

IN THE COURT OF APPEALS OF IOWA

No. 9-107 / 08-0947
Filed May 29, 2009

**IN THE MATTER OF PROPERTY SEIZED
FOR FORFEITURE FROM DUANE A. LOVELACE,**

DUANE A. LOVELACE,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, Judge.

Claimant appeals the district court's order denying his request to return seized funds and his request for sanctions against the Pottawattamie County Attorney's office. **REVERSED AND REMANDED.**

Patrick Sondag, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Margaret Popp Reyes and Shelly Sedlack, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VOGEL, P.J.

Claimant Duane Lovelace appeals the district court's order denying (1) his request to order the return of funds seized; and (2) his request for sanctions against the Pottawattamie County Attorney's office. We reverse and remand.

I. Background Facts and Proceedings

On July 2, 2007, claimant's vehicle was stopped by a deputy of the Pottawattamie County's Sheriff's office. During the stop, marijuana and heroin were discovered and \$22,600 in cash was seized. That same date, a notice of seizure was given to claimant pursuant to Iowa Code section 809A.6(2) (2007), containing the information required under section 809A.6(5). On July 26, a "Notice of Seizure for Forfeiture under Iowa Law" was filed and service was accomplished by publication on August 15. *But see* Iowa Code § 809A.8 (requiring the prosecuting attorney to file a "notice of pending forfeiture" within ninety days of the seizure and detailing the content of the notice).

On October 3, claimant's attorney hand delivered a letter to an assistant county attorney, requesting the seized cash be returned to claimant. The next day, October 4, the district court approved the assistant county attorney's ex parte application for forfeiture and ordered the property forfeited to the State of Iowa. On October 10, a "Motion to Vacate Forfeiture Order and for Return of Property and for Other Relief" was filed by claimant. After the county attorney's office contacted federal authorities, on November 28, the Office of the United States' Attorney filed a warrant for arrest in rem for the seized property; it was then under indictment.

On November 29, claimant filed a “Motion for Immediate Injunctive or Other Extraordinary Relief,” asserting the involvement of the federal authorities was undertaken to circumvent the district court’s jurisdiction. That same day, a hearing was held and the district court ordered the State of Iowa to retain the funds until further order of the court.

On December 3, the court vacated the October 4 order and ordered the return of the seized property, after finding the proper forfeiture procedure had not been followed by the county attorney’s office. The claimant then filed a bill of exceptions as to the November 29 hearing as well as a “Motion for Expanded Findings and Relief,” seeking findings that sanctions were warranted and requesting a hearing as to the nature and extent of such sanctions against “the State and/or prosecutor.” A hearing was held on February 29, 2008. In its subsequent ruling, the district court found the county attorney’s office “did a terrible job in attending to the necessary documents needed to successfully forfeit the funds,” but that nothing prevented the county attorney’s office from notifying the federal authorities of the seizure, should they be interested in pursuing their own forfeiture proceedings. It further found no basis for sanctions, concluding the prosecutors were “certainly guilty of neglect but not deception.”

Claimant appeals. The State through the attorney general’s office, responds to the issue regarding the request for return of the seized property.¹ The County responds as to the sanctions issue.

¹ As the federal authorities took control over the funds, the Claimant requests he be given substituted funds.

II. Scope of Review

We review forfeiture proceedings for correction of errors at law. *In re Property Seized For Forfeiture From Williams*, 676 N.W.2d 607, 612 (Iowa 2004). We review an order denying sanctions for an abuse of discretion. *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993).

III. Right to the Seized Property

Claimant first argues the substituted funds should be returned to him as the forfeiture was defective as detailed in the district court's December 3, 2007 order:

A forfeiture order was entered on October 4, 2007; however, the notice required by Section 809A.8 was defective in that there was no notice of pending forfeiture The Court finds that the forfeiture order was therefore defective as the proper notice was not and has not yet been given. The Court further finds that there is nothing in the "Notice of Seizure" that indicates the reason for the forfeiture. The Court further finds that there is no showing that notice of this "Notice of Seizure" was given to Mr. Lovelace.

The State asserts claimant was put on notice of the forfeiture proceedings, albeit conceding the "Notice of Forfeiture Proceedings" was miscaptioned and did not allege the reasons for the seizure. It further argues claimant did not file a timely demand for return of the property under section 809A.11.

Forfeitures are not favored under the law and we strictly construe statutes allowing forfeiture. *Property Seized For Forfeiture From Williams*, 676 N.W.2d at 612. In this instance we echo the sentiments of the district court that the county attorney's office failed in its duty of tending to the required details of the forfeiture

proceeding. However, we look to a significant flaw in the prosecutor's handling of the case which causes us to reverse the district court.

The "notice of seizure" stated the property was seized on July 2, 2007. Therefore, under Iowa Code section 809A.8(1)(a)(1), the property shall be released upon request of the owner if the prosecuting attorney has not filed a "notice of pending forfeiture" within ninety days of the seizure. That time ran on October 1, 2007. On October 3, claimant's attorney hand delivered a letter to an assistant county attorney, requesting release of the property, noting the flaws in the prosecutor's handling of the seized funds, and referenced the appropriate code sections. See Iowa Code § 809A.8(1). In spite of that request, the very next day, the prosecutor, ex parte, presented the district court this order:

The Court has examined the prosecuting attorney's application² for declaration of forfeiture and the accompanying documents and finds that proper notice has been given, the Court has jurisdiction and that facts recited provide probable cause for forfeiture all as required by 809A.16(3) of the Code. The Court approves the application and orders: The following property is forfeited

When notified of the signed order on October 10, claimant's counsel filed a motion to vacate. By the time the November 29 order was entered to temporarily enjoin release of the funds, the federal authorities had already been alerted and on November 28 had filed a Warrant for Arrest in Rem.

Claimant asserts and we agree, had claimant's counsel been alerted to the prosecutor's presentation to the court of the October 4 ex parte order, the court would have been informed of the irregularities in the proceedings and come to the same conclusion it did in the December 3 order: "No forfeiture in fact ever

² No written application appears in the record on appeal.

occurred.” Because no forfeiture in fact occurred and the funds should have been returned to claimant prior to the county attorney contacting federal authorities, we reverse and remand for entry of an order returning \$22,600, in substituted funds, to claimant.

IV. Sanctions

In denying sanctions, the district court found, “There is nothing to show that the State of Iowa tried to deceive the Court or Mr. Lovelace.” The record, however, strongly suggests otherwise. The assistant county attorney personally received a letter from claimant’s counsel outlining the statutory flaws in the prosecutor’s pursuit of the forfeiture proceedings and making a demand for the return of the property. In spite of that specific information and knowledge claimant was represented by counsel, the assistant county attorney sought and obtained, the very next day, an ex parte order asserting to the court full compliance with the appropriate forfeiture statutes.

Such action exceeds “neglect.” The district court, at the February 29, 2008 hearing, expressed dismay with the representations of the county attorney’s office, but apparently concluded that there was no problem with that office contacting the federal authorities should they wish to proceed against the property. Lost in that analysis was the timing. The assistant county attorney presented the ex parte order to the court the day after being informed by claimant’s counsel of its procedural errors. As discussed above, the federal authorities were not contacted until after the motion to vacate had been filed, a motion which would have been unnecessary had the assistant county attorney not proceeded to secure an order ex parte. As the county attorney’s office had

been alerted by claimant's counsel as to the missteps in the forfeiture proceedings, but chose to proceed presenting a seriously flawed ex parte order to the court, sanctions are warranted under Iowa Rules of Civil Procedure 1.413(1).

We therefore reverse the district court and remand for entry of an order returning to claimant \$22,600 in substituted funds. The district court shall also hold a hearing to determine a reasonable amount of attorney fees, expenses, and costs to be awarded claimant by the County. Costs on appeal are assessed to the County.

REVERSED AND REMANDED.