Affirmed and Opinion filed November 22, 2000.

In The

Fourteenth Court of Appeals

NO. 14-00-00469-CR

JOSE ARTEAGA AND
INTERNATIONAL FIDELITY INSURANCE CO., Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 759,683-A

O P I N I O N

International Fidelity Insurance Co. appeals from a final judgment of forfeiture in a criminal bond forfeiture case. Because appellant raises no reversible issues, we affirm the judgment of the court below.

I. Background

In August 1997, Jose Arteaga, not a party to this appeal, was charged with the felony offense of sexual assault of a child and placed into the custody of the Harris County sheriff.

Arteaga remained there until November 9, 1997, when Arteaga, as principal, and International Fidelity, as surety, executed a bail bond in the amount of $20,000 for Arteaga's release from the Harris County jail. Upon his release by Harris County, Arteaga was taken into custody by the United States Immigration and Naturalization Service. On May 13, 1998, Arteaga failed to appear as required in the 185th District Court and bond was ordered forfeited. A judgment nisi of forfeiture was entered on May 14, 1998.

At the trial on the forfeiture on February 9, 2000, the state introduced into evidence the bail bond and the judgment nisi. International Fidelity stipulated that Arteaga was not in custody. Licensed bailbondsman Judy Grandmason-Warren, agent for International Fidelity, testified that on November 9, 1997, an employee of the surety checked with both the bonding desk and through the Harris County computer system to see whether Arteaga had any holds placed on him by another government agency. Grandmason-Warren testified that according to customary business procedure, if the employee finds such a hold, the employee is to call the office. If the surety had received such a call in this case, she testified, the employee would have been instructed not to post the bond. The bail bond was accepted by the sheriff's department at 3:11 p.m. that day.

Deputy Shepherd, with the county processing division, testified that county records show that the hold was placed on the defendant about 5 a.m. November 9, 1997, and that the information would have appeared on the computer system by the time Arteaga bonded out that afternoon.

The day after the bail bond was posted, the surety learned that Arteaga had not been released but had been turned over to the INS. On December 1, 1997, an immigration judge signed an order finding Arteaga removable from the United States, ordering that he be granted voluntary departure in lieu of removal. Sometime between December 1, and December 15, 1997, Arteaga apparently left for Mexico.

The court below signed the final judgment of forfeiture February 9, 2000, in the

amount of $20,000 against Arteaga and the surety.

II. Discussion

In its first issue, appellant complains that it should not be held liable on the bail bond because the defendant never left the custody of the state or federal government after the posting of the bail bond until the defendant's removal from the United States under order of the United States government. Appellant argues that in order for the surety to perform its obligation under the bail bond, the surety must take custody of the defendant. Appellant further argues that because it never exercised care, custody, or control over the defendant, the federal government prevented the surety from performing its obligation. The surety, therefore, should not be held liable.

First, it appears that appellant waived this issue by not raising it with the trial court. *See* TEX. R. APP. P. 33.1; *Murphy v. Canion*, 797 S.W.2d 944, 951 (Tex. App.—Houston [14th Dist.] 1990, no writ). In the interest of justice, however, we will address appellant's substantive complaint. Appellant cites no relevant authority, nor do we know of authority, suggesting that the defendant must be turned over to the surety in the physical sense as opposed to the legal sense, or that the surety must exercise actual "care, custody, or control" over the defendant. The bail bond contract does not stipulate, nor does any statute or case suggest, that the defendant must be delivered physically to the surety upon release from custody. Indeed, trial testimony suggests that appellant expected the defendant to be released to the street upon release from jail.

Generally speaking, a defendant and his sureties may be exonerated from liability upon the forfeiture taken (1) if the bond is not valid and binding under law, (2) upon death of the principal before the forfeiture was taken, (3) upon the sickness of the principal or "some uncontrollable circumstances" that prevent the principal's appearance at court, or (4) upon the failure to present an indictment or information at the first term of the court that may be held after the principal has been admitted to bail. *See* TEX. CODE CRIM. PROC. ANN. art.

22.13 (Vernon 1989). On appeal, appellant does not argue that it is exonerated upon one of these foregoing grounds. Specifically, appellant does not argue that "some uncontrollable circumstances" prevented the principal's appearance at court. Nor does appellant complain of the sufficiency of the evidence supporting the trial court's judgment.

We also note that under article 17.16 of the Code of Criminal Procedure, a surety, before forfeiture, can relieve itself of its undertaking by surrendering the accused to the sheriff's custody or delivering to the sheriff an affidavit stating that the accused is incarcerated in federal custody. TEX. CODE CRIM. PROC. ANN. art 17.16(a) (Vernon Supp. 2000). Appellant acknowledged at trial that after it learned that the accused was in federal custody, it did nothing to relieve itself of its undertaking. We overrule appellant's first issue.

In its second issue, appellant complains that it should not be held liable after the federal government took custody of the principal and ordered him removed from the United States prior to the date when the principal was to appear in court. Appellant argues that the creditor of the surety contract, the government, may not modify the contract without the consent of the surety and that the surety will be discharged if the modification materially increased the risk of the surety.

Again, although appellant waived this issue by failing to raise it with the trial court, *see* TEX. R. APP. P. 33.1, we will consider its substantive complaint.

No evidence was presented at trial suggesting that the State modified the bail bond contract in any way or prevented appellant from meeting its obligations under the contract. Appellant cites cases – none of them Texas cases – suggesting that where the government modifies the contract or interferes with the surety's ability to meet its obligations under the contract, the surety might be relieved of its obligation under the contract. *See United States v. Galvez-Uriarte*, 709 F.2d 1323 (9th Cir. 1983) (holding that federal government not entitled to bond forfeiture where government increased risk of bail bondsman without notice and consent by advising defendant to return to Mexico until trial); *State v. Weissenburger*, 459

A.2d 693 (N.J. Super. Ct. App. Div. 1983) (holding that where state prosecutor and principal entered into agreement, without knowledge of surety, whereby defendant authorized to leave jurisdiction and where defendant failed to appear, forfeiture set aside). Appellant does not argue, however, that the State has in any way interfered with the contract. Indeed, appellant acknowledges that the defendant left the jurisdiction, in part, due to the action of a third party, the federal government. We also note that in Texas, the State releases the principal not because of contractual consideration between the State and the surety but because of constitutional and statutory rights of the principal. *See Rodriguez v. State*, 673 S.W.2d 635, 640 (Tex. App.—San Antonio 1984, no writ) (citing TEX. CONST. art. I, § 11; TEX. CODE CRIM. PROC. ANN. art. 1.07 (Vernon 1977)).

Again, appellant cites none of the statutory grounds for exoneration, *see* article 22.14, nor did appellant take steps to relieve itself of its undertaking, *see* article 17.16(a). We overrule appellant's second issue.

III. Conclusion

Having overruled both of appellant's issues, we affirm the trial court's judgment.

PER CURIAM

Judgment rendered and Opinion filed November 22, 2000.
Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.
Do Not Publish — TEX. R. APP. P. 47.3(b).