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NO. COA01-1238

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v.

Craven County
No. 00 CRS 51951

ROBBIE DEAN NIXON

Appeal by judgment creditor from an order entered 8 August 2001, *nunc pro tunc* 16 July 2001, by Judge Paul L. Jones in Craven County Superior Court. Heard in the Court of Appeals 13 May 2002.

Henderson, Baxter, Taylor & Gatchel, P.A., by David S. Henderson, for Craven County Board of Education, judgment creditor-appellant.

Mazel S. Boston, petitioner-appellee, pro se.

HUNTER, Judge.

Craven County Board of Education ("the Board") appeals from an order allowing the surety's petition to remit bond. The Board is a judgment creditor and appellant in the present action by virtue of its opportunity to be heard pursuant to N.C. Gen. Stat. § 15A-544 (1999) (repealed Jan. 1, 2001).

The facts relevant to this appeal are as follows: On 16 August 2000, Robbie Dean Nixon was arrested on charges of obtaining property by false pretenses. On 10 December 2000, Mazel S. Boston, the surety, posted an appearance bond in the amount of \$5000.00 and

Nixon was released. On 23 January 2001, an Order of Bond Forfeiture and Notice was entered when Nixon failed to appear in court. Judgment was entered upon the bond on 2 July 2001, and a writ of execution was entered on 3 July 2001. On 8 July 2001, Boston surrendered Nixon to the custody of the State. On 9 July 2001, Boston paid \$5007.67 to satisfy the judgment.

On 10 July 2001, Boston filed a petition seeking to have the bond remitted. The Board opposed remission of the bond. On 8 August 2001, *nunc pro tunc* 16 July 2001, the superior court allowed Boston's petition to remit bond. The court stated that "[t]he surety, having made a diligent effort to bring the defendant before the Court for trial, constitutes extraordinary circumstances . . . and in the Court's discretion entitles the surety to the relief prayed for in its Petition." The Board appeals. We affirm.

The Board's sole argument on appeal is that the trial court abused its discretion by remitting the bond. Specifically, the Board contends that Boston's petition to remit bond failed to allege specific facts upon which any relief could be granted. The Board notes that N.C. Gen. Stat. § 15A-544(h) provides for bond remission for extraordinary cause. Here, however, the Board asserts that Boston merely prays for bond remission without alleging any facts to support the remission. Thus, the Board argues that the petition should have been dismissed. Furthermore, even if Boston had alleged facts in its petition to support remission of the Bond, the Board contends that "making a diligent effort to bring the Defendant to Court is not 'extraordinary

circumstances' required by G.S. 15A-544(h)." Accordingly, the Board requests that the Court vacate the order remitting bond and order that bond be forfeited and paid over to them in accordance with N.C. Gen. Stat. § 115C-437 (1999).

N.C. Gen. Stat. § 15A-544(e) states in pertinent part that:

At any time within 90 days after entry of the judgment against a principal or surety, the principal or surety, by verified written petition, may request that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment.

Id. Here, judgment was entered upon the bond on 2 July 2001, and Boston petitioned for remission of the bond on 10 July 2001. Thus, N.C. Gen. Stat. § 15A-544(e) is the applicable statutory provision, not N.C. Gen. Stat. § 15A-544(h). In *State v. Horne*, 68 N.C. App. 480, 315 S.E.2d 321 (1984), this Court stated that the decision by the trial court whether or not to remit bond pursuant to N.C. Gen. Stat. § 15A-544(e)

is a discretionary one. We review only for an abuse of discretion. In order to exercise judicial discretion in a manner favorable to a surety, the judge must determine in his discretion that *justice* requires remission.

Id. at 483, 315 S.E.2d at 323 (emphasis added). In the case *sub judice*, the trial court found that the surety made "diligent" efforts, and that in its discretion the surety was entitled to remission. We find no abuse of discretion. Accordingly, we affirm.

Affirmed.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).