

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA06-745

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v.

SHIMA LILPY TOOMER,  
Defendant

Wilkes County  
No. 05 CR 050529

and

AMERICAN RELIABLE INS. CO.,  
Surety

Appeal by the Wilkes County Board of Education from an order entered 20 March 2006 by Judge Jeanie Reavis Houston in Wilkes County District Court. Heard in the Court of Appeals 2 April 2007.

*Faw, Folger & Johnson, P.C., by Fredrick G. Johnson, for plaintiff-appellant Wilkes County Board of Education.*

*No brief for defendant-appellees.*

HUNTER, Judge.

The Wilkes County Board of Education ("Board of Education") appeals from an order of the district court granting the motion of American Reliable Ins. Co. ("surety") to set aside a bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5(b)(6). We reverse.

The undisputed facts of this case are as follows: On 5 February 2005, the surety executed a \$15,000.00 appearance bond securing defendant's pretrial release on criminal charges then pending in Wilkes County District Court. As a condition of his release, defendant was to appear in district court on 6 April 2005. When defendant failed to appear as required on 6 April 2005, the court entered an order of forfeiture on the appearance bond and served the surety and defendant with notice of forfeiture on 15 April 2005.

On 12 September 2005, the surety filed a motion to set aside the bond forfeiture on the ground that "defendant was incarcerated in a unit of the Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear." N.C. Gen. Stat. § 15A-544.5(b)(6) (2005). The Board of Education filed an objection to the motion and notice of hearing on 21 September 2005. The court heard the surety's motion on 7 March 2006.

In its order setting aside the bond forfeiture, the district court found that defendant was being held in the Wake County jail on additional criminal charges at the time of his failure to appear in Wilkes County on 8 April 2005. The court found that defendant was convicted of the Wake County charges on 12 May 2005 and "remained in custody in the Wake County Jail from his arrest in that county on March 11, 2005 until his admission to the North Carolina Department of Correction[] on May 25, 2005." As its basis for allowing the surety's motion to set aside the bond forfeiture

under N.C. Gen. Stat. § 15A-544.5(b)(6), the court concluded that defendant failed to appear in Wilkes County District Court on 8 April 2005 "due to his incarceration in Wake County pending trial on charges unrelated to those pending in Wilkes County[.]"

On appeal, the Board of Education asserts that a defendant's detention in a county jail is not a statutorily authorized ground for relief from a bond forfeiture under N.C. Gen. Stat. § 15A-544.5(b)(6). We agree.

"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). In pertinent part, the statute limits the court's authority to set aside a forfeiture as follows:

(b) Reasons for Set Aside. -- A forfeiture shall be set aside for any one of the following reasons, and none other:

. . .

(6) The defendant was incarcerated *in a unit of the Department of Correction and is serving a sentence* or in a unit of the Federal Bureau of Prisons located within the borders of the State *at the time of the failure to appear*.

N.C. Gen. Stat. § 15A-544.5(b)(6) (emphasis added). Here, defendant was detained in the Wake County jail awaiting trial on additional criminal charges at the time of his failure to appear on 8 April 2005. We have previously held that, for purposes of N.C. Gen. Stat. § 15A-544.5(b)(6), "[a] county jail is a 'local

confinement facility' and not a unit of the DOC." *Robertson*, 166 N.C. App. at 671, 603 S.E.2d at 402. Accordingly, although defendant was subsequently convicted of the Wake County charges and imprisoned in the Department of Correction, he was neither "in a unit of the Department of Correction" nor "serving a sentence" at the time of his failure to appear. *Id.* at 671, 603 S.E.2d at 402. Therefore, we reverse the district court's order. *Id.* at 672, 603 S.E.2d at 402.

Reversed.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).