

STATE OF MICHIGAN
COURT OF APPEALS

In re FORFEITURE OF BAIL BOND.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LEE EATON,

Defendant,

and

YOU WALK BAIL BOND AGENCY,

Appellant.

UNPUBLISHED

September 13, 2012

No. 305002

Wayne Circuit Court

LC No. 11-000552-FH

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Appellant You Walk Bail Bond Agency appeals as of right from a judgment of bond forfeiture of \$2,500. We affirm.

Defendant Anthony Lee Eaton was arrested for making a false police report of a felony. MCL 750.411a(1)(b). He obtained a \$2,500 surety bond from appellant on January 12, 2011. He failed to appear for his arraignment on the information on January 26, 2011, and the trial court issued a bench warrant for his arrest. On April 26, 2011, the trial court entered an order revoking Eaton's release and ordering forfeiture of the surety bond. That order contains a clerk's certification that a copy of the order was served by first-class mail on Eaton and the surety, i.e., appellant, at their last known addresses. The order directed appellant to appear before the court on June 3, 2011, to show cause why judgment should not enter against it for the full amount of the surety bond. Appellant filed a motion to set aside the forfeiture and to discharge the bond because the trial court did not provide notice of Eaton's default within seven days of Eaton's failure to appear, contrary to MCL 765.28. Relying on *In re Forfeiture of Bail Bond*, 276 Mich App 482, 495; 740 NW2d 734 (2007), the trial court concluded that it was authorized to enter the bond forfeiture judgment despite the failure to timely provide notice of Eaton's default.

This Court generally reviews a trial court's decision regarding forfeiture of a bail bond for an abuse of discretion, but reviews de novo a trial court's interpretation and application of statutes and court rules. *Id.* at 488.

MCL 765.28(1) states, in pertinent part:

If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. *After the default is entered, the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear.* The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond. [Emphasis added.]

In *In re Forfeiture of Bail Bond*, this Court considered four consolidated cases that involved two prior versions of MCL 765.28. Three of the cases (involving defendants Moore, Lineman, and Velez) were decided under the version of the statute before it was amended by 2002 PA 659, effective April 1, 2003. Because that version gave the trial court discretion to provide notice of a defendant's default to a surety, this Court's analysis of that version is not helpful here. However, the case involving defendant Shepard was governed by a 2002 amended version of the statute that is substantially similar to the current version, as amended by 2004 PA 332, effective September 23, 2004. Subsection (1) of the 2002 amended version of MCL 768.28 provided:

If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. *After the default is entered, the court, upon the motion of the attorney general, prosecuting attorney, or the attorney for the local unit of government, shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear.* The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the recognizance. If good cause is not shown, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the recognizance. [Emphasis added.]

Defendant Shepard defaulted in September 2003 when he failed to appear for sentencing. *In re Forfeiture of Bail Bond*, 276 Mich App at 485, 493. The trial court issued a bench warrant for his arrest. *Id.* at 485. In March 2004, the prosecutor filed a motion for the surety to show cause why judgment should not be entered against it. *Id.* at 485, 493-494. The trial court entered an order revoking Shepard's release and ordering forfeiture of the surety bond. *Id.* at 485. The

surety argued that the court should not enter judgment against it because the court did not give timely notice, thus interfering with the surety's ability to apprehend the defendant. *Id.* at 485-486. The trial court agreed that notice was given approximately six months after Shepard failed to appear. *Id.* at 487. In recognition of the difficulty the surety may face as a result of the late notice, the court entered judgment against the surety in a reduced amount. *Id.* at 486-487, 495-496.

In evaluating the effect of the trial court's failure to provide timely notice in Shepard's case, this Court noted that the trial court could not have complied with the seven-day requirement because the prosecutor's motion that triggered the notice obligation was filed more than seven days after Shepard's failure to appear. *In re Forfeiture of Bail Bond*, 276 Mich App at 494. However, this Court explained that even if the trial court had been able to comply with the seven-day notice provision, the court's failure to do so did not prevent the court from entering judgment against the surety because the notice provision was "directory, not mandatory." *Id.* at 495. This Court observed that although the statute contains the word "shall," which usually carries a mandatory connotation, a general rule of statutory construction provides that a time limit for performance of an official duty is normally construed as directory, unless there is language that precludes performance after a specified time. *Id.* at 494; see also *People v Yarema*, 208 Mich App 54, 57; 527 NW2d 27 (1994), and *People v Smith*, 200 Mich App 237, 242; 504 NW2d 21 (1993). This Court explained:

We conclude that the seven-day notice provision of MCL 765.28(1) is directory, not mandatory. The statute does not contain any language precluding the trial court from entering a judgment against a surety when notice is not given within seven days after the defendant's default. In other words, nothing in MCL 765.28(1) expressly precludes the trial court from entering judgment on the recognizance after the specified seven-day notice period has elapsed. See *Yarema*, [208 Mich App] at 57. Despite the trial court's six-month delay in notifying BBA of Shepard's failure to appear, we conclude that the statute did not prevent the trial court from entering judgment against BBA on the forfeited surety bond. [*In re Forfeiture of Bail Bond*, 276 Mich App at 495.]

We disagree with appellant's argument that *In re Forfeiture of Bail Bond* is not controlling because it involved prior versions of MCL 765.28, which differ from the current version of the statute. The changes made by 2004 PA 332 do not affect the language that was critical to this Court's reasoning in *In re Forfeiture of Bail Bond*. The 2004 amendment eliminated the requirement of a motion before the court notifies the surety. That change has no bearing on the application of the rule of statutory construction that was the basis for this Court's decision in *In re Forfeiture of Bail Bond*, i.e., that "if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specific time, it is directory." 276 Mich App at 494-495 (quotations and citation omitted).

Moreover, appellant does not offer a valid reason to discount this Court's analysis concerning the effect of MCL 765.27. In *In re Forfeiture of Bail Bond*, 276 Mich App at 495, this Court stated that MCL 765.27 "necessarily informs our decision" concerning defendant Shepard and the three other defendants. MCL 765.27 states:

No action brought upon any recognizance entered into in any criminal prosecution, either to appear and answer, or to testify in any court, shall be barred or defeated nor shall judgment thereon be arrested, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, nor by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or a magistrate before whom it was taken was authorized by law to require and take such recognizance.

This Court stated that pursuant to this statute, “[t]he Legislature has plainly declared that the trial court’s failure to provide proper notice of a principal’s default does not bar or preclude the court’s authority to enter judgment on a forfeited recognizance.” *In re Forfeiture of Bail Bond*, 276 Mich App at 495. Although appellant contends that *In re Forfeiture of Bail Bond* was wrongly decided, we are bound by that decision, MCR 7.215(J)(1), and we find its reasoning to be sound.¹

Citing *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), appellant also argues that the Supreme Court’s enforcement of a notice provision with respect to claims involving highway defects supports its contention that the notice requirement here should similarly be enforced as written. However, *Rowland* did not involve a statute setting a time for performance of an official duty. “As a general proposition, the rule governing statutory directions to individuals is the opposite of that governing public officers Under statutes of procedure, failure to complete required steps within the time specified is usually fatal to the case.” 3 Singer & Singer, *Sutherland Statutory Construction* (7th ed), § 57.19, pp 81-82.²

Appellant also argues that the trial court failed to comply with the notice requirements of MCR 6.106(I), which states, in pertinent part:

(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.

¹ Appellant argues that the statutory construction rule from *In re Forfeiture of Bail Bond* does not apply because timely notice is important to locating a missing defendant. See *Mercy Hosp v Michigan*, 340 Mich 404, 410; 65 NW2d 838 (1954). Though late notice likely makes it more difficult for appellant to locate a defendant, because the statute’s notice provision is not “followed by words of absolute prohibition[.]” *id.* (quotations and citation omitted), this inconvenience is not dispositive.

² Appellant also cites statutes from other jurisdictions that expressly provide for release of a surety’s obligation where notice is untimely. However, those statutes do not further appellant’s argument because the Michigan statutes do not contain a similar provision. Any such remedy should be adopted by the Legislature, not by this Court.

(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond.

The decision in *In re Forfeiture of Bail Bond*, 276 Mich App at 490-491, does not support appellant's contention that a delay between a defendant's default and the notice provided to the surety provides a basis for relief. In that case, the orders revoking release and forfeiting bond were issued from approximately six months (defendant Shepard) to three years (defendant Moore) after the default. *Id.* at 487. Notice of the revocation orders was provided immediately to the defendants and the surety. This Court stated that the trial court provided notice as required by the court rule and noted that the surety's counsel had conceded that point at oral argument.³ *Id.* at 490 n 3. To the extent that appellant is claiming that a delay between the default and the notice to the surety of the order of revocation violates MCR 6.106(I)(2)(a), the argument fails under *In re Forfeiture of Bail Bond*, 276 Mich App at 490-491.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray

³ Although this Court noted that MCR 6.106 had since been amended, it stated that the notice provisions of MCR 6.106(I) remained substantially the same. *In re Forfeiture of Bail Bond*, 276 Mich App at 489 n 2. The notice provisions in the current version of MCR 6.106(I) remain substantially the same as those in effect when *In re Forfeiture of Bail Bond* was decided.