

[Cite as *State v. Jamison*, 2010-Ohio-965.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23211
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-CR-1378
v.	:	
	:	(Criminal Appeal from
BRIAN A. JAMISON	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

.....  
OPINION

Rendered on the 12<sup>th</sup> day of March, 2010.

MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellee

BRIAN A. JAMISON, Inmate #549-327, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601  
Defendant-Appellant, *pro se*

FAIN, J.

{¶ 1} Defendant-appellant Brian Jamison appeals *pro se* from an order overruling his motion for recovery of seized funds and ordering application of seized funds to outstanding court costs. Jamison contends that the trial court erred in overruling his motion to recover funds, and in ordering forfeiture of the seized funds.

{¶ 2} We conclude that Jamison lacks standing to challenge the trial court's rejection of his request for the funds, because he claimed in the trial court that another individual is the true owner of the funds. The trial court did err in applying the money to Jamison's outstanding court costs and fines, in the absence of forfeiture proceedings properly initiated under R.C. Chapter 2981, or other statutory authority allowing the court to dispose of the money. However, this error was not prejudicial to Jamison, who has improperly received the benefit of this misapplication (unless and until the rightful owner of the money comes forward to claim it), and the State, which has been prejudiced by this misapplication, has not appealed. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} In March 2006, Brian Jamison was stopped by a police officer, after Jamison had committed several traffic violations. At the time, Jamison was driving an automobile belonging to his girlfriend, Jenille Early. *State v. Jamison*, Montgomery App. No. 22177, 2008-Ohio-2065, at ¶ 2-3. Jamison was arrested, and a routine inventory search of the vehicle was conducted. The search uncovered a substantial amount of drugs, including crack cocaine, heroin, Percocet pills, and marijuana, as well as a Wesson .38 caliber revolver. *Id.* at ¶ 4-5. Jamison also had \$981 in cash on his person. *Id.* at ¶ 5.

{¶ 4} Jamison was indicted on four counts of Drug Possession, one count of Possession of Criminal Tools, and one count of Having Weapons While Under a Disability. After a jury trial, Jamison was found guilty of Possession of Crack

Cocaine and of Heroin, of Possessing Criminal Tools, of Having a Weapon While Under a Disability, and of Aggravated Possession of Drugs. He was sentenced accordingly, and we affirmed the conviction and sentence on appeal. *Id.* at ¶ 62.

{¶ 5} In October 2008, Jamison filed a motion with the trial court, asking for recovery of the \$981 seized at the time of his arrest. In his petition, Jamison alleged that Jenille Early is “the true owner of the monies in question.” Motion for Recovery of Funds, p. 1. Jamison, therefore, asked the court to release the money to Early. No factual materials were submitted with the motion. The trial court overruled Jamison’s motion in December 2008, and ordered that the seized funds be applied to Jamison’s court costs, which remained unpaid.

{¶ 6} From the order overruling his motion, Jamison appeals.

## II

{¶ 7} Jamison’s First Assignment of Error is as follows:

{¶ 8} “THE TRIAL COURT ERRED IN OVERRULING DEFENDANT [SIC] MOTION TO RECOVER FUNDS. THEREFORE INCORRECTLY ORDERED FORFEITURE OF \$981.00 THAT DEFENDANT HAD IN HIS POSSESSION.”

{¶ 9} Under this assignment of error, Jamison contends that the trial court erred by failing to comply with statutory procedures governing forfeiture of contraband. Jamison relies on R.C. 2933.43 and 2933.41, which were repealed in July 2007. The current statutes regarding forfeiture are contained in R.C. Chapter 2981, which became effective on July 1, 2007. R.C. 2981.02 allows forfeiture of property to the State pursuant to either the criminal or delinquency process in R.C.

2981.04, or the civil process in R.C. 2981.05. Before we address Jamison's forfeiture arguments, however, we will consider the issue of standing.

{¶ 10} “ ‘Standing is a threshold test that, if satisfied, permits the court to go on to decide whether the plaintiff has a good cause of action, and whether the relief sought can or should be granted to plaintiff.’ \* \* \* Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court. \* \* \* When an appellate court is presented with a standing issue, it is generally a question of law, and we therefore apply a *de novo* standard of review.” *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Bd. of County Commrs.*, Montgomery App. No. 22664, 2008-Ohio-6542, at ¶ 11 (citations omitted).

{¶ 11} The record in the case before us indicates that Jamison did not contend in the trial court that he is the owner of the property. He claimed instead that Jenille Early is the “true owner.”

{¶ 12} R.C. 2981.02(A) allows forfeiture of the following property:

{¶ 13} “(1) Contraband involved in an offense;

{¶ 14} “(2) Proceeds derived from or acquired through the commission of an offense;

{¶ 15} “(3) An instrumentality that is used in or intended to be used in the commission or facilitation of any of the following offenses when the use or intended use, consistent with division (B) of this section, is sufficient to warrant forfeiture under this chapter:

{¶ 16} “(a) A felony;

{¶ 17} “(b) A misdemeanor, when forfeiture is specifically authorized by a

section of the Revised Code or by a municipal ordinance that creates the offense or sets forth its penalties;

{¶ 18} “(c) An attempt to commit, complicity in committing, or a conspiracy to commit an offense of the type described in divisions (A)(3)(a) and (b) of this section.”

{¶ 19} R.C. 2981.02(F) further provides that:

{¶ 20} “A prosecutor may file a forfeiture action under section 2981.04 or 2981.05 of the Revised Code, or both. If property is seized pursuant to this section and a criminal forfeiture has not begun under section 2981.04 of the Revised Code, the prosecutor of the county in which the seizure occurred shall commence a civil action to forfeit that property under section 2981.05 of the Revised Code.”

{¶ 21} Under R.C. 2981.03(A)(1), a State or political subdivision acquires provisional title to property subject to forfeiture, upon commission of an offense giving rise to forfeiture. The provisional title is subject, however, to claims of third parties and a final adjudication under either R.C. 2981.04, which governs criminal forfeiture proceedings, or 2981.05, which governs civil forfeiture proceedings.

{¶ 22} R.C. 2981.03(D) provides procedures for seeking conditional release of property that is subject to forfeiture. Under this subsection, a party seeking release first requests possession of the property from the person who has custody. If the property is not released within fifteen days after the request, the party claiming possession may file a petition with the court, demonstrating how the person meets conditions specified in R.C. 2981.02(D)(3), which include:

{¶ 23} “(a) A possessory interest in the property;

{¶ 24} “(b) Sufficient ties to the community to provide assurance that the

property will be available at the time of trial;

{¶ 25} “(c) That failure to conditionally release the property will cause a substantial hardship to the claimant.”

{¶ 26} If the court finds that the party has met the criteria in R.C. 2981.03(D)(3), the court may conditionally release the property to the claimant, pending completion of the forfeiture action. R.C. 2981.03(D)(2).

{¶ 27} R.C. 2981.03(A)(4) further provides for relief from seizure, as follows:

{¶ 28} “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. If the motion is filed by a third party after an indictment, information, or complaint seeking forfeiture of the property has been filed, the court shall treat the motion as a petition of a person with an alleged interest in the subject property, pursuant to divisions (E) and (F) of section 2981.04 of the Revised Code.”

{¶ 29} In situations involving criminal forfeiture under R.C. 2981.04, the prosecutor is required to notify any person with an interest in the property, and

interested persons are permitted to file petitions to adjudicate the validity of their alleged interest. R.C. 2981.04(D) and (E). Where civil forfeiture is involved, R.C. 2981.05(B) and (C) provide similar procedures that must be followed.

{¶ 30} Where property is lawfully seized and is in custody of a law enforcement agency, R.C. 2981.11(A) requires the agency to safely keep the property pending the time it is no longer needed as evidence or for another lawful purpose. The property is then to be disposed of pursuant to R.C. 2981.12, which governs “unclaimed or forfeited property,” and 2981.13, which governs property ordered forfeited as contraband.

{¶ 31} Jamison is not an “aggrieved person,” under R.C. 2981.03(A)(4), because he is not the owner of the money, by his own admission. Jamison also did not show a possessory interest in the property for purposes of a conditional release under R.C. 2981.03(D). Jamison, therefore, does not have standing to request return of the money. If Early wishes to request return of the money, she will need to seek its return, pursuant to R.C. Chapter 2981.

{¶ 32} We note that Jamison claims on appeal that he owns \$181 of the money and that Early owns the rest. However, Jamison did not make this claim in the trial court and we cannot add new matters to the record and decide the appeal based on those facts. See, e.g., *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus (holding that “[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.”) “An appellate court may [also] not assume as true or even consider facts alleged in a party's brief or attachments

thereto.” *Phung v. Waste Management, Inc.* (1986), 23 Ohio St.3d 100, 102 (parenthetical material added).

{¶ 33} Because Jamison has failed to illustrate standing to challenge the trial court’s decision to overrule his motion, the First Assignment of Error is overruled.

### III

{¶ 34} Jamison’s Second Assignment of Error is as follows

{¶ 35} “THE TRIAL COURT ERRED BY ORDERING MONEY WHICH THE POLICE SEIZED WHEN THEY ARRESTED DEFENDANT AND PAID TO CLERK OF COURTS IN PARTIAL PAYMENT OF COURT COST.”

{¶ 36} In responding to Jamison’s argument, the State contends that the property has not been forfeited, because the trial court did not award the property to the State. Instead, the court applied the funds to payment of Jamison’s court costs. However, the trial court, in essence, forfeited the money by applying it to costs instead of returning it to Jamison, or instead of simply overruling Jamison’s request for return of the money..

{¶ 37} The State argues that the trial court has the authority to impose costs against indigent defendants under R.C. 2947.33. We agree with the State on this point. In *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, the Ohio Supreme Court reaffirmed its prior holding that court costs may be assessed against and may be collected from indigent defendants. *Id.* at ¶ 10, citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989. However, imposing judgments for costs involves different considerations than collecting on judgments that have been rendered.

Courts cannot order funds to be confiscated without following some procedure, even when the laudable aim of satisfying court costs and fines is involved. In fact, R.C. 2981.12(G) specifically states that “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.” See, also, *State v. Cruise*, Summit App. No. 24832, 2009-Ohio-6795, at ¶ 20 (Dickinson, P.J., concurring) (noting that “Section 2981.13 lists the ways in which forfeited property ‘shall’ be used, and those uses don't include payment of court costs and attorney fees.”). A trial court, therefore, cannot indirectly do what is directly prohibited or is controlled by statute.

{¶ 38} In *Threatt*, the Ohio Supreme Court held that “the state may use any method available for collection of a civil judgment for money, as well as the procedures set out in R.C. 5120.133 if the defendant is incarcerated.” 2006-Ohio-905, at ¶ 16. If the trial court concluded, as it appeared to do, that the money belongs to Jamison, the court should have ordered the money released to Jamison. The State or the Department of Rehabilitation and Corrections could then have executed against the property, pursuant to civil collection methods or under the procedures set forth in R.C. 5120.133. If the trial court intended for the property to be forfeited under R.C. Chapter 2981, the procedures in that chapter should have been followed. However, the court could not simply apply the money to fines or costs that are owed, without authority to do so.

{¶ 39} If the Department of Rehabilitation and Correction receives a certified copy of a judgment of a court of record in an action in which a prisoner has been a

party, R.C. 5120.133(A) allows the Department to transmit funds from the prisoner's account to the court for payment of the judgment, without the necessity of holding proceedings in aid of execution of the judgment.

{¶ 40} R.C. 2929.18(D) also provides that financial sanctions imposed against offenders are judgments in favor of the state or political subdivision and that the offender is the judgment debtor. Various methods of collecting the debt are permitted under this section, including executions against the property under R.C. Chapter 2329, or the person of the debtor under R.C. Chapter 2331; proceedings in aid of execution under R.C. Chapter 2333; attachment of the debtor's property under R.C. 2715; garnishment of the debtor's property under R.C. Chapter 2716; or an order for the assignment of the debtor's wages under R.C. 1321.33. See R.C. 2929.18(D)(1)(a)-(e) and (2). As noted in *Threatt*, "[u]ltimately, then, for purposes of collection, an indigent criminal defendant is really no different from any other indigent who owes a debt." 2006-Ohio-905, at ¶ 16. In *State v. Cruise*, Summit App. No. 24832, 2009-Ohio-6795, the Ninth District Court of Appeals agreed with the State that the Summit County Court of Common Pleas lacks discretionary authority to order disbursement of forfeiture proceedings to pay court costs and attorney fees. The Common Pleas Court had ordered the sum of \$1212, which was seized from the defendant at the time of his arrest, to be applied to court costs and attorney fees. The rest was to be distributed to local police and the prosecutor's office. *Id.* at ¶ 1. The Ninth District concluded that the trial court's action was impermissible under R.C. Chapter 2981. Although the written opinion is quite lengthy, two members of the court concurred only in the judgment and in Judge Dickinson's much shorter

concurring opinion. *Id.* at ¶18-20. In the concurring opinion, Judge Dickinson states as follows:

{¶ 41} “This Court recognizes the difficult situation in which the Summit County Common Pleas Court finds itself. Unfortunately, its attempt to ease that difficulty by using forfeited funds to pay court costs and attorney fees is not permitted by Chapter 2981 of the Ohio Revised Code.

{¶ 42} “Section 2981.13 lists the ways in which forfeited property ‘shall’ be used, and those uses don’t include payment of court costs and attorney fees.” *Id.* at ¶ 19-20.

{¶ 43} In the case before us, the trial court indirectly attempted to do what is prohibited by R.C. Chapter 2981. The trial court also did not indicate any other statutory authority upon which it relied. Similar attempts to apply confiscated funds to court costs were rejected under the law as it existed before R.C. Chapter 2981 was enacted. See *State v. Payne*, Warren App. No. CA2003-02-019, 2004-Ohio-1031 (rejecting a trial court order that confiscated money be used to pay court costs and attorney fees, because the trial court had failed to follow statutory procedures for forfeiture or confiscation. *Id.* at ¶6-11, discussing R.C. 2933.41 and R.C. 2933.43. As noted, these sections have been subsequently repealed and replaced with similar provisions in R.C. Chapter 2981. See Sub. H.B. 241, effective July 1, 2007).

{¶ 44} Nevertheless, we conclude that the trial court’s error in applying the \$981 found on Jamison’s person towards Jamison’s outstanding court costs is harmless as to Jamison, the only appellant in this case. He is not prejudiced by the

misapplication of these funds, because the misapplication reduces his obligation to pay the court costs, unless and until the rightful owner of the funds comes forward to claim them. The State may arguably be prejudiced, but it has not appealed.

{¶ 45} Jamison's Second Assignment of Error is overruled as harmless.

IV

{¶ 46} Both of Jamison's assignments of error having been overruled, the order of the trial court from which this appeal is taken is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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Brian A. Jamison  
Hon. Mary L. Wiseman