FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-654 / 89-277

410

STATE OF IOWA,

Appellee,

vs.

BOBBY GENE SYKES,

Appellant.

STATE OF IOWA,

Appellee,

vs.

ONE CERTAIN CONVEYANCE,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

The district court ordered the forfeiture of three vehicles owned by defendant on the ground the vehicles had been used in the unlawful transportation or distribution of controlled substances. Defendant appeals. **AFFIRMED IN PART AND REVERSED IN PART.**

John W. Ackerman, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; James Metcalf, County Attorney; and Thomas Ferguson, Assistant County Attorney; for plaintiff-appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Defendant Bobby Gene Sykes was arrested on September 9, 1985. After obtaining a search warrant, police seized a 1972 Pontiac Catalina, a 1981 Volkswagon Rabbit, a 1984 Chevrolet Corvette, a 1974 Chevrolet Camaro, and a 1973 Pontiac Grand Prix, all belonging to Sykes. Also seized was a quantity of marijuana, believed to have been found in Sykes' apartment and the Grand Prix, some alleged drug paraphernalia, over $1,400 in cash, and assorted other personal property. The State initiated forfeiture proceedings under chapter 204, section 505.8, and chapter 126 of the Code of Iowa. (Both of which have since been repealed.) The State alleged the vehicles were used in the unlawful transportation or distribution of controlled substances. Police officers found a small scale, a police scanner, and a small amount of marijuana in the Camaro. Marijuana was found stored in the engine compartment of the Grand Prix. Also, marijuana residue was found in the interior of the Corvette. The district court ruled the Corvette, Camaro, and Grand Prix should be forfeited.

Sykes appeals. He claims the procedural requirements of chapter 809 should apply because chapter 809 states it applies to forfeitures of all property. Section 809.10(2) requires a hearing on a forfeiture claim must be held within thirty days after filing of the claim. Sykes

contends the trial court should have granted his motion to dismiss because a hearing was not held within the thirty-day limit. The court ruled the thirty-day limit did not apply because the State did not proceed under chapter 809.

Defendant further contends the transcript of Sykes' trial in the criminal proceeding was inadmissible in the forfeiture proceeding. Section 809.11(1) defines a forfeiture proceeding as separate and distinct from any related criminal proceeding. He argues the State made no showing the witnesses at his criminal trial were unavailable for the forfeiture hearing. Therefore, the transcript is hearsay and not admissible. The State points out the court specifically did not admit the transcript of the criminal proceeding into evidence.

Sykes urges Iowa not to follow the federal rule that any quantity of a controlled substance, however minute, justifies forfeiture. He states the federal law requires only probable cause to believe the vehicle was used to violate the drug laws, while section 809.11(1) requires clear and convincing evidence. He believes federal precedent is of little value in interpreting Iowa law.

Sykes contends the State failed to meet its burden of proof in establishing the vehicles should be forfeited. He asserts the vehicles were not traceable to the proceeds of a criminal transaction. He states the scale and police

scanner do not necessarily show the vehicles were used for processing or delivering a controlled substance. Sykes claims the presence of marijuana in the vehicles was most likely due to one of his acquaintances, since he does not use drugs.

Finally, Sykes argues the State should have been bound by a pretrial order which provided the State prove by clear and convincing evidence the Corvette was used to transport or hold marijuana. He feels the court disregarded this pretrial order at the later hearing. Sykes claims he was denied due process because he based his defense on this pretrial order.

1. **Motion to Dismiss.** Defendant argues chapter 809 procedure should have been applied in this case because the code section states it applies to any property, with no exception for conveyances. Defendant urges us to read this chapter in conjunction with chapters 204 and 127.

Although it is unlikely this issue will arise again because chapter 127 and section 204.505 were repealed and replaced by chapter 809, we will address it to resolve Sykes' appeal. See 1986 Iowa Acts, ch. 1140, § 19.

The seizure of property at issue in this case occurred on September 9, 1985. At that time, the applicable forfeiture law was found in the Code of Iowa 1985.

Section 809.1, entitled "Seized Property," states in pertinent part:

> For the purposes of this chapter, "seized property" means all property or any part thereof seized in the execution of a search warrant, arrest warrant, or arrest without warrant; and includes the following:
>
> 4. Property subject to forfeiture except forfeitable conveyances described in chapter 127 and except forfeitable controlled substances described in chapter 204 and except property subject to forfeiture pursuant to section 728.13.

Iowa Code chapter 127, subsection 24, defines a conveyance subject to forfeiture as:

> A conveyance as defined in section 127.1 [automobile] which is used in the unlawful transportation or distribution of a controlled substance is subject to seizure and forfeiture under this chapter in the same manner as if the conveyance is used in the unlawful transportation of intoxicating liquor. The peace officer seizing a conveyance for a violation relating to the distribution or transportation of a controlled substance shall follow procedures specified in this chapter to the extent applicable.

The language of the Code is clear. At that time, chapter 809 did not apply to seizure and forfeiture of conveyances used in unlawful transportation or distribution of a controlled substance. There was, therefore, no requirement a hearing be held within thirty days from the time Sykes filed his claim. The trial court was correct in determining chapter 127 and section 204.505 were the applicable laws.

2. Criminal Case Transcript. Sykes contends the trial court erroneously used the transcript of his criminal trial against him in the forfeiture proceeding. However, he does

not refer us to any evidence in the record to support this assertion.

In the January 4, 1989, order, Judge Bauch stated the court reviewed all of the exhibits offered by the State and admits all exhibits except WW and XX, which were the transcript of the proceedings in case no. D7X05077, the criminal case.

Sykes accusation is incorrect.

3. Sufficiency of the Evidence. Defendant raises several issues on appeal which boil down to an assertion the evidence was insufficient to support the forfeiture of the three automobiles at issue: the Pontiac Grand Prix, the Chevrolet Corvette, and the Chevrolet Camaro. (The Volkswagon Rabbit was forfeited in another proceeding.)

The supreme court has clearly defined the standard of review applied in forfeiture proceedings. Matter of Rush, 448 N.W.2d 472 (Iowa 1989).

> Our review in forfeiture proceedings is deferential. In State v. One Certain Conveyance, a 1978 Dodge Magnum, 334 N.W.2d 724 (Iowa 1983) we reviewed a forfeiture proceeding under Iowa code section 204.505 and Iowa Code chapter 127 (1981). In Dodge Magnum, we stated:In forfeiture actions we sit to correct errors of law. Forfeiture under chapter 127 is a special proceeding triable to the district court and is not triable de novo on appeal to us. [W]e will not reverse [an order of forfeiture under chapter 127] unless the evidence is utterly wanting to support the conclusion of the trial court.

Id. at 477 [citations omitted].

The court in Rush reasoned it would apply the same standard of review for factual findings utilized under repealed chapter 127 to chapter 809 proceedings. Id.

> [This court will] view the evidence in the light most favorable to sustaining the district court judgment. The trial court's findings are construed liberally in order to support its result. A finding is supported by substantial evidence if it may be reasonably inferred from the evidence. If supported by substantial evidence and justified under the law, the findings are binding on us and the judgment will not be disturbed on appeal. The possibility of drawing inconsistent conclusions from the same body of evidence does not prevent a finding from being supported by substantial evidence.

Id.

We must determine whether there is substantial evidence to support the district court's ruling the vehicles were subject to forfeiture because of a violation of section 204.505. We must view the evidence in the light most favorable to the State. Id. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16).

Viewing the evidence in this light, we conclude the order of forfeiture is affirmed as to the 1973 Pontiac Grand Prix and the 1974 Chevrolet Camaro.

We affirm the return of the 1972 Pontiac Catalina. The trial court ordered its return because no evidence was presented regarding this vehicle.

We reverse the forfeiture of the 1984 Corvette and order it returned to the defendant.

A search of the Grand Prix turned up a large quantity of marijuana inside the car as well as $696.00 in currency and coins; mostly in five's and ten's. After finding the marijuana inside, the officers attempted to back the car out of the garage and noticed the engine running hot. They found another large amount of marijuana in the engine. We agree with the trial court the State has met its burden of establishing the Grand Prix held marijuana in violation of Code sections 204.505(8) and 204.505(1)(c).

An impound search of the Camaro was conducted and marijuana, a scale, and hand-held scanner were found. Additionally, officers had observed confidential buys from the Camaro which Sykes drove. The trial court was correct in concluding the car contained evidence consistent with selling drugs. The State established this vehicle was used to violate Iowa Code chapter 204.

We do not agree, however, with the trial court's finding the State has met its burden regarding the forfeiture of the Corvette. A search of the Corvette only produced marijuana residue, $455 in cash, and a scanner. Contrary to the trial court, we do not think this is sufficient evidence to show a violation of chapter 204.

In his ruling on Sykes' motion to dismiss, Judge Lybbert cautioned the State would have to prove the Corvette was used to transport or hold marijuana or the forfeiture under chapter 127 would have to be dismissed.

He stated it was doubtful mere evidence of traces of marijuana from the car would be sufficient evidence. We find the State failed to prove the car was used to hold or transport marijuana.

The bulk of the State's evidence supports the theory the car was purchased from the proceeds of Sykes' business of selling a controlled substance. This theory of forfeiture falls within the purview of chapter 809. Because Sykes did not receive the requisite thirty-day hearing, the Corvette cannot be forfeited.

AFFIRMED IN PART AND REVERSED IN PART.