

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-1237

Dubuque County No. 01311 SPCR122820

Dubuque County No. 01311 SPCR122821

Dubuque County No. 01311 SPCR122822

IN THE MATTER OF PROPERTY SEIZED
FOR FORFEITURE FROM
BO LI, NA TIAN & WEI TIAN.

BO LI, NA TIAN & WEI TIAN,
Claimants-Appellees.

Appeal from the Iowa District Court for Dubuque County

The Honorable Michael J. Shubatt, Judge.

APPELLEES' FINAL BRIEF

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PROOF OF SERVICE

I hereby certify that on the 21ST day of December 2017, I, the undersigned, did serve copies of the within Appellees' Final Brief on all other parties to this Appeal for review.

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STATEMENT OF THE CASE

Nature of the Case:

In this case the State of Iowa appeals the District Court's Ruling filed on July 28, 2017. (Ruling; App. 195).

Course Proceedings:

On February 23, 2017, the State filed an In Rem Forfeiture Complaint against Bo Li, Na Tian and Wei Tian in cases SPCR122820, SPCR122821 and SPCR122822. (In Rem Forfeiture Complaints; App. 8-13). (Due to the similar facts and economy of the Court all three cases were tried at the same time and are being handled as one appeal.)

The Claimants filed an Answer denying that the money taken was the proceeds of any criminal activity. (Answer; App. 14-19). The Claimants then filed an Application for Return of Seized Property requesting property taken from them but, not listed on the Forfeiture complaint, be returned to them. (Application for Return of Seized Property; App. 20-25).

Trial on these matters was held on May 9, 2017. (Ruling; App. 195). Bo Li, Na Tian and Wei Tian do not speak English and a Mandarin interpreter was present at the hearing. (Ruling; App. 195). The Court denied both the Forfeiture Complaint and the Application for Return of

Seized Property. (Ruling; App. 195). The State filed a Notice of Appeal on August 3, 2017. (Notice of Appeal; App. 201).

Facts:

Bo Li, Wei Tian and Na Tian are from China. (Ruling; App. 195). Bo Li, Na Tian and Wei Tian all share a residence at 1908 Judson Drive, Dubuque, IA. (Tr. p. 4, line 22- Tr. p. 5, line 21). Wei Tian and Na Tian are sisters. (Tr. p. 5, lines 17-20). Bo Li and Wei Tian are boyfriend and girlfriend. (Tr. p. 5, 17-20 and tr. p. 35, lines 18-20). Bo Li purchased a business named the Therapeutic Spa from its previous owners on September 6, 2016. (Claimants' Exhibit C and Tr. p. 22, line 22-p. 7, line 9; App. 57). The business offered massages to customers. (Tr. p. 13, line 24). Bo Li, Na Tian and Wei Tian all work at Therapeutic Spa with Na Tian and Wei Tian primarily giving massages. (Tr. p. 7, line 25-p. 8, line 20). Bo Li, Na Tian and Wei Tian all testified that there were no sexual services being offered at Therapeutic Spa. (Tr. 9. 21, lines 7-10; p. 29, line 25-p. 26, line 7; p. 42, line 20-p. 43, line 1).

Claimants had customers fill out customer consent forms. (Exhibit A; App. 38-52). On these forms the customers filled out their name and signed a waiver form. (Exhibit A; App. 38-52). Some of the consent forms were

completed by female clients. (Exhibit A and Tr. p. 31, lines 6-10; App. 38-52). Wei Tian and Na Tian also kept sheets showing what days and time they gave massages. (Exhibit E and Tr. p. 33, lines 13-18; App. 69).

Law enforcement started an investigation of Therapeutic Spa regarding improper sexual services in June or July 2016. (Tr. p. 45, line 7-12). At the time the police started their investigation the Spa was not owned or operated by the Claimants. (Tr. p. 69, lines 10-17).

As part of the investigation law enforcement found Therapeutic Spa listed on websites including Craigslist, Backpage and Rubmaps.com. (Tr. p. 46, lines 4-8 and State's Exhibit 1, 6 and 20). Some of the web sites included listings from prior to Bo Li purchasing Therapeutic Spa. (State's Exhibit 6 and 20; App. 30 and 37). Bo Li found out that Therapeutic Spa was listed on Rubmaps.com and attempted to have the business removed from the website. (Exhibit D and Tr. p. 21, line 17-p. 23, line 5 and Tr. p. 33, line 9-p. 34, line 9; App. 68).

During the investigation the officers conducting surveillance had noticed two females taking garbage with them from Therapeutic Spa. (Tr. p. 51, lines 7-18.) The females took the garbage to 1908 Judson and set it on the curb for pick up. (Tr. p. 51, lines 7-18). Police investigators searched

the garbage and found toilet paper that had seminal fluid and what appeared to be blood or fecal matter. (Tr. p. 82, line 3-13). Wei Tian testified that they were not allowed to use the dumpster behind the business because Therapeutic Spa did not pay for the dumpster or the garbage removal. (Tr. p. 34, lines 14-25 and Tr. p. 36, lines 9-13). Wei Tian testified in China they normally throw away soiled toilet paper. (Tr. p. 35, lines 1-10). Finally, Wei Tian testified that she and her boyfriend, Bo Li, would have sex at the business and would use toilet paper to clean themselves. (Tr. p. 35, lines 11-19).

Law enforcement was issued a search warrant and seized cash from 1908 Judson on February 14, 2017. (Tr. p. 55, line 24-p. 56, line 19). Law enforcement also seized electronics in the home including cell phones, tablets and computers. (Application for Return of Seized Property and Tr. p. 39, line 18-p. 36, line 1; App. 22-25). Wei Tian testified that she and her sister, Na Tian, had set aside money to open a dress store. (Tr. p. 32, lines 1-12). Wei Tian had completed a lease application for space to open a dress shop. (Exhibit B; App. 53). Both Wei Tian and Na Tian testified that they had sold some dresses prior to the seizure of money. (Tr. p. 28, lines 3-11 and Tr. p. 41, lines 15-17).

ROUTING STATEMENT

Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

ARGUMENT

- I. The District Court did not err in finding that the offense of practicing massage therapy without a license is not a serious misdemeanor.**

PRESERVATION OF ERROR:

Error was preserved by the filing of the timely notice of appeal.

STANDARD OF REVIEW:

The Court reviews statutory construction for errors at law. *State v. Lamoreux*, 875 N.W.2d 172, 176 (Iowa 2016).

DISCUSSION:

In interpreting a statute the primary goal is to give effect to the intent of the legislature. *Id.* at 177. The Court will give words their ordinary meaning in the absence of legislative definition. *State v. Walker*, 804 N.W.2d 284, 290 (Iowa 2011). The Court seeks a reasonable interpretation

which will best effectuate the purpose of the statute. *State v. Johnson*, 528 N.W.2d 638, 640 (Iowa 1995).

Forfeiture statutes are not favored under Iowa law and will be strictly construed. *State v. Dykes*, 471 N.W.2d 846, 847 (Iowa 1991). To uphold a forfeiture there must be a substantial connection between the property and the crime. *Id.* The Court must not use conjecture or speculation to tie the cash seized with the illegal activity. *State v. \$10,000 Seized from Mary Patrick*, 562 N.W.2d 192 (Iowa Ct. App. 1997). The conduct giving rise to forfeiture must be a public offense that is at least a serious misdemeanor. Iowa Code §809A.3(1)(a).

The State filed an In Rem Forfeiture Complaint against Bo Li, Wei Tian and Na Tian. (In Rem Forfeiture Complaint; App. 8-13). The only reason stated on the Complaint for the forfeiture was that, “[p]roperty was acquired from or is the proceeds of a crime.” (Forfeiture Complaint; App. 8-13). The State never specifically stated from what crime the proceeds arose.

During the forfeiture trial there was testimony that Bo Li, Wei Tian nor Na Tian had a massage therapy license. (Tr. p. 8, lines 2-4; p. 36, lines 20-24 and p. 40, lines 14-18). The State argued that because the Claimants

did not have a massage license pursuant to Iowa Code §147.2 that any proceeds from performing massages are forfeitable.

Iowa Code §147.86 states what the penalties are for violating any provision of the subtitle.

Iowa Code § 147.86 states,

Any person violating any provision of this subtitle, except insofar as the provisions apply or relate to or affect the practice of pharmacy, *or where a specific penalty is otherwise provided*, shall be guilty of a misdemeanor. *Emphasis added.*

Iowa Code §147.86 does not apply because there is a specific penalty provided for massage therapists in chapter 152C. This penalty can be found in Iowa Code §152C.4. Iowa Code §152C.4 states that practicing massage therapy without a license is not a crime, but that a civil penalty may be imposed. Iowa Code §152C should be applied to massage therapists and not Iowa Code §147.86. Iowa Code §147.86 specifically states that this provision shall not apply “where a specific penalty is otherwise provided”. *quoting* Iowa Code §147.86.

Chapter152C of the Iowa Code is titled Massage Therapy. Iowa Code §152C.3 list the requirements for licensure. Iowa Code §152C.4 lists the penalty for practicing as a message therapist without a license. Iowa Code §152C.3 states that, “[t]he board, may, by order, impose a civil penalty upon

a person who practices as a massage therapist without a license issued under this chapter or a person or business that employs an individual who is not licensed under this chapter. The penalty shall not exceed one thousand dollars for each offense.” Iowa Code §152C.4 does not make practicing as a massage therapist without a license a crime, but subject to a civil penalty. Since Iowa Code §147.86 does not apply to the practice of massage therapy without a license then it is not a serious misdemeanor. If it is not a serious misdemeanor then the State cannot base its forfeiture on those grounds.

The State argues that reading section 152C.4 to preclude application of section 147.86 would reduce section 152C.5 to surplusage, which is disfavored. The State then argues that any violation of section 152C.5 is a serious misdemeanor. However, this is not the case as nothing in chapter 152C refers to a violation being a serious misdemeanor and section 152C.5 discusses using the words “licensed massage therapist” in advertisements which is not prohibited in section 147.2.

A comparison can be made between Iowa chapter 152D and chapter 152C. Iowa chapter 152D specifically deals with athletic training. Iowa Code §152D.8 specifically states that a “person who violates a provision of this chapter is guilty of a serious misdemeanor.” The Legislature

specifically provided for a criminal penalty under chapter 152D but chose not to provide a specific criminal penalty for practicing massage therapy without a license.

Practicing massage therapy without a license is not a serious misdemeanor and not subject to a forfeiture action.

The State argues that *offering* to engage in the practice of massage therapy without a license is prohibited by section 152C.5 and nothing in section 152C.4 sets out a penalty for *offering* to engage in the practice of massage therapy and thus a forfeiture action could be based on *offering* to engage in the practice of massage therapy. (Emphasis added). This is a wide reading of the code sections. Nothing in section 152C.4 sets out any penalties for *offering* to engage in the practice of massage therapy.

Secondly, there was no evidence offered that Bo Li, Wei Tian or Na Tian specifically only offered massage therapy to anyone. There was evidence that the Claimants gave massages but there was no specific evidence that they only offered massages to any person.

II. The District Court did not err in determining that the State failed to prove, by a preponderance of the evidence, that the funds were proceeds of prostitution.

PRESERVATION OF ERROR:

Error was preserved by the timely filing of the notice of appeal.

STANDARD OF REVIEW:

The Court reviews forfeiture actions for correction of errors at law. *In re Property Seized from Chiodo*, 555 N.W.2d 412, 414 (Iowa 1996). The court views the evidence in the light most favorable to sustaining the district court judgment and the trial court's findings are construed liberally in order to support its result. *State v. Dykes*, 471 N.W.2d 846, 847 (Iowa 1991).

DISCUSSION:

Forfeiture statutes are not favored under Iowa law and will be strictly construed. *State v. Dykes*, 471 N.W.2d 846, 847 (Iowa 1991). To uphold a forfeiture there must be a substantial connection between the property and the crime. *Id.* The Court must not use conjecture or speculation to tie the cash seized with the illegal activity. *State v. \$10,000 Seized from Mary Patrick*, 562 N.W.2d 192 (Iowa Ct. App. 1997). The conduct giving rise to forfeiture must be a public offense that is at least a serious misdemeanor. Iowa Code §809A.3(1)(a).

In the present case there is no substantial connection between the cash seized and prostitution. Bo Li purchased the Therapeutic Spa from Hong Zhou on September 6, 2016. (Claimant's Exhibit C, page 10; App. 66).

Prior to Bo Li's purchase of Therapeutic Spa the State started an investigation into sexual misconduct. (Tr. p. 45, lines 7-12). The State admitted that Bo Li, Wei Tian and Na Tian did not own the spa at the time the investigation was started. (Tr. p. 69, lines 10-17).

The State investigators never stopped anyone coming in or out of Therapeutic Spa until after the search warrant was issued. (Tr. p. 70, lines 3-6). By this time the cash had already been seized. The investigators never had an undercover agent go inside Therapeutic Spa to see if any sexual services were offered. (Tr. p. 70, lines 22-24).

During the State's surveillance of Therapeutic Spa they conducted an internet investigation. (Tr. p. 45, line 25-p. 46, line 3). The State offered internet screen shots from an internet site titled "Rub Maps" as evidence of prostitution services being offered. (State's exhibits 1, 3-6; App. 26, 27-30). The State also admitted a screen shot from Craig's List. (Exhibit 20; App. 37) Nowhere on the exhibits are sexual services offered for money. Secondly, there is no way to know when these Rubmap advertisements were placed on the internet and who placed them on the internet. Exhibit 6 states that it was posted on June 20, 2016. (State's Exhibit 6; App. 30). This is two months before Bo Li purchased Therapeutic Spa. The Craig's List

exhibit had a date of October 30, 2015. (Exhibit 20; App. 37). Officer Hauptert testified that the Craig's List ad goes back to October 2015. (Tr. p. 75, lines 15-24). Again this is well before Bo Li purchased Therapeutic Spa.

The majority of the evidence supplied by the State regarding web pages is dated prior to September 6, 2016, when Bo Li purchased Therapeutic Spa. None of the web page evidence after September 6, 2016 point to prostitution.

Wei Tian testified that she tried to have Therapeutic Spa removed from the website Rubmaps.com. (Tr. p. 33, line 9-p. 34, line 6). Wei Tian mailed a letter to Rubmaps.com requesting that Therapeutic Spa be removed from that website. (Exhibit D; App. 68).

The State made a big issue out of Wei Tian and Na Tian taking garbage from Therapeutic Spa and disposing it at their residence. (Tr. p. 81, lines 1-17). Officer Bock along with other officers seized the garbage bag after it was placed outside at 1908 Judson. (Tr. p. 81, lines 18-22). The Officers found strips of toilet paper that appeared to have dried semen on them along with strips of toilet paper that appeared to have dried blood or possibly fecal matter. (Tr. p. 82, lines 6-13). A laboratory analysis

confirmed that there was semen on the toilet paper. (State Exhibit 8; App. 32).

The State argued that finding semen on strips of toilet paper was evidence of prostitution. However, Wei Tian provided a plausible explanation for the soiled toilet paper. Wei Tian testified that Therapeutic Spa was not allowed to use the big dumpster by their store. (Tr. p. 34, lines 14-25). The big dumpster was paid for by the hair salon next door and the hair salon would not allow Therapeutic Spa to use the dumpster. (Tr. p. 34, lines 14-25 and tr. p. 35, line 21-p. 36, line 13). Officer Bock testified that during his surveillance he never saw the two female employees put garbage in the dumpster. (Tr. p. 82, lines 19-21). This corroborates the testimony given by Wei Tian that they could not use the dumpster and had to take their garbage home for removal.

Also, Wei Tian testified that in China persons normally throw away soiled toilet paper instead of flushing it down the toilet. (Tr. p. 35, lines 1-10). It was common for Wei Tian, Bo Li and Na Tian to throw soiled toilet paper in the garbage.

Finally, Wei Tian and Bo Li were girlfriend and boyfriend. (Tr. p. 35, lines 11-20). Wei Tian testified that the semen on the toilet paper would

have come from them. (Tr. p. 35, lines 11-20). The parties engaged in sexual relations at the business. It should be noted that it was never determined whose semen was on the toilet paper.

Wei Tian and Na Tian taking the garbage to their residence for disposal was not evidence of prostitution, but their normal way of disposing of garbage. Therapeutic Spa did not have access to the dumpster behind the building as they did not pay for the garbage services. So to dispose of their garbage they took it home and put it out with their home garbage. In China it is common to throw away soiled toilet paper. If the Claimants' wanted to dispose of evidence of prostitution they could have flushed the toilet paper down the toilet. Finding garbage bags with toilet paper containing fecal matter is not evidence of prostitution.

The State offered evidence that during the investigation the officers only witnessed males coming from Therapeutic Spa and that is somehow evidence of prostitution. (Tr. p. 59, line 24-p. 60, line 6). However, Wei Tian testified that Therapeutic Spa kept customer sheets identifying the names of the customers. (Tr. p. 30, line 10-p. 31, 10 and Claimant's Exhibit A; App. 38). The customer sheets showed many female names that would have received massages. (Claimant's Exhibit A; App. 38). The surveillance

of Therapeutic Spa was not 24 hours and there would have been many times where no officers were surveilling Therapeutic Spa. (Tr. p. 74, lines 2-14). Officer Bock testified that during his surveillance the officers were a distance away and couldn't positively identify each worker coming out. (Tr. p. 75, lines 6-14). It is very possible then that they could not identify the sex of each customer due to the distance.

The State argues because there was cash found at the residence that it must be the proceeds of prostitution. Wei Tian testified that she and her sister were saving money to start a dress store. (Tr. p. 31, line 21-p. 32, line 12). Having envelopes of cash is not evidence that the cash was proceeds from illegal activity. Likewise, prepaid credit cards are not evidence of conducting illegal activity.

Finally, the State argues that a business card for Therapeutic Spa that was found in the purse of a person arrested for prostitution is evidence that Bo Li, Wei Tian and Na Tian were involved with prostitution. (Tr. p. 63, line 12-p. 64, line 13). The person arrested was named Deng Lihua. (Tr. p. 65, lines 1-5). The business card was found during the execution of a search warrant on April 28, 2017. (Tr. p. 63, line 12-15). This was after the State had filed the In Rem Forfeiture Complaint. Any evidence of the business

card is irrelevant as to the forfeiture as it was discovered months after the forfeiture was started. Secondly, the officers investigating Therapeutic Spa did not know if Deng Lihua ever worked at Therapeutic Spa. (Tr. p. 75, lines 2-5).

Bo Li and Wei Tian were in a loving relationship. (Tr. p. 20, lines 2-7). Bo Li would not want his girlfriend to provide sexual acts to other men. (Tr. p. 20, lines 2-7).

The State did not meet its burden that the cash seized was proceeds from prostitution. The State did not prove there was a substantial connection between the cash and that prostitution was occurring beyond mere conjecture and speculation. The District Court did not err in denying the Forfeiture complaint.

III. The District Court erred in denying the Claimant's Application for Seized Property.

PRESERVATION OF ERROR:

The Claimants' filed a separate Application for Seized Property and this application was denied by the District Court. The Application for Seized Property was argued during the hearing and in Claimants' Trial Brief. (Claimants' Trial Brief; App. 165-174). Thus, error was preserved. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

STANDARD OF REVIEW:

Statutory interpretation is reviewed for correction of errors at law.

Iowa R. App. 6.907. Any constitutional claim is reviewed de novo.

Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 258 (Iowa 2007).

DISCUSSION:

On February 14, 2017, the State not only seized cash from the Claimants but also seized electronic and documents as stated in the Application for Return of Property. (Application for Return of Property; App. 20-25) The State never included this property in their In Rem Forfeiture Complaint. The State never gave notice of the seizure of the electronics and never gave the owners the filing requirements as stated in Iowa Code §809.5(d). The Claimants each filed an Application for Return of Property. (Application for Return of Property; App. 20-25).

Iowa Chapter 809 and 809A deal with seized property. “The seizing agency shall serve notice by personal service or by sending the notice by

restricted certified mail, return receipt requested, to the last known address of any person having an ownership or possessory right in the property.”

Iowa Code §809.5(1)(a). Property seized for forfeiture shall be released to the owner if the prosecuting attorney fails to file a notice of pending forfeiture against the property within 90 days or file a judicial forfeiture proceeding within 90 days. Iowa Code §809A.8(1)(a).

The State never included the electronics on their In Rem Forfeiture Complaint. (In Rem Forfeiture Complaint; App. 8-13). The State never gave notice to the Claimants as stated in Iowa Code §809.5. As the date of the hearing the Claimants had not been charged with any crime. The property was not needed for any criminal investigation and should have been returned to the Claimants.

CONCLUSION

Failure to have a massage license is not a serious misdemeanor and as such is not a forfeitable offense. Iowa Code §152C.4 provides a specific penalty for failure to have a massage license and Iowa Code §147.86 does not apply. Secondly, the State did not prove that the cash seized was proceeds from prostitution. The State only showed suspicions and conjecture which is not enough to grant a forfeiture of funds. Thus the cash

seized must be returned to the Claimants. That State never gave proper notice regarding the seizure of the electronics and thus the electronics in Application for Returned Property must be returned to the Claimants.

NO REQUEST FOR ORAL ARGUMENT

Appellee does not believe that Oral Argument is needed.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing Appellee's Final Brief in the sum of \$0.00.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,940 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14-point Times New Roman.

/s/ Christopher M. Soppe

12-21-2017

Christopher M. Soppe

Date