Affirmed and Majority and Dissenting Opinions filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00090-CR

WILLIAM WIENER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 7
Harris County, Texas
Trial Court Cause No. 98-27637A

M A J O R I T Y O P I N I O N

William Wiener appeals the county criminal court's dismissal of his appeal of a justice court misdemeanor conviction on the grounds that: (1) his appeal bond was timely; (2) he made a bona fide attempt to appeal; and (3) if his appeal bond was defective, the trial court should have granted permission to amend it. We affirm.

Background

After running unsuccessfully for a position on Houston's city council, appellant was charged with failing to timely file a campaign finance report, a Class C misdemeanor. *See* TEX. ELEC. CODE ANN. §§ 254.041, 254.064 (Vernon Supp. 2000). On March 16, 1998, after a jury trial, appellant was found guilty

and assessed a fine of $341.67. On March 19, three days after the judgment, appellant made a cash payment to the clerk of the justice court, in the amount of $765.84, approximately twice the amount of the fine and court costs. This payment was noted in the clerk's record as a cash bond under appellant's case number, and appellant received a receipt which also indicated the money had been paid as a bond.

On April 2, appellant signed and filed an appeal bond for $765.84 with the clerk of the justice court.[1] The State filed a motion to remand the case to the justice court because appellant had not timely filed an appeal bond. The county court granted the State's motion, dismissed appellant's appeal, and ordered that the previous judgment of the justice court be enforced. Appellant asserts four points of error, two of which contend that the county court erred in dismissing his appeal because the cash paid to the justice court clerk was sufficient to constitute an appeal bond and thus, his appeal was timely filed. Alternatively, appellant contends that if the cash was not a sufficient appeal bond, then he should have been allowed to amend it under the "bona-fide-attempt-to-appeal" doctrine or Article 44.15, Texas Code of Criminal Procedure.

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[1] The appeal bond filed on April 2nd contained the following language:

> WHEREAS, in the above numbered and entitled cause [the appellant], was on the 16 day of March, A.D. 1998, convicted on a complaint charging him with a misdemeanor . . . and his punishment assessed at a fine of 341.67 Dollars and cost of said prosecution and from which judgment [the appellant] has given notice of appeal and has appealed to the County Court at Law . . . .
>
> NOW THEREFORE, we [appellant] the said defendant as principal, and [appellant] and James Matthews as sureties do hereby acknowledge ourselves jointly and severally bound to the State of Texas in the penal sum of 765.84 Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and legal representatives, CONDITIONED, that [the appellant] shall well and truly make his personal appearance before the said County Court at Law . . . INSTANTER and from day to day and term to term and answer in said cause on trial in said Court.

Cash Deposit as Effective Appeal Bond

An appeal to a county court from a municipal or justice court is by a trial *de novo*. *See* TEX. CODE CRIM. PROC. ANN. art. 44.17 (Vernon Supp. 2000). Such appeals are governed by articles 44.13 through 44.20 of the Texas Code of Criminal Procedure.[2] An appeal under these provisions is not perfected by filing a notice of appeal, but by filing an appeal bond in the justice or municipal court not later than the tenth day after the date the judgment was entered. *See id*. art. 44.14(a), (c) (Vernon Supp. 1999). The appeal bond is an appearance bond that may be forfeited if the defendant fails to appear personally. *See Xydias v. State*, 45 Tex. Crim. 422, 76 S.W. 761 (1903); *Anderson v. State*, 74 Tex. Crim. 67, 166 S.W. 1164 (1914).

To be sufficient, an appeal bond must recite the cause in which the defendant was convicted and that he has appealed, and it must be conditioned on the defendant personally appearing before the court. *See* TEX. CODE CRIM. PROC. ANN. art. 44.13(d); *Smith v. State*, 45 Tex. Crim. 567, 78 S.W. 937 (1904); *Whitcomb v. State*, 80 Tex. Crim. 446, 190 S.W. 484 (1916); *Scarborough v. State*, 20 S.W. 584, 584 (Tex. Crim. App. 1892). Also, the appellant and each of his sureties must sign the bond. *See Scarborough*, 20 S.W. at 584. The filing of a timely, proper appellate bond is essential to perfect an appeal from a municipal or justice court. *See Lopez v. State*, 649 S.W.2d 165, 166 (Tex. App.–El Paso 1983, no pet.). Thus, the appeals court is to examine the record for a timely filed appeal bond and if one has not been timely filed, the appeal court does not have jurisdiction over the case and must remand it to the justice or municipal court for execution of the sentence. *See id*. art. 44.14(b); *Cuellar v. Cardenas*, 972 S.W.2d 826, 826 (Tex. App.–Corpus Christi 1998, no pet.).[3]

Appellant contends that the information contained in the court's records and his receipt pertaining to his cash deposit reflect any necessary information to suffice as an appeal bond. However, an appeal

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[2] Effective September 1, 1999, former articles 44.13 and 44.14 were renumbered articles 45.0425 and 45.0426, respectively, with portions of former article 44.13 deleted.

[3] The amount of both appellant's cash deposit and his subsequent appeal bond was twice the amount of the fine, plus court costs. *See id.* art. 44.13(b),(c). The sufficiency of this amount is not disputed in this case.

bond must meet the requisites set forth under article 44.13(d).[4] The cash deposit in this case was not conditioned on appellant making a personal appearance in the appeal court or paying the costs of the appeal; nor was it signed by appellant or any surety. *See id*. art. 44.13(d); *Ex parte Wells*, 146 Tex. Crim. 322, 175 S.W.2d 76 (1943).[5] Therefore, the cash deposit is not sufficient as an appeal bond under article 44.13(d), and appellant's first and third points of error are overruled.[6]

Right to Amend

Appellant also argues that his cash deposit should have been treated as a defective bond which he was entitled to amend under article 44.15[7] or the bona-fide-attempt-to-appeal doctrine.

In civil cases, the bona-fide-attempt-to-appeal doctrine provides that if an instrument is filed by an appellant in a bona fide attempt to invoke appellate court jurisdiction, and the instrument is defective in some manner, the court of appeals must allow the appellant to amend it or refile the instrument to perfect the appeal.[8] Appellant argues for extension of this doctrine to the criminal context, asserting that the "may

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4 *See Ex parte Wells*, 146 Tex. Crim. 322, 175 S.W.2d 76 (1943) (concluding that the appeal bond was invalid, therefore the county court lacked jurisdiction and dismissal was proper); *Martin v. State*, 44 Tex. Crim. 197, 69 S.W. 508 (1902) (finding that because the appeal bond failed to meet the statutory requirements in effect at the time the defendant prosecuted his appeal, the county court was without jurisdiction).

5 Unlike other rules involving filing of bonds, the rules governing perfection of appeals from justice and municipal courts do not allow cash to be deposited in lieu of a bond. *Compare* TEX.CODE CRIM. PROC. ANN. arts. 44.13, 44.14 (Vernon Supp. 2000) *with* TEX. CODE CRIM. PROC. ANN. art. 17.02 (Vernon 1977) (providing that, in lieu of having sureties, an accused may deposit cash with the court) *and* TEX. R. APP. P. 24.1(c) (same).

6 *See Walker v. State*, 129 S.W. 369 (Tex. Crim. App. 1910) (finding dismissal of the appeal appropriate because the recognizance was "so wholly lacking in the essentials required by law as to constitute practically no recognizance at all").

7 *See* TEX. CODE CRIM. PROC. ANN. art. 44.15 (Whenever an appeal is taken from any state court by filing a timely bond, if the appeal court determines that such bond is defective in form or substance, the court *may* allow the appellant to amend the bond).

8 *See Grand Prairie Indep. Sch. Dist. v. Southern Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991); *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *see also* TEX. R. APP. P. 44.3 (providing that a court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities).

allow" language of article 44.15 should be construed as "must allow" similar to the interpretation given to former Texas Rule of Appellate Procedure 46(f).[9] However, the Court of Criminal Appeals has expressly rejected the argument that the civil bona-fide-attempt-to-appeal doctrine should be applied to allow appellants to amend untimely or defective notices of appeal in criminal cases. *See Olivo v. State*, 918 S.W.2d 519, 521, 524-25 (Tex. Crim. App. 1996) (noting the differences between civil and criminal cases in the attachment of jurisdiction and stating "[i]n criminal cases, '[j]urisdiction cannot be 'substantially' invoked; it either attaches or it does not.'"). Because the statutory provisions at issue in this case, articles 44.13 through 44.17, also govern the attachment of jurisdiction, the rationale of *Olivo* suggests that article 44.15 applies only to instruments purporting to meet some fundamental characteristics of a bond. Because the cash deposit in this case was not conditioned on any obligation by appellant to appear, pay appeal costs, or ake other action, it does not reach the threshold to be characterized as a bond at all, even a defective one. Moreover, its fundamental character as not being a bond was not changed or affected by the cash deposit being referred to as a bond in the clerk's record. Therefore, the cash deposit was not sufficient either to perfect the appeal or invoke any right to amend. Because an appropriate appeal bond was not filed until April 2, more than ten days after judgment was entered, the county court was without jurisdiction and had no choice but to remand the case for execution of the sentence. *See id.* art. 44.14(b); *Ex parte Wells*, 175 S.W.2d at 77. Accordingly, appellant's second and fourth points of error are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

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[9] *See* TEX. R. APP. P. 46(f) (providing in part: "On motion to dismiss an appeal . . . for a defect of substance or form in any bond or deposit given as security for costs, the appellate court *may* allow the filing of a new bond . . . .); *Grand Prairie*, 813 S.W.2d at 500 (noting that previous Texas Rule of Appellate Procedure 46(f) permitted appellants to amend appeal bonds and cash deposits in lieu of bonds).

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).

Affirmed and Majority and Dissenting Opinions and filed May 25, 2000.

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WILLIAM WIENER, Appellant

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D I S S E N T I N G O P I N I O N

I dissent from the portion of the majority's opinion denying appellant the right to amend under article 44.15. The majority asserts that "article 44.15 applies only to instruments purporting to meet some of the fundamental characteristics of a bond." I do not disagree with this statement, however, I disagree with the holding that "[b]ecause the cash deposit in this case was not conditioned on any obligation by appellant to appear or take other action, it does not reach the threshold to be characterized as a bond at all, even a defective one."

In reaching this conclusion, the majority minimizes or overlooks significant attributes of the instrument, as well as the underlying transaction,[1] that invest it with "some of the fundamental characteristics of a bond." Three days after appellant was found guilty and fined, he paid the clerk of the court, for the sole purpose of perfecting his appeal, double the amount of his fine and court costs. Not coincidentally, this was the bond amount required by the code of criminal procedure to secure the State's interest in having him appear for his trial de novo, and as security for costs of the appeal. *See* TEX. CODE CRIM. PROC. ANN., arts. 44.13, 44.16 (bond shall not be less than double the amount of fine and costs) (repealed). The record unequivocally shows that both appellant and the clerk intended this transaction to perfect the appeal by putting appellant's money at risk on condition that he appear in the higher court. The transaction was thus memorialized in an instrument in which the clerk included the amount of the bond, the style of the case, case number, and labeled it "BOND." Clearly, then, all the evidence points to this instrument as a bond, albeit a defective one.[2]

The majority's concern with the absence of obligatory language should not necessarily preclude a finding that the instrument is a bond within the contemplation of article 44.15. This statute specifically allows us to permit appellant to cure a defect of substance. Black's Law Dictionary defines "substance," in part, as "Essence; the material or essential part of a thing. . . . That which is essential." BLACK'S LAW DICTIONARY 1428 (6th ed. 1990). Presumably, then, where it is readily apparent from the instrument as well as the circumstances of its

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[1] I would hold the information contained within the four corners of the instrument is sufficient for us to consider it a bond for purpose of determining whether to allow an amendment under article 44.15. But because article 44.15 states we "may" allow an amendment, I believe we are vested with some discretion to consider the undisputed underlying facts within the record in order to avoid a harsh and unjust result. *Cf. United States v. Rogers*, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983) (the word "may" in a statute usually implies some degree of discretion).

[2] The majority does not address in its analysis of the instrument the significance of the cash deposit, the obvious purpose of it, and summarily dismisses the document itself, stating that "its fundamental character of not being a bond was not changed or affected by the cash being referred to as a bond in the clerk's record."

execution that the instrument is intended to be a bond, article 44.15 would allow an amendment even where an essential element is missing, such as the obligatory language that is absent in this case.[3]

In enacting a statute, it is presumed that a just and reasonable result is intended. *See* TEX. GOV'T CODE ANN. § 311.023(3) (Vernon Supp. 2000). In view of this, it is difficult to accept that the legislature would have intended the unduly harsh result that appellant's earnest attempt to appeal would be turned away. Despite appellant's efforts, the bond amount he posted, and his reliance on the document issued by the clerk being what it said it was, the majority refuses to acknowledge the "BOND" issued by the clerk as even a defective bond. Though the controlling statute explicitly allows us to forgive technical errors and even more serious errors of substance, we deny appellant his day in court by way of an hyper-technical, form-over-substance argument, that trivializes the right to appeal from Justice court. The majority opinion today stands in sharp contrast to the opinion of this very court which wistfully looked away from the constitutional requirement that a Justice of the Peace to file her anti-bribery statement. *See Soderman v State*, 915 S.W.2d 605, 612 (Tex App.–Houston [14th Dist.] 1996, pet. ref'd, untimely filed). In *Soderman* this court held: "we find no basis to conclude that the mere failure to submit these written statements, when the oaths themselves have been taken, renders the oath invalid." *Id*. Seems the sauce is only saved for the goose.

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Don Wittig

Justice

Judgment rendered and Opinion filed May 25, 2000.

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[3] As a practical matter, appellant's appearance was guaranteed because he had deposited twice the amount of his fine with the court, thus he had nothing to gain and much to lose by failing to appear. As such, his formal guarantee in this case was likely of no real significance.

Panel consists of Justices Amidei, Edelman, and Wittig.

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