Opinion issued March 24, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00173-CR

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1
Fort Bend County, Texas
Trial Court Case No. 06-CCV-030801

MEMORANDUM OPINION

Indiana Lumbermens Mutual Insurance Company appeals the trial court's judgment forfeiting a bond and rendering judgment against it for $2,500. After posting a bond for a defendant in a criminal case, Lumbermens filed a pleading seeking to have a capias issued for the defendant's arrest and, once the defendant

was in custody, be released from liability on the bond. The trial court did not grant or deny the request seeking the defendant's arrest; it continued the request until after the defendant failed to appear at his next court date almost six weeks later. The State then sought forfeiture of the bond and the trial court rendered judgment for the State. In two issues, Lumbermens contends the evidence is not sufficient because the State did not introduce the bond or judgment nisi into evidence or ask the trial court to take judicial notice of the bond or judgment nisi and that it established an affirmative defense to the forfeiture proceeding. We conclude the trial court properly took judicial notice of the bond and judgment nisi and thus the evidence is legally sufficient to support the judgment. We also conclude that Lumbermens did not establish its affirmative defense. We therefore affirm.

Background

Lumbermens posted a $2,500 bond for Jaime Ismael Zararte after the State filed a motion to revoke his probation and he was arrested. After Zararte was released from custody, but before his next scheduled court date on August 17, 2006, Lumbermens filed an "Affidavit for Surety to Surrender/Application for Capias" on July 5, 2006. The trial court did not issue a capias for Zararte; it instead decided to "hold until 8/17/06." At the August 17, 2006 hearing, Zararte failed to appear and the trial court ordered a capias to issue for Zararte's arrest. On September 14, 2006, the court signed a judgment nisi and issued citation to

Lumbermens. Lumbermens filed a motion to dismiss asserting that it had established an affirmative defense to forfeiture by filing the affidavit and application for capias that the trial court erroneously refused to sign. The trial court overruled the motion to dismiss and rendered a final judgment of forfeiture against Lumbermens for $2,500.

Did the State establish that it was entitled to forfeiture?

In its first issue, Lumbermens asserts that there is legally insufficient evidence to support the trial court's final judgment because the State failed to introduce the bail bond into evidence or request the trial court to take judicial notice of the bail bond.

In a bond forfeiture proceeding, the State has the burden of proof and the essential elements of its cause of action are "the bond and the judicial declaration of the forfeiture of the bond, which is the judgment nisi." *Kubosh v. State*, 241 S.W.3d 60, 63 (Tex. 2007). In *Kubosh*, the Court of Criminal Appeals noted that a trial court may take judicial notice of the judgment nisi. *Id.* at 64 (citing *Hokr v. State*, 545 S.W.2d 463, 466 (Tex. Crim. App. 1977)). A trial court may also take judicial notice of the bond. *Id.* at 65. In *Kubosh*, the trial court did not expressly state that it was taking judicial notice of the bond and the judgment nisi; however, in its final judgment, the court stated "after considering the pleadings and evidence herein, including the bail bond and the Judgment of Forfeiture [presumably the

judgment nisi] on file in this cause," it was declaring the bond forfeited. *Id.* at 62. This statement showed that the trial court had taken judicial notice of the bond and judgment nisi and, thus, the evidence was sufficient to support the forfeiture. *See id.* at 65.

Lumbermens's sole argument is that the evidence in this case is insufficient because "the State neither offered the judgment nisi nor the bond into evidence and did not request the court to judicially notice the same." The judgment in this case states, in pertinent part, ". . . it appearing to the Court after consideration of the evidence and pleadings herein, including the bail bond and the judgment of forfeiture on file in this cause . . . ." This is the same language—including the designation of the judgment nisi as a judgment of forfeiture—that supported the forfeiture in *Kubosh*. *See id.* at 62. Additionally, just as in *Kubosh*, the bond company here did not contend before either the trial court or this Court that there is any variance between the bond and the judgment nisi. Furthermore, that Lumbermens posted the bond in question was never a fact in dispute. In fact, Lumbermens submitted a proposed finding of fact to the trial court that stated, "[Lumbermens] posted a criminal bail-bond on February 10, 2006 for [Zararte], in the amount of Two Thousand Five Hundred Dollars ($2,500.00) . . . ." The trial court made this requested finding. We therefore conclude the record shows the

trial court took judicial notice of the bond and judgment nisi and that sufficient evidence exists to support the forfeiture.

We overrule Lumbermens' first issue.

Did Lumbermens establish an affirmative defense to forfeiture?

In its second issue, Lumbermens asserts that it established an affirmative defense to the State's bond forfeiture action: the defense that the surety should have been released under article 17.19 of the Texas Code of Criminal Procedure. That section provides:

> (a) Any surety, desiring to surrender his principal and after notifying the principal's attorney, if the principal is represented by an attorney, in a manner provided by Rule 21a, Texas Rules of Civil Procedure, of the surety's intention to surrender the principal, may file an affidavit of such intention before the court or magistrate before which the prosecution is pending. The affidavit must state:
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> (1) the court and cause number of the case;
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> (2) the name of the defendant;
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> (3) the offense with which the defendant is charged;
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> (4) the date of the bond;
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> (5) the cause for the surrender; and
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> (6) that notice of the surety's intention to surrender the principal has been given as required by this subsection.
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> (b) In a prosecution pending before a court, if the court finds that there is cause for the surety to surrender the surety's principal,

> the court shall issue a capias for the principal. In a prosecution pending before a magistrate, if the magistrate finds that there is cause for the surety to surrender the surety's principal, the magistrate shall issue a warrant of arrest for the principal. It is an affirmative defense to any liability on the bond that:
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> (1) the court or magistrate refused to issue a capias or warrant of arrest for the principal; and
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> (2) after the refusal to issue the capias or warrant of arrest, the principal failed to appear.

TEX. CODE CRIM. PROC. ANN. art. 17.19 (West Supp. 2010). The statute must be strictly followed. *Hernandez v. State*, 600 S.W.2d 793, 794 (Tex. Crim. App. 1980); *Pfeil v. State*, 40 S.W.2d 120, 123 (Tex. Crim. App. 1931); *see Gilmore v. State*, No. 2-05-135-CV, 2006 WL 302334, at *2 (Tex. App.—Fort Worth Feb. 9, 2006, pet. denied). The statue provides six items that are mandatory in the affidavit of surrender. *See* TEX. CODE CRIM. PROC. ANN. art. 17.19 ("The affidavit *must* state . . . ." (emphasis added)); *Gilmore*, 2006 WL 302334, at *2 (noting that Legislature's use of "must" indicates mandatory effect and thus affidavit is required to include all six items listed in statute).

Lumbermens' affidavit of surrender did not list the offense with which the defendant was charged as required by article 17.19. *See* TEX. CODE CRIM. PROC. ANN. art. 17.19(a)(3). Therefore, Lumbermens did not establish its affirmative defense under article 17.19. *See Gilmore*, 2006 WL 302334, at *2 (holding surety could not avail himself of affirmative defense because affidavit of surrender failed

to state offense with which defendant charged); *Wohr v. State*, No. 05-96-00719-CV, 1997 WL 277989, at *1 (Tex. App.—Dallas May 28, 1997, pet. ref'd) (holding trial court did not err in refusing to issue warrant for defendant's arrest because affidavit failed to state offense with which defendant charged or cause for warrant to issue); *see also State v. Vega*, 927 S.W.2d 81, 85 (Tex. App.—Houston [1st Dist.] 1996, pet. dism'd w.o.j.) ("[T]he affirmative defense listed in article 17.19(b) is based upon the filing of a proper affidavit of surrender with the court in accordance with article 17.19(a).").

We overrule Lumbermens' second issue.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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