

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-12-1169

Appellant

Trial Court No. CR0201201196

v.

Kareem Lavin Johnson

DECISION AND JUDGMENT

Appellee

Decided: March 29, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellant.

Douglas A. Wilkins, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶1} Appellant, the State of Ohio, appeals the judgment of the Lucas County Court of Common Pleas dismissing its forfeiture case against appellee, Kareem Johnson. For the following reasons, we affirm.

A. Procedural Facts and Background

{¶2} On November 13, 2011, appellee was arrested and subsequently indicted on numerous felony drug offenses. At the time he was arrested, appellee was in possession of \$789. Two days after the arrest, assistant prosecutor Jeffrey Johnston filed a petition for civil forfeiture of the cash under R.C. 2981.05.

{¶3} Appellee was ultimately indicted on six felony drug offenses on February 3, 2012. At his arraignment on February 6, 2012, appellee entered a plea of not guilty. On February 24, 2012, the trial court granted the state's request to consolidate the civil forfeiture proceeding with the criminal case.

{¶4} After several continuances, a trial was scheduled for May 22, 2012. On that morning, Johnston allegedly traveled to the trial court where he proceeded to obtain defense counsel's written consent to the forfeiture of the seized funds via a consent entry. Immediately thereafter, Johnston purportedly proceeded to the clerk's office and delivered the consent entry to the clerk. After delivering the consent entry to the clerk, Johnston exited the courthouse. Notably, a copy of the file-stamped consent entry does not appear in the record.

{¶5} Later that morning, after Johnston had already left the courthouse, appellee reached a plea agreement with the state and withdrew his plea of not guilty. The trial court accepted appellee's guilty plea and proceeded to sentencing, ultimately ordering him to serve a prison term of five years. While sentencing appellee, the court concluded that the state had failed to prosecute the forfeiture action and dismissed the state's

petition. Instead of ordering the cash forfeited to the state, the court ordered it to be applied to the payment of appellee's costs and mandatory fine.

{¶6} After filing a "motion to modify" in the trial court, the state filed this timely appeal. The trial court has subsequently denied the motion to modify.

B. Assignments of Error

{¶7} On appeal, the state assigns the following errors for our review:

First Assignment of Error: The trial court erred in ordering application of seized currency to the payment of Johnson's fines and court costs.

Second Assignment of Error: The trial court erred in dismissing the State's forfeiture petition when a consent entry had been signed by opposing counsel and was submitted to the Clerk's office for approval.

II. Analysis

{¶8} Since the state's assignments of error are interrelated, we will address them simultaneously. In both assignments of error, the state essentially challenges the trial court's dismissal of its forfeiture action. Specifically, the state argues that the trial court erred when it found that the state "failed to prosecute" the forfeiture petition, despite the delivery of the consent entry to the clerk's office.

{¶9} In civil forfeiture actions brought under R.C. 2981.05, the state is required to prove the elements of forfeiture by a preponderance of the evidence. *State. v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, 960 N.E.2d 1042, ¶ 67 (6th Dist.).

The state argues that the consent entry was sufficient to establish its right to forfeiture of the funds seized from appellee when he was arrested. By disregarding the consent entry, the state contends that the trial court committed reversible error. In order to demonstrate its filing of the consent entry, the state submitted an affidavit along with its motion to modify that essentially states the events that transpired on the morning of May 22, 2012, ultimately leading to the delivery of the consent entry to the clerk. However, as appellee notes in his appellate brief, the state's consent entry has not been made part of the record, and was not contained in the record when the trial court dismissed the forfeiture petition. Further, the state's affidavit also was not part of the record at the time the trial court dismissed the forfeiture petition.

{¶10} In sum, the state failed to provide the trial court with a copy of the consent entry. Despite the fact that a prosecuting attorney was present at appellee's sentencing hearing, the state also failed to notify the trial court of the existence of the consent entry or Johnston's delivery of it to the clerk. Taking these facts into consideration, we hold that the trial court did not err when it dismissed the state's forfeiture action for failure to prosecute.

{¶11} Having concluded that the state's forfeiture action was properly dismissed by the trial court, we turn to the state's argument concerning the trial court's use of the funds to satisfy appellee's costs and mandatory fine. The state argues that such a use is expressly prohibited by R.C. 2981.12(G), which provides: "*Any property forfeited under this chapter shall not be used to pay any fine imposed upon a person who is convicted of*

or pleads guilty to an underlying criminal offense or a different offense arising out of the same facts and circumstances.” (Emphasis added.)

{¶12} Notably, R.C. 2981.12(G) applies specifically to forfeited property. Here, the forfeiture petition was dismissed and the money was never forfeited. Thus, R.C. 2981.12(G) does not apply. Because the money was never forfeited, the state has no ownership interest in it and, by extension, no standing to challenge the use of it. *State v. Crumpler*, 9th Dist. Nos. 26098, 26118, 2012-Ohio-2601, ¶ 21; *State v. Henry*, 2d Dist. No. 10CA116, 2012-Ohio-420, ¶ 11; *Elyria v. Mudge*, 9th Dist. Nos. 10CA009838-10CA009847, 2011-Ohio-2199, ¶ 11; *State v. Jamison*, 2d Dist. No. 23211, 2010-Ohio-965, ¶ 31; *In re 1995 Mercedes C280*, 1st Dist. No. C-050433, 2006-Ohio-1565; *State v. Heintz*, 9th Dist. No. 02CA007997, 2003-Ohio-242, ¶ 8-9.

{¶13} Accordingly, each of the state’s assignments of error are not well-taken.

III. Conclusion

{¶14} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs are hereby assessed to the state in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
