IN THE COURT OF APPEALS OF IOWA

No 6-118 / 93-60

FILED
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CLERK SUPREME COURT

BISHOP ENGINEERING, INC.,
Appellee,

vs

ROBERT M. PHILLIPS, SR., and **ROBERT M. PHILLIPS, P.C.,**
Appellants

Appeal from the Iowa District Court for Polk County, Jack Levin and Michael J Streit, Judges.

The defendants appeal the district court's ruling authorizing the sale of their property in attachment proceedings and the order of the district court expunging the defendants' financing statement covering the attached property. **AFFIRMED.**

Robert M. Phillips, Sr., Ashland, Kentucky, pro se.

Peter S. Cannon, Des Moines, for appellee.

Considered by Sackett, C.J , and Habhab and Huitink, JJ.

HUITINK, J.

Robert M Phillips , Sr. and his professional corporation appeal from the district court's order authorizing the sale of property seized under a writ of attachment obtained by Bishop Engineering. We affirm.

These proceedings were initiated by Bishop Engineering ("Bishop") following Phillip's misappropriation of funds entrusted to him as Bishop's accountant. This misappropriation formed a part of Phillip's conviction for mail fraud in federal court. The federal court ordered Phillips to make full restitution to those victimized by his conduct including Bishop.

On January 8, 1991, Bishop filed a petition seeking to attach Phillip's property. A writ was issued based on Bishop's allegations Phillips misappropriated its funds and property was seized from Phillip's lake home in Guthrie County and a storage facility in Elk Point, South Dakota.

Further attachment proceedings were stayed by the bankruptcy court. Bishop eventually obtained a 1.7 million dollar judgment against Phillips in bankruptcy court. After the bankruptcy stay was lifted, Bishop filed an application with the district court to sell property seized under the writ of attachment.

After a hearing at which Phillips was represented by counsel, the district court entered an order authorizing sale of seized property. The district court's order included findings that the seized property was acquired with stolen funds. In making this

determination, the district court cited the extensive nature of Phillip's embezzlement and his lack of sufficient legitimate income to acquire this property. The court also rejected Phillips claims that a portion of this property was exempt or belonged to others. The property was ultimately sold at auction.

On appeal, Phillips challenges the validity of the district court's attachment proceedings. Phillip's argues Iowa Code §639 *et seq.* is unconstitutional because it does not provide for a predisposition hearing in violation of his due process rights. He also claims the district court failed to provide and adequate opportunity for his defense because he was incarcerated, and that the district court's order authorizing the sale of his property lacks sufficient evidentiary support. Phillips additionally argues that Bishop's recovery is precluded by his restitution obligations imposed by the federal court and Bishop's delay in prosecuting the attachment proceeding. Phillips also claims the execution provisions of Iowa Code §626 *et seq.* are unconstitutional because they discriminate against Iowa residents.

Subsequent to filing this appeal, Phillips filed a financing statement with the Iowa Secretary of State. This financing statement included a description of the attached property and named Bishop, other related parties and the district court as Phillip's debtors. The district court granted Bishop's request to expunge the financing statement. The record does not indicate the disposition of Phillip's motion to reconsider this order. In addition to the foregoing issues, Phillips also challenges the

expungement order claiming the district court lacked jurisdiction to rule on Bishop's motion.

This appeal has been pending since 1993. Phillips has requested a number of extensions of time to comply with applicable rules of appellate procedure because he remains incarcerated and is representing himself. Bishop filed a motion to dismiss Phillip's appeal citing Phillip's failure to comply with Iowa R.App.P.14 (d)(5). This rule provides:

> ... Each division of the agrument shall begin with a discussion, citing relevant authority, concerning the scope or standard of appellate review (e.g., "on error," "abuse of discretion", or de novo") and shall state how the issue was preserved for review with references to places in the record where the issue was raised and decided.

Bishop's motion was denied. However, Phillips was ordered to file an amended brief including the required Rule 14(a)(5) statement.

Phillip's amended brief includes his version of a Rule 14(a)(5) statement. In this statement, Phillips states that he believes the standard of review should be "on error" or "for an abuse of discretion". He also states that because he is pro se, the court should determine the proper scope of review "sua sponte". Phillip's statement does not include any indication as to how any of his issues, other than his sufficiency of evidence claims, were preserved for review nor is there any reference to the places in the record where the issues were raised and decided. Phillips correctly notes that his sufficiency of the evidence claim has been preserved. *See* Iowa R. Civ. P.179(b).

We have repeatedly held that matters not raised in the district court, including constitutional questions cannot be effectively asserted for the first time on appeal. *State v. Lyon*, 223 N W.2d 193, 194 (Iowa 1974), *Cerro Gordo Hotel Co. v. City of Mason City*, 505 N.W 2d 509, 513 (Iowa App. 1993) Iowa R. App. P. 14(a)(5) is intended to assist the appellate courts in determining whether issues raised on appeal have been properly preserved for review. We are unable to determine which of Phillip's assignments of error have been preserved because he has failed to state how these issues were preserved for review or where in the record any issue was raised and decided in the district court. *See Brown v. Guiter*, 256 Iowa 671, 674, 128 N.W.2d 896, 898 (1964). (Reviewing court can refuse to consider brief and agrument not containing references to the record showing how error was raised and decided in the district court.). We accordingly will not consider any of Phillips arguments not properly designated by the rule. We will however consider Bishop's sufficiency of the evidence claim and jurisdictional challenge to the district court's expungement order. Iowa R. Civ. P 179(b) (party may raise sufficiency of evidence even if no objection was made at trial); *Hutchison v. Iowa Dist. Court for Lee County*, 480 N.W.2d 260, 262 (Iowa 1992) (Challenges to subject matter jurisdiction can be raised for the first time on appeal)

The difficulty of our task has been increased by Bishop's failure to file an appellee's brief. The failure of an appellee to file a brief does not entitle the appellant

to a reversal as a matter of right, but it does provide a bases for sanctions *State ex rel. Buechler v. Vinsand,* 318 N.W.2d 208, 209 (Iowa 1982); *In re Marriage of Okonkwo,* 525 N W.2d 820, 871 (Iowa App. 1994); *Pierre v. Iowa Dept. Of Social Services,* 334 N.W.2d 359, 360 (Iowa App. 1982). Ordinarily, we will not search the record for a theory upon which to affirm the trial court. *Jefferson County v. Barton Douglas Contractors, Inc.,* 282 N.W 2d 155, 157 (Iowa 1979). We may confine our consideration to issues raised in appellant's brief or treat appellee's failure to file a brief as a concession of claims made by appellant, depending on their apparent merit. *Id.* We limit our consideration to the issues Phillips has properly preserved and impose sanctions as hereinafter provided.

Sufficiency of Evidence

Phillips essentially alleges throughout his brief that there was insufficient evidence to support several findings made by the district court. We disagree.

Ordinarily proceedings in attachment are proceedings at law. *Rutlege v. Williams,* 196 N.W. 1071 (Iowa 1924). Therefore, our review is limited to errors of law Iowa R. App. P. 4. We are bound by the trial courts findings of facts if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings. *Waukon Auto Supply v.Farmers and Merchants Savings Bank,* 440 N.W.2d 844, 846

(Iowa 1989). Evidence is not unsubstantial merely because it could support contrary inferences. *Grinnell Mut. Reins. Co. v. Voeltz,* 431 N.W.2d 783, 785 (Iowa 1985).

The record includes evidence indicating Phillips misappropriated 4.5 million dollars over a six year period. The district court was unable to reconcile Phillip's life style and acquisitions with his reported taxable income of $42,000 or less during this time period. We hold the district court could reasonably infer from these circumstances that the seized property was acquired with stolen funds.

The district court rejected Phillipp's daughter's claims to some of the property citing evidence Phillips was the purchaser of the property claimed. The district court also noted the difference in exemptions claimed in bankruptcy proceedings from Phillip's exemption claim in this case. This evidence combined with the district court's assessment of Kristina's credibility provides sufficient evidentiary support for its findings

We have searched the record and find the remainder of the district court's findings are supported by substantial evidence We accordingly affirm on this issue All other issues raised in division III of Phillip's brief have not been considered because of Phillip's failure to preserve error

We also reject Phillip's jurisdictional challenge to the district courts expungement order. It is the general rule that the trial court loses jurisdiction over the merits of a controversy once an appeal is perfected. *Shedlock v. Polk County Dist.*

Court, 534 N W.2d 656, 658 (Iowa 1995), *Wolf v. City of Ely,* 493 N.W 2d 846, 848 (Iowa 1992). An exception to the general rule, however, permits the trial court to retain jurisdiction over disputes between the parties which are collateral to the subject matter of the appeal. *Shedlock,* 534 N.W.2d at 658; *In re Estate of Tallefsrud,* 275 N.W.2d 412, 417 (Iowa 1979). Phillips appealed the validity of the writs of attachment, and the constitutionality of the proceedings authorizing the sale of the attached assets. The financing statement was filed subsequent to the appeal and was therefore a collateral matter. Because the order expunging the financing statement did not decide any issue in the underlying attachment proceedings, we find that the district court had subject matter jurisdiction to hear and decide Bishop's application to expunge the financing statement. *See Schettler v. Dist. Ct. for Carroll County,* 509 N.W.2d 459, 464 (Iowa 1993). The rest of Phillips' claims regarding this order are wholly without merit. We affirm the district court on this issue.

Phillips, throughout his brief and other statements to the court, has reminded us that he is proceeding pro se. He asks the court to grant him latitude given his unfamiliarity with applicable law and procedures. Pro se litigants are not allowed substantial departures from appellate procedures and have to accept the consequences of proceeding without legal counsel. *Polk County v. Davis,* 525 N.W.2d 434, 435 (Iowa App. 1994). We do not recognize a deferential standard for persons who choose to represent themselves. Lawyers and lay persons alike are expected to act with equal

competence. *Metropolitan Jacobson Dev. Venture v. Board of Review of Des Moines*, 476 N.W 2d 726, 729 (Iowa 1991). Phillips' pro se status does not preclude us from disposing of the majority of the issues raised based on his failure to identify or preserve error

We tax the costs of this appeal to Bishop Engineering as a sanction for failing to file an appellees brief

AFFIRMED.

Sackett, C.J , concurs. Habhab, J., concurs in part and dissents in part.

HABHAB, J. (concurring in part; dissenting in part)

I concur in all respects with the majority opinion, except that part which assesses the costs on appeal to Bishop Engineering. To that part of that opinion, I respectfully dissent.