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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

INTERNATIONAL FIDELITY
INSURANCE COMPANY,

Defendant and Appellant.

A131000

(Alameda County
Super. Ct. No. 127640)

In this bail forfeiture case, International Fidelity Insurance Company (surety) appeals a December 21, 2010, order denying its motion to vacate forfeiture and exonerate bail, an appealable order (*People v. Wilcox* (1960) 53 Cal.2d 651, 654-655), and a January 11, 2011, order of summary judgment entered on the forfeiture (Pen. Code, § 1306, subd. (a)).¹ Surety contends that the court lacked jurisdiction to declare bail forfeited on January 21, 2009, because the court improperly failed to declare forfeiture twice before for nonappearances by criminal defendant Jose M. Zimic—once for an arraignment on September 10, 2008, and again for a preliminary hearing on January 15, 2009 (the September 10 and January 15 hearings).

We affirm the orders.

BACKGROUND

We do not have the original complaint in the record to know when the criminal case was initiated, but in July 2008 Zimic appeared in custody with counsel, and the court

¹ All undesignated section references are to the Penal Code.

set bail at \$250,000. On the same day, Zimic executed a waiver of time, and waiver of personal appearance under section 977.²

On August 29, 2008, he was released on a bail bond for \$250,000 posted through surety's bail agent, Deborah Martinez Bail Bonds. The bond recites that Zimic had been ordered to appear on September 10, 2008, to answer a murder attempt charge.³

September 10 hearing. According to a record augmentation from surety, Zimic was absent for the September 10 hearing before the Honorable Christine Moruza. A two-page reporter's transcript reflects that defense counsel Timothy Rien told the court that Zimic was not in custody and agreed to an immediate request by prosecutor Lisa Faria to

² Section 977 provides in part: "(b)(1) In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2). . . ."

"(2) The accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof. . . ."

Zimic's waiver of appearance stated in part, using language of section 977, subdivision (b)(2): "The undersigned defendant hereby requests the court to proceed during every appearance of his which the court may permit pursuant to this waiver and hereby agrees that his interest will be deemed represented at all times by the presence of his attorney the same as if the defendant himself were personally present in Court, and further agrees that notice to his attorney that his presence in court on a particular day at a particular time is required will be deemed notice to hi[m] of the requirement o[f] his appearance at said time and place."

³ The bail bond, captioned for the underlying criminal case reads in part (handwriting underlined): "Defendant Zimic, Jose M. Booking No. 8336400 having been admitted to bail in the sum of Two hundred Fifty thousand Dollars (\$250,000), and ordered to appear in the above-entitled court on 9/10/08 9:00 Am on PC AT 187(A G charge/s; [¶] Now, THE INTERNATIONAL FIDELITY INSURANCE COMPANY, a New Jersey corporation, hereby undertakes that the above named defendant will appear in the above-named court on the date set forth to answer any charge in any accusatory pleading based upon the acts supporting the charge filed against him/her and all duly authorized amendments thereof, in whatever court it may be prosecuted"

set a preliminary hearing date. Court and counsel settled on January 15, and the hearing ended. The minute order reflects that Zimic was free on bail yet not present, and that the court set the preliminary hearing date.

Amendment of complaint. Pending the preliminary hearing date, the People calendared a motion to amend the complaint, but had it continued to January 5, 2009, on what would later be explained as a defense request due to Zimic's counsel being unavailable for the hearing as initially set. Neither Zimic nor defense counsel was present.

On January 5, before the Honorable Jeffrey Allen, Zimic was again absent but was represented by stand-in counsel Melissa Adams, from the office of his counsel, Rien. Adams stated that Rien had been in Seattle for two weeks but that she understood, from a phone call she just had with a member of Zimic's family, that Zimic was "with family for Christmas." She did not know "exactly where" because the family member's English was "not very good"; but she said Zimic lived in San Francisco and "We do have contact with him." She acknowledged receiving the amended complaint and recently disclosed discovery. The court ordered the amended complaint filed and, noting the section 977 waiver on file (fn. 2, *ante*), accepted on Zimic's behalf a waiver of formal arraignment and entry of a not guilty plea. This being a no-time-waiver case, the court was concerned that the amended pleading triggered the need for a personal waiver of time by Zimic. Noting, however, that the scheduled preliminary hearing date would be within the required time without a new waiver, the court maintained that date, assured by prosecutor Faria that she would be prepared to proceed on that date.

January 15 hearing. The January 15 hearing, a Thursday, was before the Honorable Carlos G. Ynostroza. Zimic was again absent, but defense counsel Rien was present and sought a continuance (§ 1050) of the preliminary hearing. Asked why Zimic was not present, Rien said, "I haven't seen him today," adding: "I did step out to call my office to ask that they make some calls for him, and we were unable to reach him as well. So I haven't had contact with him today, although I have to say I've had contact earlier in the week and last week with him. And as I informed the Court, it's a little bit

problematic because he's Spanish speaking and we have to secure interpreters each time w[e] deal with him." Among his efforts to deal with the new discovery, Rien said, he had an appointment set up last Monday (four days earlier) with his investigator. Alluding apparently to Zimic, Rien said: "He showed up. We were unable to get an interpreter."

There followed discussion by both counsel about the last hearing, before Judge Allen, and Rien being out of town in the weeks prior. This was to help apprise Judge Ynostroza of how the case came to be on for a preliminary hearing without the personal waiver that Judge Allen had warned would be needed if, as now proposed, the hearing were to be continued. Those circumstances plus ongoing defense work on the additional discovery, Rien explained, were why he now sought a continuance. The case stood at the eighth of 10 days in which to hold a no-waiver preliminary hearing, and Rien decried a "completely artificial no-time-waiver situation" as created by the People having placed the case on no-waiver status through an unnoticed request. Although his associate Adams had been at the last hearing, Rien said he first learned of Judge Allen's treatment of the case as no-waiver at today's hearing, by reading Judge Allen's order and speaking with the court clerk.

Prosecutor Faria, noting that this date had stood since the September 10 hearing, said she had five witnesses and was ready to proceed with the preliminary hearing. She summarized: "I would oppose the motion to continue because the defendant's not here and I believe I'm in a no-time-waiver posture, and if the court fails to issue the warrant, we're going to be in a situation where time will expire." Rien responded: "[T]he law is clear that if it's a defendant-induced loss of time, he can't complain about it. So if the remedy is a dismissal of the action and a re-filing, it can't happen because [Zimic] is not here today. There is a 977 on file that excuses his appearance and permits me to appear for him."

Faria argued as to Zimic's absence: "[He] was ordered by the court to be present at the preliminary examination. He has not been back here at any time to be told not to appear. And Mr. Rien indicates there's a language problem[;] they can't talk to him. So how did he know not to appear at this date?" Faria also queried what would happen if

Zimic appeared two days hence (on the tenth day): “[W]here does the time start running again?”

Remarking that these were “Good questions,” the court initially said it would issue a warrant. It asked Rien, “With regard to the bail, counsel, you are in contact with your client?” Rien replied. “Yes. And you know what, judge, I understand the Court’s ruling and I accept that. What I would ask is that you hold issuance of the warrant at least a week for me to get him in here.” After Faria objected based on the seriousness of the offense, Zimic being Peruvian and having Peruvian associations, and thus being a flight risk, the court ruled: “I’m going to make a finding of good cause to continue the warrant and not to issue it at this time, pursuant to counsel[Rien’s] request. Good cause that bail not be forfeited at this time because counsel is in contact with the client and has made comments to that effect on the record.” The court continued the matter to January 21, “for issuance of warrant.”

Bail forfeiture, etc. When Zimic was again absent on January 21, 2009, Judge Christine Moruza issued a no-bail warrant and declared bail forfeited. Rien said he had tried without success to contact Zimic since the last hearing. Notice of the forfeiture issued the next day, and the court ordered time tolled on the bond pursuant to a stipulation of surety and the People.

Surety moved to vacate forfeiture and exonerate bail, and Judge Moruza denied the motion by order of December 21, 2010, after receiving opposition and reply papers. Summary judgment followed as a matter of course on January 11 (§ 1306, subd. (a)), and surety filed notice of appeal on January 24, 2011.

DISCUSSION

Law and Issues

“If a criminal defendant who is out of custody on a bail bond does not appear at a required hearing or trial, the court may order the bail bond company to forfeit the bond. (§ 1305[, subd.](a).) To effectuate this forfeiture, the trial court must strictly comply with certain statutory requirements. [Citation.] Bail forfeiture statutes are jurisdictional

and, if not strictly followed, the court loses jurisdiction to later declare a forfeiture of the bond. [Citations.]

“We apply an abuse of discretion standard in evaluating a trial court’s denial of a motion to vacate bail forfeiture. [Citation.] However, because trial courts exercise a limited statutory discretion in ordering bail forfeitures and the issues are jurisdictional, we are required to carefully review the record to ensure strict statutory compliance. [Citations.]” (*People v. Bankers Ins. Co.* (2009) 171 Cal.App.4th 1529, 1532-1533.)

Surety claims that the court lost jurisdiction by unjustifiably declining to declare forfeiture when Zimic failed to appear for arraignment on September 10, 2008, or for the preliminary hearing on January 15, 2009. Section 1305 provides in part: “(a) 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 for any of the following: [¶] (1) Arraignment. [¶] . . . (4) Any other occasion prior to the pronouncement of judgment if the defendant’s presence in court is lawfully required.” Section 1305.1 states the matter this way, with reference to the court’s authority to order a continuance: “If the defendant fails to appear for arraignment, trial, judgment, or upon any other occasion when his or her appearance is lawfully required, but the court has reason to believe that sufficient excuse may exist for the failure to appear, the court may continue the case for a period it deems reasonable to enable the defendant to appear without ordering a forfeiture of bail or issuing a bench warrant.”

Thus one of the issues before us is whether Judge Ynostroza had reason to believe, at the January 15 hearing where he ordered a continuance, that sufficient excuse might exist for Zimic’s failure to personally appear. We begin there, and later address the September 10 hearing, where the issue is not excuse (not being offered or found) but whether Zimic had been ordered to appear on that date.

The January 15 Hearing

Judge Ynostroza’s finding is supported. He knew from the record discussion that Zimic was Peruvian. From counsel Rien’s representations, he heard that Rien had been in contact with Zimic over the past two weeks and, just four days before the hearing had

an arranged meeting with Zimic and an investigator that was frustrated by a Spanish language barrier for which they could not get an interpreter. Rien had encountered the same problem in other contacts with Zimic. He had also tried through his office just that morning to contact Zimic, without success, although this did not add anything specific to why Zimic was not there.

Surety faults the information as vague, at best, about why Zimic was not there, leaving the court with nothing but insufficient speculation for its finding. We agree that the information was slim but are guided, first, by the need expressed in section 1305.1 for the court to find only that cause “may exist” for a failure to appear justifying a continuance. The parties do not address whether that language, introduced in a section added in 1983, might modify earlier case law construing the bare “sufficient excuse” language of section 1305 (current § 1305, subd. (a)) in this manner: “The failure to . . . declare an immediate forfeiture upon the nonappearance of a defendant bailee can be justified only where there is some rational basis for a belief at the time of his nonappearance that there exists a sufficient excuse therefor. What constitutes a sufficient excuse generally rests within the sound discretion of the trial judge. . . .” (*People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 906-907.) Assuming no change in the case law, however, the finding here is still supported.

We are also guided by the inherent nature of the call. “While it is true that courts often give a nonappearing defendant the benefit of the doubt when presented with [his] attorney’s representation for why an appearance has not been made, the fact remains that such a decision is a matter for the court’s discretion. . . . Whether another trial court, or even a reviewing court, would have granted defendant a continuance is not the test for abuse of discretion.” (*People v. International Fidelity Ins. Co.* (2007) 151 Cal.App.4th 1056, 1061.)

Judge Ynostroza could rationally infer from the language barrier, coupled with Zimic being in contact with and even present with his counsel during the preceding two weeks, that an excuse due to miscommunication or misunderstanding “may exist”

(§ 1305.1) so as to warrant a six-day continuance to give him a second chance. No abuse of discretion appears.

The September 10 Hearing

Did the court alternatively lose jurisdiction by not declaring forfeiture when Zimic failed to show at the September 10 hearing? Surety claims that forfeiture was mandatory because: its bond shows that upon Zimic’s release on bail, he was ordered to appear for arraignment on that date (see fn. 3, *ante*); arraignment is, in any event, a proceeding for which bail law mandates a personal appearance (§ 1305, subd. (a)(4)); and Zimic was absent without any discussion of why, or any finding of excuse. The People argue that the written waiver of appearance under section 977 allowed Zimic’s absence, to which surety counters that the special requirement of the bail law controlled over the general provisions of section 977.

Discerning a potentially dispositive question unaddressed by the parties, we ordered supplemental letter briefs on this question: “Given that this court sits in review of Appellant’s motion to vacate forfeiture and exonerate bail, may we review error raised now that was not raised in that motion or ruled upon by the superior court—especially, whether the superior court was required to declare bail forfeited at a hearing of September 10, 2008?”

Somehow, surety construed our order as inviting more briefing on the merits of its claim of September 10 error. Only in the last sentence of its letter brief did it respond to the question we asked, saying simply and without citation to authority, “The error being a jurisdictional one, it may be raised at any time, even for the first time on appeal.” The People’s letter brief, by contrast, thoroughly addressed the question and confirms our suspicion that we cannot consider error as to the September 10 hearing when surety’s motion below asserted error only as to the January 15 hearing.

Case law does speak of error in failing to declare forfeiture as *jurisdictional*. “[F]ailure to declare a forfeiture upon a nonappearance without sufficient excuse, either where no excuse is offered or where the finding of an excuse constitutes an abuse of discretion, deprives the court of jurisdiction to later declare a forfeiture.” (*People v.*

United Bonding Ins. Co., *supra*, 5 Cal.3d at p. 907), but the determinative question for our purpose is whether such error results in *loss of jurisdiction in the fundamental sense*, or is merely *an act in excess of jurisdiction*.

“The term ‘jurisdiction,’ ‘used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition.’ [Citation.] Essentially, jurisdictional errors are of two types. ‘Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.’ [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and ‘thus vulnerable to direct or collateral attack at any time.’ [Citation.]

“However, ‘in its ordinary usage the phrase “lack of jurisdiction” is not limited to these fundamental situations.’ [Citation.] It may also ‘be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no “jurisdiction” (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ [Citation.] ‘ “[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.” ’ [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by ‘principles of estoppel, disfavor of collateral attack[,], or res judicata.’ [Citation.] Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless ‘unusual circumstances were present which prevented an earlier and more appropriate attack.’ [Citations.]” (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660-661 (*American Contractors*), citing in part to *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287-288.)

The same dichotomy controls whether a “jurisdictional” error may be waived. Because it results in a void judgment where the rendering court was “entirely without

“ ‘Under the Penal Code, a court has jurisdiction over a bail bond from the point that it is issued until the point it is either satisfied, exonerated, or time expires to enter summary judgment after forfeiture.’ ” (*American Contractors, supra*, 33 Cal.4th at p. 663.) The precise question was whether a surety could collaterally attack a summary judgment that had been entered a day earlier than the statutory scheme authorized, and that question turned on whether the prematurely entered judgment was void, or merely voidable. The court held that it was merely voidable. (*Ibid.*) Starting with the code language, the court observed that a summary judgment entered *after* the allowed time resulted in the bond being exonerated (§ 1305, subd. (c)), whereas there was no similar language concerning a judgment entered *prematurely*. (*American Contractors, supra*, at pp. 661-662.) Nor had “exceptional circumstances in [the] case precluded an earlier or more appropriate attack on the premature judgment.” The Supreme Court concluded: “A surety has the same opportunity as any other litigant to alert a court to judicial mistakes. Here, [the surety] could have moved to set aside the judgment or appealed its erroneous entry. It did not do so.” (*Id.* at p. 663.)

Here, too, no statutory language declares a bond exonerated if, for some reason, it should have been declared forfeited at an earlier proceeding due to insufficient excuse for a nonappearance. A failure to give timely or proper notice of forfeiture to a surety or its agent results in the surety being “released of all obligation under the bond” (§ 1305, subd. (b)(1)-(3)), but no such language addresses trial court failure to declare forfeiture at a proceeding earlier than it was actually declared. Subdivision (a) of section 1305 specifies the occasions (including arraignment) when a court must declare bail forfeited for a defendant’s nonappearance without sufficient excuse. The only mention of jurisdiction is: “However, the court shall not have jurisdiction to declare a forfeiture and the bail shall be released of all obligations under the bond if the case is dismissed or if no complaint is filed within 15 days from the date of arraignment.” (§ 1305, subd. (a)(5).) Neither of those events applies in our case. Thus failure to declare bail forfeited for a defendant’s unexcused failure to appear at arraignment does not result in an order that is void for lack of jurisdiction in the fundamental sense.

Our conclusion comports with *American Contractors*'s general observation that, under the Penal Code, “ ‘a court has jurisdiction over a bail bond from the point that it is issued until the point it is either satisfied, exonerated, or time expires to enter summary judgment after forfeiture.’ ” (*American Contractors, supra*, 33 Cal.4th at p. 663.) Also, as in that case, the record here reveals no exceptional circumstances that prevented surety from raising error at the September 10 hearing in its motion to vacate forfeiture and exonerate bail. The issue is therefore forfeited.⁴

DISPOSITION

The order denying the motion to vacate the forfeiture, and the ensuing summary judgment, are affirmed.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.

⁴ Surety's failure to claim error in the September 10 hearing on its motion below also resulted in a trial record that lacked the September 10 reporter's transcript or minute order. We granted surety's motion to augment the record with those papers, a motion brought before any briefing had define its appeal arguments, but our grant did not determine the propriety of using those materials to show error.

“Augmentation does not function to supplement the record with materials not before the trial court. [Citations.] Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally ‘when reviewing the correctness of a trial court’s judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.’ [Citation.]” (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Put more bluntly, “A defendant cannot challenge a lower court’s ruling and then ‘augment the record’ with information not presented to (or withheld from) the lower court. [Citation.]” (*People v. Brown* (1993) 6 Cal.4th 322, 332.)