

Affirmed and Opinion filed May 18, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01036-CR, 14-98-01037-CR, 14-98-01038-CR

NOBLE INSURANCE COMPANY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 699,352-A & 699,218-A & 738,860-A**

O P I N I O N

This is an appeal from a summary judgment in three criminal bond forfeiture cases. Appellant Noble Insurance Company executed three bonds on behalf of principal Luis Mario Garcia, who had been charged with felony offenses of aggravated assault, murder and aggravated robbery. Garcia failed to appear in court as ordered, and the trial court forfeited the bonds and entered judgments nisi.

The State filed motions for summary judgment, to which neither Noble nor Garcia filed a response. The motions were granted. Appellant Noble complains in a single point of error that the trial court erred in granting summary judgment as the State failed to allege and prove there was no valid reason for Garcia as principal not to appear. We affirm.

As appellant did not oppose the motions or file any responses, the only issue before us is whether the State's motions were sufficient as a matter of law – that is, a determination of whether the State carried its burden of proof below. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979); *Hall v. Tomball Nursing Center, Inc.*, 926 S.W.2d 617, 619 (Tex. App. – Houston [14th Dist.] 1996, no pet.).

Appellant contends that there are four issues the State must prove in a summary judgment bond forfeiture proceeding: (1) whether a valid bond was executed by the surety; (2) whether a defendant bound by bail failed to appear in a court in which the case was pending when his or her personal appearance was required; (3) whether the name of the defendant was called distinctly at the courthouse door; and (4) whether there was a valid reason for the principal not to appear. As the State's motions failed to allege and prove the fourth issue, appellant argues, that summary judgment was improper even in light of its failure to oppose the motions.

As support for its argument, appellant cites *Alvarez v. State*, 861 S.W.2d 878 (Tex. Crim. App. 1992), which, in its original majority opinion, set forth the four issues relied upon by appellant. We note, however, that in its Opinion on State's Motion for Rehearing, the Court of Criminal Appeals corrected its original majority opinion and acknowledged that the fourth issue is *not* a fact which the State has to prove in a bond forfeiture proceeding, and that the burden is on the principal (appellant) to assert and prove that good cause for his failure to appear exists:

Thus, to be entitled to forfeiture of a bond the State need only show (1) a valid bond; (2) that the defendant's name was distinctly called at the courthouse door; and (3) the defendant failed to appear within a reasonable time of that call. At the risk of being redundant, we reiterate that the burden of proof on the second and third prongs is satisfied by the judgment nisi.

Article 22.02 further provides that this judgment will be made final *unless* "good cause be shown why the defendant did not appear." This proviso operates like an affirmative defense in that the defendant admits he failed to appear but asserts he has good cause which excuses his failure to do so. The burden is appropriately placed on the defendant.

The Court of Criminal Appeals again set forth this scheme in *Hill v. State*, 955 S.W.2d 96, 100 (Tex. Crim. App. 1997), where it held that the State had the burden of establishing that there were no genuine issues of material fact as to any of the elements of the State's cause of action under the bond forfeiture, which the State proved by the bond and judgment nisi. The Court ruled that the burden then

shifted to the principal (appellant) to raise a fact issue on the affirmative defense of exoneration (i.e., good cause for failure to appear).

Appellant admits it failed to oppose the summary judgment and that it failed to allege and prove the existence of any good cause for Garcia's failure to appear. The State, as movant in the summary judgment proceeding, was not required to conclusively disprove affirmative defenses in its initial motion. *See Nicholson v. Memorial Hospital System*, 722 S.W.2d 746, 749 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e.). The State met and proved its burden of proof through the bonds and judgments nisi; appellant failed to raise a fact issue on the affirmative defense of good cause for failure to appear. The summary judgments were proper.

Appellant's point of error is overruled, and the judgments below are affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Justices Draughn, Lee and Dunn.*

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* Senior Justices Joe L. Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.