An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-1244

Filed: 7 May 2019

Pitt County, No. 17 CRS 056158

STATE OF NORTH CAROLINA

v.

BAUDILIO RIVERO BAMACA

and

LILLIAN W. WHICHARD, Bail Agent,

and

FIRST COMMUNITY INSURANCE COMPANY, Surety.

Appeal by Pitt County Board of Education from order entered 12 September 2018 by Judge Brian Desoto in Pitt County District Court. Heard in the Court of Appeals 23 April 2019.

Emma J. Hodson for Pitt County Board of Education, respondent-appellant.

Robert L. White for Lillian W. Whichard, petitioner-appellee.

TYSON, Judge.

The Pitt County Board of Education (the "Board") appeals from an order allowing First Community Insurance Company's ("Surety") motion to set aside a bond forfeiture. We vacate the trial court's order and remand for dismissal.

I. Background

On 5 February 2018, Lillian Whichard posted a $3,500.00 bond for Baudilio Rivero Bamaca ("Defendant") on behalf of Surety. Defendant failed to appear in the underlying criminal matter on 20 February 2018. On 22 February 2018, the Pitt County Clerk of Superior Court issued a notice of bond forfeiture to Surety.

On 23 July 2018, Whichard filed a motion to set aside forfeiture on behalf of Surety. Whichard's motion asserted Defendant was incarcerated in a "detention center, jail, or prison located anywhere within the borders of the United States at the time" of his failure to appear, the district attorney had been notified of this incarceration, and Defendant was still incarcerated at the time of the notice and had remained incarcerated for ten days following the notice. Whichard attached a United States Department of Homeland Security Immigration Detainer-Notice of Action, United States Department of Homeland Security Warrant of Removal/Deportation, and a copy of House Bill 131 from the 2017 Session of the North Carolina General Assembly.

The Board objected to the motion and asserted Whichard did not establish that Defendant was actually incarcerated at the time of his failure to appear, the district

attorney received notice of his incarceration, or Defendant had remained incarcerated for ten days following receipt of notice.

The trial court granted Surety's motion to set aside forfeiture. The Board appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-544.5(h) (2017).

III. Issue

The Board argues it was error for the trial court to grant Surety's motion to set aside forfeiture. It asserts no evidence established Defendant was actually incarcerated or that the district attorney had received notice of his incarceration.

IV. Analysis

We need not reach the Board's issue on appeal because we vacate the trial court's order allowing Surety's motion. Surety's motion to set aside forfeiture was filed on 23 July 2018, 151 days after the Clerk of Superior Court issued notice to Surety.

"The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in G.S. § 15A-544.5." *State v. Robertson*, 166 N.C. App. 669, 670-71, 603 S.E.2d 400, 401 (2004). Under N.C. Gen. Stat. § 15A-544.5, "*the only procedure*" for setting aside forfeiture requires

a defendant, surety, professional bondsman, or bail agent to file a written motion "*[a]t any time before the expiration of 150 days* after the date on which notice was given under G.S. 15A-544.4," listing one of the seven enumerated statutory reasons. N.C. Gen. Stat. § 15A-544.5(d) (2017) (emphasis supplied).

Notice was issued of bond forfeiture to Surety by the Clerk of Superior Court on 22 February 2018, with the final judgment date listed as 22 July 2018. The record before us shows Whichard filed the motion to set aside forfeiture on 23 July 2018, 151 days after notice was issued, and a day after the judgment became final. As a result, the trial court was without authority to set aside the forfeiture and erred by allowing Surety's motion.

V. Conclusion

Surety failed to timely file its motion to set aside within the statutorily mandated timeframe. We vacate the trial court's order allowing Surety's motion and remand for dismissal. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge McGEE and Judge BERGER concur.

Report per Rule 30(e).