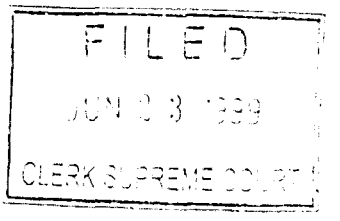
IN THE COURT OF APPEALS OF IOWA

No. 1999-85 (9-272) / 98-1241
Filed June 23, 1999

ROBERT FRANCIS MURRAY,

Petitioner-Appellant,



vs.

JOHN R. HOWES, as Trustee of STEVEN P. ADELSON KEOGH PLAN TRUST,

Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge.

Petitioner, the prior owner of real estate subject to a tax sale, appeals from a district court's decree denying his petition to vacate defendant's tax deed for the property. **AFFIRMED.**

Paul J. Bieber of Gomez, May, Carter & Schutte, Davenport, for appellant.

Mary Howes-Davis, Davenport, for appellee.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

SACKETT, C.J.

Petitioner-appellant Robert Francis Murray appeals after the district court refused to vacate a tax deed given, on property Murray once owned, to respondent-appellee John R. Howes as Trustee of the Steven P. Adelson Keogh Plan Trust. Murray contends the district court's finding he was served with a notice of the expiration of the period for the right of redemption was erroneous. We affirm.

The notice in question allegedly was served by James Reistroffer, a private process server, on June 2, 1997, as shown by an affidavit of service.[1] Reistroffer also testified he served the notice on Murray on June 2, 1997, at 7:30 p.m. As to the circumstances surrounding service, he said:

> It was dark outside, plus the hallway, looking in, was dark, the stairs.
>
> I knocked on the door, and -- it was open -- it was just screened in, it was open -- and I heard an individual, and I said, Mr. Murray? And he said, Yes. I says, I have some papers for you, and I opened up the screen and I gave it to him.
>
> Q. And so an individual identified himself by saying yes when you said Mr. Murray? A. Yes.
>
> . . . .
>
> Q. And could you describe what you recall this individual looked like? I mean -- male, right? A. Yes.
>
> Q. Race would be -- . A. It was dark, you know -- he sounded Caucasian.
>
> Q. Okay. Could it have been -- well, do you remember any other characteristics of this individual, other than he was a white male? How about his age? A. I can't remember on his age.
>
> Q. Could it have been Mr. Murray sitting over here? A. I know this is Bob Murray.

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[1] The affidavit further said Leon Hill, Scott Hill, Emily Hill, and Dustin Hill were in possession on June 2, 1997, and they, too, were served.

Q. Did you know Mr. Murray, though, on that date and time?
A. No, I did not.
Q. And -- you had no idea who he was, correct? A. No.

Murray testified he had not been at the place he was allegedly served since 1990 or 1991. He further testified he was not served with the notice. Leon Hill, the tenant at the premises and an employee of Murray's business, testified he was not living on the premises at the time of service.

The district court denied Murray's petition to vacate the deed. The court found Reistroffer's version of the events surrounding the service more credible than Murray's version. The court found the proper parties had been served with the notice in accordance with the affidavit of service. The court found Murray failed to meet his burden of proof under a clear-and-convincing-evidence standard for overturning the proof of service of the notice.

We review de novo. *Strong v. Jarvis*, 524 N.W.2d 675, 677 (Iowa App. 1994). In equity cases, we give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7); *Metropolitan Jacobson Dev. Venture v. Board of Review*, 524 N.W.2d 189, 192 (Iowa 1994). We are especially deferential to the trial court's assessment of the credibility of witnesses. *Metropolitan*, 524 N.W.2d at 192.

The evidence required to overturn a return of service made by an officer for public policy reasons must be clear, conclusive, and of satisfactory character, and the return of service should ordinarily be upheld. *See Glenn v. Miller,* 186 Iowa 1187, 1190-91, 173 N.W. 135, 136 (1919). There is a strong presumption in favor of an

officer's return of service. *See Goodale v. Bray,* 546 N.W.2d 212, 213 n. 1 (Iowa 1996). The presumption is strengthened when supported by oral testimony of the server. *Swift v. Swift,* 239 Iowa 62, 68, 29 N.W.2d 535, 539 (1947).

Murray advances the cases supporting the strong presumption in favor of a return of service do not involve private process servers and should not control here. We agree the cases address only service by an officer. *See Strong,* 524 N.W.2d at 677 (evidence was not provided to overcome the strong presumption in favor of the return of the deputy sheriff); *Swift,* 239 Iowa at 68, 29 N.W.2d at 539 (there is a strong presumption in favor of deputy sheriff's return of service, especially when supported by the officer's oral testimony); *Ruth & Clark, Inc. v. Emery,* 233 Iowa 1234, 1242, 11 N.W.2d 397, 402 (1943) (sheriff's return is presumed to be regular and valid, and the burden of proof is on the challenger); *Chader v. Wilkins,* 226 Iowa 417, 421, 284 N.W. 183, 185 (1939) (return of service of sheriff is conclusive unless its falsity is disclosed by some other portion of the record in the case); *Heater v. Bagan,* 206 Iowa 1301, 221 N.W. 932, 934 (1928) (sheriff's return upon original notice presumed correct); *Thompson Bros. v. Phillips,* 198 Iowa 1064, 1067, 200 N.W. 727, 729 (1924) (evidence of want of service held insufficient to overcome sheriff's return of service); *Des Moines Coal & Coke Co. v. Marks Inv. Co.,* 197 Iowa 589, 594, 195 N.W. 597, 598-99 (1923) (evidence was not of that clear and satisfactory character required to justify the rejection of the sheriff's return upon the original notice); *Overland Davenport Co. v. W. M. Novak Auto Co.,* 190 Iowa 205, 206, 180 N.W. 147, 147-48

(1920) (sheriff's return of service of notice and his testimony support trial court's finding of proper service); *Glenn,* 186 Iowa at 1189, 173 N.W. at 136 (where court said the truth of the matter is left in some doubt, but did not feel justified in holding the presumption in favor of the truth of sheriff's return had been successfully rebutted); *Pyle v. Stone,* 185 Iowa 785, 790-91, 171 N.W. 156, 158 (1919) (burden is on plaintiffs to show by direct and satisfactory evidence the presumption in favor of the deputy's return is not well founded); *McWilliams v. Robertson,* 180 Iowa 281, 285, 163 N.W. 198, 199 (1917) (court took judicial notice of sheriff's return of service); *Christensen v. Esbeck,* 167 Iowa 130, 135, 149 N.W. 76, 78 (1914) (presumption arises in favor of judgment as to matters based upon proper service of notice by constable); *In re East,* 143 Iowa 370, 378-79, 122 N.W. 153, 159 (1909) (deputy's return of service showed notice was given to the proper party); *Bowden v. Hadley,* 138 Iowa 711, 714, 116 N.W. 689, 689 (1908) (defendant's testimony denying service is not sufficient to overcome the sworn return of the officer); *Mosher v. McDonald & Co.,* 128 Iowa 68, 69-70, 102 N.W. 837, 838 (1905) (parol evidence insufficient to overcome the presumption in favor of sheriff's return of service); *Galvin v. Dailey,* 109 Iowa 332, 337, 80 N.W. 420, 422 (1899) (officer's return is strong evidence of its correctness, and is not overcome by such testimony as that offered by petitioner); *Farnsley v. Stillwell,* 107 Iowa 631, 634 78 N.W. 678, 679 (1899) (burden is on plaintiff to overcome presumption constable served notice); *Wyland v. Frost,* 75 Iowa 209, 210, 39 N.W. 241, 242 (1888) (evidence introduced

by plaintiff is not of that clear, conclusive, and satisfactory character required to overthrow the return of the constable); *Ketchum v. White,* 72 Iowa 193, 195, 33 N.W. 627, 628 (1887) (return of sheriff is strong presumption it correctly states what had been done).

The Trust contends the law does not distinguish a private process server from another and the Rules of Civil Procedure provide for private process servers. The Trust contends there is no basis to give a return of a private process server less weight than the return of a sheriff's deputy.

While recognizing the question of whether the strong presumption afforded an officer's return of service should also be afforded a private process server has not been addressed by the Iowa courts, we find it unnecessary to address it now. On our de novo review, giving the required deference to the credibility findings of the district court and disregarding any presumption, we find Robert Francis Murray was properly served with the required notice and affirm.

AFFIRMED.

No. 98-1241. [1999-85 (9-272)] MURRAY v. HOWES

Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel and Zimmer, JJ. Opinion by Sackett, C.J. (6 pages $2.40)

Petitioner Murray appeals after the district court refused to vacate a tax deed given, on property Murray once owned, to respondent- appellee John R. Howes as Trustee of the Steven P. Adelson Keogh Plan Trust. Murray contends the district court's finding he was served with a notice of the expiration of the period for the right of redemption was erroneous. We affirm. The notice in question allegedly was served by Reistroffer, a private process server, on June 2, 1997, as shown by an affidavit of service. Reistroffer also testified he served the notice on Murray on June 2, 1997, at 7:30 p.m. Murray testified he had not been at the place he was allegedly served since 1990 or 1991. He further testified he was not served with the notice. The district court denied Murray's petition to vacate the deed. The court found Reistroffer's version of the events surrounding the service more credible than Murray's version. The court found the proper parties had been served with the notice in accordance with the affidavit of service. The court found Murray failed to meet his burden of proof under a clear-and-convincing-evidence standard for overturning the proof of service of the notice. We

review de novo. The evidence required to overturn a return of service made by an officer for public policy reasons must be clear, conclusive, and of satisfactory character, and the return of service should ordinarily be upheld. Murray advances the cases supporting the strong presumption in favor of a return of service do not involve private process servers and should not control here. We agree the cases address only service by an officer. The Trust contends the law does not distinguish a private process server from another and the Rules of Civil Procedure provide for private process servers. The Trust contends there is no basis to give a return of a private process server less weight than the return of a sheriff's deputy. While recognizing the question of whether the strong presumption afforded an officer's return of service should also be afforded a private process server has not been addressed by the Iowa courts, we find it unnecessary to address it now. On our de novo review, giving the required deference to the credibility findings of the district court and disregarding any presumption, we find Robert Francis Murray was properly served with the required notice and affirm