IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-01-001
	:	O P I N I O N
- vs -		9/21/2009
	:	
CHRISTOPHER CROSBY,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case Nos. 07CR00166 and 07CR00229

Donald White, Clermont County Prosecuting Attorney, David Hoffmann, 123 N. Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellant

John Woliver, 204 North Street, Batavia, Ohio 45103, for appellee, Beverly Crosby

HENDRICKSON, J.

{¶1} This is an appeal from a decision of the Clermont County Court of Common Pleas granting relief from a judgment ordering forfeiture of a bail bond. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} The facts of this case are not in dispute. On February 7, 2007, defendant-appellee, Christopher Crosby, was arrested in connection with a home invasion that occurred the previous month. On May 12, 2008, Christopher pled guilty to the following felony

offenses: two counts of receiving stolen property in violation of R.C. 2913.51(A), and one count each of safecracking in violation of R.C. 2911.31(A), grand theft in violation of R.C. 2913.02(A)(1), and burglary in violation of R.C. 2911.12(A)(1).

{¶3} Following his plea, Christopher failed to appear at the June 12, 2008 sentencing hearing. The trial court issued a bench warrant. On July 16, 2008, the court adjudicated Christopher's recognizance bond forfeit pursuant to R.C. 2937.35 and scheduled a show cause hearing for August 6, 2008. The adjudication actually involved two bonds in two cases against Christopher that had been consolidated. One bond was set at $10,000 and the other at $75,000. Christopher's mother, appellee, Beverly Crosby, co-signed for both bonds.

{¶4} On July 26, 2008, Christopher was arrested on unrelated charges and taken into custody. Two days later, he appeared in court for a bond hearing on the unrelated charges. The judge presiding over the unrelated matter was a different judge from the one presiding over the present matter.

{¶5} Although Christopher was incarcerated in the Clermont County Jail at the time, neither he nor Beverly attended the August 6, 2008 show cause hearing in the present matter. That day, the trial court entered judgment of bond forfeiture in accordance with R.C. 2937.36. On August 12, 2008, Beverly moved to set aside the judgment on the bond forfeiture and for remission of the bond. The motion was heard on October 9, 2008.

{¶6} The trial court reconvened on November 13, 2008 to announce its decision granting Beverly's motion to set aside the judgment on the bond forfeiture. The court issued a judgment entry on November 17, 2008 which reflected its oral decision. This was followed by a judgment entry on December 10, 2008 granting the motion to set aside the judgment on the bond forfeiture. The state filed its notice of appeal on January 9, 2009.

{¶7} Before reaching the merits of the state's appeal, we must first determine

whether we have jurisdiction to hear this case. Under the Ohio Constitution, appellate courts do not have subject matter jurisdiction to review orders which are not final. Section 3(B)(2), Article IV, Ohio Constitution; *Aicholtz v. Moreland* (Jan. 29, 1996), Brown App. No. CA95-04-006, at 4. This court is required to raise jurisdictional issues sua sponte and dismiss an appeal that is not taken from a final appealable order. *Whitaker-Merrell Co. v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, 186.

{¶8} Upon initial examination, it appears that the record contains two final judgment entries. The November 17, 2008 entry was entitled "Judgment Entry" and was signed by the trial court ("the November entry"). This entry stated the following:

{¶9} "This matter came before the Court on October 9, 2008 pursuant to the Motion to Set Aside Bond Forfeiture filed by Beverly Crosby. The Court granted the aforementioned motion in an oral decision on the record on November 13, 2008."

{¶10} This was followed by the December 10, 2008 entry entitled "Entry granting motion of Beverly Crosby to Set Aside Judgment on Bond Forfeiture" ("the December entry"). This entry was signed by the trial court and by counsel for Beverly and counsel for the state. The December entry stated as follows:

{¶11} "Upon consideration of the Motion of Beverly Crosby filed on August 12, 2008, to set aside the judgment entered against her on the bond forfeiture in the two above styled cases, this Court finds said motion well taken and grants the motion. It is hereby ordered, adjudged and decreed that the judgment entered against Beverly Crosby is hereby set aside and dismissed."

{¶12} Should the November entry constitute the trial court's final appealable order, the state's appeal did not fall within the 30-day deadline prescribed by App.R. 4(A). If such is the case, this court cannot properly exercise jurisdiction over the appeal. However, should the December entry signify the final appealable order, the state's appeal was timely and this

court retains jurisdiction over the matter.

{¶13} First, the record does not indicate that the November entry was ever served upon the parties. Fundamental notions of procedural due process require that parties receive notice of final judgments before the time to appeal begins to run. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St. 3d 80, 81-82. Civ.R. 58(B) requires that, after a judgment is journalized, the court clerk serve all parties who are not in default for failure to appear with notice of the judgment by means acceptable under Civ.R. 5(B) and make a notation of the service in the appearance docket. *First Natl. Bank of S.W. Ohio v. Doellman,* Butler App. No. CA2004-06-134, 2005-Ohio-679, ¶27-28.

{¶14} In derogation of Civ.R. 58(B), the record in this case does not indicate that the court clerk ever served the parties with notice of the November entry or noted any such service in the docket. Therefore, service of the November entry was not perfected and the 30-day deadline for appeal was not triggered by this entry. *In re Anderson,* 92 Ohio St.3d 63, 67, 2001-Ohio-131; App.R. 4(A). We surmise, however, that this ostensible oversight by the trial court was due to the fact that the court never intended the November entry to be the final appealable order terminating the litigation.

{¶15} Civ.R. 58(A) directs the trial court, upon announcing a decision, to promptly prepare a judgment entry that is to be signed by the court and journalized by the clerk. Despite this rule, the question of whether an entry constitutes a judgment within the meaning of Civ.R. 58 is sometimes a difficult issue. Courts have described this question as *sui generis*, or peculiar to the facts of each case. See, e.g., *Ohio Assn. of Pub. School Employees v. New Miami Local School Dist. Bd. of Edn.* (1986), 31 Ohio App.3d 163, paragraph one of the syllabus.

{¶16} The intent of the trial court is crucial in determining whether an entry was meant to be a final judgment in the matter. See id at 164. See, also, *Millies v. Millies* (1976), 47

Ohio St.2d 43, 44. This intent can be ascertained by looking to the circumstances surrounding the issuance of the entry. "[T]he label or title placed on a document is not by itself determinative that the document is, in fact, a judgment entry." *St. Vincent Charity Hosp. v. Mintz* (1987), 33 Ohio St.3d 121, 123. Rather, a document is likely to be considered a judgment entry where it contains a "sufficiently definitive formal statement" indicating the court's intent to conclude the litigation by such entry. *Peters v. Arbaugh* (1976), 50 Ohio App.2d 30, 32, quoting *Millies* at 45.

{¶17} Applying these principles to the present matter, the circumstances indicate that the trial court intended the December entry to be the final judgment terminating the litigation. First, the fact that the November entry was labeled "Judgment Entry" is not dispositive. *Mintz* at 123. The December document was deemed an "entry" as well. Moreover, the court's intent that the December entry constitute the final judgment is supported by the fact that the entry included a formal statement of the court's finding in favor of Beverly and an unequivocal order that the judgment of forfeiture be set aside. This stands in contrast to the stark language employed in the November entry.

{¶18} Further evidence supports the lack of finality in the November entry. As stated, the trial court orally declared its decision granting Beverly's motion to set aside the judgment on the bond forfeiture at the November 13, 2008 hearing. At the close of that hearing, the court instructed Beverly's counsel to prepare an entry granting the motion to set aside judgment. This instruction does not accord with the inference that the November entry, issued a mere four days later, was intended to terminate the litigation. Rather, by signing the formal December entry, the trial court implicitly recognized that the November entry was either not intended to be a final disposition, or that it contained insufficient notice of its finality. *Millies* at 45.

{¶19} We conclude that, although labeled a judgment entry, the trial court's November

entry was merely an announcement of the court's decision on Beverly's motion. Both the form of the entry and the circumstances surrounding its issuance indicate that a more formal entry was to follow. The December entry was the final judgment disposing of the matter, and that entry set the time for appeal under App.R. 4(A). Consequently, the state's appeal was timely and this court has jurisdiction to consider its sole assignment of error.

{¶20} Assignment of Error No. 1:

{¶21} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT BY GRANTING THE DEFENDANT'S MOTION TO SET ASIDE JUDGMENT UNDER CIV.R. 60(B)."

{¶22} The state argues that the trial court abused its discretion in granting Beverly's motion to set aside the bond forfeiture. While the state concedes that Christopher's incarceration would constitute good cause to set aside the bond forfeiture, it emphasizes that Beverly failed to attend the show cause hearing to present this argument. The state maintains that Beverly's motion should have been construed as a motion for remission of penalty under R.C. 2937.39, which would have permitted the trial court to consider the relevant factors in determining whether to remit bond. The application of a Civ.R. 60(B) motion to set aside judgment, according to the state, improperly circumvents the remission statute.

{¶23} We begin by noting that the purpose of bail is to ensure the accused's presence during all stages of criminal proceedings. *State v. Hughes* (1986), 27 Ohio St.3d 19, 20; Crim.R. 46(A). R.C. Chapter 2937 sets forth the procedure for a court to follow when forfeiture of bail is at issue. When a defendant fails to appear at a court proceeding, the trial court may adjudge the bail forfeit in whole or in part. R.C. 2937.35. Alternatively, the court may continue the cause to a later date and, if the defendant fails to appear on that later date, declare the bail forfeit at that time. Id. Where the case involves a recognizance bond, the

court must notify the defendant and the surety of the adjudication of forfeiture and set the matter for a show cause hearing. R.C. 2937.36(C). If the defendant and the surety fail to show good cause why judgment of forfeiture should not be entered, the court enters judgment against the surety for the penalty stated in the recognizance. Id. Following this judgment of forfeiture, the surety may move for remission of the penalty if the defendant later appears, surrenders, or is re-arrested on the charge. R.C. 2937.39.

{¶24} Courts conducting a statutory remission analysis weigh various factors. These may include: "(1) the circumstances surrounding the reappearance of the accused, including timing and whether that reappearance was voluntary; (2) the reasons for the accused's failure to appear; (3) the inconvenience, expense, delay, and prejudice to the prosecution caused by the accused's disappearance; (4) whether the surety was instrumental in securing the appearance of the accused; (5) any mitigating circumstances; and (6) whether justice requires that the total amount of the bond remain forfeited." *State v. Hardin*, Lucas App. Nos. L-03-1131, -1132, -1133, 2003-Ohio-7263, ¶10.

{¶25} Following the judgment of bond forfeiture in the present matter, Beverly moved for relief from judgment and for remission of bond. At the hearing on the motion, defense counsel discussed a number of remission factors implicated by the case. In response, the trial court indicated its intent to conduct the remission analysis only if it first found that Beverly was not entitled to relief from judgment. When the court subsequently granted the motion for relief, it ruled that Beverly's remission request was rendered moot by its decision.

{¶26} A review of Ohio law reveals nothing mandating that the remission statute be applied in lieu of awarding relief from judgment under Civ.R. 60(B) in bond forfeiture cases. In fact, other courts have considered Civ.R. 60(B) motions for relief from judgment in bond forfeiture cases. See, e.g., *State v. Yount*, 175 Ohio App.3d 733, 2008-Ohio-1155 (holding that relief from judgment was warranted where defendant's incarceration in another county

constituted good cause); *State v. Ward* (Dec. 22, 1976), Putnam App. No. 1-76-59, 1976 WL 189013 (holding that relief from judgment was not warranted where surety's explanation that it did not have sufficient time to locate the defendant did not constitute good cause).

{¶27} If the legislature intended for remission under R.C. 2937.39 to be the sole remedy for the surety in these cases, it presumably would have indicated this intent when the statute was enacted or amended the statute to reflect such an intent when Civ.R. 60 was promulgated.[1] Absent such a declaration, Civ.R. 60(B) relief and statutory remission under R.C. 2937.39 are cumulative remedies. Cf. *Lyons v. Am. Legion Post No. 650 Realty Co.* (1961), 172 Ohio St. 331, paragraph three of the syllabus. Contrary to the state's argument, we find no abuse of discretion in the trial court's choice to proceed under Civ.R. 60(B) rather than the remission statute.

{¶28} We now turn to the propriety of the trial court's decision. A trial court's ruling on a motion for relief from judgment under Civ.R. 60(B) will not be disturbed absent a showing of abuse of discretion. *Argo Constr. Co., Inc. v. Kroger Ltd. Partnership I*, Clinton App. No. CA2008-09-036, 2009-Ohio-2811, ¶32. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶29} This court previously addressed a bond forfeiture case which is particularly instructive. In *State v. Tucker*, Warren CA2007-07-096, 2008-Ohio-3381, we held that forfeiture of bond was improper where a defendant was rearrested and returned to the county jail and was therefore available to appear. *Tucker* involved a defendant who was indicted for domestic violence and released from jail on bond. The defendant subsequently failed to appear at a pretrial conference. Prior to the date of the bond forfeiture hearing, the corporate

1. R.C. 2937.39, effective in January 1960, predated the Ohio Rules of Civil Procedure, which became effective in July 1970.

surety secured the defendant's re-arrest in Florida and returned him to the Warren County Jail. Despite the fact that the defendant was incarcerated, the trial court issued an order declaring the bond forfeit and directing the clerk to carry out forfeiture proceedings under R.C. 2937.36. The surety moved for relief from the trial court's order, and the court ordered that half the bond be remitted. This court reversed, agreeing with the argument that once the defendant was in the state's custody, the trial court was prohibited under R.C. 2937.35 and 2937.36(C) from declaring any portion of the bond forfeited.

{¶30} Admittedly, *Tucker* is distinguishable from the present matter in that the present matter advanced through R.C. 2937.36 forfeiture proceedings while *Tucker* did not advance past adjudicating the bond forfeit under R.C. 2937.35. As stated, once forfeiture proceedings have actually been initiated under R.C. 2937.36, good cause must be established by the surety in order to avoid forfeiture. The *Tucker* decision invoked the R.C. 2937.36(C) good cause provision in its analysis, however, finding that the surety was entitled to be exonerated from its bond obligations once the defendant was in custody and available to appear. Thus, although there is a procedural distinction between the two cases, the reasoning employed in *Tucker* is equally applicable to the present matter.

{¶31} Under the facts of this case, it is clear that Christopher could not have voluntarily appeared at the show cause hearing because he was already incarcerated on unrelated charges in the Clermont County Jail. Because he was incarcerated in the same jurisdiction, it would have been possible to secure Christopher's presence at the show cause hearing in the present matter. He was, in other words, available to appear. *Tucker* at ¶28.

{¶32} Furthermore, the record indicates that the trial court knew Christopher was in custody and could have appeared at the show cause hearing. The trial court conducted a review hearing in the present matter on August 5, 2008, the day before the show cause hearing. The transcript for that hearing indicates that Christopher was present and

represented by counsel. At the October 9, 2008 hearing on Beverly's motion for relief, the court reiterated its awareness of Christopher's incarceration:

{¶33} "THE COURT: -- on August 5th -- the Court had the hearing on August 5th or indicated the Defendant Chris Crosby was present --

{¶34} "MR. BREYER [prosecutor]: Right.

{¶35} "THE COURT: with attorney Greta Herberth, State represented by Bill Ferris, and at that time the Court under Criminal Rule 32 ordered him committed and -- and -- and denied bond because the rule allows pending sentencing for the Court to do that. Now, what that means is he may have been picked upon [sic] the 5th; he may have been picked up on the 4th or possibly the 3rd, but you're right, Mr. Woliver, the date that the Court granted the judgment, which was August 6th, he was already in custody."

{¶36} There is nothing in the record to explain why Christopher was not transported to the show cause hearing even though the trial court knew he was in custody. Due to the fact that Christopher was available to appear, it was readily possible to uphold the purpose of bail, which is to ensure the accused's presence at all proceedings, had Christopher simply been transported from the county jail to the show cause hearing.

{¶37} The fact that Christopher's appearance was not procured by Beverly does not change the outcome. As the Sixth Appellate District observed in *State v. Richardson* (Aug. 13, 1982), Lucas App. No. L-82-126, 1982 WL 6546 at *1:

{¶38} "The purpose of bail is to ensure that the defendant appears in court for criminal proceedings. Crim.R. 46(A). Even when the defendant does not appear, the surety may avoid forfeiture if the defendant is produced in court on or before a date certain set by the court. R.C. 2937.36(C). *It should make no difference whether the defendant is produced by the surety or produced by law enforcement officers; either way the objectives of Crim. R. 46 and R.C. 2937.36 are achieved when the defendant is produced in court on the date his*

presence is required. We are cognizant of the fact that the defendant in the case sub judice failed to appear in court on several occasions. Nevertheless, R.C. 2937.36 allows the surety to avoid forfeiture if the accused appears on the date set by the court pursuant to R.C. 2937.36(C)." (Emphasis added.)

{¶39} In sum, the trial court was aware that Christopher was being held at the Clermont County Jail on the day of the show cause hearing. There does not appear to be a viable reason for the failure to transport him to court that day. In accordance with the principles enunciated in *Tucker* and *Richardson*, because Christopher was in the state's custody and available to appear, the trial court was precluded from declaring the bond forfeited.

{¶40} The state's sole assignment of error is overruled.

{¶41} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.