

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO, :  
 :  
 Appellee, : CASE NO. CA2003-08-197  
 :  
 - vs - : O P I N I O N  
 : 9/20/2004  
 :  
 EARL CAVIN, JR., et al., :  
 :  
 Appellants. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR01-11-1699

Robin N. Piper, Butler County Prosecuting Attorney, Randi E. Froug, Government Services Center, 315 High Street, 11<sup>th</sup> Fl., Hamilton, Ohio 45011, for appellee

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**VALEN, J.**

{¶1} Appellant, Earl Cavin Jr. ("Cavin Jr"), and appellant, Earl Cavin Sr. ("Cavin Sr."), appeal a decision of the Butler County Court of Common Pleas finding that money seized from a safe in the home of Cavin Jr.'s sister, Sharon Cavin ("Sharon"), was subject to forfeiture as contraband.

{¶2} On November 15, 2001, Cavin Jr. was arrested after participating in a drug buy. During the arrest, money was

confiscated from Cavin Jr.'s home and place of business.

Pursuant to a search warrant, police also confiscated \$103,180 in cash, a checkbook, and two police scanners from a safe in Sharon's residence.

{¶3} Cavin Jr. was charged in a 12-count indictment, but later pled guilty to only count 11 of the indictment, aggravated possession of drugs. Count 11 of the indictment contained a specification under R.C. 2925.42, seeking the forfeiture of \$112,334 in cash.

{¶4} As part of his plea agreement, Cavin Jr. agreed to forfeit \$15,532, which was the money seized from his business and residence. The plea form also indicated that Cavin Jr. and the state agreed to set a forfeiture hearing to determine the disposition of the money seized from the safe at Sharon's residence.

{¶5} At this point, the instant case becomes a procedural quagmire, aided in part by the confusing forfeiture statutory scheme. We will attempt to reconstruct the procedure of this case, as evidenced by the record.

{¶6} Cavin Jr.'s guilty plea form was filed with the trial court on January 17, 2002. The entry of conviction was filed on March 4, 2002. The trial court had scheduled a forfeiture hearing under R.C. 2925.42 for February 28, 2002. On February 21, 2002, Cavin Jr. requested a continuance, citing a scheduling conflict. The record contains an entry file stamped March 8, 2002, setting a forfeiture hearing for June 12, 2002.

{¶7} On June 10, 2002, the state filed a motion for forfeiture under R.C. 2933.41(C). On June 12, 2002, Cavin Sr. and Sharon filed a motion for return of the property. The same parties filed a motion to dismiss the forfeiture action on July 15, 2002. Cavin Jr. filed a motion to dismiss on July 17, 2002, and in this motion, Cavin Jr. asserted that he never claimed the right or ownership of the money removed from Sharon's residence.

{¶8} The state indicates in its appellate brief that a hearing was held on July 18, 2002, wherein the trial court made specific findings regarding the applicability of the R.C. 2933.41 forfeiture motion. No transcript of this hearing was provided to this court, and the record does not reflect these findings.

{¶9} The record does show that the state filed a petition for forfeiture under R.C. 2933.43 on July 22, 2002, and personally served a notice on Cavin Sr. and Sharon on July 23, 2002. We can find no notation in the record that the state placed notice of the proceedings in a general circulation newspaper. We note that the state asserts that such notice took place, but it does so by referring this court to the state's memorandum in opposition to appellants' motion to dismiss, filed with the trial court in 2002. In this memorandum, the state made unsubstantiated assertions that notices were published in the newspaper.

{¶10} On August 21, 2002, Cavin Sr. and Sharon filed a

motion to dismiss the latest forfeiture petition. Included among their arguments were assertions that the state had failed to fulfill the statutory requirements under R.C. 2933.43.

{¶11} After the state's response, the trial court denied the motion to dismiss without making any findings. A forfeiture hearing was held on July 14-16, 2003. A jury determined that \$54,018.47 was contraband and therefore, subject to forfeiture. Cavin Jr. and Cavin Sr. raise five assignments of error on appeal.<sup>1</sup>

{¶12} Assignment of Error No. 1:

{¶13} "THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PROCEED UNDER ORC. 2933.43, WHEN THE STATE OF OHIO FAILED TO STRICTLY COMPLY WITH SAID STATUTE'S REQUIREMENTS."

{¶14} We begin our analysis by noting that forfeitures are not favored by the law and the law requires that individual property rights must be favored when interpreting forfeiture statutes. Dept. of Liquor Control v. Sons of Italy Lodge 0917, 65 Ohio St.3d 532, 534, 1992-Ohio-17. To that end, "statutes imposing restrictions upon the use of private property, in derogation of private property rights, must be strictly construed." *Id.*, citing State v. Lilliock (1982), 70 Ohio St.2d 23, 26.

{¶15} The state originally sought the forfeiture of \$103,180 pursuant to R.C. 2925.42, but the forfeiture hearing

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1. We will refer to Cavin Sr. and Cavin Jr. as "appellants" for the remainder of the decision unless it is necessary to differentiate between them.

was eventually held under R.C. 2933.43 procedures. Appellants argue that the court erred in allowing the state to proceed under R.C. 2933.43 because R.C. 2933.43 service and publication requirements were not met and the hearing was held more than 45 days from conviction, which was contrary to the language of R.C. 2933.43.

{¶16} R.C. 2933.43 provides the procedure for seizure and forfeiture of contraband under R.C. 2933.42 by law enforcement officers. Subsection (C) of R.C. 2933.43 states that if a law enforcement officer determines that an item is contraband because of its relationship to the underlying offense, there can be no forfeiture unless the person pleads guilty or is convicted of the offense.

{¶17} Subsection (C) also provides that the forfeiture hearing "shall be held no later than forty-five days" after conviction, or the admission or adjudication of the violation "unless the time for the hearing is extended by the court for good cause shown." <sup>2</sup>

{¶18} Strict compliance with the requirements of R.C. 2933.43(C) is required in order to afford due process. See Sons of Italy Lodge 0917, 1992-Ohio-17, syllabus. Strenuous due process is particularly necessary when the status of the property as contraband is unclear. *Id.* at 537. Failure to strictly comply with the notice requirements of R.C. 2933.43

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2. R.C. 2933.43(C) also states that if property seized was determined by law enforcement to be contraband other than because of a relationship to an underlying criminal offense, the forfeiture hearing must be held no later

renders a forfeiture inappropriate. See id; City of Hamilton v. Callon (1997), 119 Ohio App.3d 759, 760; Akron v. Turner (1993), 91 Ohio App.3d 595, 598.

{¶19} We find that the procedural requirements of R.C. 2933.43 were not followed and this failure is fatal to this forfeiture action. First, we note that we can find no evidence in the record that the state published the pertinent notice of the forfeiture hearing in a newspaper of general circulation once each week for two consecutive weeks.

{¶20} Further, the 45-day time frame to hold the forfeiture hearing was not followed. There is no evidence in the record that the state was permitted to act outside of the time limit because of "good cause shown," as the trial court made no such finding. This court can find no support from the record to justify the state's delay in proceeding to the hearing as required under R.C. 2933.43 or no evidence to serve as the basis for good cause shown.

{¶21} The state has argued in its briefs both at the trial court level and on appeal that the procedural problems encountered fall squarely on Cavin Jr.'s shoulders. Specifically, the state implies that the delay in its proceeding under R.C. 2933.43 occurred because Cavin Jr. misled them about his right or ownership of the money until he disclaimed the money long after his conviction.

{¶22} We note that the record shows that Cavin Jr. filed a

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than 45 days after the seizure, unless the time for the hearing is extended

motion for return of property on December 13, 2001, which was one month before his plea. As part of this motion, Cavin Jr. states that "his sister had personal property and monies belonging to her father confiscated from her home, which has not been returned to her \*\*\*."

{¶23} When law enforcement authorities originally seized the money, they did not seize the cash from Cavin Jr.'s business or home, but from a safe in Sharon's home. The state should have been on notice from the point of seizure that this forfeiture action would not be typical, if typical is ever the case for forfeitures. As forfeitures are not favored at law, it is imperative that the state maintain a vigilant adherence to forfeiture statutory requirements.

{¶24} Accordingly, we find that the state failed to strictly follow the procedures of R.C. 2933.43 in obtaining the forfeiture. We sustain appellants' first assignment of error.

{¶25} Based upon our finding under the first assignment, appellants' second, third, fourth, and fifth assignments of error are rendered moot. The entry of verdict on the forfeiture of \$54,018.47 as contraband is vacated and this matter is remanded to the trial court for further proceedings consistent with this opinion.

{¶26} Judgment reversed and cause remanded.

YOUNG, P.J., and WALSH, J., concur.

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by the court for good cause shown.