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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2014AP2515-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMMY LEE BRANCH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order
Denying in Part a Postconviction Motion, Entered in Kenosha
County Circuit Court, the Honorable Faye Flancher,
Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Mr. Branch was arrested and charged with attempted burglary of a restaurant. No money was taken from the restaurant. At the time of his arrest, police seized \$583 in cash that Mr. Branch had on his person. Is Mr. Branch entitled to a return of the \$583 because the money is not contraband or needed for evidence or further investigation?

The circuit court said no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be welcomed if it would be helpful to the court. Publication is not warranted, as this is a fact-specific-case requiring application of established legal principles.

STATEMENT OF THE CASE AND FACTS

On December 21, 2009, a worker at a Shell gas station called 911 because she believed that someone was trying to break into the attached Cousins restaurant. (1:1-2). The first officer to arrive observed an individual running and a car weaving at a high rate of speed alongside the building. The car was stopped, and Mr. Branch was located in a nearby tree and arrested. (1:2). Further investigation revealed that the drive-thru window of the Cousins restaurant had been damaged—there were several small pry marks at the top of the frame and the window was pushed inward by

approximately three inches. A pry tool and screwdriver were located near the building. No money was taken. (1:2).

Mr. Branch was charged with one count of attempted burglary of a building or a dwelling, party to a crime, as a repeater, contrary to Wis. Stat. §§ 943.10(1m)(a), 939.32, 939.05, 939.62(1)(b). (1). A \$5000 cash bond was set. (23:3).

On February 26, 2010, Mr. Branch pled to one count of attempted burglary, party a crime. (28:6-7, 9). In exchange for Mr. Branch's plea, the State agreed to recommend 18 months of probation, restitution in the amount of \$140 for the repair to the drive-thru window, no contact with the victim or co-defendant, and 60 days in the county jail. (28:2-3; *see also*, 34:5-6). At the conclusion of the plea hearing, the court modified the \$5000 cash bond to a \$5000 signature bond and Mr. Branch was released from custody. (28:11-12).

Subsequently, Mr. Branch picked up additional charges elsewhere, including Milwaukee County, Illinois, and Tennessee. (*See, e.g.*, 34:10). On July 9, 2010, the court on the State's motion ordered the \$5000 signature bond forfeited. (8; 30:2; 31:2).

On May 21, 2013, Mr. Branch was sentenced in this case. (34). The Honorable Faye Flancher imposed a prison sentence of four years (2 years initial confinement and 2 years extended supervision). (34:14). The court ordered \$140 in restitution and court costs. (34:15). The court did not impose a fine or the \$250 DNA surcharge. (34:14-15).

At the conclusion of the sentencing hearing, Mr. Branch asked the court to return the \$800 cash that he had on him when he was arrested. (34:16-17). The circuit court replied that the State would check whether the Racine Police Department was holding the money, and also that "[b]efore

any money is released back to you, sir, the victim will be made whole and money will be applied to the court costs in the case and costs of supervision.” (34:17).

On June 26, 2013, the circuit court issued a written order that the “\$1,070 cash” the Racine County Sheriff’s Department seized from Mr. Branch shall be released to the Clerk of Court for Racine County “to be used to satisfy the outstanding court costs and fees, as well as the restitution owed to the victim.” (14; App. 101). The order did not reference any statutes or law. Subsequently, on July 19, 2013, an updated order was entered for “\$583 cash” instead of “\$1070 cash.”¹ (17; App. 102).

Mr. Branch filed a postconviction motion. The postconviction motion sought additional sentence credit, and an order granting the return of his property, the \$583 in cash. (18). The motion asserted that under the return of property statute, Wis. Stat. § 968.20, the cash should be returned because there was no indication from the record that the cash was contraband, evidence, or a dangerous weapon. (18:5-6). The State did not file a response.

A hearing was held. The circuit court, the Honorable Faye Flancher, presiding, granted additional sentence credit. (35:5; 19; 21; App. 107, 110). The circuit court denied Mr. Branch’s request for the return of his property stating:

All right, on the return of property, I will just address that right now. Mr. Branch had a \$5,000 signature bond forfeited, so if there is any money remaining, that is going to the \$5000 signature bond. That’s done...

¹ Mr. Branch does not contest that \$583 in cash is the correct amount.

Again, your request to have any funds returned is denied. Any moneys currently being held will be applied to the \$5000 forfeited signature bond.

(35:3-4, 5; 19; App. 105-106, 107, 110). The State did not take a position on the return of property. Mr. Branch appealed. (22).

RELEVANT STATUTE

Wis. Stat. 968.20 Return of property seized.

(1) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 173.12, 173.21(4), or 968.205,² returned if:

(a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or

(b) All proceedings in which it might be required have been completed....

(1m)(b) If the seized property is a dangerous weapon or ammunition....

(1r)(a) If the seized property is a firearm....

(2) Property not required for evidence or use in further investigation, unless contraband or property covered under sub. (1m) or (1r) or s. 173.12 or 968.205 may be returned by the officer to the person from who it was seized without the requirement of a hearing....

² Wis. Stat. § 173.12, titled “Animal fighting; seizure,” and Wis. Stat. § 173.21, titled “Holding animals for cause,” discuss the return of animals. Wis. Stat. § 968.205, titled “Preservation of certain evidence,” discusses “biological material.”

ARGUMENT

I. Mr. Branch Is Entitled to a Return of the \$583 in Cash Because the Money Was Not Contraband or Needed for Evidence or Further Investigation.

Wisconsin statutes 961.55(3), 973.075(5), and 968.20 all address return of property. However, when the state does not initiate a forfeiture action, as in this case, Wis. Stat. § 968.20 governs. *See generally, State v. Jones*, 226 Wis. 2d 565, 569, 579-82, 594 N.W.2d 738 (1999).

Wis. Stat. § 968.20 allows a person claiming the right to possession of property seized to seek the property's return in the circuit court. The statute directs the circuit court to return seized property to its rightful owner, unless the property is a dangerous weapon belonging to a person who committed a crime, contraband, or property needed for evidence or further investigation. Wis. Stat. § 968.20; *State v. Glass*, 2000 WI App 252, ¶ 7, 239 Wis. 2d 373, 620 N.W.2d 213. The purpose of the statute is "to permit the swift return of seized property to the proper owner when the property is no longer needed by law enforcement personnel." *Id.*

When an interested party seeks the return of property under Wis. Stat. § 968.20, the state must establish by the greater weight of the credible evidence that the property is either contraband or needed as evidence in a case. *Jones*, 226 Wis. 2d 565 at 595.

Interpreting Wis. Stat. § 968.20 presents a question of law that is reviewed *de novo*. *State v. Perez*, 2001 WI 79, ¶ 12, 244 Wis. 2d 582, 628 N.W.2d 820. A trial court's findings of fact will be reviewed under the clearly erroneous standard. *Champeau v. City of Milwaukee*, 2002 WI App 79, ¶ 9, 252 Wis. 2d 604, 642 N.W.2d 634.

In this case, Mr. Branch is entitled to a return of his money. At no point did the State establish that the money was contraband or needed for evidence or further investigation. No allegations were made that any money was taken from the Cousins restaurant.

This case contrasts to *Jones*. In *Jones*, the defendant requested the return of \$1,783 in cash, which was seized, along with various drug paraphernalia, during a search incident to his arrest for operating a motor vehicle while intoxicated. 226 Wis. 2d 565 at 569. The Wisconsin Supreme Court held that the State had met its burden of proving that the money was contraband because “the State established, by the greater weight of the credible evidence, a logical nexus between the money and the drug paraphernalia in Jones’s possession.” *Id.* at 598. At a motion to suppress the evidence hearing, an officer had testified that he found a small scale, six cigarette lighters, three pieces of charred “Chore-boy” scouring pads, and \$1,783 in cash in the defendant’s vehicle. The officer further testified that “Chore-boy” pads are regularly used in a crack pipe for ingesting crack cocaine and that a scale is a common tool that drug dealers use to measure drugs for sale. The wads of cash were also significant: the number of twenties in set totals, the separation of money on the defendant’s body, and the lack of any alternative explanation for the large amount of cash all indicated to the officer that the money was drug related. The defendant presented no evidence to the contrary. *Id.* at 597-98.

Here, the record is devoid of any evidence connecting the money seized from Mr. Branch’s person to a crime. Thus, the State did not meet its burden, and Mr. Branch is entitled to a return of his money.

Moreover, the circuit court did not cite, nor is Mr. Branch aware of, any authority that enables a court to spontaneously order that property seized by the police that is not contraband or evidence be used to pay restitution or court costs and fees. Under the restitution statute, Wis. Stat. § 973.20, a circuit court may order a defendant to return property that does not belong to him or order a set amount of money to be paid for restitution. Similarly, a circuit court can order that a defendant pay certain costs, fees, and surcharges. *See, e.g.* Wis. Stat. §§ 973.06. However, these statutes do not indicate that a circuit court can order that a defendant's property be used to pay restitution or court costs and fees.

In addition, while a circuit court can order that money posted for bail be used to compensate victims, pay costs, or a forfeiture judgment, nothing indicates that a circuit court can order that an individual's seized property can be used to pay a bond forfeiture. Wis. Stat. § 969.13.

Therefore, the \$583 in cash should be returned to Mr. Branch, and the order releasing the cash in its entirety to the Racine County Clerk of Court's office should be vacated.

CONCLUSION

For the reasons stated, Tommy Lee Branch respectfully requests that this Court reverse the order denying in part his postconviction motion and direct the circuit court to enter an order returning the money to Mr. Branch and vacating the order releasing Mr. Branch's money to the Racine County Clerk of Court's office.

Dated this 15th day of January, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,944 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of January, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of January, 2015.

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