

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLEGHENY CASUALTY COMPANY,

Defendant and Appellant.

A107069

Alameda County

Super. Ct. No. 462174

Appellant appeals from an order refusing to discharge the forfeiture of a bail bond and set aside the summary judgment. Appellant contends that the bond should be exonerated on grounds that the trial court violated the requirements of the jurisdictional statute when forfeiture of the bond was not declared in “open court.” We agree that the technical requirements mandated by Penal Code section 1305, subdivision (a),¹ were not met in this instance, and we therefore reverse the judgment and remand with directions to vacate forfeiture and exonerate the bond.

FACTUAL AND PROCEDURAL BACKGROUND

On March 10, 2001, Allegheny Mutual Casualty Company, through its agent, Al Graf Bail Bonds, posted surety bond No. AA23290, in the amount of \$60,000, for the release of the defendant, Fernando Velente, from custody. On March 9, 2001, the defendant was ordered to appear back in court on March 21, 2001.

The defendant did not appear as ordered. At the March 21, 2001 proceedings, there was apparently no court reporter present; and therefore no reporter’s transcript

¹ Further references are to the Penal Code unless otherwise specified.

memorialized whether the court made any declaration of bail forfeiture in open court.² However, the court clerk's docket and minutes reflect the court's order of bail forfeiture and the issuance of a bench warrant.

On March 22, 2001, a notice of forfeiture was mailed indicating that the defendant had failed to appear on March 21, 2001. The bail agent did not receive a copy of the March 21, 2001 minutes until April 19, 2001. The minutes did not reflect whether the court declared the forfeiture in open court and erroneously calculated the total amount of bail forfeited to be in the amount of \$80,000. Sometime after the March 21 minutes were initially prepared, they were apparently amended *nunc pro tunc* to delete the \$80,000 forfeiture calculation.

Although summary judgment was entered on the forfeiture on March 27, 2002, the appellant's motion to vacate the summary judgment, set aside the bail forfeiture, and exonerate the bond was not filed until February 5, 2004. At the hearing of the motion the court stated that "the presence of a reporter isn't going to make a difference" with regards to whether bail forfeiture is done in "open court" and concluded that the minute order was sufficient to satisfy the requirements of section 1305, subdivision (a). The court denied the motion and this timely appeal followed.

DISCUSSION

Appellant contends we must not only set aside the trial court's forfeiture of bail but also exonerate the bond, based upon what, at first, appears to be a hyper-technical reading of section 1305, subdivision (a), which provides in pertinent part: "A court shall in *open court* declare forfeited the undertaking of bail or the money or property deposited as bail if, without sufficient excuse, a defendant fails to appear" (Italics added.)

² Pursuant to California Rules of Court, rule 4(a) we might have dismissed the appeal due to the failure to provide an adequate record (i.e., a transcript) of the March 21, 2001 proceedings. However, because the appeal is essentially based on the lack of a reported record of the March 21, 2001 proceedings and because we have the transcript of the later hearing of the motion to vacate the summary judgment, set aside the bail forfeiture, and exonerate the bond, we are able to make certain inferences regarding the March 21, 2001 proceedings.

Appellant essentially contends that the written minutes of the proceedings cannot suffice because the statute requires the declaration of forfeiture to be expressed by the judge in the presence of a court reporter while the court is in public session.

It is undisputed that the 1998 amendment to section 1305, subdivision (a), imposed the additional requirement that bail be declared forfeit in “open court.” Prior to its amendment in 1998, the statute required a declaration of bail forfeiture, but did not specify any particular method for doing so. The statute previously read: “A court shall declare forfeited the undertaking of bail or the money or property deposited as bail if, without sufficient excuse, a defendant fails to appear for [a scheduled court appearance].” (Former Pen. Code, § 1305, subd. (a), as amended by Stats. 1996, ch. 94, § 1.) Thus, under the former section bail forfeiture was valid when simply memorialized in the clerks’s minutes of the proceedings. (See *People v. Topa Ins. Co.* (1996) 42 Cal.App.4th 566, 568 [“The Legislature certainly knows how to require on-the-record statements by the court. [Citation.] And nothing in [the then] current language of Penal Code section 1305 suggests an on-the-record pronouncement of forfeiture is necessary.”])

Post-amendment opinions have concluded that the plain language of the amended statute indicates that for bail to be forfeited, the trial court must make an express declaration of forfeiture by stating “bail is forfeited,” and that the declaration must be made on the record, while the court is in session. (*People v. National Automobile & Casualty Ins. Co.* (2002) 98 Cal.App.4th 277, 283; *People v. Amwest Surety Ins. Co.* (2004) 125 Cal.App.4th 547, 554 (*Amwest*).)

In *People v. National Automobile and Casualty Ins. Co.*, *supra*, at page 285, the trial court failed to comply with the statutory requirement when, “during a recess in the proceedings [the court] directed the clerk to enter a forfeiture on the minutes.” The court of appeal also concluded that the trial court’s failure to state its intention on the record “deprived the court of jurisdiction to later declare a forfeiture” and resulted in the exoneration of the bond: “Following . . . the dictates of strict construction of bail forfeiture statutes as we must, we conclude the trial court’s failure to expressly state bail is forfeited in open court as mandated by section 1305, subdivision (a) resulted in the

court losing jurisdiction to later attempt to forfeit the bail by simply noting it in the minutes. Accordingly, we reverse the court's order and remand with directions to the trial court to vacate the forfeiture and exonerate the bond." (*Id.* at pp. 290-291.)

In *Amwest, supra*, 125 Cal.App.4th at pages 549-550 the court found a minute order to be insufficient to satisfy the statutory requirements of 1305 (a). In *Amwest*, although a bench warrant was issued, and the clerk's minutes for the day state that "bail ordered forfeited" the court of appeal concluded that record did not demonstrate that the trial court had declared bail forfeited in "open court," because the reporter's transcript of the proceedings contained no such statement. Agreeing with the opinion in *National Automobile & Casualty Ins. Co., supra*, 98 Cal.App.4th 277, the court concluded that the bail bond was exonerated, by operation of law, because the trial court failed to timely declare the forfeiture in open court. (*Amwest, supra*, at p. 554.)

In the present case, there is no reporter's transcript of the proceedings on March 21, 2001, presumably because no reporter was present at the critical juncture, and the clerk's minutes do not reflect that the court declared the forfeiture in open court. Even if we were to assume that the forfeiture could be declared in "open court" without being "on the record" in the presence of a reporter,³ this record would be insufficient to satisfy the requirements of the statute.

The statutory provisions regarding forfeiture of bail establish jurisdictional requirements that are understood to protect not only the surety but also any individual citizens who might have pledged their property on behalf of friends or family seeking release from custody. "The law traditionally disfavors forfeitures and this disfavor

³ We need not further discuss the question what is meant by "open court" in this context, but note that the term is usually understood to mean nothing "more or less than 'public.'" (See *People v. Valenzuela* (1968) 259 Cal.App.2d 826.) While we do not here conclude that the statute necessarily requires a reporter's presence, we must conclude that nothing can be inferred from the absence of a reporter's transcript where a silent transcript would be also insufficient. We will not speculate as to what occurred at the March 21, 2001 proceedings beyond considering the statements in this record; and neither the parties nor the trial judge said anything to suggest that the declaration of forfeiture was made in open court but simply not recorded by the court's reporter.

extends to forfeiture of bail. [Citations.] Thus, Penal Code sections 1305 and 1306 dealing with forfeiture of bail bonds must be strictly construed in favor of the surety to avoid the harsh results of a forfeiture.’ [¶] The standard of review, therefore, compels us to protect the surety, and more importantly the individual citizens who pledge to the surety their property on behalf of persons seeking release from custody, in order to obtain the corporate bond . . . [¶] It is well established in the case law that Penal Code sections 1305 and 1306 are subject to precise and strict construction. . . . ‘ “[W]here a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations, an act beyond those limitations is in excess of its jurisdiction.” [Citations.]’ ” (*County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58, 62; see also *People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 904 [“because the provisions of section 1305 are jurisdictional, a failure on the part of the court to comply therewith in ordering a forfeiture in reliance on that section renders the order null and void”]; *People v. Topa Ins. Co.* (1995) 32 Cal.App.4th 296, 300-303 [provisions of sections 1305 and 1306 are jurisdictional and must be strictly followed, or else court loses jurisdiction and its actions are void].)

At the hearing on the motion to set aside the summary judgment and exonerate the bail, the trial court commented that the open court requirement could not be interpreted to mean in “open court on the record.” While we sympathize with the trial court’s sentiment that the presence of a court reporter should not determine whether bail was forfeited in open court, the weight of authority is that the technical requirements mandated by the amendment of section 1305, subdivision (a) cannot be satisfied without an express declaration, made while the court is in public session, that bail is forfeited. The best practice would be for the judge to make the declaration in the presence of the court reporter, as well as memorializing in the clerk’s minutes that the declaration was made “in open court.” This record does not demonstrate that the “open court” requirement was satisfied. Accordingly, we reverse the trial court’s judgment and remand with directions to vacate the forfeiture and exonerate the bond.

Lambden, J.

We concur:

Kline, P.J.

Ruvolo, J.*

* Presiding Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFIED FOR PUBLICATION

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BY THE COURT:

The opinion in the above-entitled matter filed on January 19, 2006, was not certified for publication in the Official Reports. It now appears that the opinion should be published in the Official Reports and it is so ordered.

Kline, P.J.

Trial Court: Superior Court of Alameda County

Trial Judge: Hon. Winifred Y. Smith

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The People

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