

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ACCREDITED SURETY AND
CASUALTY COMPANY,

Defendant and Appellant.

A135542

**ORDER MODIFYING
NONPUBLISHED OPINION
[NO CHANGE IN JUDGMENT]**

(Mendocino County
Super. Ct. No. MCUKCVCV12-18269)

BY THE COURT:*

IT IS ORDERED that the opinion filed on September 24, 2013, is modified as follows and the petition for rehearing and request for publication are DENIED:

1. On page 11, in part III.C., the second sentence of the first full paragraph, is deleted and the following is inserted in its place:

The *Granite State* court did observe: “If a motion has been filed to vacate the forfeiture during the exoneration period, but not decided during that period, it cannot be said that the ‘period of time specified in Section 1305 has elapsed without the forfeiture having been set aside,’ (§ 1306, subd. (a)) because the court may yet decide to set aside the forfeiture. *It is only when a decision has been made* to deny the motion that the ‘period of time specified in Section 1305,’ i.e., 185 days plus any extension of that period, ‘has elapsed without the forfeiture having been set aside.’ (§ 1306, subd. (a).)” (*Granite State, supra*, 114 Cal.App.4th at p. 764, italics added.) However, the *Granite State* court did not consider whether summary judgment is premature when entered the same day as an order denying the motion to vacate the forfeiture.

* Before Jones, P.J., Simons, J., and Bruiniers, J.

2. On page 11, in part III.C., add a new penultimate sentence to the second full paragraph (i.e., add a new penultimate sentence to the final full paragraph of part III.C.):

On May 1, 2012, Accredited’s motion to vacate forfeiture was denied and, accordingly, the appearance period “ha[d] elapsed without the forfeiture having been set aside.” (§ 1306, subd. (a).)

The modification effects no change in the judgment.

Date _____

_____ P.J.

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(Mendocino County
Super. Ct. No. MCUKCVCV12-18269)

Appellant Accredited Surety and Casualty Company (Accredited) appeals from an order denying its motion to vacate the forfeiture of a bail bond and from summary judgment entered on the bond, pursuant to Penal Code sections 1305 and 1306.¹

Accredited argues: (1) that the trial court lacked jurisdiction to order forfeiture of the bond because it failed to give timely notice of forfeiture; (2) that the bail bond was invalidated when the trial court issued a bench warrant in an amount less than the amount of bail; and (3) that the trial court lacked jurisdiction to enter summary judgment on the same day it denied Accredited’s motion to vacate the forfeiture. None of Accredited’s arguments have merit and we affirm.

I. STATUTORY BACKGROUND

“ ‘The object of bail and its forfeiture is to insure the attendance of the accused and his obedience to the orders and judgment of the court.’ [Citations.] . . . [T]he ‘bail bond is a contract between the surety and the government whereby the surety acts as a

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

guarantor of the defendant's appearance in court under the risk of forfeiture of the bond.' [Citation.] Thus, when there is a breach of this contract, the bond should be enforced. [Citation.]" (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657–658 (*American Contractors*)).

Accordingly, section 1305, subdivision (a), provides, in relevant 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 for any of the following: [¶] (1) Arraignment. [¶] (2) Trial. [¶] (3) Judgment. [¶] (4) Any other occasion prior to the pronouncement of judgment *if the defendant's presence in court is lawfully required*. [¶] (5) To surrender himself or herself in execution of the judgment after appeal." (Italics added.) Section 1305, subdivision (b), provides, in part: "If the amount of the bond . . . exceeds four hundred dollars (\$400), the clerk of the court shall, within 30 days of the forfeiture, mail notice of the forfeiture to the surety The clerk shall also execute a certificate of mailing of the forfeiture notice and shall place the certificate in the court's file. If the notice of forfeiture is required to be mailed pursuant to this section, the 180-day period provided for in this section shall be extended by a period of five days to allow for the mailing. [¶] . . . [¶] The surety or depositor shall be released of all obligations under the bond if . . . : [¶] (1) The clerk fails to mail the notice of forfeiture in accordance with this section within 30 days after the entry of the forfeiture."

"The 185[-day period] after the date the clerk of the court mails a notice of forfeiture (180 days plus five days for mailing) to the appropriate parties is known as the appearance period. (§ 1305, subd. (b).) During this time, the surety on the bond is entitled to move to have the forfeiture vacated and the bond exonerated on certain grounds, such as an appearance in court by the accused. (§ 1305, subd. (c)(1).) The trial court may also toll the appearance period under certain circumstances, or extend the period by no more than 180 days from the date the trial court orders the extension, provided that the surety files its motion before the original 185-day appearance period expires and demonstrates good cause for the extension. (§§ 1305, subds. (e), (i) [(current subd. (j))], 1305.4.) [¶] After the appearance period expires, the trial court has 90 days to

enter summary judgment on the bond. (§ 1306, subs. (a), (c).) If summary judgment is not entered within the statutory 90-day period, the bond is exonerated. (§ 1306, subd. (c).)” (*American Contractors, supra*, 33 Cal.4th at p. 658, fns. omitted.)

“ ‘The law traditionally disfavors forfeitures and this disfavor extends to forfeiture of bail. [Citations.] Thus, Penal Code sections . . . 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.” (*County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58, 62.)

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 9, 2009, Accredited issued a bail bond in the amount of \$150,000 ensuring the appearance of Jonathan C. Passel to answer a felony charge of manufacturing controlled substances (Health & Saf. Code, § 11379.6, subd. (a)).

A pretrial conference was held, on October 13, 2010. The minute order from that date indicates that Passel was not present but that Passel’s attorney appeared on his behalf, pursuant to section 977.² On October 27, 2010, Passel again was not present for a pretrial conference. The minutes again indicate that Passel’s attorney appeared on his behalf, pursuant to section 977. However, the minute order also shows a check mark in

² “Section 977 allows a felony defendant to waive his or her personal presence at some hearings, appearing instead solely through his or her attorney.” (*People v. Indiana Lumbermens Mutual Ins. Co.* (2011) 194 Cal.App.4th 45, 49.) Section 977, subdivision (b), provides: “(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.”

the box titled “Cash/Bond Posted/Forf.” The reporter’s transcript makes no reference to bond forfeiture, but does indicate that Passel had a section 977 waiver on file.³ Another pretrial conference was set for November 10, 2010.

Our limited record next indicates that, on February 24, 2011, Passel again did not personally appear for a hearing on a motion in limine. The trial court declared the bond forfeited and issued a bench warrant in the amount of \$75,000. On February 28, 2011, the court clerk mailed Accredited a notice of order forfeiting bail. The notice reads in pertinent part: “You are hereby notified that the surety bond posted by you on behalf of [Passel] has been ordered forfeited by the Court for failure to appear on 2/24/11. [¶] Your contractual obligation to pay this bond will become absolute on the 181st day following the date of the mailing of this Notice of Order Forfeiting Bail unless the Court shall sooner order the forfeiture set aside and the bond reinstated.” Accredited timely requested and was granted a 180-day extension of the exoneration period.

On March 2, 2012, Accredited filed a motion to vacate the forfeiture, contending that the court lost jurisdiction to declare a subsequent forfeiture when Passel failed to appear on October 27, 2010, bail was ordered forfeited, but the clerk failed to mail notice of the forfeiture. In the alternative, Accredited argued that the trial court should reduce the bond to the amount of the \$75,000 bench warrant.

On May 1, 2012, the trial court both denied Accredited’s motion and entered summary judgment, against Accredited, in the sum of \$150,000. In denying Accredited’s motion to vacate the forfeiture, the court found: “The court did not actually order the bail forfeit[ed] on October 27, 2010.” The court explained: “[A section] 977 waiver had been filed on behalf of [Passel] by his attorney . . . on 8/24/10 authorizing [defense counsel] to appear on his behalf unless directed otherwise by the court. The motion was unopposed. The court granted the motion but ordered [Passel] to be personally present on 2/24/11. When he didn’t appear at that time the appropriate notice was given. [¶] . . .

³ The record does not contain a reporter’s transcript from each of the relevant hearings. However, the reporter’s transcript from October 27, 2010, is included in the clerk’s transcript as an attachment to the trial court’s May 1, 2012 order.

[¶] . . . Here, the fact that [Passel] had signed a 977 waiver and the court, in August, had given counsel discretion as to whether [Passel] had to appear for pre-trial [was] a sufficient excuse or justification. . . . [¶] Out of an abundance of caution, the court reviewed a previously filed transcript of the court record from 10/27/10 which shows that counsel appeared late but was allowed to appear 977 for [Passel]. There is no indication in that transcript that a warrant was issued for [Passel] or the bail forfeit[ed].” Accredited filed a timely appeal from the trial court’s summary judgment and from the order denying Accredited’s motion to vacate the forfeiture.⁴

III. DISCUSSION

In seeking reversal of summary judgment and the trial court’s order denying the motion to vacate forfeiture, Accredited argues: (1) that the trial court lacked jurisdiction to order forfeiture of the bond, on February 24, 2011, because it failed to give notice of the October 27, 2010 forfeiture; (2) that the bail bond was invalidated when the trial court issued a bench warrant for an amount less than the amount of bail; and (3) that the trial court lacked jurisdiction to enter summary judgment on the same day it denied Accredited’s motion to vacate the forfeiture.

A. *Failure to Give Notice of October 27, 2010 Forfeiture*

First, Accredited argues that bail was exonerated as a matter of law when the trial court failed to give notice of the forfeiture ordered on October 27, 2010. “ ‘The abuse of discretion standard applies to the trial court’s resolution of a motion to set aside a bail forfeiture [citation], subject to constraints imposed by the bail statutory scheme. ‘[W]hen a statute requires a court to exercise its jurisdiction in a particular manner, to follow a particular procedure, or to act subject to certain limitations, an act beyond those limits is in excess of its jurisdiction.’ [Citation.]” (*County of Los Angeles v. Fairmont Specialty Group* (2009) 173 Cal.App.4th 538, 542; *County of Orange, supra*, 140 Cal.App.4th at pp. 1491–1492.) “[H]owever, ‘[t]he abuse of discretion standard is not a unified

⁴ “Courts have recognized both the order on motion to vacate and the ensuing entry of summary judgment as appealable. [Citations.]” (*County of Orange v. Lexington Nat. Ins. Corp.* (2006) 140 Cal.App.4th 1488, 1490, fn. 1 (*County of Orange*).

standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" (*County of Los Angeles v. Fairmont Specialty Group*, at p. 543.) Here, contrary to Accredited's assertion, the issue is not a legal one. Rather, Accredited appears to take issue with the trial court's factual finding that, on October 27, 2010, it did not actually order the bail forfeited. The trial court's finding is supported by the record.

“ [T]he surety and bail agent are entitled to separate notice under the statute every time a forfeiture is declared.' [Citation.]" (*County of Los Angeles v. Granite State Ins. Co.* (2004) 121 Cal.App.4th 1, 4.) And, the clerk's failure to provide notice of an initial forfeiture constitutes jurisdictional error. (*County of Orange, supra*, 140 Cal.App.4th at p. 1490.) However, “the court can continue a hearing and still retain its jurisdiction to declare a forfeiture at a later time as long as it has a reason to believe that a sufficient excuse exists for the nonappearance.” (*People v. Ranger Ins. Co.* (1994) 31 Cal.App.4th 13, 19.) “[T]he reviewing court may look to the reporter's transcript, as well as the minutes, to supply a sufficient record of sufficient excuse.” (*People v. Frontier Pacific Ins. Co.* (1998) 63 Cal.App.4th 889, 895.) However, “where the record of the actual proceedings[, either in the transcript or in the minutes,] fails to disclose that the court had sufficient cause for a continuance, the court has lost jurisdiction to later declare a forfeiture of bail.” (*Id.* at p. 891.)

We agree with the People that Accredited has presented what is essentially a dispute over whether the transcript or minutes from October 27, 2010, should prevail. “It may be said that as a general rule that when . . . the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to the greater credence [citation]. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript must depend upon the circumstances of each particular case. [Citation.]" (*In re Evans* (1945) 70 Cal.App.2d 213, 216.)

Here, the October 27, 2010 transcript—making no mention of bail forfeiture, much less a declaration of forfeiture in open court—is entitled to greater credence. Although the record does not contain a written section 977 waiver, the transcript, from October 27, 2010, the register of actions, and the minute order indicate that a section 977 waiver was on file. Thus, because Passel’s appearance on October 27, 2010, was not “lawfully required” or was with “sufficient excuse,” by virtue of his section 977 waiver, there could have been no actual forfeiture on that date. (§ 1305, subd. (a)(4); *People v. American Bankers Ins. Co.* (1987) 191 Cal.App.3d 742, 747 [“[s]ince the defendant may appear through counsel under section 977, subdivision (a), he or she will have sufficient excuse for not appearing so long as counsel appears and is authorized to proceed in the defendant’s absence”].)

In any event, even if the trial court made an order of bail forfeiture on October 27, 2010, that order itself would be void. In *People v. National Automobile & Casualty Ins. Co.* (2004) 121 Cal.App.4th 1441, Division Three of this court rejected an argument very similar to that raised by Accredited. In that case, defense counsel asked that the defendant’s presence be waived for an appearance on October 19, 2001. The trial court agreed. Nonetheless, when the defendant did not appear on October 19, 2001, the trial court ordered bail forfeited. No notice of forfeiture was sent. At a subsequent hearing, the trial court “set aside” the forfeiture and reinstated the bail bond. (*Id.* at pp. 1444–1445.) Approximately one year later, on November 1, 2002, the defendant again failed to appear and bail was ordered forfeited. Notice of forfeiture was timely sent. (*Id.* at p. 1446.)

On appeal, the surety argued that because the trial court failed to provide notice of the October 19, 2001 forfeiture, it lacked jurisdiction to subsequently declare a forfeiture on November 1, 2002. (*People v. National Automobile & Casualty Ins. Co., supra*, 121 Cal.App.4th at p. 1446.) The court concluded: “Appellant’s contentions are undermined by the record. The bond issued by appellant in this case could not have been forfeited on October 19, 2001, for the simple reason the defendant’s appearance on that date was not ‘lawfully required’ under section 1305.” (*Id.* at pp. 1448–1449.) “Because

the defendant's appearance on that date was not required, any order forfeiting bail was void, and there was consequently no actual forfeiture or necessity for providing the surety with section 1305, subdivision (b) notice." (*Id.* at p. 1451.)

Here too, the trial court did not err in failing to give notice of forfeiture after October 27, 2011, and it retained jurisdiction to declare a subsequent forfeiture.

In its reply brief, Accredited states: "[O]n further scrutiny of the record, it was the occasion of November 10, 2010, that the defendant failed to appear and the court declared a bail forfeiture without giving notice of forfeiture to the surety and bail agent." We need not address this argument because it was raised for the first time in Accredited's reply brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12.) Furthermore, the record does not contain either a minute order or a transcript from November 10, 2010 and, thus, Accredited has not met its burden to show reversible error by an adequate record. (*People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 715 ["the general rule is that, faced with a silent record, an appellate court will presume that the trial court performed its duty and acted in the lawful exercise of its jurisdiction"]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574–575; *People v. Indiana Lumbermens Mutual Ins. Co.*, *supra*, 194 Cal.App.4th at p. 52 ["[a]n appealed judgment is presumed to be correct"].)

B. *Amount of the Bond*

Next, Accredited argues that "the bail bond was invalidated when the trial court issued a bench warrant for an amount less than the amount of bail ordered by the court." However, we agree with the People that no authority has been cited, and we know of none, that suggests the issuance of a bench warrant in an amount less than the amount of bail previously posted exonerates a bail bond.

C. *Time for Entering Summary Judgment*

Finally, Accredited contends that bail was exonerated when the trial court entered summary judgment prematurely—on the same day the trial court denied its motion to vacate the forfeiture. Specifically, Accredited asserts that the May 1, 2012 summary

judgment was not in compliance with section 1306, subdivision (a), because it was entered before the 180-day exoneration period elapsed. Again, Accredited's factual and legal premises are unsupported.

The language of the statute is clear. At the time summary judgment was entered, section 1306, subdivision (a), provided: "When any bond is forfeited and the period of time specified in Section 1305 *has elapsed* without the forfeiture having been set aside, the court which has declared the forfeiture, regardless the amount of the bail, *shall* enter a summary judgment against each bondsman named in the bond in the amount for which the bondsman is bound. The judgment shall be the amount of the bond plus costs, and notwithstanding any other law, no penalty assessments shall be levied or added to the judgment."⁵ (Stats. 1995, ch. 56, § 3, p. 133, italics added.) In other words, "[i]f the forfeiture is not set aside by the end of the appearance period, the court is required to enter summary judgment against the surety. (§ 1306, subd. (a).)" (*American Contractors, supra*, 33 Cal.4th at p. 657.)

Here, it is clear that the statutory requirements for entry of summary judgment were met. The statutory 185-day period (180 days plus 5 days for mailing) would have expired on September 1, 2011. (§ 1305, subds. (b), (c).) However, Accredited filed a timely motion to extend the exoneration period, which gave Accredited until March 5, 2012, to move to vacate the forfeiture. (§ 1305.4; *People v. American Surety Ins. Co.* (1999) 75 Cal.App.4th 719, 727 ["trial court did not err in determining the request to extend the 180-day period was untimely because it was filed after the period expired"].) Accredited filed such a motion, on March 2, 2012. But, by the time summary judgment was entered, on May 1, 2012, the appearance period had "elapsed without the forfeiture having been set aside." Accordingly, the trial court was compelled to enter summary judgment. (§ 1306, subd. (a).)

⁵ Section 1306, subdivision (a) has since been amended to delete the phrase, "regardless of the amount of bail." (Stats. 2012, ch. 470, § 50.)

Accredited's reliance on *People v. Granite State Insurance Co.* (2003) 114 Cal.App.4th 758, 762 (*Granite State*) and *American Contractors, supra*, 33 Cal.4th 653 do not convince us to reach a contrary conclusion. Accredited contends: “[*Granite State*] means that as long as a motion for relief from forfeiture is pending, the exoneration period does not expire until the day the motion is denied, and a court necessarily has no jurisdiction to enter summary judgment on the day it is denied.” But, *Granite State* did not so hold.

In *Granite State, supra*, 114 Cal.App.4th 758, the surety moved to vacate forfeiture and exonerate the bond before the expiration of the appearance period, and scheduled the hearing within 30 days following expiration of that period. The trial court found good cause to continue the hearing three times, ultimately hearing the motion more than five months after the expiration of the appearance period. The motion was denied, and the trial court entered summary judgment on the bond within 90 days following the denial. The surety moved to set aside the summary judgment, claiming the trial court lost jurisdiction to enter it because it was entered more than 90 days beyond the expiration of the extended appearance period. (*Id.* at pp. 761–762.)

The *Granite State* court held only that a trial court did not lose jurisdiction to enter summary judgment 90 days after the expiration of the 185-day period provided by sections 1305 and 1306 when a surety's motion to vacate forfeiture is pending. (144 Cal.App.4th at pp. 760–761, 766.) Instead, the court concluded that “the 90-day period for entry of summary judgment does not begin to run until the motion is denied.” (*Id.* at p. 766.) The court explained: “In sum, we conclude that where a surety timely files a motion to vacate forfeiture prior to the expiration of the exoneration period, and the motion is decided after expiration of that period as provided under section 1305, subdivision (i) [(current subdivision (j))], the court's power to enter summary judgment begins *on the day following denial of the motion* and expires 90 days later. Since summary judgment in this case was entered within 90 days of the date the trial court denied the motion to vacate, it was timely entered and the court did not err in denying Granite's motion to set aside the judgment.” (*Id.* at p. 770, italics added.)

One could read the italicized dicta above as supporting Accredited’s argument. However, the *Granite State* court did not need to consider whether the exoneration period “lapses” only on the day a motion for relief from forfeiture is denied. (§ 1306, subd. (a).) We refuse to read *Granite State* as authority for a proposition it did not consider. (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

American Contractors, supra, 33 Cal.4th 653, is no more availing. In *American Contractors*, our Supreme Court held that a summary judgment entered on the last day of the original 180-day appearance period was one day premature and thus voidable. (*Id.* at p. 657, 659, 665.) Here, in contrast, the appearance period—having been extended once—expired on March 5, 2012. The trial court’s entry of summary judgment, on May 1, 2012, was not premature.

IV. DISPOSITION

The summary judgment and order denying Accredited’s motion to vacate a forfeiture order and exonerate the bail bond are affirmed. The People are to recover their costs on appeal.

Bruiniers, J.

We concur:

Jones, P. J.

Simons, J.