

[Cite as *Jenkins v. Cleveland*, 2017-Ohio-1054.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104768

ANDRE JENKINS

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-854094

BEFORE: Celebrezze, J., Keough, A.J., and Jones, J.

RELEASED AND JOURNALIZED: March 23, 2017

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Plaintiff-appellant, Andre Jenkins (“Jenkins”), brings this appeal challenging the trial court’s denial of his petition for return of property. After a thorough review of the record and law, we reverse the trial court’s judgment and remand the matter for further proceedings consistent with this opinion.

I. Factual and Procedural History

{¶2} The instant matter arose from a dispute over \$14,890 that officers from the Cleveland Police Department seized from Jenkins during a traffic stop on August 24, 2015.

{¶3} On November 10, 2015, Jenkins, pursuant to R.C. 2981.03(A)(4), filed a petition for return of property against defendant-appellees, the city of Cleveland, Cleveland Police Chief Calvin Williams, and Officer Colin Ginley (“the city”). In his petition, Jenkins argued that the officers illegally seized his money without probable cause and requested that the money be returned immediately.

{¶4} On December 1, 2015, the city filed two motions to dismiss: one pertained to the city and Chief Williams, and the other pertained to Officer Ginley. In its motions to dismiss, the city argued that (1) the federal government filed a warrant to seize Jenkins’s money in the United States District Court for the Northern District of Ohio on October 7, 2015; (2) the city turned the money over to the federal government pursuant to the federal

warrant on October 8, 2015; and (3) the city no longer possessed Jenkins's money and, thus, had nothing to return to Jenkins.

{¶5} On June 27, 2016, the trial court granted the city's motions to dismiss, and dismissed the matter pursuant to *State v. Clayton*, 8th Dist. Cuyahoga No. 98795, 2013-Ohio-2198.

{¶6} Jenkins filed the instant appeal challenging the trial court's dismissal. He assigns five errors for review:

I. The trial court erred when, without conducting any type of hearing, and without making any findings of fact, it summarily granted the [city's] motion[s] to dismiss.

II. Given the seizure here was indisputably caused exclusively by local police, and given no basis for their seizure under the state's forfeiture law existed, it follows: due process under the state constitution seems clearly to bar (especially in view of the government's asset forfeiture policy) any reviewing court from crediting and ratifying the after-the-fact solicitations of the police that caused the government to make the effort to confiscate money, seized in the state's name, for their benefit.

III. Given factual findings by a trial court in ruling on dispositive motions (here [motions] to dismiss) are mandatory, it follows when the court failed to make findings, which would permit a review of the court's determinations, a dismissal was inappropriate, thus a remand for the required findings is required.

IV. An appellate court can, and must, take judicial notice, not only, of a change in the law relevant to the litigation involved in the appeal before it, but also of the fact that the litigant adversely affected had no opportunity to bring that fact and related matters to the trial court's attention.

V. Given a lawsuit filed under favor of [R.C. 2981.03(A)(4)] is not an action for the recovery of property, the trial court before whom the action is pending lacks the power to analogize the action to an action filed under

favor of this statute to one filed for replevin, and summarily dismiss the action because the property centralized in the quest for a hearing is no longer in the possession of the people who seized the property in the name of the state.

II. Law and Analysis

A. Standard of Review

{¶7} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *Vetor v. Cliffs Natural Resources, Inc.*, 8th Dist. Cuyahoga No. 104023, 2016-Ohio-5846, ¶ 8, citing *Assn. for Defense of Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 537 N.E.2d 1292 (1989). The trial court’s review of a Civ.R. 12(B)(6) motion to dismiss is limited to the four corners of the complaint along with any documents properly attached to or incorporated within the complaint. *High St. Properties L.L.C. v. Cleveland*, 8th Dist. Cuyahoga No. 101585, 2015-Ohio-1451, ¶ 17, citing *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38. “Under these rules, a plaintiff is not required to prove his or her case at the pleading stage. * * * Consequently, as long as there is a set of facts, consistent with the plaintiff’s complaint, which would allow the plaintiff to recover, the court may not grant a defendant’s motion to dismiss.” *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063 (1991).

{¶8} When reviewing a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor

of the plaintiff. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6. Furthermore, we must undertake an independent analysis without deference to the lower court's decision. *Hendrickson v. Haven Place, Inc.*, 8th Dist. Cuyahoga No. 100816, 2014-Ohio-3726, ¶ 12. To prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a court granting relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

B. Petition for Return of Property

{¶9} Jenkins's assignments of error are interrelated and pertain to the trial court's judgment granting the city's motions to dismiss and dismissing the case. We will address Jenkins's first assignment of error because it is dispositive of this appeal.

{¶10} In his petition for return of property, Jenkins alleged that the police illegally seized his money without probable cause and argued that he was entitled to relief under R.C. 2981.03(A)(4), Ohio's forfeiture statute, which provides, in relevant part:

A person aggrieved by an alleged unlawful seizure of property may seek relief from the seizure by filing a motion in the appropriate court that shows the person's interest in the property, states why the seizure was unlawful, and requests the property's return. If the motion is filed before an indictment, information, or a complaint seeking forfeiture of the property is filed, the court shall promptly schedule a hearing on the motion, and at the hearing the person shall demonstrate by a preponderance of the evidence that the seizure was unlawful and that the person is entitled to the property. If the motion is filed by a defendant after an indictment, information, or a complaint seeking forfeiture of the property has been filed, the court shall treat the motion as a motion to suppress evidence.

{¶11} The record before this court is devoid of any charges that were filed against Jenkins — either in the Cleveland Municipal Court or the Cuyahoga County Court of Common Pleas — for which his property was seized. Furthermore, it is undisputed that Jenkins was not convicted of any crimes for which his property was seized. The trial court granted the city’s motions to dismiss Jenkins’s petition on the basis that Jenkins’s property had been transferred to the federal government.

{¶12} In his first assignment of error, Jenkins argues that the trial court erred by “summarily” granting the city’s motions to dismiss without holding a hearing or issuing findings of fact.

{¶13} Initially, we disagree with Jenkins’s assertion that the trial court summarily dismissed the case without providing an explanation for its ruling. In fact, Jenkins’s assertion is belied by the record. The trial court’s June 27, 2016 journal entry granting the city’s motions to dismiss provides, in relevant part,

[m]otion to dismiss of [the city of Cleveland and Chief Williams] is granted. The property in question has been transferred to the federal government.

Forfeiture proceedings in the United States District Court for the Northern District of Ohio are pending (1:16 CV 484). This matter is properly dismissed pursuant to *State v. Clayton*, 2013-Ohio-2198 (8th Dist.2013).

Motion to dismiss of [Officer Ginley] is granted for the reasons stated above.

{¶14} Nevertheless, for the reasons that follow, we find that the trial court erred by granting the city’s motions to dismiss.

{¶15} The issue before this court is whether Jenkins was entitled to relief under R.C. 2981.03(A) although the city had purportedly transferred Jenkins’s money to the federal government pursuant to a warrant seeking forfeiture of the money. This court has previously addressed this issue and analyzed circumstances in which local police departments seized property and subsequently transferred the property to the federal government. Furthermore, this court has expressed concern about local law enforcement circumventing the procedural protections set forth in R.C. 2981.03(A) by transferring seized property to the federal government pursuant to 18 U.S.C. 981(b)(2), governing federal forfeitures.

{¶16} Most recently, in *Clayton*, Clayton was arrested for drug trafficking, possession of criminal tools, carrying a concealed weapon, and having weapons while under disability. The local police seized \$22,832 from Clayton’s vehicle. *Clayton*, 8th Dist. Cuyahoga No. 98795, 2013-Ohio-2198, at ¶ 2. During pretrial proceedings, the state dismissed the charges against Clayton. Clayton filed a motion for the release of his money. In opposing Clayton’s motion, the state produced evidence demonstrating that Clayton’s money was seized by, and in the custody of the federal government. *Id.* at ¶ 3.

Specifically, “[i]n response to Clayton’s motion for return of property, *the state provided copies of two federal warrants* for the seizure of Clayton’s property, including \$22,832 in U.S. currency.” (Emphasis added.) *Id.* at ¶ 15. The trial court denied Clayton’s motion, concluding that the issue had to be addressed in the federal court. *Id.* at ¶ 4. On appeal, this court affirmed the trial court’s judgment, concluding that because the

local police transferred the money to the federal government, Clayton's claim, if any, was against the federal government. *Id.* at ¶ 15-16.

{¶17} In *State v. Primm*, 8th Dist. Cuyahoga No. 94630, 2011-Ohio-328, Cleveland police officers seized \$26,318 from Primm during a traffic stop. Primm was arrested and charged with drug trafficking, having weapons while under disability, and possessing criminal tools. Primm pled guilty to the having weapons while under disability charge and the remaining counts were nolle. *Id.* at ¶ 2. After the conclusion of the criminal case, Primm filed a motion requesting that his money be returned. The state notified the trial court that Primm's money was in the possession of the federal government. The trial court originally ordered that the money be returned to Primm. Thereafter, the state filed a motion to reconsider and rescind. In support of its assertion that the federal government was in possession of Primm's money,

[t]he state produced a U.S. Department of Justice, "Declaration of Administrative Forfeiture" statement that indicated that the funds had been forfeited on April 4, 2007, pursuant to 21 U.S.C. 881. The statement also indicated that notice of the seizure and intent to forfeit had been published on June 4, June 11, and June 18, 2007, to all interested parties.

Id. at ¶ 4. The trial court granted the state's motion to reconsider and rescind, thereby vacating its previous order that the money be returned to Primm. *Id.* at ¶ 5. On appeal, this court affirmed the trial court's judgment. *Id.* at ¶ 8.

{¶18} In *Harris v. Mayfield Hts.*, 8th Dist. Cuyahoga No. 95601, 2011-Ohio-1943, Mayfield Heights police officers seized \$15,084.47 from Harris during a traffic stop. Officers notified the Drug Enforcement Administration (“DEA”) about the seizure and an agent planned to pick up the seized money the following day. *Id.* at ¶ 9. Harris filed a complaint in replevin and a motion for the immediate return of his money. Defendants-appellees filed a motion to dismiss Harris’s complaint, “arguing that since agents of the United States government took possession of the funds, the court of common pleas was without jurisdiction to hear Harris’s replevin action.” *Id.* at ¶ 3. The trial court granted the motion to dismiss for lack of jurisdiction and held that Harris’s motion for the return of his property was moot. *Id.* at ¶ 4.

{¶19} On appeal, this court noted that it was unclear whether the federal government or the local police department was in possession of Harris’s money:

based on the record before this court, it is unclear whether the federal government now possesses the funds at issue. On May 24, 2010, Mayfield Heights Police Department seized \$15,084.47 from Harris. On May 26, 2010, Mayfield Heights completed a Request for Adoption of State or Local Seizure form. From that point on, the record is silent as to whether the federal government approved the Request for Adoption and whether the federal government actually took custody of the funds. The appellees state in their brief that the DEA “took possession of the currency.” However, they cite no evidence in the record supporting this allegation.

Id. at ¶ 11. This court was not persuaded by appellees’ assertion that they no longer had possession of Harris’s money, emphasizing that the record was “conspicuously silent as to whether the federal authorities possess[ed] the funds at issue and whether the local government lawfully seized the funds[.]” *Id.* at ¶ 36. Furthermore, this court noted

that there was no evidence in the record demonstrating that Mayfield Heights provided Harris with any notice of forfeiture proceedings. *Id.* at ¶ 27. Without notifying Harris of a forfeiture action, this court explained, “the [s]tate effectively precluded Harris from asserting any claim [to the money] in the United States District Court.” *Id.* For all of these reasons, this court concluded that the trial court erred by dismissing Harris’s replevin action and remanded the matter to the trial court for further proceedings. *Id.* at ¶ 37.

{¶20} In *Long v. State*, 8th Dist. Cuyahoga No. 97044, 2012-Ohio-366, law enforcement officers seized “an undetermined amount of cash” from Long during the execution of a search warrant.¹ *Id.* at ¶ 2. Pursuant to R.C. 2981.03, Long filed a petition for the return of his property in the Cuyahoga County Court of Common Pleas. The state filed a motion to dismiss the petition, arguing that “the common pleas court did not have jurisdiction over Long’s petition because the property seized had been, or remained, with federal authorities.” *Id.* at ¶ 4. The trial court dismissed Long’s petition, concluding that the federal court had jurisdiction over the matter. *Id.*

{¶21} On appeal, this court noted that there was no evidence in the record demonstrating whether the sheriff’s department or the DEA maintained jurisdiction over the seized property:

¹ The search warrant was executed by members of the Cuyahoga County Sheriff’s Department and the DEA.

[t]he only evidence before this court that references the United States government are two pieces of paper: (1) a U.S. Department of Justice-Drug Enforcement Administration Receipt for Cash or Other Items, which lists the six items seized on May 6, 2011; and (2) a U.S. Department of Justice-Drug Enforcement Administration Receipt for Cash or Other Items, which lists the [money] as being turned over to the owner, Marvin Long, on May 24, 2011. Neither of these documents establishes whether state or federal authorities had actually seized or maintained possession of the seized property.

Id. at ¶ 8. This court concluded that there was no evidence in the record supporting the state's assertion that the federal government adopted the money. *Id.* at ¶ 9. Accordingly, this court held that the trial court erred by dismissing Long's petition for the return of the seized property. *Id.* at ¶ 11.

{¶22} In the instant matter, the city asserts in its appellate brief that (1) "[o]n October 7, 2015 the [f]ederal [g]overnment filed a 'Warrant to Seize Property Subject to Forfeiture' in [f]ederal [c]ourt under case #1:15MJ9126"; (2) "[p]ursuant to this warrant * * the [city] turned over the funds that were seized from [Jenkins]"; and (3) "[o]n or about October 29, 2015, [Jenkins] was notified by the Federal Bureau of Investigation (FBI) of their intention to seek forfeiture of the funds[.]" Appellee's brief at 1-2.

{¶23} After thorough review, we find that the record is devoid of any evidence supporting the city's assertions that the federal government seized Jenkins's money, the

city transferred Jenkins's money to the federal government, or that Jenkins was notified of a forfeiture action. Unlike *Clayton*, our record does not contain a copy of the federal warrant that was filed to seize Jenkins's property. Unlike *Long*, our record does not contain any receipts documenting the city's transfer of Jenkins's money to the federal government. Unlike *Primm*, our record does not contain a "Declaration of Forfeiture" statement indicating that Jenkins's money had been forfeited to the federal government. *Primm*, 8th Dist. Cuyahoga No. 94630, 2011-Ohio-328, at ¶ 7.

{¶24} In support of its argument that Jenkins's property is in the possession of the federal government, the city merely provided citations to the federal court cases in which the federal warrant was filed, N.D. Ohio. No. 1:15-MJ-9126, and forfeiture proceedings commenced, *United States of Am. v. \$14,890 in U.S. Currency*, N.D. Ohio No. 1:16-CV-484. We are unable to determine whether the money was transferred to the federal government based solely on the citations to the federal cases because such a determination would require evidence outside of the record. Arguments relying on evidence outside of the record are not appropriately considered on a direct appeal. *State v. Spaulding*, Slip Opinion No. 2016-Ohio-8126, ¶ 102, citing *State v. Madrigal*, 87 Ohio St.3d 378, 391, 721 N.E.2d 52 (2000); *State v. Thomas*, 8th Dist. Cuyahoga No. 101797, 2015-Ohio-3226, ¶ 27 (an issue that requires evidence outside of the record is unresolvable on direct appeal). Furthermore, the citations are not properly considered under Civ.R. 12(B)(6) because the trial court's review is limited to Jenkins's petition.

{¶25} For all of these reasons, we find that the trial court erred by dismissing Jenkins's petition for the return of property without holding a hearing. Accordingly, Jenkins's first assignment of error is sustained. Our analysis of Jenkins's first assignment of error renders his second, third, fourth, and fifth assignments of error moot.

III. Conclusion

{¶26} The city's assertions that the federal government filed a warrant to seize Jenkins's money, the city transferred Jenkins's money to the federal government, and Jenkins was notified that the money was transferred to the federal government or a forfeiture action was commenced are entirely unsupported by the record before this court.

Accordingly, the trial court erred by dismissing Jenkins's petition for the return of his property.

{¶27} The trial court's judgment is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

KATHLEEN ANN KEOUGH, A.J., and
LARRY A. JONES, SR., J., CONCUR