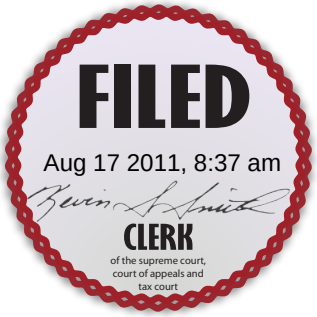

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IN THE
COURT OF APPEALS OF INDIANA

FRONTIER INSURANCE COMPANY and MIDWEST BONDING, INC.,	)	
Appellants,	)	
vs.	)	No. 20A04-1102-CR-89
STATE OF INDIANA,	)	
Appellee.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-9802-CF-16

August 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Frontier Insurance Company and Midwest Bonding, Inc. (collectively, "Frontier") appeal the denial of a motion to correct error which challenged an order for forfeiture of a bond and the imposition of late surrender fees. Frontier presents a single issue: whether the forfeiture judgment was entered absent statutory compliance. We reverse.

Facts and Procedural History

On February 17, 1998, the State charged David Alonzo, Jr. ("Alonzo") with Possession of a Controlled Substance, as a Class C felony.[1] On February 26, 1998, a $5,000 bail bond, with Frontier Insurance Company as surety, was posted to secure Alonzo's release.[2]

On April 17, 1998, Alonzo failed to appear for a pre-trial hearing, and the trial court ordered bondsman Albert McClelland ("McClelland") to produce Alonzo in open court on May 15, 1998. Alonzo failed to appear on May 15th and the trial court issued a bench warrant for his arrest and ordered McClelland to surrender Alonzo immediately or suffer late surrender fees. The trial court also ordered the bond forfeited. The "Order of Bond

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[1] Ind. Code § 35-48-4-10.

[2] Indiana Code Section 35-33-8-3.2 permits defendants to use a bail agent approved by the Commissioner of the Department of Insurance and given the power of attorney by an insurer (surety) to post bail for the defendant in return for a premium. The premium is the amount the defendant pays the bail agent to post the bail. See Ind. Code § 27-10-1-8. If the defendant appears when required, the bond money posted by the surety is returned to it. Ind. Code § 27-10-2-5. If there is a breach of a bail agent or surety's undertaking, "that sets in motion the process under Section 12, whereby a bail agent or surety can be assessed late surrender fees and can be required to forfeit the bond." State v. Boles, 810 N.E.2d 1016, 1018 (Ind. 2004).

Forfeiture" provided, "Judgment is withheld pending passage of statutory time."[3] (App. 27.)

On July 8, 2010, the trial court entered judgment against Frontier and McClelland in the sum of $5,000 ($1,000 bond forfeiture and $4,000 late surrender fees). On August 5, 2010, Frontier filed a motion to correct error. Therein, Frontier alleged that the court clerk had failed to comply with Indiana Code Section 27-10-2-12(a)(2) by mailing a notice of the May 15, 1998 surrender order to the address for Frontier as indicated in the bond.

The trial court conducted a hearing on the motion to correct error on October 28, 2010. The parties agreed, pursuant to Indiana Trial Rule 53.3(B), that the time limitation under Trial Rule 53.3(A) would not apply. The motion to correct error was denied on January 25, 2011. Frontier appeals.

Discussion and Decision

Standard of Review

The burden of establishing that notice was sent as required by the bail forfeiture statute, Indiana Code Section 27-10-2-12, rests upon the State, and not upon sureties or bail agents. Harris v. State, 912 N.E.2d 432, 435 (Ind. Ct. App. 2009). A surety's claim that notice was not provided is "similar to claims of a judgment being void for lack of personal jurisdiction due to inadequate service of process, pursuant to Indiana Trial Rule 60(B)(6)." Id. at 434. We review a denial of a motion to set aside judgment making such claims for an abuse of discretion. Id. (citing Allegheny Mut. Cas. Co. v. State, 474 N.E.2d 1051, 1053

[3] Indiana Code Section 27-10-2-12(c) provides that "All late surrender fees are due as of the date of compliance … or three hundred and sixty-five (365) days after the mailing of notice required … whichever is earlier, and shall be paid by the surety when due."

(Ind. Ct. App. 1985)). We will affirm the ruling unless it clearly contravenes the logic and effect of the facts before the court and the inferences reasonably drawn therefrom. Id. However, the interpretation of a statute by the trial court is a question of law to which this Court owes no deference. Randolph v. Randolph, 722 N.E.2d 867, 869 (Ind. Ct. App. 2000).

Analysis

Indiana Code Section 27-10-2-12 provides that, if a defendant does not appear as provided in the bond, the court shall issue a warrant for the defendant's arrest and order the bail agent and the surety to surrender the defendant to the court immediately. Subsection (a)(2) requires the court clerk to mail notice of the surrender order to the bail agent and the surety:

> The clerk shall mail notice of the order to both:
> (A) the bail agent; and
> (B) the surety;
> at each of the addresses indicated in the bonds[.]

The bail forfeiture statute further provides that, upon the bail agent or surety's failure to produce the defendant within the statutorily prescribed time period and establish that his or her absence was not with their consent or connivance, the court shall enter a judgment of forfeiture of the bond and impose statutorily prescribed late fees. Ind. Code § 27-10-2-12(b),(c),(d). In State v. Boles, 810 N.E.2d 1016 (Ind. 2004), the Court explained the post-notice statutory procedure for forfeiture of a bond and late surrender fees assessment:

> Once the clerk mails notice to the bail agent and surety that a defendant has failed to appear, the bail agent or surety has 365 days to produce the defendant or show good cause why either has not, as set out in Section 12(b)(2). One hundred twenty days after notice, however, late surrender fees begin to be assessed against the bail agent or surety. I.C. § 27-10-2-12(c). The late fees

> must be paid when the bail agent or surety produces the defendant or after the expiration of 365 days, whichever happens first. Id.
>
> The amount of late surrender fees assessed depends on when the bail agent or surety produces the defendant, and the amount ranges from 20% of the face value of the bond after 120 days to 80% of the face value of the bond after 240 days. Id. Although the surety can be released from the bond if the defendant is produced within 365 days, the practical effect of assessing late surrender fees seems to be to reduce the amount of money the surety is entitled to have returned to it. If the defendant is not produced within 365 days, then the court will order forfeited an amount equal to 20% of the face value of the bond. This amount will not be returned to the surety.

810 N.E.2d at 1018.

Notice under Section 12 to both the bondsman and the surety is a condition precedent to the forfeiture of a bond. Accredited Sur. & Cas. Co. v. State, 565 N.E.2d 1131, 1132 (Ind. Ct. App. 1991); accord Frontier Ins. Co. v. State, 769 N.E.2d 654, 657 (Ind. Ct. App. 2002). Accordingly, it is a defense to the imposition of late surrender fees that the court failed to provide notice to the bail agent and surety that an order has issued for the surrender of the defendant. Boles, 810 N.E.2d at 1022, n.2. The purpose of the notice requirement is to afford the bail agent or surety notice of the forfeiture and the opportunity to produce the defendant in court, pay costs, and satisfy the court that the defendant's absence was not with their consent or connivance and thus save themselves from loss. Starkie v. State, 113 Ind. App. 589, 49 N.E.2d 968, 970 (1943). As the forfeiture statute is "somewhat drastic in its operation," the full measure of protection according to its terms must be afforded to sureties. Id.

Here, the clerk mailed a copy of the May 15, 1998 order, via certified mail, to McClelland and to Frontier. Frontier had provided three addresses associated with the bond; specifically, the face of the bond listed a New York address, the text of the bond listed an Indiana address, and the attached power of attorney listed a California address. The notice was sent to the California address. A copy of a certified mail receipt evidencing delivery of the notice, signed by a Frontier courier, was returned to the court clerk. Frontier contends that this is insufficient to satisfy the statutory requirement that notice shall be mailed to "each of the addresses indicated in the bonds." Ind. Code § 27-10-2-12.

Frontier relies upon the language of an earlier case in which Frontier was also the appellant:

> [T]he State asserts that the trial court substantially complied with the notice requirements of the bond forfeiture statute because notice to McClelland at Frontier's Indiana address served as notice to both McClelland and Frontier. However, as the correspondence was addressed to McClelland and not Frontier, it cannot be assumed that Frontier opened that correspondence and received a copy of the notice. Further, because the correspondence was sent to an address other than the one indicated for McClelland in the bond, it cannot be assumed that he received a copy of the notice. Further, we do not find that notice to Frontier's office in California, rather than Indiana, is sufficient to satisfy the statutory requirements. The bond forfeiture statute makes clear that notice must be sent to the addresses indicated in the bond. This is a condition precedent for bond forfeiture and reflects legislative intent that sureties receive a full measure of protection of their property rights before a judgment may be entered against them.

Frontier, 769 N.E.2d at 658.

The State nonetheless argues that the trial court here properly found that the power-of-attorney form was part of the bond. The State points to the Frontier Court's observation, in a

footnote, that the State had not "argue[d] that the address on the power of attorney attachment was a part of the bond such that notice to Frontier at either address (California or Columbia City) would suffice to meet the requirements of the bond forfeiture statute." Frontier, 769 N.E.2d 657, n.1. However, notwithstanding the observation, the Frontier Court did not decide or suggest that the argument, if presented, would have been dispositive.

We are now squarely presented with that question. A statute is itself the best evidence of legislative intent and we strive to give the words in the statute their plain and ordinary meaning. State v. American Family Voices, Inc., 898 N.E.2d 293, 297 (Ind. 2008), reh'g denied. The plain meaning of the statute, if it has one, must be given effect. Id. When the word "shall" appears in a statute, it is construed as mandatory rather than discretionary unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning. Boles, 810 N.E.2d at 1019.

Here, the relevant statute provides that the clerk shall mail notice to the bond agent and the surety at each of the addresses indicated in the bonds. The address for Frontier preprinted on the face of the bond form is 510 Branch Court, Columbia City, Indiana.[4] This is the address in the bond. With reference to an attached document, the clerk mailed notice to California, where it was received by a courier. Although this is arguably "substantial compliance," it falls short of "the full measure of protection afforded to sureties" by our statutory scheme. Starkie, 49 N.E.2d at 970.

[4] This is immediately followed by a handwritten address for McClelland.

Because the trial court clerk failed to send the required notice to Frontier's address listed in the bond, the statutory condition precedent to accomplish bond forfeiture and the imposition of late surrender fees was not satisfied. As such, the trial court erred in its judgment of forfeiture and the imposition of late surrender fees.

Reversed.

FRIEDLANDER, J., and BROWN, J., concur.