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**MONTANA MAGISTRATES' ASSOCIATION
POSITION ON SB327**

SENATE BUSINESS & INDUSTRY

EXHIBIT NO. 16

DATE 2/10/05

BILL NO. SB 327

1. If enacted, SB327 will limit the discretion of Judges. A perhaps unintended consequence of this will be to eliminate the possibility of Judges allowing those traveling to a distant destination, with too little cash to pay a ticket for speeding, to agree to pay for that ticket in installments through a time pay agreement. Without that option, the speeder will be required to pay the cost of the ticket immediately, or to travel back to the arresting jurisdiction for trial and subsequent payment of the ticket or, lastly, to await arrest for failure to appear and pay the speeding fine, the bondsman's fee and the \$100 Drivers' License reinstatement fee. If you live in Bozeman or Missoula and happen to be caught speeding in Sidney, the trip back to court to pay the fine could be quite time consuming and expensive. I have attached a copy of a letter from a resident of Billings who was able to pay her speeding fine in Stanford through a time pay agreement rather than being required to reappear in Stanford Justice Court to resolve the matter. The Judge involved has noted that this offender has made all her payments on schedule. (Attachment 1)
2. If enacted, SB327 is likely to affect either jail populations or local jurisdiction collections. Most of the State's jails are overcrowded, particularly in the larger jurisdictions. Those who cannot immediately pay the fines and fees for infractions may be jailed, released on their own recognizance or required to acquire bond. Requiring all offenders to acquire bond for minor infractions appears excessive to some Judges. Some Judges have stated that they will release some offenders on their own recognizance if denied the ability to use time pay agreements with those offenders. In this case, the local jurisdiction loses the collections that would have been realized had a time pay agreement been available.
3. The members of the MMA have noted that communication with the State's bailbondsmen, that group's professionalism and its self-policing activities have improved in recent years. While the MMA is not certain that these improvements have resulted from the mandatory training those individuals receive, it does believe that the training requirements now required should be retained. SB327 would exempt bailbondsmen from those annual training requirements.
4. The issue of time pay bail agreements in Montana has been heard and decided in the Ninth Circuit Court of Appeals (*Restvedt v. Carlson*, No. 03-35243, May 15, 2003). A copy of a Westlaw summary of that case is attached (Attachment 2). Pertinent statements from that case are as follows:
 - a) "...This bonding device has been approved by the Attorney General of the State of Montana."
 - b) "...Appellant's assertion that Appellee's use of the time pay bail bonds flies in the face of Mont. Code Ann. [section] 46-9-402 is devoid of any logic. The record contains not a scintilla of evidence that the Appellees, in setting and accepting a criminal defendant's bail, is acting as a surety for the defendant or is furnishing bail for the defendant."

- c) "Appellant's argument that their state-bestowed right to sell surety insurance is a confine on a judge's discretion in setting bail in accordance with Montana statutes has no basis in law, and the Trial Court's reliance upon *Nunez v. City of Los Angeles*, F.3d 867 (9th Cir. 1996), was correct in granting Appellee's Motion for Summary Judgment."
- d) "Summary Conclusion. Because the time-pay bail program does not deprive the plaintiffs of any constitutionally protected liberty or property interest, we affirm the district court's decision."

5. The Montana Magistrates' Association recognizes and appreciates the valuable service provided to the State's justice system by the bail bond industry. Despite this, we do not believe that the justice system exists to become a guarantor of that industry's financial success and security.

ATTACHMENT 1

Judge Carver

Please except
part of my payment on my
ticket. Sorry for speeding.
I will send 15 more dollars
on Jan. 10th 2005. Than Feb^{1st}
2005 I can afford. 25. Than
In Feb. I should or will
have an Income Tax return
to send the last 20⁰⁰.

Thank you
Tammy Wine
P.O. Box 2
Billings, MT.
59103

Tammy Wine

1-5-05

ATTACHMENT 2

Westlaw

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For opinion see 101 Fed.Appx. 226

Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.

Scott RESTVEDT, d/b/a Valley Bail Bonds and Process Service; David Crow, d/b/a Valley Bail Bonds and Process Service; Evelyn Crow, d/b/a Valley Bail Bonds and Service, Plaintiffs/Appellants,

v.

Patricia CARLSON, individually and in her official capacity as Court Administrator for the Bozeman Municipal Court, Defendant/Appellee.

No. 03-35243.
May 15, 2003.

On Appeal from the United States District Court for the District of Montana, Butte Division Case No. CV-02-48-BU-RWA

Brief of Appellee

Douglas W. Marshall, Esq., Marshall Law Firm, P.C., 108 South Church Avenue, Bozeman, MT 59715, (406) 582-1427, Attorneys for Appellants

Barry G. O'Connell, Esq., Moore, O'Connell & Reffling, P.C., P.O. Box 1288, Bozeman, MT 59711-1288, (406) 587-5511, Attorneys for Appellee

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***1 STATEMENT OF ISSUE**

WHETHER, IN CRIMINAL CASES, A MONTANA MUNICIPAL COURT'S USE OF A TIME PAY BAIL BOND, A BOND PAID IN INSTALLMENTS PRIOR TO FINAL ADJUDICATION, INFRINGES UPON ANY FEDERALLY PROTECTED INTEREST OF PERSONS AUTHORIZED TO ISSUE SURETY BONDS.

STATEMENT OF FACTS

Carlson is the duly elected judge of the Municipal Court of Bozeman, Montana. [ER 4, ¶ 1] Occasionally, Carlson allows criminal defendants appearing before her to elect to use a "time pay" bond. [ER 4, ¶ 3] When a defendant elects to use such a device, he/she signs a "time pay" agreement in which the defendant agrees to pay into the Court's "bond pending account" a sum of money over a period of time until the full amount of the bond is received. [ER 4, ¶ 3] The defendant is advised that the bond amount will be returned should a finding of "not guilty" be made. Conversely, if a finding of "guilty" is made, the bond amount or a portion thereof will be used to pay whatever fines are levied. [ER 4, ¶ 3] This bonding device has

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been approved by the Attorney General of the State of Montana. [ER 3, Exh. A]

Restvedt and Crow are authorized to write surety bonds for criminal defendants in the Bozeman Municipal Court. [ER 6, ¶ 6] They claim that the use of a time pay bond infringes on their "protected property and liberty interests." [ER 2, ¶ 2] As a result, they sought injunctive relief forbidding the use of *2 time pay bail bonds, as well as the payment of their costs and attorney fees.

SUMMARY OF ARGUMENT

The Appellee's use of a time pay bail bond is not contrary to Montana law. Additionally, the Montana statutory scheme relating to the licensure of persons to sell surety bonds does not give Appellants a property interest to sell bonds to any particular individual or to make a profit.

ARGUMENT

Appellee does not disagree that the Appellants have a property interest in their license to sell surety bonds. That right, however, is not grounded in the Bill of Rights of the Montana Constitution, specifically, art. II, § 21, as claimed by Appellants. In fact, for this proposition, Appellants cite absolutely no authority--nor can they--as none exists. Nor are the Appellants' property interests grounded upon Mont. Code Ann. § 33-1-211 (statutory definition of surety insurance); or upon Mont. Code Ann. §§ 28-11-401 et seq. (statutory statement of the rights and obligations arising from the suretyship relationship); or upon Mont. Code Ann. §§ 46-9-101 et seq. (statutory provisions relating to bail). Rather, Appellants' right to sell surety bonds devolves from their meeting the requirements set forth in Mont. Code Ann. §§ 33-17-201 et seq. entitled "Licensing and Appointment of Insurance Producers."

*3 This Court has observed that:

Section 1983 provides a private right of action for violations of federal statutes "only if the statute creates enforceable rights and if Congress has not foreclosed such enforcement in the statute itself." [Interior citations omitted] A statute creates a right enforceable under § 1983 if: (1) the statute was intended to benefit the plaintiffs; (2) the statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct, and; (3) the interest asserted by the plaintiff is not so vague or amorphous that it is beyond the competence of the judiciary to enforce. *Groten v. California*, 251 F.3d 844, 848 (9th Cir. 2001).

Undoubtedly, the surety licensing statute was intended to benefit the Appellants. Certainly, if an applicant meets the licensing criteria set forth at Mont. Code Ann. §§ 33-17-211 and 212, this statutory scheme requires that the applicant "must be issued a license. . ." Mont. Code Ann. § 33-17- 214. Nevertheless, Appellants fail to meet the third requirement of the relevant statutory scheme. Appellants' claimed interest is to sell bail bonds to those individuals whom the Municipal Court allows to utilize the time pay bail scheme. This interest is not encompassed within the licensing statutory scheme.

The Bozeman Municipal Court, as all other courts in the State of Montana, is bound by the Montana Legislature's directive that:

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(1) Bail may be furnished in the following ways:

(a) by a deposit with the court of an amount equal to the required bail of cash, stocks, bonds, *4 certificates of deposit, or other personal property approved by the court;

(b) by pledging real estate situated within the state with an unencumbered equity, not exempt, owned by the defendant or sureties at a value double the amount of the required bail;

(c) by posting a written undertaking executed by the defendant and by two sufficient sureties; or

(d) by posting a commercial surety bond executed by the defendant and by a qualified agent for and on behalf of the surety company.

(2) The amount of the bond must ensure the appearance of the defendant at all times required through all stages of the proceeding including trial de novo, if any, and unless the bond is denied by the court pursuant to 46-9-107, must remain in effect until final sentence is pronounced in open court.

Mont. Code Ann. § 46-9-401.

A criminal defendant appearing before the Bozeman Municipal Court who is offered and who opts to accept a time pay bail bond is making bail by the payment of cash. As long as the bail is fully paid "before conviction," the statutory requirements are met. Mont. Code Ann. § 46-9-102(1). While this arrangement may arguably lessen the Appellants' profits, the same can also be said for the Court's acceptance of the pledge of property or the release of a defendant upon their own recognizance. Thus, Appellants' claim that the use of time pay bail bond is "arbitrary and capricious" is simply unwarranted.

Appellants' assertion that Appellee's use of the time pay bail bonds flies in the face of Mont. Code Ann. § 46-9-402 is *5 devoid of any logic. The record contains not a scintilla of evidence that the Appellee, in setting and accepting a criminal defendant's bail, is acting as a surety for the defendant or is furnishing bail for the defendant.

It is obvious that Appellants do not understand the difference between Restvedt I and the instant case. As noted by the Trial Court:

Restvedt I differs from the present case, however, in that it concerned only warrants for contempt citations . . . [which] require release upon the posting of 'a written undertaking, with two sufficient sureties[.]' [Citation omitted]

The present case, on the other hand, concerns the judge's authority to set bail for criminal defendants appearing before her.

[ER 7, p. 5]

Appellants' argument that their state-bestowed right to sell surety insurance is a confine on a judge's discretion in setting bail in accordance with Montana statutes has no basis in law, and the Trial Court's reliance upon Nunez v. City of Los Angeles, 147 F.3d 867 (9th Cir. 1998), was correct in granting Appellee's Motion for Summary Judgment.

CONCLUSION

The Trial Court's grant of Appellee's Motion for Summary Judgment was correct, and this Court should affirm the Trial Court.

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Very Important
2.

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101 Fed.Appx. 226
101 Fed.Appx. 226, 2004 WL 1336752 (9th Cir.(Mont.))
(Cite as: 101 Fed.Appx. 226, 2004 WL 1336752 (9th Cir.(Mont.)))

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Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,
Ninth Circuit.

Scott RESTVEDT, dba Valley Bail Bonds and Process Service; David Crow, dba Valley Bail Bonds and Process Service; Evelyn Crow, dba Valley Bail Bonds and Process Service, Plaintiffs--Appellants,

v.

Patricia CARLSON, individually and in her official capacity as Court Administrator for the Bozeman Municipal Court, Defendant--Appellee.

No. 03-35243.

Submitted June 11, 2004. [FN*]

FN* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

Decided June 15, 2004.

Appeal from the United States District Court for the District of Montana, Richard W. Anderson, Magistrate, Presiding. D.C. No. CV-02-00048-RWA.

Douglas W. Marshall, Esq., Marshall Law Firm, Bozeman, MT, for Plaintiffs-Appellants.

Barry G. O'Connell, Esq., Moore, Rice, O'Connell & Refling, Bozeman, MT, for Defendant-Appellee.

*227 Before: PREGERSON, THOMPSON, and CALLAHAN, Circuit Judges.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**1 Scott Restvedt and the other plaintiffs who do business as Valley Bail Bonds (collectively "the plaintiffs") appeal the district court's summary judgment in favor of Patricia Carlson, administrator and judge of the Bozeman Municipal Court, in their 42 U.S.C. § 1983 action challenging Judge Carlson's "time-pay" bail policy. We review grants of summary judgment de novo. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003).

Even if we were to assume for the sake of argument that Article II, Section 21 of the Montana Constitution gives the plaintiffs the right under Montana law to practice their bail bond profession, Judge Carlson's use of the time-pay bond program does not abridge any such "right." It merely gives defendants who are entitled to bail the opportunity to post bail in installments, rather than pay the full amount at the outset. Such a program provides an alternative form of bond structure to persons who are unable or unwilling to pay for a surety bond. It is possible the program could compete with the plaintiffs' opportunity to provide surety bonds, but neither Montana law nor the United States Constitution confers upon the plaintiffs any right to issue surety bonds free from competing alternative arrangements.

Because the time-pay bail program does not deprive the plaintiffs of any constitutionally protected liberty or property interest, we affirm the district court's decision. See *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir.1998).



AFFIRMED.

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