



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 15, 2021

The Honorable Chris Taylor
Tom Green County Attorney
122 West Harris
San Angelo, Texas 76903

Opinion No. KP-0392

Re: Whether a court has discretion to accept an affidavit of surety to surrender a principal and to require a bondsman to show cause for the surrender (RQ-0410-KP)

Dear Mr. Taylor:

You ask whether a court has discretion to accept an affidavit of surety to surrender a principal and to require a bondsman to show cause for the surrender.¹ Your question concerns the practice of “going off bond,” by which a surety on a bail bond surrenders the accused, who is the bond principal, thereby relieving the surety of the bond’s liability. *See generally Maya v. State*, 126 S.W.3d 581, 583–84 (Tex. App.—Texarkana 2004, no pet.) (discussing affidavits to “go off” bond). You explain that the “Tom Green County Treasurer has been receiving increasing complaints that Bondsmen [are] going off bonds just because someone fell behind on paying their bill.” Request Letter at 1. You note that “this is not the reason” stated on the affidavit. *Id.* You state that judges at all levels are telling you that “they cannot deny a go off bond.” *Id.*

I. Statutory Context

A. Occupations Code section 1704.207

In a county with a population of 110,000 or more, chapter 1704 of the Occupations Code governs bail bond sureties.² *See* TEX. OCC. CODE § 1704.002(1); *see also id.* § 1704.002(2) (applying chapter to counties with population less than 110,000 who choose to create a bail bond board). Chapter 1704 defines a “bail bond” as “a cash deposit, or similar deposit or written undertaking, or a bond or other security, given to guarantee the appearance of a defendant in a criminal case.” *Id.* § 1704.001(1). A “bail bond surety” is a “person who: (A) executes a bail bond as a surety or cosurety for another person; or (B) for compensation deposits cash to ensure

¹*See* Letter from Honorable Chris Taylor, Tom Green Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (June 3, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0410KP.pdf> (“Request Letter”).

²Tom Green County’s population is 119,200. *See* <https://www.census.gov/quickfacts/tomgreencountytexas>.

the appearance in court of a person accused of a crime.” *Id.* § 1704.001(2). Chapter 1704 provides for a county bail bond board to supervise and regulate the bonding business in the county. *See id.* § 1704.101(3).

Chapter 1704 expressly authorizes the surrender of a principal in section 1704.207. *See id.* § 1704.207. Section 1704.207 requires the surety to notify the principal or his or her attorney of the surety’s intention to surrender the principal. *Id.* § 1704.207(a)(1). It also requires the surety to file an affidavit with the court or magistrate before which the prosecution is pending that includes a statement of the surety’s intention to surrender the principal and “the reason for the intended surrender.” *Id.* § 1704.207(a)(2). Section 1704.207 does not include a list of reasons justifying the surrender. *See id.* § 1704.207.

Section 1704.207 contains no language authorizing the court to refuse to accept an affidavit that otherwise satisfies the statutory requirements. *See id.* Nor does it contain language authorizing the court to deny the surrender. *See id.* Instead, it allows a principal who believes the surrender was without reasonable cause to contest to the surrender. *Id.* § 1704.207(b) (providing that when the defendant, the defendant’s attorney, or an attorney for the State “determines that a reason for the surrender was without reasonable cause” they may contest the surrender before the court). In such a contest, “[i]f the court finds that a contested surrender was without reasonable cause, the court may require the person who executed the bond to refund to the principal all or part of the fees paid for execution of the bond.” *Id.* § 1704.207(c).

B. Code of Criminal Procedure article 17.19

Beyond the regulation of sureties, chapter 17 of the Code of Criminal Procedure governs bail in all criminal proceedings. *See TEX. CODE CRIM. PROC. arts. 17.01–.50; see also id.* art. 1.02 (applying procedures in the Code of Criminal Procedure to all criminal proceedings). Two provisions provide for the surrender of a principal.³ *See Pfeil v. State*, 40 S.W.2d 120, 123 (Tex. Crim. App. 1931) (recognizing two statutory provisions allowing for a surety to surrender a principal); *Seneca Ins. Co., Inc. v. Ross*, 507 S.W.3d 798, 802 (Tex. App.—El Paso 2015, no pet.) (describing generally the two ways a surety can end its financial liability on the bond).

Article 17.19 authorizes a surety “desiring to surrender his principal” to file an affidavit of the surety’s intention to make a surrender in the court where the prosecution is pending in order to obtain a *capias*⁴ or warrant for the return of the principal to custody. TEX. CODE CRIM. PROC. art. 17.19(a); *Apodaca v. State*, 493 S.W.2d 859, 860 (Tex. Crim. App. 1973) (recognizing that the filing of the affidavit and issuance of the warrant does not discharge the surety until the principal is in custody). Under article 17.19, the surety must file an affidavit similar to the affidavit required

³Article 17.16 authorizes a surety to discharge his or her liability on a bond by surrendering the accused into custody or informing the sheriff that the accused is in custody elsewhere. *See TEX. CODE CRIM. PROC. art. 17.16.* Because you tell us the complaints you received involve the late payment of a bill, we focus on article 17.19, which does not involve the circumstances required in article 17.16.

⁴A *capias* is a writ that is “(1) issued by a judge of the court having jurisdiction of a case after commitment or bail and before trial, or by a clerk at the direction of the judge;” and “(2) directed ‘To any peace officer of the State of Texas,’ commanding the officer to arrest a person accused of an offense and bring the arrested person before that court immediately or on a day or at a term stated in the writ.” *Id.* art. 23.01.

by Occupations Code section 1704.207. Compare TEX. CODE CRIM. PROC. art 17.19(a)(1), with TEX. OCC. CODE § 1704.207(a)(2). The surety must state in the affidavit “the cause for the surrender.” TEX. CODE CRIM. PROC. art. 17.19(a)(5). Like section 1704.207, article 17.19 does not contain a list of reasons sufficient to surrender the principal. See *id.* art. 17.19. Article 17.19 requires that the court shall issue the *capias* “if the court finds that there is cause for the surety to surrender” the principal. *Id.* art. 17.19(b) (providing similarly that in a proceeding pending before a magistrate, the magistrate shall issue a warrant for the arrest of the principal if “there is cause”).

II. Texas Court of Criminal Appeals Decision in *McConathy v. State* and its Progeny

In *McConathy v. State*, 545 S.W.2d 166 (Tex. Crim. App. 1977), the Court of Criminal Appeals concluded that no authority existed “for the trial judge to refuse the issuance of the arrest warrant after the requisite affidavit” to surrender the principal was filed pursuant to article 17.19. *McConathy*, 545 S.W.2d at 168. Though other appellate courts have clarified certain matters relating to the surrender of the principal, we find none that contradicts or disputes the Court of Criminal Appeal’s conclusion in *McConathy*.

Shortly after *McConathy*, the Eastland Court of Appeals recognized that articles 17.16 and 17.19 permitted a “surety to relieve himself of his obligation under the bond at any time, *ex parte*, without any form of hearing.” *Dunn v. Brown*, 584 S.W.2d 535, 537 (Tex. App.—Eastland 1979, no writ). The Texarkana Court of Appeals concluded that the mere filing of an affidavit to go off bond, without any requirement that the affidavit be affirmatively presented for signature or refusal, was insufficient to satisfy the elements of the affirmative defense in article 17.19(b). See *Maya*, 126 S.W.3d at 584; see also TEX. CODE CRIM. PROC. art. 17.19(b) (creating an affirmative defense to liability on a bond that the court or magistrate refused to issue a *capias* or warrant for the arrest of the principal, and after such refusal the principal failed to appear). The Waco Court of Appeals concluded that article 17.19 contained no requirement that the cause required in a surrender affidavit “rise to the level of probable cause.” *Spears v. State*, No. 10-08-00396-CR, 2009 WL 5155573, at *2 (Tex. App.—Waco, Dec. 30, 2009, no pet.) (not designated for publication).

Pursuant to these authorities, a court in receipt of a properly filed surrender affidavit has no discretion to deny the surrender. See *Seneca*, 507 S.W.3d at 802 (stating that “a surety can accomplish a surrender by filing an affidavit in the proper court”); *Robbins v. Roberts*, 833 S.W.2d 619, 621, 623–24 (Tex. App.—Amarillo 1992, no pet.) (allowing an affidavit that contained a factual error to support the surrender, but requiring a refund of the bond premium and noting that the language of section 1704.207’s predecessor provides for a “determination of reasonable cause after the surrender [and that] the trial judge has no authority to refuse the surrender when the surety has submitted the requisite affidavit”).⁵

⁵In *McConathy*, the Court of Criminal Appeals also concluded that “all statutes dealing with the surrender of the principal must be read in light of” section 1704.207’s predecessor statute. *McConathy*, 545 S.W.2d at 168; see also *Hernandez v. State*, 600 S.W.2d 793, 798 (Tex. Crim. App. 1980) (clarifying that *McConathy*’s conclusion is fitting for counties to which chapter 1704 applies), *Robbins*, 833 S.W.2d at 622 (agreeing that the remedy in section 1704.207’s predecessor works in conjunction with the criminal procedure articles). Thus, in a county subject to chapter 1704, section 1704.207’s method to contest the reasonableness of cause in an affidavit filed under section 1704.207 is also the method to challenge cause in an affidavit filed under article 17.19.

S U M M A R Y

Occupations Code subsection 1704.207(a) and Code of Criminal Procedure article 17.19 authorize a bond surety to surrender a principal after filing an affidavit, which among other things, states the cause for the surrender. The Texas Court of Criminal Appeals has determined that these statutory provisions contain no authority for the trial judge to refuse the surety's affidavit to surrender a principal. Instead, the mechanism by which to challenge a surety's reasonable cause is a principal's contest under Occupations Code subsection 1704.207(b).

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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