Affirmed and Opinion filed June 8, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00324-CR

INTERNATIONAL FIDELITY INSURANCE COMPANY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 713506-A

O P I N I O N

In this bond forfeiture proceeding, International Fidelity Insurance Company ("IFI") appeals a judgment entered in favor of the State on the grounds that the trial court was without jurisdiction to act and that a previous mandamus order compelling the trial court to enter the judgment was improper. We affirm.

Background

Yenith Reales was arrested and charged with committing a felony in Harris County. On March 27, 1996, Reales, as principal, and IFI, as surety, executed a bail bond in the amount of $50,000 for Reales's release from custody. On April 24, Reales, her attorney, and an IFI representative appeared in court and

the IFI representative attempted to surrender Reales on the bond.[1] After some discussion, the trial court suggested that IFI and Reales take a day to "work things out" and return the next day. However, on April 25, Reales failed to appear,[2] and the trial judge signed IFI's affidavit and order of surrender, orally revoked the bond, and issued an alias capias for Reales's arrest. Reales failed to appear for a required hearing on October 17, 1996, and on October 18, the trial court signed a judgment nisi forfeiting her bond.[3] On that date, IFI filed its answer asserting a general denial and the affirmative defense of equitable remittitur.[4]

When the bond forfeiture case was tried, IFI claimed it was not liable because the trial court had revoked the bond on April 25, 1996. The State claimed that IFI was still liable because the trial court could not revoke the bond without Reales being returned to custody. On October 3, 1997, the trial court entered a final judgment (the "first judgment") exonerating IFI based on the prior revocation of its bond, and holding only Reales liable on the bond. On October 30, the State filed a writ of mandamus in this court which was conditionally granted, directing the trial court to vacate the take-nothing judgment in favor of IFI and to enter judgment against IFI for the full amount of the bond (the "mandamus order"). *See In re John B. Holmes*, No.14-97-01219-CV, 1998 Tex. App. at *7 (Houston [14th Dist.] January 15, 1998, orig. proceeding). By letter dated February 25, 1998, the Court of Criminal Appeals denied IFI leave to file an application for writ of mandamus without written order. On February 17, 1998, the trial court vacated

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1 The April 25th affidavit of surrender indicated that IFI wished to surrender Reales because she had moved without notifying IFI of her whereabouts.

2 Although both parties have listed Reales as a party to this appeal, the record reflects that Reales is still a fugitive and did not file a notice of appeal.

3 A judgment nisi is a judicial declaration of the forfeiture of a bond; once established, it is prima facie proof that the statutory requirements of a bond forfeiture proceeding have been complied with. *See Tocher v. State*, 517 S.W.2d 299, 301 (Tex. Crim. App. 1975).

4 When a forfeiture has been declared on a bond, the case is docketed on the scire facias or on the civil docket in the name of the State of Texas, as plaintiff, and the principal and his sureties, if any, as defendants, and the proceedings are governed by the same rules as govern other civil suits. *See* TEX. CODE CRIM. PROC. ANN. art. 22.10 (Vernon 1989). After forfeiture of the bond, if the sureties have been duly notified, they may answer in writing and show cause why the defendant did not appear. *See id.* art. 22.10.

the first judgment and entered a judgment (the "second judgment") in favor of the State and against Reales and IFI for the full amount of the bond, plus court costs. It is from this judgment that IFI now appeals.

Jurisdiction of the Trial Court

IFI's first two points of error contend that the trial court lacked jurisdiction to vacate the first judgment and enter the second judgment, in accordance with the mandamus order, because the court's plenary power had since expired.[5]

Law of the Case

The law of the case doctrine provides that when an appellate court has determined questions of law in a prior appeal, those determinations will generally govern a case throughout all of its subsequent stages. *See Bell v. State*, 938 S.W.2d 35, 47 (Tex. Crim. App. 1996); *Ware v. State*, 736 S.W.2d 700, 701 (Tex. Crim. App. 1987). The doctrine applies when a court of appeals is asked to decide a matter that it has itself previously determined. *See Smith v. State*, 740 S.W.2d 503, 512 (Tex. App–Dallas 1987), *vacated and remanded on other grounds*, 761 S.W.2d 22 (Tex. Crim. App. 1988). The matter at issue must be the same question of law as was previously determined, and the matter must have actually been resolved in the first appeal. *See Ware*, 736 S.W.2d at 701. The doctrine applies to implicit holdings, *i.e.*, conclusions that are logically necessary implications of positions articulated by the court, as

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5 On October 8, 1997, the State filed a motion to modify the judgment which was denied by the trial court on October 15, 1997. IFI argues that, if governed by the rules of civil procedure, then the State's motion to modify extended the trial court's plenary power to November 14, 1997, thirty days after the motion was denied by the trial court. Alternatively, if construed as a purely criminal case, and assuming the State had a right to file the motion to modify, then the trial court's plenary power expired on December 17, 1997, seventy-five days after the first judgment was signed. Further, IFI argues that because a bail forfeiture proceeding is a criminal proceeding, the State should not have been able to avail itself of the substantive remedies available through a civil motion to modify the judgment, at least insofar as such a motion extends the trial court's jurisdiction. Although bond forfeiture cases are criminal in nature, they are governed by the rules governing civil suits. *See* TEX. CODE CRIM. PROC. ANN. art. 22.10 (Vernon 1989); *see also State ex rel. Rodriguez v. Marquez*, 4 S.W.3d 227, 228 (Tex. Crim. App. 1999); *State ex rel. Vance v. Routt*, 571 S.W.2d 903, 907 (Tex. Crim. App. 1978). However, because identifying the date on which the court's plenary power expired is not essential to the disposition of this appeal, we do not address IFI's contention regarding this matter.

well as explicit ones. *See Alberti v. Klevenhagen*, 46 F.3d 1347, 1351 n.1 (5th Cir. 1995).[6] Appellate courts have discretion to depart from the law of the case doctrine in exceptional or urgent situations. *See LeBlanc v. State*, 826 S.W.2d 640, 644 (Tex. App.–Houston [14th Dist.] 1992, pet. ref'd).

In this case, the State contended in the mandamus proceeding that the trial judge had exceeded his authority in signing a take-nothing judgment in favor of IFI and against the State, thereby exonerating IFI, because Reales was never returned to in custody. In its response, IFI listed, among other reasons to deny mandamus, that the trial judge no longer had jurisdiction to modify or change the judgment and therefore, mandamus was not available to compel him to do so. In its unpublished opinion, this court expressly determined that the trial judge had no authority to revoke the bond, had no authority to exonerate IFI under article 17.09 or 22.13 of the Code of Criminal Procedure, and thus had a ministerial duty to enter judgment against IFI on the bond.[7] *See In re John Holmes*, at *3-6. Accordingly, this court directed the trial court to vacate the first judgment and enter judgment against IFI for the full amount of the bond, and the trial court complied. *See id.* at *7.

Although this court's mandamus opinion did not expressly address the argument that the trial court lacked jurisdiction to change or modify it's judgment, the power of the trial court to do so at the direction of the appellate court was a "logically necessary implication" of the position taken by the appellate court. *See Alberti*, 46 F.3rd at 1351; TEX. R. APP. P. 47.1. That is, it would have been a meaningless act for this court to have granted the mandamus had it not concluded that the trial court had the power to follow

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6 *See generally* 43 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 43.406 (1995).

7 Mandamus is an extraordinary remedy. *See Rivercenter Assocs. V. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993); *In re Xeller*, 6 S.W.3d 618, 624 (Tex. App.–Houston [14th Dist.] 1999, no pet. h.). To be entitled to mandamus relief in a criminal matter, a relator must show: (1) that the act he demands the trial court to perform is a ministerial one, and (2) he has no other adequate remedy at law. *See Rodriguez*, 4 S.W.3d at 228. An act is ministerial "when the law clearly spells out the duty to be performed . . . with such certainty that nothing is left to the exercise of discretion or judgment." *State ex rel. Healey v. McMeans*, 884 S.W.2d 772, 774 (Tex. Crim. App. 1994). Further, a court may be directed by mandamus to enter a *particular* judgment if that judgment is the only proper one under the circumstances. *See Vance*, 571 S.W.2d at 907.

its directive. Therefore, we apply the law of the case doctrine to these points of error and conclude that we have no discretion to reexamine the issues decided in the mandamus case.[8]

Plenary Power

Even if the law of the case doctrine were inapplicable in this instance, we do not agree that the trial court lacked jurisdiction to take the action specified in the mandamus. After final judgment is entered, a trial court retains "plenary power" to set aside, modify, or amend its judgment for a period of time, as determined under rule 329b of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 329b. After expiration of the trial court's plenary power, a judgment can generally be set aside *by the trial court* only by bill of review or judgment nunc pro tunc. *See id.* 329b(f). This limitation on trial courts' power to change their judgments is what enables those judgments to achieve the finality they need to be appealed and ultimately enforced. *See* David Peeples, *Trial Court Jurisdiction and Control over Judgments*, 17 BAYLOR L. REV. 367, 368 (1986). Without such a limitation, judgments would remain subject to change by trial courts and could therefore not effect a resolution of disputes. *See id.*

Viewing the concept of plenary power in the context of its purpose to achieve finality of judgments, we do not perceive the limit on a trial court's plenary power as in any way restricting the power of a higher court to review and take appropriate action with regard to trial court judgments. IFI cites various cases which it claims acknowledge that once a court's plenary power has elapsed, it has no authority to alter its judgment, and an order from a higher court on subsequent review does not reinvest the lower court with plenary power. However, two of these cases are distinguishable from this case in that they address only the validity of court actions taken after the expiration of the applicable plenary power and not any actions taken pursuant to the direction of a higher court.[9] The two remaining cases merely hold that once a trial

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[8] Nor do we address IFI's argument regarding the State's inability to appeal a bond forfeiture as it was also addressed in this court's mandamus opinion. *See In re John B. Holmes*, No.14-97-01219-CV, 1998 Tex. App. at *3-4 (Houston [14th Dist.] January 15, 1998, pet. denied).

[9] *See Garza v. State*, 896 S.W.2d 192 (Tex. Crim. App. 1995)(concluding that the court of appeals had no jurisdiction to act outside of the fifteen day period provided to review its opinion once a petition for discretionary review was filed under Texas Rules of Appellate Procedure 101); *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648 (Tex. 1987)(holding that the trial court had no

court dismisses an indictment, jurisdiction is lost and can only be re-obtained by securing a new indictment, not by reinstating the dismissed case.[10] Obviously, the case at bar is distinguishable in that the first judgment did not dismiss the case. Therefore, IFI has cited no authority which supports its assertion that a trial court cannot act at the direction of a higher court after its plenary power has expired. Further, if a higher court could not direct a lower court to act after the lower court's initial plenary power period had lapsed, then actions by the higher court would, in effect, also be limited by the period of the lower court's plenary power. Because we find no authority or logic supporting such a contention, we overrule IFI's first and second points of error.

Propriety of Mandamus Relief

In points of error three and four, IFI contends that the mandamus relief was improper because: (1) the trial court had no clear duty to act in the manner compelled; and (2) the trial court's original judgment had a valid basis in reason and law. IFI's arguments in support of these points of error are the same as those made in the mandamus action. Indeed, the text of this portion of IFI's brief in this appeal is the same, almost verbatim, as that stated in its response to the petition for mandamus. IFI asserts that this court did not address these issues in the mandamus action. However, the trial court's duty to render judgment against IFI was the focus of the mandamus opinion. Whether or not the mandamus opinion expressly addressed these arguments, it was required to address every issue raised and necessary to the final disposition of the case. *See* TEX. R. APP. P. 47.1. The opinion specifically addressed the propriety of issuing the mandamus and concluded that the State had sufficiently shown it's right to mandamus relief. *See In re John Holmes*, at *3-6. Because IFI is arguing the same issues of law in these points of error as were determined in the mandamus action, the law of the case doctrine forecloses our reconsideration of them. Accordingly, IFI's third and fourth points of error are overruled, and the judgment of the trial court

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jurisdiction to entertain a motion to unseal records after its plenary power over the judgment sealing the records had expired).

10 *See State ex. rel. Holmes v. Denson*, 671 S.W.2d 896, 898-99 (Tex. Crim. App. 1984) (orig. proceeding) (denying mandamus to reinstate dismissed case); *Garcia v. Dial*, 596 S.W.2d 524, 528-30 (Tex. Crim. App. 1980) (granting mandamus to set aside an order reinstating a dismissed case).

is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed June 8, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig (J. Wittig dissents without an opinion).

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