IN THE COURT OF APPEALS OF IOWA

No. 1-179 / 90-1088

STATE OF IOWA,

Appellee,

vs.

DONALD ROLAND,

Appellant.

FILED
MAY 29 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.

Roland appeals the denial of his application seeking the return of $410 in cash seized from him following his arrest for robbery. **REVERSED AND REMANDED.**

Donald Roland, appellant, pro se.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Bruce A. Ingham, Assistant County Attorney, for appellee.

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

OXBERGER, C.J.

On May 27, 1989, Donald Roland robbed a bar and took some cash. The bartender at the time of the robbery testified that between $250 and $300 was taken in the robbery. The State estimated the amount of cash taken was approximately $585. When Roland was arrested several hours after the robbery, the police found $996.55 in cash on his person and in his truck. The State seized all of cash found in Roland's possession.

Roland was convicted of first-degree robbery. The supreme court affirmed his conviction in an unpublished per curiam opinion on October 29, 1990.

On May 29, 1990, Roland filed the present pro se application asking that $410 of the cash seized from him during his arrest be returned to him. His application stated that $410 was seized from his person and $556.55 was seized from his truck. The application also noted that at his trial, the State asserted that approximately $585 was taken during the robbery.

The district court found Roland failed to state the nature of his interest in the property and the grounds upon which he sought the return of the cash. Relying on Iowa Code section 809.3(2)(1989), the district court concluded Roland's application was insufficient as a matter of law, and granted the State a judgment on the pleadings.

Roland, still acting pro se, has appealed the district court's ruling. He reiterates his argument he is entitled to the return of the $410 because this amount represents the difference between the State's estimate of the robbery proceeds and the amount of cash seized by the police at the time of his arrest. He also asserts he had cashed a check shortly before the robbery, thus giving him a legitimate explanation for the possession of the $410. He asks us to order the return of the $410 or to remand for a district court hearing on his application.

We note that in his application Roland states $410 was seized from his person, whereas, in his brief he states a total of $995.77 was seized during his arrest. In both his application and his brief Roland states $556.55 was seized from his truck at the time of his arrest. We assume Roland's application contained an inadvertent error because $410 is approximately the difference between the total amount seized and the State's assertion of the amount he took during the robbery.

We review this matter for correction of errors at law. Iowa R. App. P. 4; Matter of Kaster, 454 N.W.2d 876, 877 (Iowa 1990). "Although forfeiture statutes are not criminal statutes, they are penal in nature and must be strictly construed." Id. (citing State v. One Certain 1969 Ford Van, 191 N.W.2d 662, 666 (Iowa 1971)). At a forfeiture hearing, the State must prove by a preponderance

of the evidence the property is forfeitable. Iowa Code §809.11(1); State v. $2,434.00 Cash, 461 N.W.2d 346, 347 (Iowa App. 1990).

Iowa Code section 809.6 provides that property which may not legally be possessed is automatically forfeited. But, Iowa Code section 809.8 requires county attorneys and the attorney general to file a notice of forfeiture in the case of property which is merely "forfeitable." Section 809.8(2) further requires notice of forfeiture "not later than one year after the date upon which the state learned that the property was forfeitable or not later than six months after the property was seized, whichever is later. Failure to file within that time terminates the state's right to claim a forfeiture of the property."

Iowa Code section 809.1(2) states "forfeitable property" means any of the following:

> (a) Property which is illegally possessed.
> (b) Property which has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense.
> (c) Property which is acquired as or from the proceeds of a criminal offense.
> (d) Property offered or given to another as an inducement for the commission of a criminal offense.

In his application for the return of the $410, Roland asserts the State failed to file a "Notice of Forfeiture" within one year of the seizure, and therefore the State failed to extinguish his ownership interest in the money. Roland also asserts in his application the $410 "was never

used as evidence nor has it been claimed that it was not the Defendant's [Roland's] money. But the money has never been returned to Roland."

In its motion for judgment on the pleadings, the State merely asserted (1) to the extent the application is for the return of forfeitable property, Roland improperly filed his application as a criminal case, and (2) to the extent the application is for the return of seized property, Roland failed to set forth the nature of his interest in the cash and the grounds upon which he sought to have the cash returned.

Iowa Code section 809.3(2) states in part:

> The application for the return of seized property shall state the specific item or items sought, the nature of the claimant's interest in the property, and the grounds upon which the claimant seeks to have the property immediately returned. Mere ownership is insufficient as grounds for immediate return. The written application shall be specific and the claimant shall be limited at the judicial hearing to proof of the grounds set out in the application for immediate return. . . . . If no specific grounds are set out in the application for return, or the grounds set out are insufficient as a matter of law, the court may enter judgment on the pleadings without further hearing.

Roland asserts (1) the State never claimed at his trial that he took more than $585 from the bar and (2) the State never filed a "notice of forfeiture" extinguishing his ownership interest in the cash.

While Roland's pro se application lacks specificity with respect to what grounds he bases his application on,

we refuse to find the application insufficient as a matter of law. Roland's application presents more than a bald assertion of ownership. The application, read as a whole, adequately sets forth the grounds upon which Roland seeks the return of the cash, such that a hearing should be held to allow Roland and the State an opportunity to present their cases.

The State's reply merely pointed out Roland's technical inadequacies without making any claim the money does not belong to him. We find it nonsensical to require a greater showing of ownership, at the pleading stage, than Roland has made with respect to the cash in his possession at the time of his arrest. Further, we recognize that citizens who have not committed any crime often carry fairly large sums of cash. At the hearing Roland will have the opportunity to present evidence, such as the canceled check he claims to have cashed shortly before his arrest or any other evidence he might have to explain how he came to have the cash in his possession at the time of his arrest.

REVERSED AND REMANDED.

Sackett, J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I specially concur. In doing so I note that Donald Roland brought this action under section 809.3 of the Iowa Code. He is entitled to pursue this remedy for under subparagraph 1 of that section "any person claiming a right to immediate possession of seized property may make application for its return in the office of the clerk of court for the county in which the property was seized."

However, when Roland filed his application, he was required to (1) state the specific item or items sought, (2) the nature of his interest in the property, and (3) the grounds upon which he seeks to have the property immediately returned. Iowa Code § 809.3(2). Subsection 2 of that section is clear that "mere ownership is insufficient as grounds for immediate return."

Subsection 2 further provides that the written application "shall be specific and a claimant shall be limited at the judicial hearing to proof of the grounds set out in the application for immediate return." There is the additional provision that if no specific grounds are set out in the application for the return of the property or if the grounds set out are insufficient as a matter of law, the court may enter judgment on the pleadings without further hearing.

I have reviewed Roland's application and find it lacking in many respects. But for the fact that he proceeded pro se, I would quickly affirm the trial court

for it is clear to me that he is basing his claim for immediate return of the seized property on a "mere ownership" allegation, an assertion declared by statute to be insufficient. The fact that the State has not proceeded with forfeiture and is now precluded from doing so has no bearing on whether a claimant is entitled to immediate possession of seized property. The State's failure to file a timely claim for forfeiture merely terminates its right to claim a forfeiture of the forfeitable property. State v. Ludtke, 446 N.W.2d 797 (Iowa 1989). The property remains intact and is not open for grabs; there are other provisions available for its disposition when the State's rights are terminated.

Be that as it may, although I concur in the result reached by the majority, since this is a section 809.3 application, the burden rests with Roland to prove his claim for immediate possession. In this respect, Chapter 809 is a special proceedings chapter that provides for the disposition of seizable and forfeitable property. On the one hand, there is a remedy available for a person that claims a right to immediate possession of seized property to enforce that right, and on the other hand, it gives to the State the right to proceed against forfeitable property that has been seized. That chapter prescribes the procedure that must be followed in each instance.

When the State forfeits property under section 809.8, it has the burden to prove by a preponderance of the

evidence that the property is forfeitable. Iowa Code § 809.11 (1989), State v. $2,434 Cash, 461 N.W.2d at 347 (Iowa App. 1990). See also Matter of Rush, 448 N.W.2d 472, 475 (Iowa 1989). But this burden of proof comes into play only when the State seeks to forfeit the property. Here, where Roland makes claim to seized property under section 809.3, it is for him to carry that burden of proof.

Under section 809.3 the burden rests with the claimant to set forth specific grounds in his application for return of the property. In addition, section 809.5 casts meaningful light on where the burden of proof rests in an 809.3 hearing. That section makes it clear that "upon the filing of a claim and following hearing by the court, property which has been seized shall be returned to the person who demonstrates a right to possession . . ." Here Roland claims the property. It should be for him to demonstrate his right to possession. He cannot rest on the allegations of his application.