2004) 121 Cal.App.4th 1441, 1449-1450, *People v. Classified Insurance Corp.* (1985) 164 Cal.App.3d 341, 344-346, *People v. National Automobile & Cas. Ins. Co.*, (1977) 77 Cal.App.3d Supp. 7, 9 accord *People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304

The *North Beach* case held that Penal Code section 977 was implemented to protect an accused’s due process rights to be present at certain stages of his prosecution, and that Penal Code section 977, subdivision (b)(1), in and of itself, did not lawfully require a defendant’s presence pursuant to Penal Code section 1305. The *North Beach* Court recognized that the purposes of Penal Code section 977 were distinct from those in Penal Code section 1305 and found that Penal Code section 977 not independently require a defendant to appear in court for a motion hearing.

The *North Beach* court found that the defendant's presence was not lawfully required so that the court was not required to forfeit bail upon the defendant's failure to appear, by the general provisions of Penal Code section 977.

“Subdivision (b) of section 977 of the Penal Code provides that in felony cases a defendant must be present at certain designated stages of the proceedings and then adds: 'The accused shall be personally present at all other proceedings unless he shall, with leave of court, execute in open court, a written waiver of his right to be personally present, approved by his counsel, which waiver must then be filed with the court; . . .'

“By juxtaposition of the two foregoing principles appellant asserts that the unexcused absence of the defendant at the proceedings held at 3:30 p.m. on March 24, 1972, gave rise to an opportunity to declare the bail forfeited which, unexercised, precluded further action to forfeit the bail on the following Monday, March 27. The provisions in section 977 are designed to implement the defendant's due process right to be present at his trial and other proceedings. (See *People v. Williams* (1970), 10 Cal.App.3d 745, 751--752, 89 Cal.Rptr. 364.) It is absurd to contend that an attorney by appearing without his client an hour and one-half before the latter was directed to appear could place his client in default. The remedy, if the appearance of the defendant was necessary, was to refuse to entertain the motions without the presence of the defendant. The denial of the motions renders that issue moot. No order of forfeiture could have been entered at those proceedings and therefore *People v. United Bonding Ins. Co.*, supra, is inapplicable.”)*People v. North Beach Bonding Company*, (1974) 36 Cal.App.3d 663, 669.)

The rule that the general provision Penal Code section 977, subdivision (b) did not require a defendant's presence for purposes of the forfeiture of bail was confirmed in *People v. Classified Insurance Corp.* (1985) 164 Cal.App.3d 341, 345-346

“Since Hernandez was charged with a felony, respondent urges this court to refer to section 977 in construing the phrase "other occasion when his presence in court is lawfully required" in section 1305. Section 977 provides in pertinent part:

"(b) In all cases in which a felony is charged, the accused must be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he shall, with leave of court, execute in open court, a written waiver of his right to be personally present, approved by his counsel, which waiver must then be filed with the court; ..."

“Respondent's contention is that an accused's presence is lawfully required at all proceedings, unless a written waiver is executed by the accused and filed with the court. Respondent then reasons that since Hernandez did not execute such a waiver in this matter his presence was lawfully required at his section 995 motion. Finally, respondent concludes that since Hernandez was lawfully required to appear for his section 995 motion, his failure to do so triggered the application of section 1305 requiring forfeiture of bail.

“Respondent's construction of section 1305 by reference to section 977 is untenable. Respondent acknowledges that section 977 is designed to implement a defendant's due process rights. (People v. North Beach Bonding Co. (1974) 36 Cal.App.3d663, 111 Cal.Rptr. 757.) (*People v. Classified Insurance Corp.* (1985) 164 Cal.App.3d 341, 345-46.)

This analysis of *North Beach* and *Classified* was affirmed in several other cases. In *People v. National Automobile and Casualty Ins. Co.* (2004) 121 Cal.App.4th 1441, the court relied on *Classified* to explain that Penal Code section 1305 only requires the defendant's presence at certain hearings and that the absence of a Penal Code section 977 waiver does not convert all non-mandatory proceedings into hearings where a defendant's presence is lawfully required under Penal Code section 1305.

“The trial court was in error in its apparent belief that the defendant's presence was required at the October 19, 2008 hearing. Under section 1305, only certain proceedings in a criminal matter require a defendant's attendance. The absence of a section 977 waiver does not convert all proceedings - specifically including a hearing on a section 995 motion to strike – into occasions which a ‘defendant's presence in court is lawfully required’ for purposes of section 1305, subdivision(a)(4). (See: *People v. Classified Ins. Co.*, (1985) 164 Cal.App.3d 341, 344-347.) It is undisputed that the sole original purpose of the hearing scheduled for October 19, 2008, was to hear the defendant's demur and section 995 motion; it was not for arraignment, trial, judgment, or execution of judgment, on the occasions enumerated in section 1305 subdivision (a) when a defendant's appearance is always required.” (*People v. National Automobile and Casualty Ins. Co.*, (2004) 121 Cal.App.4th 1441, 1449.)

In *People v. Sacramento Bail Bonds* (1984) 210 Cal.App.3d 118 and *People v. American Bankers Ins. Co.* (1990) 225 Cal.App.3d 1378 the courts explained that a defendant was lawfully required to appear at a trial readiness conference because former rule of court 227.6 (Renumbered CRC 4.112)

required the defendant's presence. The *Sacramento* court recognized that in *Classified* no rule of law, including Penal Code section 977, required the defendant's presence and agreed that *Classified's* analysis of Penal Code section 977 was correct.

“However, the circumstances of Classified Ins. are materially different from those here. Thus, in that case, no rule of law required the defendant's presence at the hearing at which he was absent--a hearing on a motion pursuant to section 995. (Id. at p. 344-345.) The court of appeal correctly noted section 977 [fn omitted] did not require that defendant be present at the section 995 hearing. (Id. at p. 345.; *People v. North Beach Bonding Co.* (1974) 36 Cal.App.3d 663, 669,.)” (*People v. Sacramento Bail Bonds*, (1984) 210 Cal.App.3d 118.)

In *People v. International Fidelity* (2012) 212 Cal.App.4th 1556 the court held that a court could not forfeit a bond on a misdemeanor defendant when the defendant's attorney had lost contact with the defendant, but was still presumptively appearing for the defendant. In *International Fidelity* @ 1563-1564, the Court contrasted *People v. Sacramento supra* 210 Cal.App3d 118 and noted that Penal Code 977(b) required the defendant's presence if a waiver was not filed. This statement mischaracterizes the *Sacramento* decision, which was based its conclusion that the defendant's presence was lawfully required on a rule of court, not Penal Code section 977, subdivision (b). The *International Fidelity* court did not address the circumstances presented here, and did not discuss or distinguish those cases holding that

Penal Code section 977, subdivision (b)(1) cannot be the basis for lawfully requiring the defendant's presence in court.

Similarly in the case of *People v. Jimenez* (1995) 38 Cal.App.4th 795, the court relied on Penal Code section 1305(a)(5), that requires a defendant released on an appeal bond, to appear for the execution of judgment. That case noted that it did not analyze Penal Code section 977, subdivision (b) beyond the plain language of the statute. (*Id.* at fn 8.)

Therefore the Court of Appeals was correct that current case law has rejected the general provisions of Penal Code section 977, subdivision (b)(1) as the sole basis to lawfully require a defendant's presence in court for the purposes of forfeiting bail.

e. The Court Cannot Declare a Forfeiture of Bail if the Defendant's Presence is not Lawfully Required

Additional decisions, not discussed by the Court of Appeals, have found forfeitures void where a defendant was not present at a hearing not covered by Penal Code section 1305, subdivision (a). These cases include: *People v. Allen, (Amwest Surety Ins. Co.)* (1994) 28 Cal.App.4th 575 [forfeiture of appeal bond void where made prior to the issue of remitter]; *People v. Accredited Surety & Casualty Co.* (2012) 209 Cal.App.4th 617 [forfeiture void where defendant was not ordered to appear pursuant to Penal Code 1269b because he was not in custody when hearing set; *People v. Ranger Ins. Co.*, (2006) 145 Cal.App.4th 23 [forfeiture void where court

order failed to continue arraignment date set by jailor pursuant to Penal Code 1269b]; *People v. American Surety Ins. Co.* (2009) 178 Cal.App.4th 1437; [forfeiture void at hearing scheduled by prosecutor's letter without court order].

In *People v. Morstadt* (1894) 101 Cal. 379 the Supreme Court held that a trial court could not declare a forfeiture at the time set for the defendant to appear for a preliminary examination because his attorney had filed a demurrer and the hearing on the demurrer was continued to a time after the defendant's scheduled preliminary examination.

In several other cases which did not specifically discuss Penal Code section 977 the courts concluded that the defendant's presence was not required at a felony proceeding, and that the trial court did not have jurisdiction to declare a forfeiture of bail.

In *People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301 the court found that a defendant was not required to be personally present at a narcotics review (NCR) hearing that was designed for optional settlement negotiations. The *Ranger* (1992) court distinguished between mandatory hearings which did not require a specific court order to appear and other hearings, such as the NCR hearing at issue, which required a specific court order to lawfully require the defendant's presence.

In *People v. American Contractors Indemnity Co.* (2001) 91 Cal.App.4th 799, the defendant was released on bail after conviction and

prior to sentencing. Upon discovering that the defendant had been released on bail the District Attorney filed a motion to revoke bail. This motion was scheduled nearly a month before the defendant was ordered to appear. The trial court revoked bail and ordered a forfeiture of bail. Both the trial court and the court of appeals agreed that this order of forfeiture was void.

In *People v. Resolute Ins Co.* (1968) 259 Cal.App.2d 633, the court found that the court's jurisdiction to forfeit bail is subject to the express statutory condition precedent that the defendant fail to appear as lawfully required. In *Resolute* the defendant was ordered to appear in court on April 2, 1965. On March 30, 1965, the District Attorney made a motion to issue a bench warrant because the defendant was in custody in Canada. The defendant was not given notice of the March 30, 1965, hearing. The court forfeited bail on March 30, 1965. The *Resolute* court found this order of forfeiture void because it was made on a date prior to the defendant's requirement to appear.

“Manifestly, Tucker on March 30, had not neglected to appear for a trial which was set for April 2. Lacking the essential jurisdictional fact on March 30, the forfeiture order made on that date was in excess of jurisdiction and void.” (*Id.* at p. 636.)

In *People v. Allen, (Amwest Surety Ins. Co.)* (1994) 28 Cal.App.4th 575 the court found the forfeiture of an appeal bond void where the declaration of forfeiture was ordered when the defendant failed to appear at a hearing for a new charge, prior to the issue of remitter on the case for which

the defendant had posted bail. The trial court was held to not have jurisdiction to order the defendant to appear for purposes of forfeiting bail prior to the completion of the appellate case.

In *People v. Accredited Surety & Casualty Co.* (2012) 209 Cal.App.4th 617, the court found a forfeiture void where a second bond was posted for a defendant who was not in custody when the bond was posted. The defendant was not ordered to appear by the court on the date set on the bond or the jailor pursuant to Penal Code section 1269b.

In *People v. Ranger Ins. Co.* (2006) 145 Cal.App.4th 23 the forfeiture was found void where no court order continued the arraignment date initially set by jailor pursuant to Penal Code section 1269b.

In *People v. American Surety Ins. Co.* (2009) 178 Cal.App.4th 1437 the court found a forfeiture void where the hearing was scheduled by prosecutor's letter without court order.

In *People v. Aymar* (1929) 98 Cal.App. 1, the court found that the defendant was required to appear in court based on former Penal Code Section 1434. The *Aymar* decision distinguished the cases of *People v. Ebner* (1863) 23 Cal. 158; *People v. Budd* (1881) 57 Cal. 349; and *Carroll v. Police Court* (1924) 66 Cal.App. 66 because Penal Code section 1434 was not in effect at the time of those cases. Therefore the *Aymar* case found that the defendant's presence was lawfully required in court because of a specific statutory requirement.

In *Caroll v. Police Court* (1924) 66 Cal.App. 66 the court upheld the forfeiture of bail when the defendant was not present in court for trial and the District Attorney had made a motion for, and obtained an order for the defendant to personally appear at the trial for purposes of identification.

In *People v. Budd* (1881) 57 Cal. 349, the court found that a bond could not be forfeited at a misdemeanor trial because no order was made for the defendant to be personally present and no provision of law “prevented the Court from proceeding with trial of the case in the defendant’s absence.” (*Id.*, at p. 350.)

In *Beasley v. Municipal Court* (1973) 32 Cal.App.3d 1020, the court found the forfeiture of bail at a misdemeanor trial “void and illegal” (*Id.*, at p. 1027.) The court found that pursuant to Vehicle section 40512.5 a defendant was not required to appear at a misdemeanor vehicle code violation trial.

In *People v. Ebner* (1863) 23 Cal. 159, the court found a forfeiture of bail void where the defendant appeared through counsel to enter a plea on a misdemeanor.

In *People v. Semecal* (1968) 264 Cal.App.2d Sup. 985, the court upheld a forfeiture of bail when neither the defendant nor counsel appeared at the time set for trial on a misdemeanor. The court distinguished the decision of *In re Baird* (1957) 150 Cal.App.2d 561, where a defendant had written the court stating that he would be out of town. In *Baird* the court

conducted a trial against the defendant in absentia. In *Semecal* there was no showing that the defendant's absence was intentional. "mere absence standing alone is purely equivocal" (*Id.*, at p. 991.) The main focus of the *Semecal* decision was that the bail forfeiture provisions must be read in a way that will allow "the orderly administration of the judicial process" (*Id.* at p. 990.) If a defendant's absence at trial, personally or by counsel, the court would be left with the choice of allowing a defendant to "at his whim delay or perhaps forever halt society's inherent right to prosecute." (*Id.* at p. 991.) Similarly it would not be appropriate to continue the trial in absentia where "[t]here would be no safeguard that such a defendant's unexplained absence would not later inure to benefit his claim of misadventure, that his absence was excusable, and that due process required a retrial in his presence." (*Id.*)

In the present case there was no provision of law that prevented the trial court from conducting the pre-trial hearing without the defendant's presence. There was no court order that the defendant to appear or any specific statute or rule that required his personal presence. The court could have conducted the hearing with the defendant's attorney, or if the defendant's presence was required, could have continued the hearing and ordered the defendant to appear.

f. Penal Code Section 977, subdivision (b)(1) Does Not Require the Defendant's Presence at Procedural Hearings such as a Pretrial Hearing

People v. North Beach Bonding, supra, relied upon the decision of *People v. Williams* (1970) 10 Cal.App.3d 745 to support its finding that Penal Code section 977, subdivision (b)(1) did not lawfully require the defendant's personal presence. *Williams* is a part of a long line of cases that have held that Penal Code Section 977, despite the plain language of the statute, only requires a defendant's personal presence at fundamental hearings that bear a substantial relationship to a defendant's opportunity to defend against the charges. (See *People v. Cole* (2004) 33 Cal.4th 1158; *People v. Bradford*, (1997) 15 Cal.4th 1229; *People v. Jackson* (1980) 28 Cal.3d 264; *People v. Waidla* (2000) 22 Cal.4th 690; *People v. Clark* (2011) 52 Cal.4th 856; *People v. Virgil* (2011) 51 Cal.4th 1210; *People v. Castaneda* (2011) 51 Cal.4th 1292.)

"Finally, "under sections 977 and 1043, a criminal defendant does not have a right to be personally present, even in the absence of a written waiver, where he does not have such a right under article I, section 15 of the California Constitution. [Citations.]" [127 Cal.Rptr.3d 248](*Cole, supra*, 33 Cal.4th at p. 1231, 17 Cal.Rptr.3d 532, 95 P.3d 811 [defendant's absence from in-court conferences related to guilt and penalty phase jury instructions did not bear a reasonably substantial relationship to his opportunity to defend against the charge]; *People v. Riel* (2000) 22 Cal.4th 1153, 1195-1196, 96 Cal.Rptr.2d 1, 998 P.2d 969 [the defendant's presence at discussions of jury instructions would not " have affected the fullness of his opportunity to defend against the charges"];

Waidla, supra, 22 Cal.4th at pp. 741-742, 94 Cal.Rptr.2d 396, 996 P.2d 46 [conference in chambers related to instructions did not bear a reasonably substantial relation to the fullness of the defendant's opportunity to defend]; *People v. Dennis* (1998) 17 Cal.4th 468, 538, 71 Cal.Rptr.2d 680, 950 P.2d 1035 [" We find it unlikely that defendant, a layperson, would have contributed in any way to the discussions regarding appropriate instructions on issues of law"].) For the same reason defendant had no right under the California Constitution to be personally present at these discussions, he had no right under sections 977 and 1043 to be personally present, nor was a written waiver required." (*Cole, supra*, at p. 1231, 17 Cal.Rptr.3d 532, 95 P.3d 811.) (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1343.)

In *People v. Williams* (1970) 10 Cal.App.3d 745 751-752 the defendant alleged a violation of due process because he was not present when the magistrate issued an order holding him to answer to the Superior Court. The *Williams* court relied on the California Supreme Court case of *People v. Isby* (1947) 30 Cal.2d 879, 894 to find that a defendant's absence at such a hearing was not a violation of due process under Penal Code section 977 because the accused did not suffer any damage by reason of such absence.

Williams is a part of long line of authority which holds that the plain language of Penal Code section 977, subdivision (b)(1) that "a defendant shall be present for all other proceedings," does not mean that the defendant is lawfully required to appear at non-critical hearings.

The *Williams* decision was relied upon by the California Supreme Court in *People v. Jackson* (1980) 28 Cal.3d 264. *Jackson* involved the

necessity of a defendant's presence at a mistrial hearing. The Court concluded that the defendant's presence was not required at a mistrial hearing. The Court concluded that "defendant's presence at the mistrial hearing was not required in order to protect defendant's interests, to assure him a fair and impartial trial, or to assist counsel in the defense of the case." (*Id.* at p. 310.)

The *Jackson* decision was relied upon by the Supreme Court in *People v. Rundell* (2008) 43 Cal.4th 76, where the Court explained that Penal Code section 977 is similar to constitutional provisions protecting the defendant's right to be present, and that a defendant is "not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend himself against the charges against him." (*Id.* at p. 178.)

In *People v. Bradford* (1997) 15 Cal.4th 1229, 1357 the Supreme Court stated that Penal Code section 977 did not require a defendant's presence, or a written waiver unless the hearing was necessary to protect the defendant's right to defend against the charge.

"This court repeatedly has held that a defendant is not entitled to be personally present either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters as to which the defendant's presence does not bear a " ' "reasonably substantial relation to the fullness of his opportunity to defend against the charge." ' "
(*People v. Bittaker* (1989) 48 Cal.3d 1046, 1080;

People v. Horton (1995) 11 Cal.4th 1068, 1120-1121; *People v. Johnson, supra*, 6 Cal.4th 1, 18; *People v. Medina* (1990) 51 Cal.3d 870, 902-903; *People v. Holloway* (1990) 50 Cal.3d 1098, 1116.) Sections 977 and 1043 do not require the defendant's presence, or a written waiver, unless that standard has been met. (*People v. Cooper, supra*, 53 Cal.3d 771, 825; *People v. Medina, supra*, 51 Cal.3d 870, 902; *People v. Holloway, supra*, 50 Cal.3d 1098, 1116; *People v. Bloyd* (1987) 43 Cal.3d 333, 359-360.)” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357)

In *People v. Hovey* (1988) 44 Cal.3d 543, the defense counsel purported to waive the defendant’s presence for a read-back of testimony. The court found that defendant is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him, and the burden is on the defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial.

In *People v. Perry* (2006) 38 Cal.4th 302, the Court found that the “defendant's right to be present depend[ed] on two conditions: (1) the proceeding is critical to the outcome of the case, and (2) the defendant's presence would contribute to the fairness of the proceeding.” (*Id.* at p. 312.)

“Thus a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding. Examples include the exclusion of a defendant from a conference on the competency of child witnesses [citation], a

conference on whether to remove a juror [citation], and a conference on jury instructions [citation]. And there is no error in excluding a defendant from routine procedural discussions on matters that do not affect the outcome of the trial, such as when to resume proceedings after a recess. (See, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1039–1040, 64 Cal.Rptr.2d 594, 938 P.2d 388.)” (*People v. Perry, Supra*, 312)

In *People v. Davis* (2005) 36 Cal.4th 510, the Court found that the defendant in a capital case had a right to be present at a hearing discussing the contents of a jailhouse tape where the defendant was personally present when the tapes were made. The standard under Sections 977 and 1043 are similar. “The accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him.” (*Id.* at p. 530.)

In *People v. Mooney* (1933) 130 Cal. App. 521 the court found that the defendant’s presence was not mandated. A defendant who is represented by counsel is not entitled as a matter of right to be present when a case is set for trial. “His presence, however, is not necessary at proceedings which are merely preliminary or formal and no matters affecting his guilt or innocence are presented.” (*Id.* at p. 522.)

In *People v. Boehm* (1969) 270 Cal.App.2d 13 the court found that the defendant need not be personally present because his presence would not have benefited him. “In the language of *Snyder v. The Commonwealth of Massachusetts*, *Supra*, any possible benefit that he might have derived from

being personally present at the conference would have been ‘but a shadow’”
(*Id.* at p. 20.)

In *People v. Isby* (1947) 30 Cal.2d 879, the Supreme Court found that the defendant was not required for preliminary or formal matters and that the presence of the defendant is “a condition of due process to the extent that a fair and just hearing would be thwarted by his absence and to that extent only.” (*Id.* at p. 894)

In a similar context some trial courts conduct pre-preliminary hearings to negotiate settlements and handle other procedural matters before a preliminary hearing. Such proceedings are separate and distinct from the preliminary hearing itself. (*People v. Rocio Garrido* (2005) 127 Cal.App.4th 359; *Drescher v. The Superior Court* (1990) 218 Cal.App.3d 1140; *People v. Williams* (1983) 139 Cal.App.3d 1013; *People v. Lance Robert Underwood* (1983) 139 Cal.App.3d 906) “This practice is apparently employed by the Pomona branch of the Los Angeles County Superior Court to facilitate negotiated dispositions in felony prosecutions prior to preliminary hearing.” (*People v. Jose Luis Torrez* (1987) 195 Cal.App.3d 751, 754.)

Because merely procedural hearings are not fundamental to the defendant’s case, the court in *Foosadas v. County of San Joaquin* (2005) 130 Cal.App.4th 649 held that a court commissioner could preside over a pre-

preliminary hearing without the stipulation of the parties. Conducting this hearing was a subordinate judicial function.

“Real party agrees that presiding over a motion to continue a hearing and pre-preliminary hearing conferences are subordinate judicial duties because they do not raise complex facts and legal issues or contested questions of law. (Rooney v. Vermont Investment Corp. (1973) 10 Cal.3d 351, 360-362 [110 Cal.Rptr. 353]; People v. Lucas (1978) 82 Cal.App.3d 47, 50-51 [147 Cal.Rptr. 235].) (*People v. Foosadas, supra*, at p. 655)

These cases uniformly hold that Penal Code section 977 does not require a defendant’s presence at hearings similar to the pretrial conference at issue here.

g. The Court Should Construe the Provisions of Penal Code Section 977, Subdivision (b)(1) in the Context of a Bail Forfeiture Similarly to the Construction of that Statute in the Context of a Defendant’s Due Process Right to be Present

Those hearings specified by Penal Code section 1305, subdivision (a), and other specific statutes and rules of court, mirror those hearings where the defendant’s personal presence is required to protect his fundamental constitutional rights. Therefore Penal Code section 977, subdivision (b) should not be used to form the sole basis of the defendant’s lawful requirement to appear at a hearing where no other statute or rule applies.

The expansive reading of Penal Code section 977 provisions made by the People could be used to justify forfeitures where the defendant was not

ordered to appear, the defendant's presence was not mandated by any specific or statute and even where the defendant did not have actual notice of such hearing.

The provisions of Penal Code section 1305, subdivision (a) as well as the specific statutes and rules of court that require a defendant's personal presence cover every hearing that the defendant would be required to attend pursuant to Penal Code section 977. Since the defendant is not required to appear at non-critical hearings pursuant to Penal Code section 977, subdivision (b)(1), that statute cannot be relied upon as the sole basis of lawfully requiring a defendant's presence to appear.

This interpretation provides the most clarity to courts, sureties and defendants. This interpretation will assure that bail bonds are not improperly and unnecessarily forfeited when a defendant chooses to allow his or her attorney to conduct those non-critical portions of the criminal proceedings.

CONCLUSION

In the present case the appellate court concluded that the trial court was without jurisdiction to forfeit bail at a felony pre-trial hearing where the defendant was not specifically ordered to appear. The pre-trial hearing was set as day 0 of 45 for the defendant's jury trial. The hearing was set for settlement discussions and other scheduling and procedural matters. Such a pretrial hearing is not a hearing that is constitutionally protected, or necessary for a fair and just process. Penal Code section 977, subdivision (b)(1) should

not be construed more broadly in the context of a bail forfeiture, than it is in the context of the due process protections that it was implemented to protect.

And, lastly, under sections 977 and 1043, a criminal defendant does not have a right to be personally present, even in the absence of a written waiver, where he does not have such a right under article I, section 15 of the California Constitution. (*People v. Waidla*, *supra*, 22 Cal.4th 690, 742, 94 Cal.Rptr.2d 396, 996 P.2d 46; [17 Cal.Rptr.3d 593] *People v. Bradford* (1997) 15 Cal.4th 1229, 1357, 65 Cal.Rptr.2d 145, 939 P.2d 259.) (*People v. Cole*, *supra*, 33 Cal.4th at 1231)


The felony pretrial conference at issue in this case was not a hearing that required the defendant's personal presence to assure fundamental fairness. Therefore the conclusion of the court of appeals, as well as, *People v. North Beach Bonding Company* (1974) 36 Cal.App.3d 663, that Penal Code section 977, subdivision (b)(1)'s provisions do not provide an independent basis to lawfully require a defendant's personal appearance in court, is consistent with longstanding authority regarding the scope and purpose of Penal Code section 977, subdivision (b)(1).

Therefore, since the pretrial hearing was not a fundamental constitutionally protected hearing, the defendant's presence was not required by Penal Code section 977, subdivision (b)(1) and the Court was without jurisdiction to forfeit bail.

Therefore the Court was without jurisdiction to forfeit bail on April 29, 2011 because neither the provisions of Penal Code section 1305, nor the

general provisions of Penal Code section 977, subdivision (b)(1) lawfully required the defendant's presence at that hearing. Since the defendant's presence was not lawfully required, the Court was without jurisdiction to forfeit bail and the forfeiture was void.

Dated: September 24, 2014

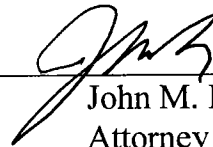


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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Answer Brief on the Merits is produced using 13-point or greater Roman type, including footnotes, and contains 6,673 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 24, 2014



John M. Rorabaugh,
Attorney for Appellant

State of California)
County of Los Angeles)
)

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