An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-965

Filed: 17 April 2018

Wilson County, No. 15 CR 002022

STATE OF NORTH CAROLINA

v.

KELLY SUMMER LEWIS, Defendant,

and

ROLAND M. LOFTIN, JR., Bail Agent,

and

AGENT ASSOCIATES INSURANCE, L.L.C., Surety.

Appeal by Wilson County Board of Education from order entered 5 June 2017 by Judge John J. Covolo in Wilson County District Court. Heard in the Court of Appeals 29 March 2018.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for plaintiff-appellant Wilson County Board of Education.

No brief filed for defendant Kelly Summer Lewis.

No brief filed for bail agent Roland M. Loftin, Jr.

No brief filed for surety Agent Associates Insurance, L.L.C.

ELMORE, Judge.

The Wilson County Board of Education ("Board") appeals from the trial court's order reducing a bond forfeiture amount after denying a surety's motion to set aside the bond forfeiture. After careful review, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

On 10 August 2016, Kelly Summer Lewis ("Defendant") failed to appear in Wilson County District Court in an underlying criminal matter. The Wilson County Clerk of Court issued a bond forfeiture notice in the amount of $18,000.00 to Defendant, Surety Agent Associates Insurance, L.L.C. ("Surety"); and Surety's Bail Agent, Roland M. Loftin, Jr. ("Bail Agent") on 11 August 2016. Notice was mailed to the parties on 14 August 2016.

On 12 September 2016, Bail Agent filed a motion to set aside the bond forfeiture (form AOC-CR-213) on Surety's behalf. Form AOC-CR-213 is a preprinted form which lists the exclusive seven grounds for which a movant may move to set aside a bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5 (2017). Bail Agent checked box number 4 on the form, asserting the following ground for its motion:

> The defendant has been served with an order for arrest for the failure to appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.

In support of the motion, Bail Agent attached a copy of a court record showing that a new trial date had been set for 21 September 2016. On 30 September 2016, the Board objected to the motion.

The trial court held a hearing on the motion on 5 June 2017. The Board argued that while Surety's motion included evidence that would tend to support one of the statutory grounds to set aside, the trial court was required to deny the motion pursuant to N.C. Gen. Stat. § 15A-544.5(f), because defendant had failed to appear on two or more previous occasions in the case, as noted on the Conditions of Release Order dated 18 July 2016. Surety did not challenge the applicability of Section 15A-544.5(f). After arguments from the parties, the trial court denied Surety's motion to set aside the bond forfeiture, finding that Surety had not established any grounds to set aside pursuant to N.C. Gen. Stat. § 15A-544.5(b). Nonetheless, the trial court ordered Surety to pay a lesser bond forfeiture amount of $100.00. The trial court entered a written order on the same day, and a handwritten notation next to the order states "Surety to pay $100.00." The Board appeals.

On appeal, the Board argues that the trial court erred in reducing the bond forfeiture amount from $18,000.00 to $100.00. The Board contends that while the trial court correctly denied the motion to set aside, it had no authority to reduce the amount of the bond forfeiture. The Board raises only a question of law, which we review *de novo*. *State v. Knight*, ___ N.C. App. ___, ___, 805 S.E.2d 751, 753 (2017). For the foregoing reasons, we agree with the Board's argument.

We recently addressed this same issue in *State v. Knight*, a case which is factually indistinguishable from the instant case. We held that "when a motion to set

aside a forfeiture is denied under N.C.G.S. § 15A-544.5, an obligor [ ] may not be held liable for less than the amount agreed upon pursuant to the bond it actually executed." *Id.* at ___, 805 S.E.2d at 756.

Section 15A-544.5 provides the exclusive relief for setting aside a bond forfeiture that has not yet become a final judgment. *See Knight*, ___ N.C. App. at ___, 805 S.E.2d at 755. Under this section, a bond forfeiture may only be set aside for one of seven enumerated reasons and "none other." N.C. Gen. Stat. § 15A-544.5(b). Thus, the trial court has no discretion to grant relief for a non-enumerated reason.

Additionally, the section provides that "[i]f at the hearing the court allows the motion, the court *shall* enter an order setting aside the forfeiture." *Id.* § 15A-544.5(d)(6) (emphasis added). If the court does not allow the motion to set aside, "the forfeiture *shall* become a final judgment of forfeiture." *Id.* § 15A-544.5(d)(7) (emphasis added). We held that given this mandatory language, "[t]he only 'relief' authorized under N.C.G.S. § 15A-544.5 is the setting aside of the bond forfeiture," and therefore, "[t]here is no 'partial' relief provided under the plain language of the statute." *Knight*, ___ N.C. App. at ___, 805 S.E.2d at 755.

By contrast, an entirely separate section provides for the exclusive means of seeking relief *after* a final judgment of forfeiture has been entered. *See* N.C. Gen. Stat. § 15A-544.8 (2017). Section 15A-544.8 provides two enumerated reasons for which a movant may seek relief from a final judgment of forfeiture, and the trial court

is afforded more discretion in granting relief. To that end, the trial court "may grant the party *any relief* from the judgment that the court considers appropriate, including *the refund of all or a part* of any money paid to satisfy the judgment." *Id.* § 15A-544.8(c)(4) (emphasis added). Thus, in ruling on a motion for relief from final judgment, the trial court is permitted to reduce the amount of the forfeiture.

We reasoned that because the discretionary language is omitted from Section 15A-544.5, but retained in Section 15A-544.8, the decision appears to be a "conscious choice" on the part of the legislature. *See Knight*, ___ N.C. App. at ___, 805 S.E.2d at 756. Thus, in *Knight*, we held that "the plain language used in N.C.G.S. § 15A-544.5 and the statute's legislative history demonstrate that the General Assembly intended to limit a trial court's authority in setting aside a bond forfeiture before the entry of a final judgment." *Id.* Accordingly, "[u]nder N.C.G.S. § 15A-544.5, a trial court may only grant relief from a forfeiture for the reasons listed in the statute, and the only relief it may grant is the setting aside of the forfeiture." *Id.*

In the instant case, it is undisputed that Surety moved to set aside the forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5(b)(4), and the Board conceded that Surety's motion included evidence to support at least one basis for relief. Regardless, disposition of the motion is controlled by Section 15A-544.5(f), which provides the following:

> **Set Aside Prohibited in Certain Circumstances.** – No forfeiture of a bond may be set aside for any reason in any

> case in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed. Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official. The judicial official shall indicate on the release order when it is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

N.C. Gen. Stat. § 15A-544.5(f). The prohibition contained in Subsection (f) specifically bars the trial court from setting aside the forfeiture if its conditions are met, and therefore, it is mandatory. *State v. Adams*, 220 N.C. App. 406, 408, 725 S.E.2d 94, 95 (2012). We have previously held that the actual notice requirement of Subsection (f) is satisfied where the defendant's "release order explicitly indicated" that it was the defendant's second or subsequent failure to appear. *State v. Hinnant*, ___ N.C. App. ___, ___, 806 S.E.2d 346, 348 (2017).

Here, Defendant failed to appear in the same case on at least two occasions, and Surety had actual notice before executing the bond. This is evidenced by defendant's release order, dated 18 July 2016, which states "[t]his was the defendant's second or subsequent failure to appear in this case." This is sufficient to satisfy the actual notice provision contained in N.C. Gen. Stat. § 15A-544.5(f). We also note that Surety did not contest the applicability of Subsection (f) at the hearing. Therefore, we hold that given the mandatory language of N.C. Gen. Stat. § 15A-

544.5(f), the trial court did not err in denying Surety's motion to set aside the bond forfeiture.

Consistent with *Knight*, we further hold that the trial court erred in reducing the amount of the bond forfeiture from $18,000.00 to $100.00. Because the trial court denied the motion to set aside, it had no statutory authority under Section 15A-544.5 to grant partial relief by reducing the amount. *Knight*, ___ N.C. App. at ___, 805 S.E.2d at 757. We therefore vacate the trial court's order. On remand, the trial court "shall enter an order directing Surety to pay the amount of the bond as executed, less any amounts already paid." *Id.*

VACATED AND REMANDED.

Judge TYSON concurs in result only.

Judge ZACHARY concurs.

Report per Rule 30(e).