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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LEXINGTON NATIONAL INSURANCE
CORPORATION,

Defendant and Appellant.

B251224

(Los Angeles County
Super. Ct. No. GA086366)

APPEAL from an order of the Superior Court of Los Angeles County,
Patrick J. Hegarty, Judge. Reversed with directions.

John M. Rorabaugh (Santa Ana); E. Alan Nunez (Fresno) for Defendant
and Appellant.

Office of the County Counsel, Richard D. Weiss, Acting County Counsel,
Ruben Baeza Jr., and Lindsay Yoshiyama for Plaintiff and Respondent.

INTRODUCTION

An insurer appeals from the trial court’s order denying the insurer’s motion to vacate forfeiture of the bail bond it had posted for a criminal defendant. The issue presented in this appeal is also currently pending before our Supreme Court in *People v. Safety National Casualty Insurance Co.* (2014) 225 Cal.App.4th 438, review granted July 23, 2014, S218712, and *People v. American Contractors Indemnity Co.* (2014) 226 Cal.App.4th 1059, review granted August 13, 2014, S219842: May Penal Code section 977, subdivision (b)(1), be used to determine whether a proceeding at which a defendant charged with a felony failed to appear was a proceeding at which the defendant was “lawfully required” to appear for purposes of forfeiting bail under Penal Code section 1305, subdivision (a)(4)? Unless and until our Supreme Court holds otherwise, we conclude that it may not. Accordingly, we reverse.

FACTUAL AND PROCEDURAL SUMMARY

In May 2012, the People filed a complaint charging Ahmed Alsherebi with two felonies—false imprisonment (Pen. Code, § 236) and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(4)).¹ Alsherebi was arraigned on May 17, and Lexington National Insurance Company posted a bail bond in the amount of \$80,000 for his release. Alsherebi appeared with private counsel, and the matter was continued to May 31 for “preliminary hearing setting.” Alsherebi was present in court with private counsel on May 31 when a 60-day time waiver was taken and the matter was continued to July 12. On July 12, Alsherebi appeared with a new attorney (Anthony Salerno) who substituted in as defense counsel; another 60-day time waiver was taken, and the matter was continued again to August 23 for preliminary hearing setting.²

¹ All undesignated statutory references are to the Penal Code.

² According to the minute orders for May 17, May 31, July 12 and August 23, 2012, the trial “court order[ed] the defendant to appear on the next court date.” However, as we note in the text, at least with respect to August 23, 2012, the reporter’s transcript is to the contrary. (There is no reporter’s transcript for the dates prior to August 23, 2012.)

On August 23, the trial court and defense counsel (Salerno) and Alsherebi had the following exchange:

“The Court: This is Case GA086366. [¶] What are we doing today?”

“[Defense counsel]: The short version is we’re hoping to have a preliminary hearing setting at some date during the last week of September.

“The Court: How about the 26th?”

“[Defense counsel]: That should be good.

“The Court: All right. Preliminary hearing setting September 26, 2012, 8:30 a.m., this department. That will be 0 of 10. [¶] Mr. Alsherebi, do you waive your right to a speedy preliminary hearing so I can set the matter for September 26th, knowing the People would have ten court days from that date to start your preliminary hearing?”

“The defendant: Yes.

“The Court: Counsel join?”

“[Defense counsel]: I do.

“The Court: See you back on the 26th.”

According to the minute order of September 26, although his counsel was present, Alsherebi failed to appear that day, “without sufficient excuse.” The trial court ordered Alsherebi’s bail forfeited. The court issued but, at defense counsel’s request, held a bench warrant for further hearing on October 4.³

On October 1, the court clerk mailed Lexington a notice of forfeiture of bail, informing Lexington its contractual obligation to pay Alsherebi’s bail would become absolute on the 186th day following the date of mailing of the notice.⁴

³ According to the October 4, 2012, minute order, defense counsel appeared, but Alsherebi again failed to appear without sufficient excuse, and the trial court ordered the issuance of a “no bail” bench warrant.

⁴ The period of 185 days after the date the clerk of the court mails a notice of forfeiture (180 days plus five days for mailing) to the surety and bail agent is known as the “appearance period” as the trial court must set aside a forfeiture of bail and exonerate the bond if the defendant appears (or is surrendered to custody by the bail agent) within

On April 4, 2013, Lexington filed a motion for an extension of this date pursuant to section 1305.4, and on May 1, the trial court granted Lexington’s request, extending the time for Alsherebi’s appearance (or forfeiture of bail) to August 1.

On July 30, Lexington filed a motion to vacate forfeiture and exonerate bail pursuant to section 1305 (or, in the alternative, for further extension of the appearance date). Citing the reporter’s transcript of August 23, 2012 (submitted as one of its supporting exhibits), Lexington argued the trial court had lost jurisdiction over the bond because the court had not ordered Alsherebi to appear at the September 26, 2012 preliminary hearing setting (when the court ordered bail forfeited).

At the August 27 hearing on the motion, the trial court noted the defendant had been present at the four hearings prior to the issuance of the warrant and forfeiture of the bond on September 26, and all of the hearings—May 17, May 31, July 12 and August 23—“were exactly the same.” The defendant was asked to waive time, he waived time and he was advised of the next court date. Rejecting Lexington’s argument that in the absence of an order to appear on September 26, 2012, Alsherebi had not been “lawfully required” to appear on that date for purposes of section 1305, the trial court denied Lexington’s motion to vacate forfeiture and exonerate bond. “All hearings in felony matters in my court are mandatory hearings.” “Unless there’s been granted [section] 977 authority in a felony matter defendant is required to appear at all hearings.”

Lexington appeals.

DISCUSSION

I. Standard of Review.

As we have noted, the issue in this appeal is whether section 977, subdivision (b)(1), may be used to determine whether a proceeding at which a defendant charged with a felony failed to appear was a proceeding at which a defendant was “lawfully required” to appear for purposes of bail forfeiture under section 1305, subdivision (a)(4). Resolution of a motion to vacate forfeiture and exonerate bail is “within the trial court’s

that time. (*People v. North River Ins. Co.* (2011) 200 Cal.App.4th 712, 717-718 & fn. 1 (*North River*); § 1305, subds. (b) & (c)(1).)

discretion and should not be disturbed on appeal unless an abuse of discretion appears in the record.’ [Citations.]” (*People v. Fairmont Specialty Group* (2009) 173 Cal.App.4th 146, 151.) However, where, as here, we review a trial court’s interpretation of a statute on uncontested facts, the issue involves a pure question of law, and our review is de novo. (*Ibid.*; *North River, supra*, 200 Cal.App.4th at p. 717.)

II. Statutes Governing Bond Forfeiture.

“The statutory scheme governing bail forfeitures is found in . . . section 1305 et seq. These provisions must be carefully followed by the trial court, or its acts will be considered without or in excess of its jurisdiction. [Citation.]’ (*People v. Aegis Security Ins. Co.* (2005) 130 Cal.App.4th 1071, 1074 [30 Cal. Rptr. 3d 686], fn. omitted.)” (*North River, supra*, 200 Cal.App.4th at p. 717.)

Section 1305 specifies when and how bail is forfeited, stating in pertinent part as follows: “(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. [¶] (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. . . .” (§ 1305, subd. (a).)

Pursuant to section 1305, subdivisions (b) and (c), the trial court must set aside a forfeiture of bail and exonerate the bond if the defendant appears or is surrendered to custody by the bail agent within 185 days after the notice of forfeiture is mailed by the clerk of the court, and as we have noted, this 185-day period is known as the “appearance period.”

“In interpreting these statutes, we must bear in mind that “[t]he law traditionally disfavors forfeitures and this disfavor 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.” [Citation.]” (*North River, supra*, 200 Cal.App.4th at p. 717.)

Pursuant to subdivision (a) of section 1306, if the appearance period elapses without the forfeiture having been set aside, the trial court must enter summary judgment against the surety. (*North River, supra*, 200 Cal.App.4th at p. 718.) However, pursuant to subdivision (i) of section 1305, if a motion to vacate the forfeiture and exonerate the bond is timely filed, it may be heard within 30 days after the expiration of the appearance period. (*North River, supra*, 200 Cal.App.4th at p. 718; see *People v. Granite State Insurance Co.* (2003) 114 Cal.App.4th 758, 768.) If the trial court fails to enter summary judgment within 90 days after the date upon which it may first be entered, it loses the right to do so. (§ 1306, subd. (c).)

III. Section 977 and Due Process.

As relevant, subdivision (b)(1) of section 977 provides as follows: “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). . . .”⁵

As stated in subdivision (b)(2) of this statute, “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. . . .” A waiver of a defendant’s personal presence shall be in the following format: “The undersigned defendant, having been advised of his or her right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on

⁵ While subdivision (b)(1) of section 977 specifies “the accused shall be personally present . . . during the preliminary hearing,” the appearance at which the defendant in this case failed to appear was a preliminary hearing *setting*. Consequently, if section 977 has any application to this case at all, it is only because the defendant had not executed “a written waiver of his . . . *right* to be personally present” at other proceedings not expressly mentioned in subdivision (b)(1). (Italics added.)

questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that his or her interest is represented at all times by the presence of his or her attorney the same as if the defendant were personally present in court, and further agrees that notice to his or her attorney that his or her presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of his or her appearance at that time and place.”

As our Supreme Court stated in *People v. Bradford* (1997) 15 Cal.4th 1229, “It is established that a defendant has a federal constitutional right, emanating from the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment, to be present at any stage of the criminal proceedings ‘that is critical to its outcome if his presence would contribute to the fairness of the procedure.’ (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [107 S. Ct. 2658, 2667, 96 L. Ed. 2d 631] [no constitutional violation when defendant was absent from competency hearing]; *United States v. Gagnon* (1985) 470 U.S. 522, 526-527 [105 S. Ct. 1482, 1484-1485, 84 L. Ed. 2d 486] [no constitutional violation when defendant was absent from judge’s discussion with juror].) In addition, a defendant has the right to be personally present at critical proceedings, pursuant to the state Constitution (Cal. Const., art. I, § 15; *People v. Johnson* [(1993)] 6 Cal. 4th 1, 18), as well as pursuant to statute (§ 977, 1043).

“This court repeatedly has held that a defendant is not entitled to be personally present either in chambers or at bench discussions that occur outside of the jury’s presence on questions of law or other matters as to which the defendant’s presence does not bear a “‘reasonably substantial relation to the fullness of his opportunity to defend against the charge.’” [Citations.] *Sections 977 and 1043 do not require the defendant’s presence, or a written waiver, unless that standard has been met.* [Citations.]” (*People v. Bradford, supra*, 15 Cal.4th at pp. 1356-1357, italics added; see also *People v. Clark* (2011) 52 Cal.4th 856, 1003-1004; *People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.)

IV. The Trial Court Erred in Ordering Bail Forfeited Because the Defendant Was Not “Lawfully Required” to Appear at the September 26, 2012 Hearing.

The trial court must declare bail forfeited if, without sufficient excuse, a defendant fails to appear at arraignment, trial, judgment, or “[a]ny other occasion prior to the pronouncement of judgment if the defendant’s presence in court is lawfully required.” (§ 1305, subd. (a).) September 26, 2012, was the date set for the continued preliminary hearing setting—not arraignment, trial or judgment; consequently, the issue is whether the preliminary hearing setting was “[an]other occasion” when Alsherebi’s presence in court was “lawfully required.” According to the record, the trial court did not order Alsherebi to appear on that date. The trial court concluded, nevertheless, that because Alsherebi had been present on August 23, 2012, when the court continued the preliminary hearing setting to September 26, 2012, and he had not executed a waiver pursuant to section 977, subdivision (b)(2), his presence on that date was “lawfully required.”

This rationale has been considered and rejected in a number of appellate decisions because, while section 977 protects a felony defendant’s due process right to be present at all trial proceedings, it has no bearing on a defendant’s obligation to appear at certain trial court proceedings in order to maintain bail status. (*People v. National Automobile & Casualty Ins. Co.* (2004) 121 Cal.App.4th 1441, 1449 [“The absence of a section 977 waiver does not convert all proceedings—specifically including a hearing on a section 995 motion to strike—into occasions at which a ‘defendant’s presence in court is lawfully required’ for purposes of section 1305, subdivision (a)(4)”]; *People v. Classified Ins. Corp.* (1985) 164 Cal.App.3d 341, 344-345; *People v. National Auto. & Cas. Ins. Co.* (1977) 77 Cal.App.3d Supp. 7, 9; accord, *People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304 [narcotics case review was not a trial readiness conference at which former rule 227.6 (predecessor to rule 4.112) of the California Rules of Court required defendant’s presence].)

The People argue these cases are distinguishable and notes that other decisions support the conclusion section 977 is relevant to bail forfeitures under section 1305. For

example, the People argue the “court t[ook] for granted that [s]ection 977 applies to bail forfeiture” in *People v. Indiana Lumbermens Mutual Ins. Co.* (2011) 194 Cal.App.4th 45. Our Supreme Court’s decision in *People v. Safety National Casualty Insurance Co.*, *supra*, S218712, will resolve the issue. In the meantime, we agree with the reasoning in the appellate decisions that find that section 977 is only intended to protect a felony defendant’s due process rights—that is, section 977 only requires a defendant’s presence at those stages of the proceedings bearing a “““reasonably substantial relation to the fullness of his opportunity to defend against the charge.”””” (*People v. Bradford, supra*, 15 Cal.4th at p. 1357, citations omitted.) We therefore conclude that Alsherebi’s failure to appear at the continued preliminary hearing setting did not support the trial court’s determination that bail had been forfeited in the absence of a section 977 waiver. Alsherebi had not been ordered to appear on September 26, 2012, and the preliminary hearing setting conference was not a proceeding where his appearance was otherwise “lawfully required” under section 1305, subdivision (a)(4).

DISPOSITION

The order denying Lexington’s motion to vacate forfeiture of its bail bond is reversed, and the trial court is directed to enter a new order granting the motion instead. Lexington is to recover its costs on appeal.

WOODS, Acting P. J.

We concur:

ZELON, J.

FEUER, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.