

STATE OF NORTH CAROLINA v. DAVID RENE CRUZ, Defendant, and ROBERT L. MCQUEEN, Surety

NO. COA03-1116

Filed: 21 September 2004

Bail and Pretrial Release--bond forfeiture--motion for relief from final judgment

The trial court did not err by denying a surety's motion for relief from final judgment of bond forfeiture under N.C.G.S. § 15A-544.5 based on the reasoning set forth under *State v. Evans*, __ N.C. App. __ (Sept. 21, 2004)(No. COA03-1114).

Judge WYNN dissenting.

Appeal by surety from order entered 10 March 2003 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 25 May 2004.

*David Phillips, for the Cumberland County Board of Education.
Parish & Cooke, by James R. Parish, for the surety.*

CALABRIA, Judge.

Robert L. McQueen ("McQueen") appeals the trial court's denial of his motion for relief from final judgment of bond forfeiture. We affirm.

On 24 September 2001, David Rene Cruz ("the defendant") was arrested and charged with felony breaking and entering and felony conspiracy. The defendant's bond was \$2,000.00, which was posted on 24 September 2001 by McQueen. On 7 June 2002, the defendant failed to appear, and the bond was ordered forfeited on the same date with a final judgment date of 11 November 2002. McQueen received appropriate notice.

On 24 July 2002, the defendant pled guilty to misdemeanor breaking or entering. Based upon the defendant's plea, on 8

October 2002, McQueen filed a *pro se* motion to set aside the bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5 as all the charges for which the defendant was bonded to appear had been finally disposed of by the court other than by the State taking a dismissal with leave. McQueen indicated he served a copy of the motion on the district attorney and the school board attorney by mailing a copy to each by first class mail on 8 October 2002. However, McQueen did not mail a copy of the motion to the school board attorney until 17 October 2002. Based upon the delay in service, the school board requested McQueen's motion to set aside the bond forfeiture be denied.

On 26 November 2002, the trial court denied McQueen's motion upon finding that "the Surety [was] effectively denying the Board the Notice to which they are entitled by North Carolina General Statute 15A-544(d)(4)." Though the 26 November order was immediately appealable pursuant to N.C. Gen. Stat. § 15A-544.5(h) (2003), McQueen filed no appeal, and the forfeiture became a final judgment. Thereafter, McQueen initiated a new proceeding on 31 January 2003 by filing a motion for relief from final judgment of forfeiture. The trial court denied said motion by order entered 10 March 2003. From this denial, McQueen appeals.

In a related appeal, *State v. Evans*, ____ N.C. App. ____, ____ S.E.2d ____ (Sept. 21, 2004) (No. COA03-1114), we addressed the same issues raised by the parties based upon similar facts. For the reasons stated in *State v. Evans*, we affirm.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

In a related appeal, *State v. Evans*, ____ N.C. App. ____, ____ S.E.2d ____ (2004) (03-1114), filed 21 September 2004, this Court addressed the same issues raised by the parties based upon similar facts. In *Evans*, McQueen had surrendered the defendant to the sheriff prior to the entry of the final judgment of bond forfeiture. In this case, the defendant pled guilty prior to the entry of the final judgment of bond forfeiture. Based upon the defendant's guilty plea, McQueen sought the return of the bond amount. As *Evans* and the case *sub judice* are substantially similar, I respectfully dissent based upon the reasons stated in my dissent in *Evans*. Indeed, the factors for determining whether extraordinary circumstances exist favor McQueen.