

Opinion No. 64-58

May 6, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Donald J Wilson, Assistant Attorney General

TO: Mr. Louis R. Lopez, Administrative Assistant to Court Administrator, Supreme Court Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Must a justice of the peace, under New Mexico law, collect from bondsmen or bonding companies bonds which have been forfeited; and, if so, what is the proper procedure to be used?
2. May a justice of the peace refuse a bond from a bondsman or from a bonding company that has in the past refused to make good their bond forfeits?

CONCLUSIONS

1. See Analysis.
2. Yes.

OPINION

ANALYSIS

In regard to the first question concerning bond forfeits that have occurred in various justice of the peace courts and which have not been collected by the justice of the peace, it is our opinion that the law imposes a mandatory duty and obligation upon such justices to collect such forfeitures. This must be done pursuant to and in accordance with the following statutes:

"Section 36-15-1. When any party or witness shall have executed a bail bond, or entered into a recognizance in any criminal cause, or any civil cause wherein (a) *capias* may have been issued before any justice of the peace, and the said party, or witness, is required to appear before said justice, at this office, within the proper precinct, at the time fixed by the terms of said bail bond or recognizance, upon the failure of said party or witness to appear as aforesaid, **it shall be the duty of the justice before whom the cause is pending, to declare said bail bond, or recognizance, forfeited, and he shall enter such judgment or forfeiture on his docket.**" (Emphasis added).

It is apparent from the foregoing statute that the duty imposed upon the justice of the peace is mandatory and not within his discretion. The word "shall" has been construed to mean "must." 39 **Words and Phrases** 123, 80 C.J.S. 136.

As to the procedure to be employed by the justice of the peace in collecting the forfeitures, Section 36-15-3, N.M.S.A., 1953 Compilation, is applicable.

"Section 36-15-3. It shall be the duty of the justice so declaring and entering said forfeiture, forthwith, after entry of the same in his docket, to summon the party or witness and their securities against whom the forfeiture was taken, to be and appear before him at his office at a day and hour therein specified, and show cause, if any he or they may have, why the judgment of forfeiture should not be made final. Such summons shall cite said party or witness and their securities to appear before said justice as aforesaid, not less than five (5) nor more than ten (10) days after the date of the service of said summons. Should such party or witness be without the county or state, and the officer holding the summons be unable to make personal service as provided by law, such service may be had by posting up at least four (4) notices in four (4) of the most public places within the precinct wherein such judgment of forfeiture was rendered, stating the names of the parties to the suit, when and against whom such forfeiture was taken, the amount thereof, and unless such party or witness, and securities, appear before said justice and show cause within the time stated in said notice, said judgment of forfeiture shall be declared final: Provided, that nothing contained in this article shall be construed as to deprive such person in interest of the right of appeal from such final judgment of forfeiture, if taken within ten (10) days after the rendition of such final judgment."

As to collecting the judgment, Section 36-15-5, N.M.S.A., 1953 Compilation provides:

"At any time after ten (10) days subsequent to the rendition of final judgment of forfeiture, the justice shall issue execution for the satisfaction of said judgment as in ordinary cases, and collect such fees as are now allowed by law in ordinary actions."

It must be noted that by virtue of Section 36-15-1, N.M.S.A., 1953 Compilation the foregoing procedure is applicable only in cases wherein the amount of the bail bond does not exceed one hundred dollars (\$ 100). In cases wherein the amount of the bail bond is greater than one hundred dollars (\$ 100), the following statutes are applicable:

"Section 41-4-21, N.M.S.A., 1953 Compilation. -- If, without sufficient cause the defendant neglects to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required according to the condition of his recognizance, the court **must** direct that fact to be entered upon its minutes and the recognizance or money deposited in lieu thereof, as the case may be, is thereupon forfeited." (Emphasis added)

It should be pointed out that the New Mexico Supreme Court in *State v. Barboa*, 64 N.M. 5, has held this statute to be mandatory in its terms and it must be strictly followed.

The interlocutory order of forfeiture is fatally defective if it fails to include therein a finding that the defendant (principal on the bond) failed to appear. **State v. Barboa**, supra.

In an action on recognizance, Section 41-4-22, N.M.S.A., 1953 Compilation provides:

"The court shall cause the clerk to give the surety thirty (30) days' notice, which notice shall be served upon them as in case of a summons in a civil action. Said notice shall require said sureties to appear on or before a given date and show cause why judgment shall not be entered against them for the amount of the recognizance. If good cause is not shown the court may then enter judgment against the sureties on said recognizance for such sum as it sees fit, not exceeding the full amount thereof. The court may remit or reduce the whole or part of the penalty, and render judgment thereon according to the circumstances of the case and of the situation of the parties, and upon such terms and conditions as seem just and reasonable. When a judgment has been rendered against the defendant or surety for the whole or part of the penalty of a forfeited recognizance, the court rendering such judgment may in his discretion remit or reduce the amount thereof when after such rendition the accused has been arrested and surrendered to proper court to be tried on such charge, or to answer the judgment of said court."

Thus, from the foregoing statutes it is apparent that when the defendant, without sufficient cause, fails to appear, his bond is thereupon forfeited and the justice must direct the clerk of the court to serve a summons on the surety requiring said surety to appear on or before a given date and show cause why a judgment on the recognizance should not be entered against him.

As to whether or not a justice has the right to refuse a bond from a bondsman or bonding company that has in the past refused to make good their bond forfeits, Section 41-4-4, N.M.S.A., 1953 Compilation provides:

"The sureties on any bail bond, shall in all cases justify as to their sufficiency; and the officer taking such bond shall certify his approval of the same, as to its form and the manner of its execution and as to the sufficiency of the sureties thereon."

It therefore appears that the justice use his own discretion in determining whether a particular bondsman or bonding company is "sufficient."

In summary, when a defendant fails to appear before a justice of the peace as required by law and his bond is thereby forfeited, in order to collect such forfeiture, the justice **must** do the following things:

I. When the amount of the bail bond does not exceed one hundred dollars (\$ 100).

1. Enter judgment of forfeiture on docket.

2. Summon defendant and his surety to appear and show cause why the judgment of forfeiture should not be made final.

a. Summons must cite defendant and surety to appear not less than five (5) nor more than ten (10) days after date of service.

b. If defendant is without the state or county serve by posting four (4) notices in four (4) of the most public places within the precinct.

3. If defendant and surety do not appear and show cause within the time stated in the notice, judgment of forfeiture shall be declared final.

4. Any time after ten days (10) subsequent to the rendition of the final judgment of forfeiture issue executions for the satisfaction thereof.

II. When the amount of the bail bond exceeds one hundred dollars (\$ 100).

1. Direct the defendant's failure to appear to be entered upon the minutes.

2. Cause the Clerk to give the surety thirty (30) days' notice to appear and show cause why judgment should not be entered against him for the amount of recognizance.

3. Notice referred to in § 41-4-22, supra, shall be served as in case of a summons in a civil action.