

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1311

Filed: 6 August 2019

Alamance County, No. 17CR053304

STATE OF NORTH CAROLINA

v.

ELMER ROMERO ORTIZ, Defendant, and
ANTHONY BROADWAY, Bail Agent, and
1ST ATLANTIC SURETY COMPANY, Surety.

Appeal by the State from Order entered 18 September 2018 by Judge Larry D. Brown, Jr. in Alamance County District Court. Heard in the Court of Appeals 21 May 2019.

Todd Allen Smith and Champion & Giles, P.A., by Robert Clyde Giles, II, for Alamance-Burlington Board of Education, Appellant.

No brief for Elmer Romero Ortiz, Defendant.

David K. Holley for Anthony Broadway, Bail Agent, Appellee.

Brian Elston Law, by Brian D. Elston, for 1st Atlantic Surety Company, Surety, Appellee.

INMAN, Judge.

The Alamance-Burlington Board of Education (“the Board”) appeals from the trial court’s order providing relief from a forfeited bond before a final judgment. The Board argues that the trial court erred in granting relief based on N.C. Gen. Stat. §

15A-301 because a different statute, N.C. Gen. Stat. § 15A-544.5, is the exclusive means for relief. After thorough review of the record and applicable law, we vacate the trial court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record tends to show the following¹:

On 29 June 2017, Defendant Elmer Romero Ortiz ("Defendant") was arrested in Alamance County on felony charges of committing a statutory sex offense on a child younger than fifteen years of age and taking indecent liberties with a minor. Defendant was released on a \$50,000 bond on 30 June 2017 to secure his appearance at further proceedings. The bond was underwritten by Anthony Broadway as bail agent for 1st Atlantic Surety Company (collectively, "Sureties").

Defendant failed to appear for his 14 February 2018 court date. The court forfeited Defendant's bond and issued an order for his arrest. The forfeiture order was entered on 19 February 2018, the parties were notified of the forfeiture on 22 February 2018, and the final judgment of forfeiture was scheduled to be entered on 22 July 2018.

On 26 April 2018, Sureties filed a motion to recall the order for arrest and strike the forfeited bond, pursuant to N.C. Gen. Stat. §§ 15A-301 and 15A-544.5.

¹ Because there is no transcript of the trial court proceedings, the parties prepared a narrative summarizing what transpired at the hearings, pursuant to Rule 9(c)(1) of our Rules of Appellate Procedure.

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Suretias alleged that Defendant was deported at the time of his missed 14 February 2018 court appearance.

During the initial hearing on the motion on 3 May 2019, the Board argued that because the forfeiture had not yet become a final judgment, Section 15A-544.5 was the sole avenue of relief and that Suretias could not establish any of that statute's enumerated factors to set aside the bond forfeiture. Suretias conceded that none of the factors existed, but argued that Section 15A-301 provided alternative authority for the trial court to strike the forfeiture. The trial court took the matter under advisement and continued the hearing.

At the second hearing on 9 May 2018, at the request of the trial court, Defendant's counsel and an assistant district attorney for Alamance County were present, along with Suretias and the Board. Defense counsel informed the trial court that Defendant was in federal immigration custody on 14 February 2018 and that his current whereabouts were unknown.² The assistant district attorney asserted her belief that since being deported, Defendant "had already returned to the United

² Throughout the proceedings, Defendant's location was never verified, nor did the trial court ever determine whether he was permanently deported or detained somewhere in the United States. Prior to his February 2018 court date, in a letter dated 20 November 2017, the United States immigration authorities notified the Alamance County Clerk of Court that it "[would] be enforcing an order of removal from the United States against" Defendant. The assistant district attorney also filed a dismissal with leave on 14 February 2018 reasoning that Defendant was deported. And in the trial court's order granting relief from the forfeited bond, it found that Defendant was in federal custody prior to his court date.

States without proper permission and had been apprehended by law enforcement officials in Texas.” The trial court again took the matter under advisement.

During the third hearing on 20 July 2018—two days before the original final judgment date—the trial court told the parties that it would not strike Defendant’s arrest order but would grant Sureties relief from the forfeited bond. The trial court entered a written order on 18 September 2018 citing Section 15A-301 for its authority to grant relief and found “that extraordinary circumstances exist[ed] for good cause” to strike the bond forfeiture.

The Board appealed on 20 September 2018.

II. ANALYSIS

A. Notice of Appeal

Sureties argue that the Board’s appeal should be dismissed because it untimely filed notice of appeal more than two months following entry of final judgment on 20 July 2018. We disagree.

Rule 3 of our Rules of Appellate Procedure generally provides that in civil actions a party has 30 days to file and serve notice of appeal from the date of the trial court’s final judgment or from the date of service if not served within three days upon judgment. N.C. R. App. P. 3(c) (2019); *Brown v. Swarn*, __ N.C. App. __, __, 810 S.E.2d 237, 238 (2018). In describing what makes a judgment final, Rule 58 of our Rules of Civil Procedure states:

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[A] judgment is entered when it is *reduced to writing, signed by the judge, and filed with the clerk of court* pursuant to Rule 5. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered.

N.C. Gen. Stat. § 1A-1, Rule 58 (2017) (emphasis added). Thus, “the rendering of an oral ruling does not constitute the entry of a final judgment or order.” *Kingston v. Lyon Constr., Inc.*, 207 N.C. App. 703, 709 n.3, 701 S.E.2d 348, 353 n.3 (2010) (citing *Kirby Bldg. Sys., Inc. v. McNeil*, 327 N.C. 234, 393 S.E.2d 827 (1990)); see also *Carter v. Hill*, 186 N.C. App. 464, 465-66, 650 S.E.2d 843, 844 (2007) (holding that no judgment was entered to support the civil contempt order because it was made orally by the trial court and not reduced to writing, pursuant to Rule 58).

After the trial court’s oral ruling at the 20 July 2018 hearing, the clerk stamped “forfeiture stricken” on the bond forfeiture notice, and the trial court signed and dated that stamp. The clerk also wrote “entered” and the date next to the stamp. No copy of the signed and stamped forfeiture notice was served on either of the parties. Sureties assert that (1) the stamped forfeiture notice constituted a valid written final judgment and (2) because final judgment was rendered, the Board had actual notice of the entry of judgment and its content, notwithstanding the lack of service.³

³ Sureties made the same argument in the district court arguing that the Board had actual notice of the court’s decision on 20 July 2018. The trial court, in an order entered on 21 December 2018, denied Sureties’ motion. Sureties do not contest any of the findings in that order.

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It is clear from the 18 September 2018 order that the trial court did not construe the signed and stamped forfeiture notice to be a final judgment. Not only was the stamped notice not served on the parties, as required by Rule 58 of the Rules of Civil Procedure, the parties' and trial court's actions contravene Sureties' argument. At the conclusion of the 20 July 2018 hearing, the trial court told Sureties, consistent with Rule 58, *to draft a proposed final order*, deliver it to the Board for review, and then submit it to the trial court. After Sureties submitted a proposed order, the trial court notified the parties that it would write its own final order. These communications are inconsistent with the stamped and signed forfeiture notice serving as a final judgment. *See Russ v. Woodard*, 232 N.C. 36, 41, 59 S.E.2d 351, 355 (1950) (holding that a final judgment is made "without any reservation for other and *future directions* of the court, so that it is not necessary to bring the case again before the court" (quotations and citations omitted) (emphasis added)).

Further, the Board's conduct reflects that it did not have notice that final judgment had been rendered before the trial court's written order in September 2018. *See Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001) (citations omitted) ("[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered."). After the trial court indicated that it would write the final order, the

Board continually inquired up until 18 September 2018 as to when the order would be finalized because it “wished to enter a timely notice of appeal.”

We therefore conclude that the trial court’s judgment granting relief from the forfeited bond was not entered on 20 July 2018, but rather on 18 September 2018. Because the Board timely filed notice of appeal two days later, we need not address Sureties’ secondary argument concerning the Board’s actual notice, and proceed in reviewing the merits of the issue on appeal.

B. Authority to Grant Relief Pre-Final Judgment

The Board argues that Section 15A-544.5 is the sole provision in Chapter 15A for a court to provide relief before the date of a forfeited bond’s final judgment and that the trial court erred in granting relief from the bond forfeiture. In response, Sureties argue that Section 15A-301 granted the trial court authority to relieve them of their bond obligation. For the reasons set out below, we conclude that the trial court exceeded its statutory authority provided by Chapter 15A and vacate the trial court’s order.

Section 15A-554.1 *et seq.* of our General Statutes govern bail bond forfeiture and establish the contours of the trial court’s authority to relieve an obligor from its bond liability. When a bond has been issued to secure the pre-trial release of a criminal defendant who then proceeds to “fail[] on any occasion to appear before the court as required,” the trial court is obligated to “enter a forfeiture for the amount of

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that bond . . . against each surety on the bail bond.” N.C. Gen. Stat. § 15A-544.3(a) (2017). A forfeiture order becomes a final judgment 150 days after notice is given to the interested parties. *Id.* § 15A-544.6. Once final, the judgment is docketed “as a civil judgment . . . against each surety named in the judgment.” *Id.* § 15A-544.7(a).

In certain statutorily-prescribed circumstances, the trial court can grant relief to a surety from the forfeited bond pre- and post-final judgment. For bonds that have not become final judgments, the trial court can only “set aside” a forfeiture if one of seven enumerated reasons have been established, such as due to the defendant’s death or additional incarceration. *See id.* § 15A-544.5(b) (“Reasons for Set Aside.”). For final judgments, the trial court can grant “relief” if (1) “[t]he person seeking relief was not given notice” or (2) “[o]ther extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.” *Id.* § 15A-544.8(b).

Here, the trial court concluded that, although Section 15A-544.5 did not apply,⁴ as no factor existed to set aside the forfeited bond, Section 15A-301 provided a basis to grant relief. Section 15A-301 generally allows for the trial court to recall “[a]ny criminal process other than a warrant or criminal summons . . . for good cause.” *Id.* § 15A-301(g)(2). The trial court construed Section 15A-544.5 to apply only to “motions to set-aside [sic] a forfeiture,” and concluded that a “motion[] to strike a bond

⁴ Section 15A-544.8 was not implicated because the parties disputed the bond forfeiture before it was scheduled to become final on 22 July 2018. *See id.* § 15A-544.6 (stating that a forfeiture does not become final if (1) an order to set aside the forfeiture was entered on or before the final judgment date or (2) a motion to set aside the forfeiture is pending on the date of final judgment).

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forfeiture (recall of process)” pursuant to Section 15A-301 is distinct and provided an alternative basis to grant Sureties relief. Because Sureties motioned to “strike”—instead of set aside—the forfeited bond, the trial court concluded Section 15A-301 applied in lieu of Section 15A-544.5.

The Board contends that a bond forfeiture is not a criminal process as written in Chapter 15A, Article 17 of our General Statutes, but rather a civil matter separate from any criminal statute’s purview. Indeed, although bond proceedings are ancillary to an underlying criminal proceeding, they are civil in nature and are not controlled by the North Carolina Rules of Criminal Procedure, *State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 221, 606 S.E.2d 907, 909 (2005), and forfeited bonds are docketed as civil judgments once final. N.C. Gen. Stat. § 15A-544.7(a). Further, Article 17 of our General Statutes establishes four types of criminal processes: citations, criminal summons, warrants for arrests, and orders for arrests. N.C. Gen. Stat. §§ 301 *et seq.* (2017). Bond forfeiture proceedings—and bonds generally—are not listed as a criminal process or referenced in any of Article 17’s provisions. It follows then that a trial court’s authority to recall a criminal process under Section 15A-301 does not extend to bond forfeitures.⁵

⁵ The trial court’s error in this regard is understandable. It is well established that the purpose of bail “is to secure the appearance of the principal in court as required.” *State v. Hollars*, 176 N.C. App. 571, 574, 626 S.E.2d 850, 853 (2006) (quotations and citation omitted). But, “Criminal Process” is defined as “[a] process (such as an arrest warrant) that issues to compel a person to answer for a crime.” Black’s Law Dictionary (11th ed. 2019); *see also State v. Jones*, __ N.C. App. __, __ 805 S.E.2d

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Even assuming, without deciding, that a bond forfeiture proceeding is a criminal process, Section 15A-544.5 provides that “[t]here shall be no relief from a [pre-final] forfeiture except as provided in this section” and that “a forfeiture shall be set aside for any one of the [seven] reasons, *and none other.*” *Id.* §§ 15A-544.5(a)-(b) (emphasis added). Section 15A-544.5 clearly and unambiguously instructs that it is “[t]he *exclusive avenue for relief* from forfeiture on an appearance bond (where the forfeiture has not yet become a final judgment).” *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012); *see also State v. Knight*, __ N.C. App. __, __, 805 S.E.2d 751, 755 (2017) (“[B]y its plain language, [Section] 15A-544.5 provides the ‘exclusive’ relief for setting aside a bond forfeiture that has not yet become a final judgment.”); *State v. Robertson*, 166 N.C. App. 669, 670-71, 603 S.E.2d 400, 401 (2004) (same); *State v. Cobb*, __ N.C. App. __, __, 803 S.E.2d 176, 178 (2017) (same).

It is for this reason that the trial court could not rely on Section 15A-301 to relieve Sureties from the forfeited bond. Accordingly, because relief from a pre-final judgment forfeiture “is exclusive and limited to the reasons provided in [Section] 15A-544.5,” *State v. Rodrigo*, 190 N.C. App. 661, 664, 660 S.E.2d 615, 617 (2008), the

701, 710 (2017) (Zachary, J., dissenting) (citing Black’s Law Dictionary’s definition and Article 17’s Official Commentary on what constitutes a criminal process). If bond procedures are meant to incentivize a defendant’s appearance in court, it is arguable that bond proceedings can be categorized as a criminal process. We need not answer this question because, as is discussed below, Section 15A-544.5 narrows the trial court’s authority with respect to bonds before they become final judgments. *See Whittington v. N.C. Dep’t of Human Res.*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990) (“[W]hen one statute speaks directly and in detail to a particular situation, that direct, detailed statute will be construed as controlling other general statutes regarding that particular situation, absent clear legislative intent to the contrary.”).

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trial court's authority to grant relief is limited to one of the seven enumerated reasons set out in subdivision (b). And because Defendant's "deportation is not listed as one of the [seven] exclusive grounds" to set aside a bond forfeiture, *id.* at 665, 660 S.E.2d at 618, the trial court was without authority to grant Sureties relief from the forfeited bond. *See also State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005) (holding that the trial court "lacked the authority to grant surety's motion" because it "was not premised on any ground set forth" in Section 15A-544.5).

Sureties first argue that the trial court did not err in granting them relief because N.C. Gen. Stat. § 15A-544.5(b)(1) allows the trial court to set aside the forfeiture when the "failure to appear has been set aside . . . and any order for arrest issued for that failure to appear has been recalled." Sureties assert that, in conjunction with the relief from the forfeiture, the trial court also struck Defendant's failure to appear and recalled the order for arrest because it "did not grant in part or deny in part [Sureties'] motion."

We are unpersuaded. First, the written narrative crafted by the Board—which was not objected to by Sureties—states that the trial court refused to strike the order for arrest. Second, the order itself is silent as to a decision on the failure to appear or the order for arrest, merely stating that "[t]he issue before this Court is to determine whether the Surety and Bail Agent should receive relief from the Bond Forfeiture in this case." Lastly, the trial court's order expressly concludes that "[no]

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factors exist as enumerated under [Section] 15A-544.5 to strike the forfeiture in this case” and that it was relying on Section 15A-301 in granting relief.⁶ Sureties’ understanding of the court’s order is thus misplaced.⁷

Sureties next argue that the trial court did not err because the Board failed to file a written objection to the motion to set aside the bond forfeiture as required by statute. Upon a motion to set aside a forfeiture, “[e]ither the district attorney or the county board of education may object to the motion by filing a written objection.” N.C. Gen. Stat. § 15A-544.5(d)(3) (2017). If, after 20 days upon service of the motion, “neither the district attorney nor the attorney for the board of education has filed a written objection to the motion . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either.” *Id.* § 15A-544.5(d)(4). Despite there being multiple hearings on the matter, there is no evidence in the record showing that the Board filed a written objection within 20 days of Sureties’ motion. However, Sureties did not raise this issue before the trial court and instead fully participated over the course of three hearings. *See Richland Run Homeowners Ass’n v. CHC Durham Corp.*, 123 N.C. App. 345, 347, 473 S.E.2d 649, 651 (1996) (“[B]y attending and participating in the hearing without objection or without requesting a continuance,

⁶ Because the trial court admitted that Section 15A-544.5 was inapplicable, we reject Sureties’ other arguments pertaining to the trial court’s authority under that statute.

⁷ We also reject Sureties’ additional argument that the Board lacks standing to appeal the order because it is premised on the trial court granting relief through N.C. Gen. Stat. § 15A-544.5(c).

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plaintiff waived any right to object to the summary judgment hearing on the ground of lack of notice.”), *rev'd on other grounds*, 346 N.C. 170, 484 S.E.2d 527 (1997). Because Sureties did not preserve this issue for appeal by arguing that Section 15A-544.5(d)(4) applied, it cannot serve as an alternative basis to affirm the trial court's order.

III. CONCLUSION

In sum, we hold that the Board timely filed its notice of appeal on 20 September 2018 upon the trial court's final 18 September 2018 order. We also hold that the trial court erred in granting Sureties relief from the forfeited bond. Section 15A-544.5 is the exclusive section for relieving a party from a forfeited bond pre-final judgment and the trial court in this instance was without statutory power under Section 15A-301 to supplement that authority. In determining that no basis existed within Section 15A-544.5 to set aside the forfeited bond, the trial court's order is vacated.

VACATED.

Chief Judge MCGEE and Judge ARROWOOD concur.