TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00544-CV

Appellant, Richard J. W. Nunez // Cross-Appellant, The State of Texas

v.

Appellee, The State of Texas // Cross-Appellee, Richard J. W. Nunez

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NO. D-1-GV-07-002174, HONORABLE KARIN CRUMP, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

The parties have filed cross appeals from the trial court's final judgment in this bond forfeiture case. The trial court found good cause to remit to appellant Richard J.W. Nunez, the surety, the bond amount after deducting costs and accrued interest on the bond amount. *See* Tex. Code Crim. Proc. art. 22.16(b) (authorizing court "in its discretion" before entry of final judgment to remit to surety all or part of bond amount after deducting costs and accrued interest "[f]or good cause shown").

On appeal, Nunez argues that the trial court abused its discretion and violated his due process rights by requiring him to pay accrued interest on the bond amount to the State of Texas. In its cross appeal, the State argues that the trial court abused its discretion by remitting the bond amount to Nunez because there was no evidence or insufficient evidence of "good cause." *See id.* The parties also join issue on whether the State has the right to bring its cross appeal.

For the following reasons, we conclude that the State does not have the right to bring its cross appeal but that the trial court did not abuse its discretion or violate Nunez's due process rights by requiring him to pay accrued interest on the bond amount to the State. Thus, we affirm the trial court's final judgment.

Background

Bond Forfeiture

To give context to the parties' arguments, we begin by providing a brief overview of chapter 22 of the Texas Code of Criminal Procedure, the chapter that governs suits for bond forfeiture. *See id.* §§ 22.01–.18; *see also Mendez v. State*, No. 03-12-00200-CV, 2013 Tex. App. LEXIS 13278, at *1–2 (Tex. App.—Austin Oct. 25, 2013, no pet.) (mem. op.) (generally describing suits for bond forfeiture). Bail bonds and personal bonds generally are forfeited when a defendant is required to personally appear but fails to do so. *See* Tex. Code Crim. Proc. art. 22.02. When a defendant fails to personally appear in this context, "judgment shall be entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, if any, the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown why the defendant did not appear." *Id.* The judgment declaring the forfeiture is referred to as a judgment nisi. *See Alvarez v. State*, 861 S.W.2d 878, 880–81 (Tex. Crim. App. 1992).

After a trial court enters a judgment nisi, the suit is docketed "upon the scire facias or upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties, if any, as defendants," and that proceeding generally is "governed by the same rules

governing other civil suits." Tex. Code Crim. Proc. art. 22.10. At a later hearing in the suit to finalize the bond forfeiture, the essential elements of the State's cause of action are the bond and the judgment nisi. *See Alvarez*, 861 S.W.2d at 880–81; *Mendez*, 2013 Tex. App. LEXIS 13278, at *1–2. The burden then shifts to the surety and defendant to show "good cause why the defendant did not appear." *See* Tex. Code Crim. Proc. arts. 22.02 (requiring judgment in favor of State "unless good cause be shown why the defendant did not appear"), 22.13(a) (listing "causes, and no other, [which] will exonerate defendant and surety, if any, from liability upon the forfeiture taken").

Relevant to this appeal, article 22.16(b) of the Texas Code of Criminal Procedure authorizes a trial court within its discretion to remit all or a portion of the bond amount to the surety before entry of a final judgment after deducting costs and "the interest accrued on the bond amount." *Id.* art. 22.16(b).[1] For purposes of article 22.16, "interest accrues on the bond amount from the date of forfeiture in the same manner and at the same rate as provided for the accrual of prejudgment interest in civil cases." *Id.* art. 22.16(c). With this context, we turn to the parties' dispute.

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[1] Article 22.16(b) states:

> For other good cause shown and before the entry of a final judgment against the bond, the court in its discretion may remit to the surety all or part of the amount of the bond after deducting the costs of court and any reasonable and necessary costs to the county for the return of the principal, and the interest accrued on the bond amount as provided by Subsection (c).

Tex. Code Crim. Proc. art. 22.16(b).

The Underlying Proceeding

Jose Elizalde was indicted for driving while intoxicated. On May 7, 2007, he, as the principal, and Nunez, as the surety, entered into a bond in the amount of $12,000 payable to the State of Texas. The bond was conditioned on Elizalde's personal appearance before the trial court. After Elizalde failed to appear on August 17, 2007, the trial court signed a judgment nisi on August 22, 2007. Elizalde was subsequently arrested in May 2009 and remained incarcerated until a judgment of conviction was rendered against him in June 2011. He was sentenced to seven years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

The State's suit to finalize the bond forfeiture began a few months after the trial court signed the judgment nisi, and Nunez was served and then filed an answer in November 2007. In his answer, Nunez sought a remittitur of the bond amount. Over seven years later, the State filed a motion for summary judgment. The State, however, did not present this motion to the trial court because, according to the State, Nunez had raised a fact issue in his response to the State's motion for summary judgment. In his response to the State's motion, Nunez sought remittitur pursuant to article 22.16(b) of the Texas Code of Criminal Procedure and asserted laches, arguing that the State "failed to timely and diligently pursue its remedies by failing to bring the case to trial for over 8 years after the date of [Elizalde]'s failure to appear." Nunez supported his response with the chronology from Elizalde's criminal case, including the dates of Elizalde's incarcerations.

The trial on the merits occurred in May 2016. Neither party presented witnesses, but the trial court took judicial notice of its file and the "Register of Actions" in Elizalde's criminal case. The trial court also admitted exhibits, including copies of the bond, the judgment nisi, the register

of actions in Elizalde's criminal case, and his judgment of conviction. Nunez did not challenge the validity of the judgment nisi or that the bond had been forfeited but sought remittitur of the bond amount for "good cause." *See* Tex. Code Crim. Proc. art. 22.16(b).

Nunez argued that "good cause" existed to remit the amount of bond to him because the State did not serve Elizalde with its bond forfeiture petition even though he was in the State's custody beginning in May 2009 and delayed action on the bond forfeiture suit until February 2015, resulting in Nunez's "lost opportunity" to present evidence as to why Elizalde did not appear in August 2007. According to Nunez, the "delay caused [him] to lose the principal and access to the principal" and Elizalde "could have testified as to the very reason in the first place why he didn't appear on the 17th day of August of 2007." *See id.* arts. 22.02 (requiring judgment in favor of State "unless good cause be shown why the defendant did not appear"), 22.13(a) (listing causes which will exonerate defendant and surety from "liability upon the forfeiture taken," including "uncontrollable circumstance which prevented [defendant's] appearance at court," but requiring defendant's appearance "before final judgment on the bond to answer the accusation against him, or show sufficient cause for not so appearing"). When asked by the trial court at the hearing to explain the State's reasons for the delay, the State responded that the case "somehow fell through the cracks" and that "the problem, of course, was that principal [Elizalde] had been out of custody for so long."[2]

[2] The exhibits admitted during the trial showed that, after the bond was forfeited in August 2007, Elizalde remained incarcerated after his arrest in May 2009 until he was convicted in June 2011 and then transferred to TDCJ.

On May 19, 2016, the trial court advised the parties by letter that it was ruling in favor of Nunez and requested that he prepare a final order that remitted the bond amount to Nunez after deducting costs. The trial court, however, on June 10, 2016, signed a final judgment in favor of the State for the bond amount against Nunez and Elizalde, interest against Nunez, and court costs against Nunez and Elizalde. In response, Nunez filed a motion to reform the judgment pursuant to rule 329b of the Texas Rules of Civil Procedure, seeking to vacate the judgment signed on June 10, 2016, and to enter judgment in his favor and in accordance with the trial court's notice to the parties as to its ruling. *See* Tex. R. Civ. P. 329b.

On June 28, 2016, the trial court signed an "Amended Final Judgment" in which it found good cause to remit to Nunez "the entire amount of the bond after deducting the costs of court . . . and the interest that accrued on the bond from the date of the forfeiture until the day before the signing of this order." These cross appeals followed.

Analysis

Standard of Review

Although bond forfeiture proceedings arise from criminal matters, civil law governs appellate review. *See* Tex. Code Crim. Proc. art. 44.44 (providing that "the proceeding shall be regulated by the same rules that govern civil actions where an appeal is taken"); *State v. Sellers*, 790 S.W.2d 316, 321 (Tex. Crim. App. 1990) (explaining that "bond forfeiture is a criminal matter"); *Mendez*, 2013 Tex. App. LEXIS 13278, at *3–4 (concluding that appellate review of bond forfeiture proceedings is governed by civil law, including standard of review); *see also* Tex. Code Crim. Proc. art. 44.42 (authorizing defendant to appeal "final judgment rendered upon a personal

bond"); *International Fid. Ins. Co. v. State*, No. 03-09-00539-CR, 2010 Tex. App. LEXIS 8873, at *6–7 & n.3 (Tex. App.—Austin Nov. 3, 2010, no pet.) (mem. op., not designated for publication) (applying civil standard of review for legal and factual sufficiency of evidence in context of bond forfeiture suit).

Resolution of this appeal turns on statutory construction, which is a question of law that we review de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Our primary concern is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). "We thus construe the text according to its plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to absurd results." *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008)). "We generally avoid construing individual provisions of a statute in isolation from the statute as a whole." *Texas Citizens*, 336 S.W.3d at 628.

The State's Cross Appeal

In its issue, the State argues that the trial court abused its discretion by remitting the bond amount because there was no evidence or insufficient evidence of "good cause." *See* Tex. Code Crim. Proc. art. 22.16(b) (authorizing court in its discretion to remit amount of bond to surety "[f]or other good cause shown and before the entry of a final judgment against the bond").

As a threshold matter, the parties join issue with the State's authority to bring its cross appeal. The State concedes that generally it does not have the right to appeal in a bond forfeiture case. *See Sellers*, 790 S.W.2d at 321–22 (affirming dismissal of appeals and "[f]inding no provision

in law authorizing a State's appeal in bond forfeiture cases"); *see also* Tex. Code Crim. Proc. art. 44.42 (authorizing "defendant" to appeal "final judgment rendered upon a personal bond"). The State, however, argues that it has authority to appeal in this case pursuant to subsection (a)(2) and section (c) of article 44.01 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 44.01(a)(2), (c). Those subsections provide:

> (a) The state is entitled to appeal an order of a court in a criminal case if the order: . . .
>
> (2) arrests or modifies a judgment;
>
> . . .
>
> (c) The state is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment.

Id. Also relevant to this appeal, subsection (d) provides that the State "may not make an appeal under Subsection (a) . . . later than the 20th day after the date on which the order . . . to be appealed is entered by the court." *Id.* art. 44.01(d).

Based on our review of the relevant language, we conclude that these provisions are unambiguous. *See State v. Robinson*, 498 S.W.3d 914, 918–19 (Tex. Crim. App. 2016) (noting prior holding that "'plain' language of Article 44.01(a)(2) [was] unambiguous"). Applying the plain meaning of the text then, we turn to our analysis of the State's authority to bring its cross appeal pursuant to either section (c) or subsection (a)(2). *See Scott*, 309 S.W.3d at 930.

Article 44.01(c)

The State argues that article 44.01(c) authorizes its cross appeal because Nunez initiated the appeal by filing his notice of appeal. Applying the plain meaning of section (c) in the context of article 44.01, however, we conclude that it does not entitle the State to bring its cross appeal in this bond forfeiture case. *See* Tex. Code Crim. Proc. art. 44.01(c). Section (c) authorizes the State to appeal a "ruling" in an appeal brought by a "defendant" who has been "convicted" in the case and is appealing "the judgment." *Id.*; *see Pfeiffer v. State*, 363 S.W.3d 594, 600–01 (Tex. Crim. App. 2012) (explaining reach of State's "limited" right to cross appeal under article 44.01(c)). Applying the ordinary meaning of the text, we observe that Elizalde was not "convicted" in this case—the State's bond forfeiture suit—but in the criminal case against him. In fact, Elizalde has not and cannot appeal his "judgment" of conviction in this case, which judgment of conviction was rendered against him in June 2011. *See* Tex. Code Crim. Proc. art. 44.02 (addressing defendant's right to appeal in criminal action); *see also Pfeiffer*, 363 S.W.3d at 600–01.

Article 44.01(a)(2)

The State alternatively argues that article 44.01(a)(2) authorizes its cross appeal. *See* Tex. Code Crim. Proc. art. 44.01(a)(2). Article 44.01(a) lists "various pre-trial orders and some post-trial orders" that the State may appeal in criminal cases. *See id.* art. 44.01(a) (listing orders in criminal cases that State may appeal including order granting new trial, dismissing indictment, sustaining claim of former jeopardy, and granting motion to suppress evidence); *Pfeiffer*, 363 S.W.3d at 600 (explaining that "[a]rticle 44.01(a) enumerates the various types of 'orders' that the State may appeal" and that "[a]ppealable 'orders' under paragraph (a) include various pre-trial orders and some

post-trial orders"). Among the listed types of orders, subsection (a)(2) refers to an "order" that "arrests or modifies a judgment." *See* Tex. Code Crim. Proc. art. 44.01(a)(2).

The State argues that subsection (a)(2) authorizes its appeal because it is appealing the trial court's "amended" final judgment that "reformed" and, therefore, modified the judgment signed by the trial court on June 10, 2016. As noted above, however, section (d) of article 44.01 expressly prohibits the State from "mak[ing]" an appeal under section (a) "later than the 20th day after the date on which the order, ruling, or sentence to be appealed is entered by the court." *Id.* art. 44.01(d). The trial court entered its amended final judgment on June 28, 2016, and the State did not file its notice of appeal until August 26, 2016. Thus, even if the amended final judgment is an "order [that] modifies a judgment" within the meaning of subsection (a)(2), the State failed to bring its appeal within the 20 day statutory time period required by section (d) for doing so.[3]

For these reasons, we conclude that the State was not entitled to bring its cross appeal, overrule its issue on this ground, and do not further address it.

[3] Because we have concluded that the State was not entitled to bring its cross appeal under subsection (a)(2), we expressly do not determine whether the amended final judgment is an "order [that] modifies a judgment" within the meaning of subsection (a)(2). *See* Tex. R. App. P. 47.1; *compare State v. Robinson*, 498 S.W.3d 914, 918–19 (Tex. Crim. App. 2016) (concluding that article 44.01(a)(2) authorized State's appeal in context of order that modified judgment of conviction by imposing shock probation); *State v. Gutierrez*, 129 S.W.3d 113, 115 (Tex. Crim. App. 2004) (concluding that article 44.01(a)(2) authorized State's appeal in context of order that reduced sentence that was assessed in judgment of conviction), *with State v. Green*, 287 S.W.3d 782, 784–85 (Tex. App.—Amarillo 2009, no pet.) (holding that "article 44.01(a)(2) does not authorize the State to appeal a reformation of a final judgment in a bond forfeiture proceeding").

Nunez's Appeal

In his issue on appeal, Nunez argues that the trial court abused its discretion and violated his constitutional rights to due process by "ordering, without a hearing, that [the State] is entitled to interest in the amount of $5,282.00 solely from Appellant, Richard J.W. Nunez (but not against the defendant of the underlying criminal offense, Jose Elizalde)."[4] *See* U.S. Const. amend. XIV, § 1 (stating that no state may deprive person of property "without due process of law"). He argues that the State is responsible for the large dollar amount of interest because of its "unreasonable and flagrant" delay in taking action on this case and that he was not given an opportunity to be heard with respect to the accrued interest despite requesting a hearing on the matter.

It is true that the "right to be heard" is fundamental to the concept of due process and that a litigant's right to be heard generally includes "the right to a full and fair hearing before a court

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[4] During the pendency of this appeal, this Court requested a response from Nunez concerning the timeliness of his appeal because he filed his notice of appeal more than 30 days after the amended final judgment was signed. *See* Tex. R. App. P. 26.1; Tex. R. Civ. P. 329b(h) (explaining that time for appeals runs from date that reformed judgment is signed). As noted above, pursuant to rule 329b of the Texas Rules of Civil Procedure, Nunez filed a motion to reform the trial court's final judgment that was signed on June 10, 2016. Among his complaints in that motion, Nunez argued that the trial court erred by awarding interest to the State. Because the trial court's amended final judgment did not modify the interest awarded to the State, Nunez's motion extended the appellate timetable applicable to the amended final judgment to 90 days after that judgment was signed. *See* Tex. R. App. P. 26.1(a) (extending appellate deadline for filing notice of appeal to 90 days after date judgment is signed when party files motion for new trial); Tex. R. Civ. P. 306c (addressing prematurely filed documents), 329b(g) (stating that motion to reform judgment extends time for perfecting appeal in same manner as motion for new trial); *Brighton v. Koss*, 415 S.W.3d 864, 865–67 (Tex. 2013) (per curiam) (concluding that motion to modify original judgment extended appellate timetable applicable to second judgment because second judgment did not correct all errors or omissions asserted in motion to modify original judgment); *see also Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563–64 (Tex. 2005) (explaining rules for determining if motion for new trial extends appellate timetable when trial court enters subsequent judgment after motion is filed). Thus, we conclude that his notice of appeal was timely.

having jurisdiction over the matter." *Soefje v. Jones*, 270 S.W.3d 617, 625 (Tex. App.—San Antonio 2008, no pet.) (citation omitted); *see University of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) ("Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976))). The trial court, however, considered Nunez's request for remittitur pursuant to article 22.16(b) of the Texas Code of Criminal Procedure during the trial on the merits, and Nunez had the opportunity to present evidence and to be heard at that time.

Further, section (b) of article 22.16 expressly requires a trial court to deduct accrued interest on the bond amount when the trial court remits all or part of a bond to a surety under that section, and section (c) provides the formula for determining the amount of accrued interest to be deducted. *See* Tex. Code Crim. Proc. art. 22.16(b), (c). Section (c) provides that interest accrues on the bond amount from "the date of forfeiture in the same manner and at the same rate as provided for the accrual of prejudgment interest in civil cases." *See id.* art. 22.16(c); *see also* Tex. Fin. Code §§ 304.103 (stating that "prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment"), .104 (addressing accrual of prejudgment interest and stating that it "is computed as simple interest and does not compound"). Applying the plain meaning of section (c)'s text, we conclude that the only evidence that was necessary to calculate the amount of the deduction for accrued interest on the bond amount was the actual "date of forfeiture." Nunez does not dispute the date of forfeiture or contend that the trial court miscalculated the rate or amount of interest that had accrued on the bond amount from the date of forfeiture.

Further, Nunez's challenge to the trial court's award of interest to the State was based solely on the State's delay in obtaining the final judgment, which challenge he raised with the trial court in his motion to reform the original judgment. But the trial court was not required to hold a hearing on that motion. *See* Tex. R. Civ. P. 329b(c) (stating that motion to reform judgment shall be considered overruled by operation of law in event that motion "is not determined by written order signed within seventy-five days after the judgment was signed"); *cf. id.* R. 327 (generally requiring trial court to hear evidence when motion for new trial is supported by affidavit and based on jury misconduct). On this record, we cannot conclude that the trial court abused its discretion or violated Nunez's due process rights by not conducting a subsequent hearing after the trial on the merits with respect to the amount of interest awarded to the State.

As support for his argument that the trial court violated his due process rights by awarding interest based on the State's delay in obtaining a final judgment, Nunez cites the opinion in *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555 (1983). We find that case not applicable to the procedural context of this bond forfeiture case. The alleged due process violation in that case was based on the government's delay in prosecuting a civil forfeiture claim for eighteen months after having already seized an individual's money. *Id.* at 556; *see also id.* at 564–65 (applying *Barker* test and explaining that "[t]he *Barker* test involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"); *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972) (outlining balancing test for determining when defendant has been deprived of right to speedy trial). In contrast, here the State did not seize Nunez's property during the pendency of its bond forfeiture

suit—i.e., Nunez had the use of his money during this time period. The State also timely filed and served Nunez with its bond forfeiture suit and, during the pendency of the case before the trial court, Nunez did not file a motion to dismiss for want of prosecution or seek a trial setting. In this context, we cannot conclude that, because of the State's delay in obtaining a final judgment, the trial court abused its discretion or violated Nunez's due process rights by awarding accrued interest on the bond amount.

Because we have concluded that the trial court did not abuse its discretion or violate Nunez's due process rights by awarding interest on the bond amount to the State without holding a subsequent hearing on the interest award or because of the State's delay in obtaining a final judgment, we overrule Nunez's issue.

Conclusion

For these reasons, we affirm the trial court's judgment.[5]

Melissa Goodwin, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: August 18, 2017

[5] To the extent that Nunez seeks attorney's fees on the ground that the State's cross appeal was "frivolous and unauthorized" and a remand for the trial court to determine an amount of attorney's fees to be awarded, we deny this request. *See* Tex. R. App. P. 45 (authorizing court of appeals to award prevailing party "just damages").