STATE OF MICHIGAN

COURT OF APPEALS

In re FORFEITURE OF BAIL BOND.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO JONES,

Defendant,

and

OOA DISCOUNT BAIL BOND AGENCY,

Appellant.

UNPUBLISHED
September 13, 2012

No. 305014
Wayne Circuit Court
LC No. 10-013226-FC

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

PER CURIAM.

Appellant OOA Discount Bail Bond Agency appeals as of right from a circuit court order denying its motion to set aside a May 9, 2011, judgment after bond forfeiture in the amount of $50,000. We reverse the trial court's order denying appellant's motion, vacate the judgment after bond forfeiture, and remand for a new show cause hearing in accordance with this opinion.

Defendant Antonio Jones was charged with two counts of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, possession of a firearm during the commission of a felony, MCL 750.227b, and commission of a felony with a motor vehicle, MCL 257.732(6). At some point, Jones was released from custody on a bond posted by appellant. After Jones failed to appear for trial, the court entered an order on March 31, 2011, revoking Jones's release and forfeiting bond. The order also directed appellant to appear at a hearing on May 6, 2011, to show cause why judgment should not be entered against it for the amount of the surety bond. The March 31, 2011, order lists appellant as the surety, but does not list any address for appellant. Further, the certificate of mailing portion of the order was not completed and there is no indication in the court file that notice of the show cause hearing was ever provided to appellant before the hearing. The register of actions indicates that a bond forfeiture

hearing was held on May 6, 2011, following which the court issued a judgment against appellant for $50,000. The judgment indicates that a copy was mailed to appellant at an address on Garfield Street in Detroit. On May 31, 2011, appellant filed a motion to set aside the judgment, asserting that it did not receive any notice before the judgment was entered and, therefore, it did not have a meaningful opportunity to produce defendant Jones before entry of the judgment.

At a hearing on June 3, 2011, the trial court considered the present case as well as a separate bond forfeiture case in *People v Antonio Bonds*, LC No. 2010-011743, which also involved appellant. At the hearing, the court acknowledged that it did not have a file on "the Jones matter." With respect to the Bonds case, the court determined that the notice of intent to enter judgment was sent to appellant at the Garfield address. Despite not having the file in defendant Jones's case, the court commented that "as far as I can see they got notice," but it did not explain the basis for any finding that proper notice was provided in the Jones case. Further, although the court stated on the record that it would not to rule on appellant's motion until appellant had an opportunity to locate Jones, the court entered an order that day denying appellant's motion to set aside the judgment after bond forfeiture.

Initially, we reject appellant's contention that the trial court's failure to provide notice to appellant within seven days after defendant's failure to appear for trial precluded the court from entering a bond forfeiture judgment. This Court reviews a trial court's decision regarding forfeiture of a bail bond for an abuse of discretion. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 488; 740 NW2d 734 (2007). This Court reviews de novo a trial court's interpretation and application of statutes and court rules. *Id*.

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*, 276 Mich App at 495, 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. 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. [Citation omitted.]

Although MCL 765.28 has since been amended by 2004 PA 332, effective September 23, 2004, the amendments do not affect this Court's analysis in *In re Forfeiture of Bail Bond*. The 2004 amendment eliminated the requirement of a motion before the trial court notifies the surety. The elimination of a motion 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, in *In re Forfeiture of Bail Bond*, 276 Mich App at 495, this Court also relied on MCL 765.27, stating that the statute "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.

On appeal, appellant does not address either *In re Forfeiture of Bail Bond* or MCL 765.27. In light of those authorities, we conclude that the failure to provide notice within seven days after Jones's failure to appear did not prevent the trial court from entering a judgment against appellant.

However, the procedural due process clause requires that the surety be given "an opportunity to appear before the court and show cause why judgment should not be entered against it." *In re Forfeiture of Bail Bond*, 276 Mich App at 492 n 5. "A trial court may not order judgment on a forfeited bond without first conducting a show-cause hearing." *Id*. The trial court evidently held a show cause hearing on May 6, 2011, but there is no indication in the record that notice of the show cause hearing was ever provided to appellant. Indeed, the March 31, 2011, order directing appellant to appear at the May 6, 2011, show cause hearing lists appellant's name, but does not list any address for appellant, and the certificate of mailing portion of the order, which is intended to document service of the order on the surety, was never completed. If due process requires a show cause hearing before entry of judgment on a forfeited bond, then due

process requires notice of the hearing. The pertinent orders do not show that notice was provided to appellant until after the judgment of forfeiture was entered.

At the hearing on appellant's motion to set aside the judgment, the trial court stated that "as far as I can see they got notice," but it provided no basis for that belief, at least with respect to defendant Jones's case, and it had earlier stated that it did not have the court file for defendant Jones's case. The decision whether to set aside a judgment involves an exercise of discretion. *In re Forfeiture of Bail Bond*, 229 Mich App 724, 727; 582 NW2d 872 (1998). Here, the court could not have properly exercised its discretion without accurate information about the notice – required to afford due process – that was provided to appellant before the show cause hearing. Moreover, the trial court stated at the hearing that it would hold off ruling on appellant's motion in order to afford appellant an opportunity to locate Jones, but it then proceeded to enter an order that day denying the motion. The trial court abused its discretion by denying appellant's motion under these circumstances.

For these reasons, we reverse the trial court's order denying appellant's motion to set aside the bond forfeiture judgment, vacate the judgment after bond forfeiture, and remand for a new show cause hearing, after proper notice to appellant, to afford appellant an opportunity to show cause why judgment should not enter against it for the amount of the surety bond.

Reversed in part, vacated in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

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