FILED
OCT 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

386

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed October 29, 1985
vs.	)	
MARK NOEDING GROSVENOR,	)	5-371 84-1370
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Johnson County - L. Vern Robinson and Ansel J. Chapman, Judges.

Defendant appeals the district court's refusal to order return to defendant property seized in a search warrant search. **REVERSED.**

Raymond D. Perry, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Defendant appeals the district court's refusal to order return to defendant property seized in a search warrant search. We reverse.

On September 7, 1983, defendant was arrested and certain property was seized, including $877.00 from defendant's wallet, and $4,000 found in a pocket of a jacket in a closet inside defendant's room. The next day the clerk of court sent a notice to defendant concerning forfeiture of the seized property pursuant to section 809.2 of the Iowa Code. The notice was sent by certified mail but it was returned to the clerk on October 4, 1983, undelivered. A copy of the notice was also sent to defendant's attorney by regular mail.

The notice contained information describing the property seized and subject to forfeiture, and a directive for the defendant to appear at an 8:00 a.m. hearing on September 20, 1983, to show cause why the seized property should not be forfeited.

On September 16, 1983, defendant filed an application to the district court for the return of his seized property. Four days after defendant's application, on September 20, 1983, the assistant county attorney appeared in court for the forfeiture hearing. No hearing was held, however, because defendant and his attorney did not appear. On July 20, 1984, after defendant's criminal conviction and subsequent applications for the return of his property, the trial court ordered all of the property seized on September 7, 1983, forfeited.

The following issues are raised by defendant on appeal: (1) whether the notice sent by the State, the day after defendant's arrest, was improper and inadequate under Iowa Code section 809.2 (1983); (2) whether Iowa Code section 809.4 (1983), required the State to schedule and serve notice of a hearing after defendant filed his claim on September 16, 1983; and (3) whether the State failed to timely resist defendant's claim for the return of his property under Iowa

Code section 809.4. We reverse the trial court on the basis that the State failed to comply with Iowa Code section 809.4.

The applicable code sections read as follows:

> **809.1 Seized property.** 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:
>
> * * *
>
> 5. Other property relevant and material as evidence in a criminal prosecution.
>
> **809.2 Notice.** The clerk of court shall issue a notice, containing a reasonable description of the seized property and the time, place, and cause of its seizure, within seventy-two hours after the time of its seizure in a manner reasonably calculated to apprise affected persons of their right to file a claim for the return of the property, pursuant to section 809.3.
>
> **809.3 Claimant.** Any person claiming the right to possession of seized property may make application for its return in the office of the clerk of court for the county in which it was seized.
>
> **809.4 Hearing.** All claims made for the return of the seized property shall be set for hearing and such hearing shall be held not less than five nor more than thirty days after the filing of the first claim.

The supreme court has considered these forfeiture statutes to be penal in nature, "a circumstance which requires that they be strictly construed against the state." State v. One Certain 1982 Honda Auto, 353 N.W.2d 90, 91 (Iowa 1984). In State v. Kaufman, 201 N.W.2d 722, 723 (Iowa 1972), the supreme court stated that "forfeitures are not favored and forfeiture statutes should be strictly construed." Generally forfeitures are not favored either in law or equity. Chicago, R.I. & P.R. Co. v. City of Iowa City, 288 N.W.2d 536, 541 (Iowa 1980); Loulie v. Plumb, 250 N.W.2d 53, 56 (Iowa 1977); Collins v. Isaacson, 261 Iowa 1236, 1242, 158 N.W.2d 14, 17-18 (1968).

I. Notice Under Section 809.2. Defendant alleges that the notice sent by the clerk on September 8, 1983, was defective in that it did not strictly comply with the requirements of Iowa Code section 809.2.

Section 809.2 states that the clerk shall issue a notice, ". . . in a manner reasonably calculated to apprise affected persons of their right to file a claim for the return of the property, pursuant to section 809.3." Defendant argues, quite persuasively, that sections 809.2, 809.3, and 809.4 must be read as a step-by-step process. He alleges that section 809.2 merely outlines the procedures for the clerk to follow in issuing a notice to potential claimants. The defendant claims section 809.2 does not allow the State to set a hearing date before the defendant files a claim for the property pursuant to section 809.3. Defendant finally alleges that after a notice has been issued according to section 809.2, and a claim filed pursuant to section 809.3, then, and only then, may the State issue a notice containing a date for a hearing on forfeiture of the property.

Defendant's argument is persuasive in that in 1981, an amendment to section 809.2 took out wording that had allowed the clerk to set a hearing date at the same time it sent the original ntoice. See 1981 Iowa Acts (69 G.A.) ch. 206, § 1. This specific code section has not heretofore been interpreted by the supreme court, and we decline to do so at this time. Although defendant is quite convincing in his argument, he waived any alleged errors in notice of the forfeiture hearing when he filed his claim for the property on September 16, 1983. A general appearance is a waiver of notice and if a party appears in person or by attorney he submits himself to the jurisdiction of the court. Lonning v. Lonning, 199 N.W.2d 60, 62 (Iowa 1972). Since defendant has waived any alleged defects in the original notice, we need not address this issue any further.

II. Schedule and Serve Notice of Hearing Pursuant to § 809.4 (1983). Defendant's step-by-step interpretation of sections 809.2, 809.3, and 809.4,

necessarily concludes that the State is required to send a second notice to all claimants after an initial claim is made under section 809.3. The relevant language of 809.4 states in part, "[A]ll claims made for the return of the seized property shall be set for hearing . . . ." It would be logical to presume that the requirement of a hearing would naturally include a notice of that hearing sent to all interested parties. The State, in fact, impliedly agrees that notice of a hearing is required. In their brief, the State admitted that "there was apparently an assumption that defendant would seek return of the money . . .," so they sent notice of a hearing along with the original notice pursuant to 809.2. The State argues that strict construction of the statutes is appropriate for the substantive provisions which state the characteristics of forfeitable property, but inappropriate, however, for the procedural provisions in the absence of prejudice to the claimant. It cites no authority for this conclusion, nor have we found any.

While the necessity of the second notice of a hearing date could easily be read into the language of section 809.4, we decline to do so at this time. Our unwillingness to construe the section in the manner desired by the defendant is based upon our holding on the third issue raised in this appeal.

III. Failure to Timely Resist Defendant's Claim. The clerk sent the initial notice to defendant on September 8, 1983, informing him that a hearing date was set for the 20th of September, 1983. Defendant filed his application on the 16th of September, 1983. Finally, on July 12, 1984, the State resisted defendant's claim, and on July 20, 1984, the court ordered the property forfeited.

Section 809.4 states in part that "[A]ll claims . . . shall be set for hearing and such hearing shall be held not less than five nor more than thirty days after the filing of the first claim." (Emphasis ours.) The State cites to Texas authority in arguing that this provision is directory and not mandatory. This is unpersuasive.

The Iowa Supreme Court has said, "when addressed to a public official the word 'shall' is ordinarily mandatory, excluding the idea of permissiveness or discretion." Roth v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972); Schmidt v. Abbott, 261 Iowa 886, 890, 156 N.W.2d 649, 651 (1968). Construction of this section as mandatory would be more in line with the requirement that forfeiture statutes be strictly construed against the State. See State v. One Certain 1982 Honda Auto, 353 N.W.2d 90, 91 (Iowa 1984).

The State asserts that it did comply with the requirements of section 809.4, in that the hearing date was set for September 20, 1983, a full 12 days after notice was sent to defendant on the 8th of September. This argument is buttressed by the State's additional contention that defendant had actual notice of the forfeiture hearing through his general appearance. Finally, the State asserts that even if the July 12, 1984, resistance and July 20, 1984, hearing were considered, the fact that they were more than thirty days after the filing of the claim does not matter because the defendant could not have received the money anyway and therefore was not harmed.

All of these arguments fail to demonstrate that the State strictly complied with the statute. Even if defendant's general appearance waived any notice issues under section 809.2, the fact remains that he did not file his claim until September 16, 1983. Section 809.4 clearly states that the hearing shall not be held "less than five days . . . after the filing of the first claim." From September 16, 1983, to September 20, 1983, is only four days, whereas five days is required. Also, the hearing on July 12, 1984, is well beyond the thirty-day limit imposed by section 809.4.

We hold that the State did not strictly comply with Iowa Code section 809.4 (1983), and therefore reverse the district court.

REVERSED.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. The majority summarily dismisses authority from another jurisdiction which is directly on point.

In McKee v. State, 318 S.W.2d 113 (Tex. Civ. App. 1958), the court dealt with an appeal by a defendant who claimed the forfeiture action was void because the case was not heard within 30 days from the date of filing as provided by statute. The court stated:

> There is no absolute test by which it may be determined whether a statutory provision is mandatory or directory. The fundamental rule is to ascertain and give effect to the legislative intent. Although the word "shall" is generally construed to be mandatory, it may be and frequently is held to be merely directory. In determining whether the Legislature intended the particular provision to be mandatory or merely directory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction. Provisions which are not of the essence of the thing to be done, but which are included for the purpose of promoting the proper, orderly and prompt conduct of business, are not generally regarded as mandatory. If the statute directs, authorizes or commands an act to be done within a certain time, the absence of words restraining the doing thereof afterwards or stating the consequences of failure to act within the time specified, may be considered as a circumstance tending to support a directory construction. (Authority)

Id. at 117.

The court held the time period stated in the forfeiture provision was directory and not mandatory.

Similarly, I feel that the language contained in section 809.4 which provides Iowa's time limitations on forfeiture proceedings should be considered as directory. For this reason, I would affirm the district court.