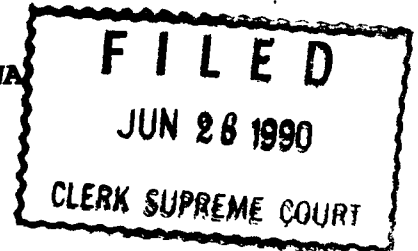


IN THE COURT OF APPEALS OF IOWA

No. 0-153 / 89-896



HARVEY HARRIS,

Plaintiff-Appellee,

vs.

POLK COUNTY, IOWA, and BOB E. RICE, POLK COUNTY SHERIFF,

Defendants-Appellees,

and

STATE OF IOWA, and JERRY L. WEISS, POLK COUNTY CLERK OF COURT,

Defendants-Appellants.

Appeal from the Iowa District Court for Polk County,
Gene L. Needles, Judge.

Defendants appeal an order granting plaintiff's summary judgment. **REVERSED. CASE DISMISSED.**

Thomas J. Miller, Attorney General, and Joanne Moeller,
Assistant Attorney General, for defendants-appellants.

Robert A. Nading II, Ankeny, for plaintiff-appellee.

James A. Smith, County Attorney, and Mary W. Vavroch,
Assistant County Attorney, for defendants-appellees Polk
County and Rice.

Considered by Oxberger, C.J., and Hayden and Sackett,
JJ.

SACKETT, J.

The question is whether in March of 1987 the appellant, Polk County Clerk of Court, was obligated to reimburse a cash bail bond to plaintiff-appellee Harvey Harris. Harris was the depositor of the cash bail bond. The bail bond had been returned to a defendant in a criminal action when the charges on which bail was required were dismissed. We hold the clerk, under the law in effect at the time, was not obligated to the plaintiff-depositor. We reverse a trial court order granting the plaintiff-depositor summary judgment. We enter judgment of dismissal on the claim of defendants-appellants, the Polk County Clerk of Court and the State of Iowa. No appeal has been taken from the trial court order granting summary judgment to defendants-appellees Polk County, Iowa and Bob E. Rice, Polk County Sheriff.

The facts are basically without dispute. On December 8, 1986, Harlen Mott, Jr., was arrested in Polk County on a parole violation warrant. Mott was jailed. A \$28,750 appearance bond was necessary for his release. On December 9, 1986, plaintiff Harvey Harris presented a cashier's check for the bond to the Polk County Sheriff. The cashier's check showed Harris as the remitter. The sheriff gave Mott a receipt with Mott's name on it. Mott gave the receipt to Harris. The sheriff delivered the bond money to the Polk County clerk's office. On

March 17, 1987, a district court judge recalled the preliminary parole violation. Mott and his father asked the Polk County clerk's office to return the bond money. The clerk, on Mott's request, issued a check on March 26, 1987, to Mott's father for \$28,750.

Learning of the transaction, plaintiff filed a tort claim against the State. The claim was denied by the State Appeal Board. This suit followed. Plaintiff contends he should have been reimbursed for the bond. Plaintiff and defendants both filed motions for summary judgment.

The trial court entered summary judgment against the State of Iowa and the Polk County Clerk of Court, finding a breach of duty in the clerk's failure to return the money to plaintiff Harris, the person who actually deposited it. The trial court concluded this result was dictated by Iowa Code sections 602.8104(2)(m), 682.37, 682.38, and 811.8(2) (1985).

Section 602.8104(2)(m) provides in relevant part:

2. The following books shall be kept by the clerk:

* * *

m. A book in which the deposits of funds, money, and securities kept are recorded as provided in section 682.37.

Section 682.37 provides:

The clerk of the district court with whom any deposit of funds, moneys, or securities shall be made, as provided by any law or an order of court, shall enter in a book, to be provided and kept for that purpose, the amount of such deposit, the character thereof, the date of its deposit, from whom received, from what source derived, to whom due or to become due, if known.

Section 682.38 provides:

The clerk shall be liable upon the clerk's bond for all such funds, moneys, or securities which may be deposited with the clerk, and shall make complete verified statements thereof to the board of supervisors at the January and June sessions each year.

Section 811.8(2) provides:

Upon the filing of the undertaking and the certificate of the officer, or the certificate of the officer alone if money has been deposited instead of bail, the court or clerk shall immediately order return of the money deposited to the person who deposited the same, or order an exoneration of the surety.

Appellants do not argue the trial court was incorrect in determining the clerk did not comply with the statutory provisions for record-keeping. They do not argue the code sections cited by the trial court do not support its holding. Appellants contend section 811.8 is not applicable because it applies only to cases where the defendant is surrendered, which is not the case here. We agree with appellants on this issue. Appellants contend the return of the money to Mott was authorized under Iowa Code section 811.2(c) (1985), which provides in relevant part:

Require the execution of an appearance bond in a specified amount and the deposit with the clerk of court in cash or other qualified security of a sum not to exceed ten percent of the amount of the bond, such deposit to be returned to the defendant upon the performance of the appearances as required in section 811.6.

They further contend their position is supported by Iowa Rule of Criminal Procedure 27(2)(d) that provides:

If the court direct the prosecution to be dismissed, the defendant, if in custody, must be discharged, or his bail, if any, exonerated, and if money has been deposited instead of bail, it must be returned to the defendant. (Emphasis added.)

Iowa R., Crim. P. 27(2)(d).

We agree with appellants the Polk County clerk was, at the time the bail money was returned, authorized by Iowa R. Crim. P. section 811.2(c) to return the bail money to Mott. We note section 811.2(c) has been amended since, and currently provides:

Require the execution of an appearance bond in a specified amount and the deposit with the clerk of the district court or a public officer designated under section 602.1211, subsection 4, in cash or other qualified security of a sum not to exceed ten percent of the amount of the bond, the deposit to be returned to the person who deposited the specified amount with the clerk upon the performance of the appearance as required in section 811.6. (Emphasis added.)

The issue of whether a different result would be dictated by the current statute is not before us.

We reverse the order granting plaintiff summary judgment and grant a judgment of dismissal to defendants State of Iowa and Polk County Clerk of Court. No appeal having been taken from the order granting summary judgment to defendants Polk County, Iowa, and Bob E. Rice, Polk County Sheriff, the matter is now dismissed in its entirety.

Appellate costs are taxed to plaintiff.

REVERSED. CASE DISMISSED.