NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0154**
VERSUS	*	**COURT OF APPEAL**
$35,146.00 (U.S. CURRENCY)	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. K-19991-99, SECTION "MAG-1"
Honorable Gerard L. Hansen, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Max N. Tobias, Jr.)

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AFFIRMED.

The State of Louisiana appeals a trial court judgment vacating a judgment of forfeiture that pertained to cash seized by the New Orleans Police Department (NOPD) from Jimmie Dickerson's home. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 11, 1999, based on a confidential informant's tip that Mr. Dickerson stored and sold narcotics and proceeds at 5419 Constance Street in New Orleans, NOPD obtained and executed a search warrant for that address. Earlier, the police had conducted a surveillance of Mr. Dickerson and observed him participating in what they believed to be three narcotics transactions. No drugs or drug paraphernalia were located when the police stopped Mr. Dickerson in the vehicle or when his home was searched. However, the officers found $545 in cash in his vehicle. In Mr. Dickerson's home, the police located guns and a shoebox containing $34,601. Pursuant apparently to a seizure warrant signed on November 16, 1999, NOPD's asset forfeiture unit seized the money from Mr. Dickerson's vehicle and home totaling $35,146.

Thereafter, the State sent a notice of pending forfeiture dated December 17, 1999 to Mr. Dickerson at 5419 Constance Street, but the notice was returned marked "unclaimed." Also, on December 23, 1999, the State published notice of the pending forfeiture in the newspaper.

On April 18, 2000, the magistrate division of the Criminal District Court presumably issued a default judgment of forfeiture. This judgment is not included in the record on appeal. On or about June 9, 2000, Mr. Dickerson filed a rule to show cause why the money was seized. The resolution of that rule, along with the rule itself, is not in the record. On or about May 22, 2001, Mr. Dickerson filed a motion to annul the judgment of forfeiture and motion for return of seized property.

On September 21, 2001, the trial court held a hearing on the motion to annul. On October 2, 2001, the trial court issued a judgment ordering that the forfeiture against Mr. Dickerson be set aside and vacated and that the appropriate office return $35,146 to Mr. Dickerson. The trial judge's stated reason for his ruling was that the warrant issued for the seizure was defective in that the element of probable cause was absent. The trial judge specifically stated that if he was the judge who signed the warrant, he made a mistake in

that the warrant was defective.

From that judgment, the State filed a writ application. Concluding that the judgment was a final, appealable judgment, this court denied the State's writ application on November 8, 2001. The State then filed a notice of intent to appeal the judgment, which the trial court signed on November 19, 2001.

DISCUSSION

On appeal, the State contends that the defendant's motion to annul was improperly granted. The State first argues that Mr. Dickerson lacked standing to contest the default judgment because he failed to file a claim pursuant to La. R.S. 40:2610 and because he allegedly told the seizing police officer that the money did not belong to him.

La. R.S. 40:2610 provides, in part, as follows:

> Only an owner of or interest holder in property seized for forfeiture may file a claim, and shall do so in the manner provided in this Section. The claim shall be mailed to the seizing agency and to the district attorney by certified mail, return receipt requested, within thirty days after Notice of Pending Forfeiture. No extension of time for the filing of a claim shall be granted.

The trial court dismissed the State's argument, reasoning:

> I think his presence in the Court, the acceptance of the

> fact that we're hearing his argument and didn't throw it out on the basis that he had no merit is sufficient to show that he had the money. Another Judge by his own action give him an Order to return the money to him. Another Judge acknowledged the fact that it was his money. So I don't think that argument holds.

Although the record does not include the order referenced by the trial court, we nevertheless agree with the trial court that Mr. Dickerson has standing. Although the cited statute sets forth the method for one to use to contest a seizure, it does not apply here to prevent Mr. Dickerson from using a motion to annul to contest the default judgment rendered against money seized from his home and vehicle. The State has provided neither a jurisprudential nor a statutory basis for a finding that La. R.S. 40:2610 either affects standing or is applicable at this juncture in this case.

Furthermore, like the trial court, we attribute no significance to Mr. Dickerson's alleged denial that the money was his at the time it was seized. Again, noting the State's failure to make a proper, complete record for our review, we defer to the trial court's statements that Mr. Dickerson did file a claim after the warrant was signed and two months later obtained an order for return of the money, which another judge signed. The State's argument lacks merit.

The State next argues that the motion to annul was procedurally

barred by the Code of Civil Procedure articles on nullity actions. In his motion to annul, Mr. Dickerson argued that the default judgment was invalid because the State failed to comply with La. R.S. 40:2608; specifically, he argued that the State failed to notify him of the pending forfeiture. That argument could be categorized as a demand for a nullity for a vice of form pursuant to La. Code Civ. Pro. art. 2002 A(2).

Mr. Dickerson also demanded a nullity of the default judgment on the basis that the warrant directing the seizure was not based on probable cause. This basis is best categorized as a vice of substance pursuant to La. Code Civ. Pro. art. 2004. Given the trial court's statements at the hearing, it is clear the court rendered judgment vacating the default judgment solely on the basis that the warrant was defective and not on the basis of any problem with notice to Mr. Dickerson. Thus, the State's arguments regarding La. Code Civ. Pro. art. 2002, whether Mr. Dickerson received notice of the proceeding, and whether he "voluntarily acquiesced" in the judgment pursuant to La. Code Civ. Pro. art. 2003 are irrelevant and will not be addressed.

La. Code Civ. Pro. art. 2004 provides:

A. A final judgment obtained by fraud or ill practices may be

annulled.

B. An action to annul a judgment on these grounds must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practice.

This article is not limited to cases of actual fraud or intentional wrongdoing, but is sufficiently broad to encompass all situations when a judgment is rendered through some improper practice or procedure which operates, even innocently, to deprive the party cast in judgment of some legal right, and when the enforcement of the judgment would be unconscionable and inequitable. *Kem Search, Inc. v. Sheffield*, 434 So.2d 1067, 1070 (La. 1983).

In the *Kem Search* case, the court noted:

> The trial court is permitted discretion in deciding when a judgment should be annulled because of fraud or ill practice. . . . However, the ambit of a trial judge's discretion is determined by the reasons for its existence. . . . As Judge Friendly noted in *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 71 (C.A.2d 1967), several of the most important reasons for deferring to the trial judge's exercise of discretion are: his observation of the witness, his superior opportunity to get "the feel of the case," see *Cone v. West Virginia Pulp & Paper Co.*,330 U.S. 212, 216, 67 S.Ct. 752, 755, 91 L.Ed. 849 (1947), and the impracticability of framing a rule of decision where many disparate factors must be weighed, see *Atchison, T. & S.F. Ry. v. Barrett*, 246 F.2d 846 (C.A.9th 1957). On occasion, when a problem arises in a context so new and unsettled that the rule-makers do not yet know what factors should shape the result, the case may be a good one to leave to lower court discretion. See Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L.Rev. 635, 662 (1971). (Citations omitted.)

434 So.2d at 1071.

Pertinent to our review of the judgment on appeal is the supreme court's statement in *Belle Pass Terminal, Inc. v. Jolin, Inc*., 2001-0149 (La. 10/16/01), 800 So.2d 762, that:

> It is imperative that courts review a petition for nullity closely as an action for nullity based on fraud or ill practices is not intended as a substitute for an appeal or as a second chance to prove a claim that was previously denied for failure of proof. The purpose of an action for nullity is to prevent injustice which cannot be corrected through new trials and appeals. . . . In reviewing a decision of the trial court on a petition for nullity, the issue for the reviewing court is not whether the trial court was right or wrong but whether the trial court's conclusions were reasonable. *Kem Search* at 1071. (citations omitted)

2001-0149, at p. 5-6, 800 So.2d at 766. Accordingly, we must consider whether the ruling of the trial court was reasonable.

As to La. Code Civ. Pro. art. 2004, the State argues only that Mr. Dickerson's action for nullity was not filed within one year of discovery of the "ill practice" as required by section B of the article. The State claims that the ill practice was the seizure of the money in November 1999. Based upon the record before him, the trial judge, however, indicated that the nullity action was timely because the record showed that Mr. Dickerson brought an action to get his money back within two months after the judgment of forfeiture was entered, and entry of the default judgment of forfeiture based upon a defective

warrant was the event constituting ill practice.

Based on the trial judge's findings, and in the absence of any argument or evidence submitted by the State to the contrary, we conclude that June 2000 marked Mr. Dickerson's discovery of the "ill practice" associated with the issuance of the default judgment of forfeiture. Hence, we find that the motion to annul, filed in May 2001, was timely under article 2004.

Finally, the State argues that the default judgment of forfeiture was proper because the totality of the circumstances show that the seizure warrant was based upon probable cause. Aside from the parties' arguments, the only information in the record concerning the circumstances in this case is the trial judge's recounting of the incidents leading up to the seizure:

> There was some information that he was dealing drugs. That they came out to the scene. . . did a surveillance and then went to Judge Waldron and got a . . .[search warrant] because they said they saw some activity. . . . They went into the house, they found nothing. Nothing. They arrested him someplace, found nothing on him. I think they searched his car, they found nothing on him. They found no drugs any place but they found the forty-nine thousand (sic) dollars which the dog came and hit upon. . . . So the dog hits upon what they call drug money and therefore they seize it. They come here to us with that information showing no drug connection whatsoever. No drug connection in the arrest, no confirmation of stopping anyone who bought drugs from the location, no confirmation of drugs in the car, no confirmation of drugs on the person, no confirmation of drugs anywhere in sight . . . . Having all that in mind there was no probable cause. The warrant was defective from the day it was signed. If I signed it I made a mistake.

> And I've set these aside before because I don't believe that we should take and seize people's property for no reason. . . . I find no probable cause at this time for the warrant. Therefore, . . . the fruits of the seizure [have] to be returned if the method by which you seize is defective.
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> [A]s to probable cause, they had a confidential informant and they watched the house but they didn't stop anyone who had . . . allegedly purchased drugs from the place. When they found [Mr. Dickerson] in his car he had a, you say[,] large sum of money on him. I think he had five hundred and some odd dollars on him. It's not unusual for people in this City to carry that amount of money on them. The large sum of money was in the house, not on his person. . . . They found weapons in the house. It's not illegal to have weapons in your house. And it's only illegal to have weapons in your house if you have weapons while you're dealing drugs. Therefore, I just think the entirety of the warrant is defective.

Considering the State's failure to make a proper record for review on appeal, as well as the comments made by the trial judge, we are compelled to conclude that Mr. Dickerson was deprived of his legal right to obtain the money seized and that enforcement of the default judgment of forfeiture would be unconscionable and inequitable. The decision of the trial court to vacate the judgment of forfeiture and return the money to Mr. Dickerson was within the court's discretion. Based on what is contained in the record and, even more, what is absent from the record, we find that the trial judge's decision was reasonable. The October 2, 2001 judgment is affirmed.

AFFIRMED