

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-582

Filed: 3 March 2020

Granville County, No. 18 CRS 050036

STATE OF NORTH CAROLINA

v.

DAVID LEMUS, Defendant,

v.

1ST ATLANTIC SURETY COMPANY, Surety.

Appeal by the State from order entered 13 March 2019 by Judge James Hardin in Granville County Superior Court. Heard in the Court of Appeals 3 February 2020.

Tharrington Smith, LLP, by Stephen G. Rawson and Colin Shive, for the State-appellant.

Ragsdale Liggett PLLC, by Amie C. Sivon and Hill Law PLLC, by M. Brad Hill, for 1st Atlantic Surety Company-appellee.

No brief filed on behalf of defendant.

BERGER, Judge.

The Granville County Board of Education (“the Board”) appeals from an order denying its motion for sanctions against 1st Atlantic Surety Company (“1st Atlantic”). We affirm.

Factual and Procedural Background

On April 14, 2018, David Lemus (“Defendant”) was charged with assault with a deadly weapon with intent to kill. On April 25, 2018, a bail agent with 1st Atlantic posted a \$100,000.00 bond for Defendant. Defendant was secured by Immigration and Customs Enforcement pursuant to an order of removal, and he was deported on May 26, 2018.

On July 23, 2018, Defendant was called and failed to appear on the charge for which 1st Atlantic posted Defendant’s bond. The Granville County Clerk of Court issued and mailed a bond forfeiture notice to 1st Atlantic, the bail agent, and Defendant on July 24, 2018. The final judgment date was set for December 21, 2018. That same day, a bail agent for 1st Atlantic filed a motion to set aside the bond forfeiture (“Motion to Set Aside”) pursuant to N.C. Gen. Stat. § 15A-544.5(b).

The Board objected and timely filed a motion for sanctions in the amount of 50% of the bond and notice of hearing (“Motion for Sanctions”). The Board’s motion alleged that “the motion to set aside filed on behalf of [1st Atlantic] did not include the documentation required by N.C. Gen. Stat. § 15A-544.5. The filing of the motion

to set aside has and will cause the Board to incur additional and unnecessary expenses.”

The hearing on the Motion for Sanctions began on February 15, 2019. During the hearing, 1st Atlantic moved to continue the case. The trial court granted the motion and the case was continued for February 28, 2019.

On February 28, 2019, 1st Atlantic filed a motion for relief pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, which the trial court denied. 1st Atlantic then orally moved to withdraw its Motion to Set Aside.

In an order filed March 13, 2019, the trial court granted 1st Atlantic’s oral motion to withdraw. In that same order, the trial court denied the Board’s Motion for Sanctions, stating it did not have jurisdiction to order sanctions due to 1st Atlantic’s withdrawal of its Motion to Set Aside. It is from this order the Board appeals.

The Board contends that the withdrawal of a motion to set aside a bond forfeiture does not deprive the trial court of jurisdiction over a pending motion for sanctions filed against the party withdrawing its motion to set aside. Pursuant to the plain language of the statutes governing bail bond forfeiture, we disagree.

Analysis

“Questions of law, including matters of statutory construction, are reviewed *de novo*.” *State v. Chestnut*, 255 N.C. App. 772, 774, 806 S.E.2d 332, 334 (2017).

N.C. Gen. Stat. § 15A-544.1 *et seq.* governs bail bond forfeiture.

By executing a bail bond the defendant and each surety submit to the jurisdiction of the court and irrevocably consent to be bound by any notice given in compliance with this Part. The liability of the defendant and each surety may be enforced as provided in this Part, without the necessity of an independent action.

N.C. Gen. Stat. § 15A-544.1 (2019).

“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). Section 15A-544.5(b) enumerates the only grounds for which a forfeiture shall be set aside, and the court has no discretion to grant relief for any unenumerated reason. N.C. Gen. Stat. § 15A-544.5(b). The pertinent enumerated ground in this case reads that a forfeiture shall be set aside if:

The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, or any time between the failure to appear and the final judgment date, and the district attorney for the county in which the charges are pending was notified of the defendant’s incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney’s receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C. Gen. Stat. § 15A-544.5(b)(7).

There are two procedures for setting a bond forfeiture aside. N.C. Gen. Stat. § 15A-544.5 (c), (d). Applicable, here, is Subsection (d), which reads as follows:

(d) Motion Procedure.-- If a forfeiture is not set aside under subsection (c) of this section,¹ the only procedure for setting it aside is as follows:

(1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, any of the following parties on a bail bond may make a written motion that the forfeiture be set aside:

- a. The defendant.
- b. Any surety.
- c. A professional bondsman or a runner acting on behalf of a professional bondsman.
- d. A bail agent acting on behalf of an insurance company.

The written motion shall state the reason for the motion and attach to the motion the evidence specified in subsection (b) of this section.

. . . .

(3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.

. . . .

¹ Subsection(c) reads: "Procedure When Failure to Appear Is Stricken.-- If the court before which a defendant's appearance was secured by a bail bond enters an order striking the defendant's failure to appear and recalling any order for arrest issued for that failure to appear, that court may simultaneously enter an order setting aside any forfeiture of that bail bond. When an order setting aside a forfeiture is entered, the defendant's further appearances shall continue to be secured by that bail bond unless the court orders otherwise." N.C. Gen. Stat. § 15A-544.5(c).

(5) If either the district attorney or the county board of education files a written objection to the motion, then not more than 30 days after the objection is filed a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.

(6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

(7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:

- a. The date of the hearing.
- b. The date of final judgment specified in G.S. 15A-544.6.

(8) If at the hearing the court determines that the motion to set aside was not signed or that the documentation required to be attached pursuant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional. A motion for sanctions and notice of the hearing thereof shall be served on the surety not later than 10 days before the time specified for the hearing. If the court concludes that a sanction should be ordered, in addition to ordering the denial of the motion to set aside, sanctions shall be imposed as follows: (i) twenty-five percent (25%) of the bond amount for failure to sign the motion; (ii) fifty percent (50%) of the bond amount for failure to attach the required documentation; and (iii) not less than one hundred percent (100%) of the bond amount for the filing of fraudulent documentation. Sanctions awarded under this subdivision shall be docketed by the clerk of superior court as a civil judgment as provided in G.S. 1-234. The clerk of superior court shall remit the clear proceeds of the sanction to the county finance officer as

provided in G.S. 115C-452. This subdivision shall not limit the criminal prosecution of any individual involved in the creation or filing of any fraudulent documentation.

N.C. Gen. Stat. § 15A-544.5(d).

Here, 1st Atlantic timely moved to set aside the bond forfeiture under Subsection 15A-544.5(b)(7). In response, the Board objected and filed its first Motion for Sanctions pursuant to N.C. Gen. Stat. § 15A-544.5(d)(8). The hearing began on February 15, 2019, at which time opening statements by both parties were given. During 1st Atlantic's opening statement, counsel moved to continue the case. After opening statements concluded, the trial court heard from both parties and allowed 1st Atlantic's motion to continue and set the hearing for February 28, 2019.

On February 28, 2019, the trial court first denied 1st Atlantic's motion for relief filed that same day. 1st Atlantic then orally moved to withdraw its Motion to Set Aside. The trial court granted the motion to withdraw and stated it had not ruled on the underlying Motion to Set Aside. The trial court then concluded it had no jurisdiction to address the Board's Motion for Sanctions because the trial court did not make a ruling on the underlying Motion to Set Aside. The trial court memorialized these findings and conclusions in its March 13, 2019 order.

On appeal, the Board contends the trial court still had jurisdiction to hear its Motion for Sanctions because "the voluntary dismissal of the case by the party against whom sanctions are sought does not deprive the trial court of jurisdiction over the sanctions motion." Pursuant to the plain language of Section 15A-544.5, we disagree.

Section 15A-544.5(d)(8) states in pertinent part:

If at the hearing the court determines that the motion to set aside was not signed or that the documentation required to be attached pursuant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional.

N.C. Gen. Stat. § 15A-544.5(d)(8) (emphasis added). Thus, in order for the trial court to consider a motion for sanctions, the trial court must hold a hearing and first make a determination regarding the underlying motion to set aside. The trial court's authority to order sanctions against the surety who filed a motion to set aside is triggered if, and only if, the trial court makes a determination regarding the merits of the motion to set aside.

Here, the trial court did not make a determination regarding the merits of the Motion to Set Aside. The trial court granted 1st Atlantic's motion to withdraw before the trial court could reach the merits of the Motion to Set Aside. Once the trial court granted 1st Atlantic's motion to withdraw, it no longer had jurisdiction over the Motion for Sanctions.

The Board contends that "[t]his Court should treat motions for sanctions under the bond forfeiture statutes similarly to those made in any other civil case, and specifically hold that the withdrawal of a motion to set aside does not divest the trial court of jurisdiction over the sanctions motion." However, to do so would contravene

STATE V. LEMUS

Opinion of the Court

the plain language of N.C. Gen. Stat. § 15A-544.1 *et seq*; see *State v. Moraitis*, 141 N.C. App. 538, 541, 540 S.E.2d 756, 757 (2000) (“A statute that is clear on its face must be enforced as written.”); see also *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (“Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute.”). A court cannot exercise authority not specifically prescribed in the bond forfeiture statutes. See *State v. Knight*, 255 N.C. App. 802, 806, 805 S.E.2d 751, 754 (2017) (emphasizing that the trial court’s authority over bond forfeiture must be exercised in accordance with the relevant statutory provisions). Accordingly, the trial court did not err in concluding that it lacked jurisdiction to hear the Board’s Motion for Sanctions.

Conclusion

The trial court did not err in denying the Board’s Motion for Sanctions for lack of jurisdiction.

AFFIRMED.

Judges STROUD and COLLINS concur.

Report per Rule 30(e).