State of Wisconsin Court of Appeals District III

State of Wisconsin,
Plaintiff-Respondent,

vs

BRIEF OF DEFENDANT - APPELLANT
Case No. 2021AP001849

Troy Allen Lanning,
Defendant-Appellant.

Appealed from the decision of Burnett County Circuit Court Judge Melissia Mogen

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Statement of Issues Presented

The issue presented is how a change in the statutory language of Wisconsin Statute §961.555(2)(a) affects the ruling in *State v. One 2000 Lincoln Navigator, 2007 WI App 127, 301 Wis. 2d 714, 731 N.W.2d 375*, in conjunction with a pre conviction dismissal of a civil forfeiture action.

Statement of Oral Argument

Defendant - Appellant does not believe oral argument is necessary.

Statement in Regards to publishing

Defendant - Appellant does believe publishing is appropriate to provide a clarification on proper procedure of dismissing pre conviction civil forfeiture cases through both voluntary dismissal by the state or for failure to hold a hearing in the current statutory requirements. This could have a significant effect on the fundamental rights and property interests of both criminal defendants and innocent owners of property subject to civil forfeiture actions.

Statement of the Case

Troy Lanning is charged with various felonies in the Burnett County Circuit Court under Case Number 20CF153 for Possession with intent to distribute Methamphetamine, maintain a drug trafficking place, and possession of drug paraphernalia. (R at 2, Doc. 2 of Circuit Court Record). There are two accompanying civil cases, 2020CV47 and 2020CV55 which when filed sought forfeiture of Troy Lanning's improved real property in the town of Siren, Wisconsin. During the pendency of the case the State of Wisconsin and Defense counsel reached a plea agreement to globally resolve the case. Part and parcel to this plea agreement was an agreement to dismiss civil forfeiture action in case number 20CV55 with prejudice. (R at 7, Doc. 28 of Circuit Court Record). The plea was rejected by Hon. Judge Melissia Mogen citing insufficiency of the parties to provide adequate basis and requested additional comment. (R at 15, Document 21 of Circuit Court Record in Case No. 20CV55).

From the outset of the case the District Attorney was not going to file a forfeiture action against the real property of Troy Lanning worth approximately $75,000.00. The district attorney advised the assistant district attorney of his decision. Contrary to the decision to elect not to pursue the forfeiture action the assistant district attorney did so regardless. That same assistant district attorney was subsequently charged criminally for unrelated activity. (Please see Wisconsin Case No. 21CF67).

The state in document 29 submitted a formal motion and memorandum to accept the plea agreement, providing grounds for the

agreement clarifying there is no refusal to prosecute, the complications discussed under the 4th amendment issues in the case, a comprehensive restatement of consideration of the case, evidentiary issues, other inherent "private" considerations, and their relation to the public interest. (R at 9, Document 29 of the Circuit Court Record). In document 32, defense counsel on behalf of Troy Lanning offered a response that agreed with the State's position, also mentioning that there was an outstanding motion in limine and that the plea was well founded and discussed. (R at 14, Document 32 of the Circuit Court Record).

On October 27th, 2021 Judge Mogen declined the proposed court order in Document 21 with the text that the court "made oral ruling on three separate dates with these underlying issues and matter." (R at 15, Document 21 of the Circuit Court Record of 2020CV55). The language of that proposed order involved dismissal with prejudice of case number 20CV55. In document 22 of the circuit court record a Petition for Leave for appeal was filed on October 27th, 2021 by Lanning. This cited the denial of the district attorney's motion to dismiss referencing Wis. Stat. §961.555(5) and Wis Stat. §961.55, that no lis pendens was filed before the state filed the Amended Summons on June 11, 2020 and the amended complaint on June 12, 2020 and offered argument on behalf of Lanning to obtain leave for interlocutory appeal. Dismissal of the civil action was the joint remedy sought as opposed to a judgment of forfeiture whereby no hearing was held within the statutory requirements. On december 16th, 2021 the court of appeals ordered Lanning to provide the court with a written order for review. The written order was provided, and on January 31st, 2022 stating

interlocutory appeal was warranted and that the issue was one of first impression and of general importance in the administration of justice.

Argument

Wisconsin Statute *§961.555* is Wisconsin's Statute addressing forfeiture proceedings in Wisconsin and contains two key provisions under subsection 2(a):

"*That if no charge is issued within 6 months after the seizure or a 6 month extension is not granted, the seized property shall be returned to the owner."* (Id).

The statute goes on to state that a forfeiture action shall be commenced by "*filing a summons, complaint, and affidavit of the person who seized the property with the clerk of circuit court provided service of authenticated copies of those papers is made in accordance with ch.* 801 *within 90 days after filing upon the person from whom the property was seized and upon any person known to have a bona fide perfected security interest in the property."* (Id).

Reading onward in Wisconsin Statute into Sub. (2) (b), it is required a hearing be held, not set, within 60 days of the service of the answer and allows a continuance only when it is applied for within the 60 day period. *State v. Baye, 191 Wis. 2d 334, 528 N.W.2d 81 (Ct. App. 1995)*. In this case, no continuance was requested for cause and there was no stipulation by the parties.

Defendant - Appellant restates as argued in the petition for leave of appeal that *Jones v. State 226 Wis. 2d 565 Wis. 1999) 594 N.W. 2d 738* is instructive. It was cited that in paragraph one:

"*We conclude that the legislature intended that the turn of property provision in 961.55(3) can only be triggered by an unsuccessful forfeiture action brought by the state. In all other situations where the state has not initiated a forfeiture action, we conclude that a person claiming the right to property seized by the authorities is limited to the procedure as set forth in Wis. Stat. 968.20.*" (Id).

In this case, the state moved to dismiss the relevant civil matter which comports with Wis Stat §961.55(3) wherein the state initiated an action for dismissal. This motion should have been granted. As such statutory procedure has been followed. The state did initiate a forfeiture action, but the state did not comply with the requirements of having a hearing within 60 days of the filing of the answer. Therefore, the court has lost jurisdiction which according to *Jones* cited above dismissal becomes mandatory. (*Jones v. State 226 Wis. 2d 565 Wis. 1999) 594 N.W. 2d 73).*

Further relevant to the accompanying consideration of the appropriateness of the plea agreement, it was discretionary for the District Attorney to initiate forfeiture proceedings or not (*see Paragraph 27 of Jones*)and further stated in Paragraph 32:

"*The district attorney is answerable to the people of the state and not to the courts or the legislature in which he or she exercises prosecutorial discretion. The district*

attorney had the right in and of itself to dismiss this forfeiture action. The court did lose its jurisdiction and should be dismissed." (Id).

It is advanced that the district attorney is authorized as to what is filed and what should be dismissed. A lis pendens was not filed and the real estate was transferred to the defendants indigent mother to assist in defending her son. Troy Lanning does not own the real estate which was transferred before the amended criminal complaint and has not been joined to the forfeiture action and sits as an innocent party in the matter.

The contention that the court has lost jurisdiction is further supported in *State v. Rosen, 72 Wis. 2nd 200, 240 N.W. 2nd 168, (1976)* "*... any failure to follow these mandatory time limits causes the circuit court to lose jurisdiction*". Further, "*the petition must be dismissed unless the requisite hearing is held within the 60 day period, dismissal with prejudice".* (Id).

This court directed the parties attention to the issue of how a change in the statutory language of Wis. Stat. §961.555(2)(a) affects the ruling in *State v. One 2000 Lincoln Navigator*, 2007 WI App 127, 301 Wis. 2d 714, 731 N.W.2d 375, regarding loss of competency.

In the above case, no hearing was held within the 60 day time limit and the circuit court promptly dismissed the forfeiture action without prejudice.The ruling in *State v. One 2000 Lincoln Navigator*, was that a forfeiture action should have been dismissed with prejudice, rather than without prejudice, to counteract the contention of the state that the court

may simply file a new forfeiture action to circumvent the 60 day time limit for holding a hearing:

"*Accordingly, once the sixty-day period mandated by § 961.555(2) (b) has expired, the circuit court loses competency, and the State may not start the clock running anew by filing another forfeiture petition based on the same facts.*" (Id).

The perceived concern as interpreted by the Defendant - Appellant is in following the development of case law under concerns cited in the footnotes of *State of Wisconsin v. MICHAEL J. SCOTT, LORI M. SCOTT, ALLY FINANCIAL, INC. A/K/A C T CORPORATION SYSTEM, A BLACK 1966 OLDSMOBILE AUTOMOBILE VIN #338676M362750, A BROWN 2015 CHEVROLET SILVERADO VIN #1GC1KWE81FF631314, A 2008 POLARIS RANGER SERIAL #4XARB50A482701431, A 2008 SEA DOO "JET SKI" HULL #YDV13580E808, A 2008 SEA DOO "JET SKI" HULL #YDV24947C808, APPROXIMATELY 55 LBS. OF TETRAHYDROCANNABINOLS (THC) AND $22,955.00 IN UNITED STATES CURRENCY, (State v. Scott, Appeal No. 2017AP1345 (Wis. Ct. App. Apr. 4, 2019),* wherein the court addressed the new subsection of Wis. Stat. 961.55 which reads:

"*A judgment of forfeiture may not be entered under this chapter unless a person is convicted of the criminal offense that was the basis for the seizure of the item that is related to the action of the forfeiture."* (961.55(1)(g) (2017-18). 2017 Wisconsin Act 211, §8).

The property issue in this case was commenced after June 11th, 2020 placing it within the statutory scheme as above cited. It is surmised then, that one possible concern is how a circuit court judge addresses a companion civil forfeiture until a criminal defendant has been convicted. A judge may interpret that since no criminal conviction has been made, no "judgment" in regards to forfeiture may occur until such conviction is finalized.

This interpretation would be overbroad and contrary to public policy. Defendant - Appellant responds that the change in law does not preclude a district attorney from dismissing a forfeiture action as it purports to do in this case through a supported agreement filed with the circuit court. Secondly, statutory language still favors the prompt handling of seizures and forfeiture actions. This is why the statutory language still is consistent with the language that the forfeiture action must hold a hearing within 60 days of service under Wis. Stat. §961.555(2)(b). This early procedural hearing need not necessarily adjudge that the property be forfeited at the time of that hearing, but that the property seized is ordered subject to forfeiture should the defendant be found guilty at trial. In other words, there continues to be a valid reason to hold procedural hearings.

That is the only logical way to reconcile Wis Stat. §961.555(2)(b) with the statutory language A forfeiture hearing held within 60 days is still a necessary safeguard to ensure if an innocent party is harmed by the forfeiture and a chance for the defendant to argue the property is not subject to forfeiture under the clear and convincing standard. In 2017 *Wisconsin*

Act 211 , the additional change under Wis. Stat. §961.55(1)(k) reflects this sentiment, wherein 1(k) provides "*a person who has been subject to a seizure of property has a right to a pretrial hearing under 968.20"*. Subsection five further bolstered the contention that innocent owners are considered and the prompt return of property if appropriate. Again in reading *Wisconsin Act 211* there is protective language to the individual subject to forfeiture wherein section §961.55(1M) reads the property of an innocent owner may not be forfeited, and *"A person who claims to be an innocent owner may follow the procedures under s. 961.555 (5)*".

It is therefore argued that the statutory scheme and changes thereto are meant for the prompt handling of forfeiture actions, that the hearing timeframe set forth in Wis Stat. §961.55(2) comports with legislative intent, and does not disallow a circuit court judge from dismissing a forfeiture action especially upon the request of a district attorney. Dismissal and procedural defect are fundamentally different than a "judgment" being entered, which again, it is asserted that the new language discussing there cannot be a judgment until there is a conviction is made to favor a defendant's rights rather than further curtail them. Another way to state this is that the State cannot seize a criminal defendant's property until the state has proven they are guilty. Certainly a district attorney can dismiss a civil forfeiture action at their discretion, and this is doubly true when the mandatory procedural hearing was not held.

The constitution guarantees certain rights to the citizens of the country. The 14th amendment of the constitution contains due process

statements about what the government, federal and state, can and cannot do to its citizens. The Defendant- Appellant and his mother have been denied their right to property. The district attorney did not do this as the district attorney did not want this to be done and tried to stop it. It was only the court that perpetrated this denial.

The fifth amendment in part says that citizens shall not be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of the law, nor shall property be taken for public use without just compensation. Substantive due process is applied commonly when a new law is being applied and should be considered in comparing the notion that a judgment for forfeiture not being entered until a conviction has been made vs a remaining on the books 60 day hearing being held on the forfeiture of property. The new addition to the statute in no way nullifies the 60 day requirement for a forfeiture action to hold a "hearing". A "hearing" is not synonymous with a forfeiture judgment being entered, but a necessary constitutional protection to prevent the arbitrary deprivation of property from a U.S. Citizen. All the language surrounding the forfeiture statutes contemplate consideration of those subject to forfeiture ensuring prompt, substantial, and serious consideration are given to forfeitures and to to protect innocent parties.

Conclusion

Concisely stated, a dismissal of a forfeiture action is not a judgment of forfeiture as contemplated in the law. A judgment of forfeiture is the actual taking of the property by the state. Nothing forbids the state from

dismissing the case especially if the statutorying hearing scheme was not adhered to. It is respectfully prayed that the Court of Appeals should summarily order that the forfeiture action under Burnett County Case Number 20CV55 be dismissed on grounds that regardless of any change of law the District Attorney has full authority to dismiss a forfeiture action, that the timeframe for the 60 day was not had as is mandatory under statute and supporting case law, and that the modification of law under the forfeiture statute is not at odds with the initial 60 day requirement to hold a hearing on property subject to forfeiture.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. (rule) 809.19(8)(b) and (c) for a brief produced using the following font: Times new Roman: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2546 words.

Dated: May 3rd, 2022

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 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 one or more initials or other appropriate pseudonym or designation 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.

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