

STATE OF MICHIGAN
COURT OF APPEALS

AMERICAN EAGLE FIREWORKS, WILLIAM
STAJOS, and JAN STAJOS,

UNPUBLISHED
June 18, 1999

Plaintiffs-Appellants,

v

No. 206713
Ingham Circuit Court
LC No. 96-083849 CZ

CITY OF LANSING, KIRT BAKER, JEFF
AVIERO, KIM WARREN EDDIE, and JAMES
BALLARD,

Defendants-Appellees.

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

This 42 USC § 1983 and malicious prosecution action arises out of defendants' seizure and destruction of certain fireworks sold by plaintiffs. Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8). The trial court disposed of plaintiffs' claims on the grounds of governmental immunity and an earlier decision by this Court which found that plaintiffs' fireworks were illegal under Michigan's fireworks statute. We affirm.

Initially, plaintiffs claim that the trial court erred in granting summary disposition because the fireworks were not contraband subject to lawful seizure or destruction. A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). In this case, the trial court did not err in granting summary disposition for defendants because the fireworks were contraband per se and were therefore subject to immediate destruction.¹

MCL 780.652; MSA 28.1259(2) authorizes the issuance of search warrants and permits officers to seize any property that is possessed in violation of any law of this state or property that is contraband. Some Michigan statutes specifically declare certain objects or substances to be contraband and permit their confiscation and/or destruction.² However, Michigan's fireworks statutes, MCL 750.243a *et seq.*; MSA 28.440(1) *et seq.*, do not contain a similar declaration that illegal

fireworks may be destroyed as contraband. The fireworks in this instance were nevertheless contraband per se because the fireworks statute required plaintiffs to have a permit to possess them and because plaintiffs had no such permit. This was the holding of *Stajos v City of Lansing*, 221 Mich App 223, 234; 561 NW2d 116 (1997), where this Court ruled that these same fireworks were forbidden by Michigan's fireworks statute because they were not specifically permitted by a statutory exception.

Contraband per se refers to items of which the mere possession is contrary to public policy. *People v Rosa*, 11 Mich App 157, 161; 160 NW2d 747 (1968). Plaintiffs concede on appeal that contraband per se is subject to forfeiture without explicit statutory authority. The fireworks in the instant case were not legally possessed, and it therefore would have been improper to return them to plaintiffs. Because the fireworks in this matter were contraband per se, their seizure and immediate forfeiture was authorized by MCL 780.652; MSA 28.1259(2).

Plaintiffs also argue that the fireworks were merely derivative contraband and not contraband per se. The argument is without merit. An example of derivative contraband is money earned in a illegal drug sale. *People v Washington*, 134 Mich App 504, 510; 351 NW2d 577 (1984). The fireworks in question in this case were specifically found to be unlawfully possessed pursuant to statute. The items therefore were not merely incidentally connected to a statutory violation, but instead were themselves illegal and hence not derivative contraband. Plaintiffs also cite MCL 750.388; MSA 28.620, governing malicious destruction of property seized by legal process, as supporting their contention that defendants may be held liable for destruction of the fireworks. However, that statute does not apply to this case because it controls only executions on property to collect debts, not officers seizing goods in the course of a search warrant.

Next, plaintiffs argue that the trial court erred in ruling that assistant prosecuting attorney Eddie was immune for his actions. The trial court committed no error because Eddie is immune from liability for claims arising under both 42 USC § 1983 and state law.

Prosecuting attorneys are absolutely immune from a 42 USC § 1983 claim when initiating a prosecution and presenting the state's case. *Baldori v Smith*, 219 Mich App 713, 717; 558 NW2d 9 (1996) citing *Imbler v Pachtman*, 424 US 409, 431; 96 S Ct 984; 47 L Ed 2d 128 (1976). Eddie's alleged acts of furthering a search warrant and ordering the disposal of the explosives are well within the usual functions of a prosecutor. Although Eddie's 42 USC § 1983 immunity does not govern plaintiffs' state law claims because Eddie's actions in furtherance of the search warrant and destruction of the fireworks as contraband per se were within the scope of his prosecutorial function, he is entitled to qualified immunity pursuant to MCL 691.1407(2); MSA 3.996(107)(2).

Next, plaintiffs argue that they established a prima facie case of malicious prosecution, so that summary disposition was improper. However, plaintiffs failed to state a claim for malicious prosecution because they cannot demonstrate that the prior criminal proceedings terminated in their favor. *Payton v Detroit*, 211 Mich App 375, 394-395; 536 NW2d 233 (1995). In the criminal matter involving plaintiffs' illegal possession of fireworks, plaintiffs' business, American Eagle, pleaded no contest to violating the fireworks statute. This cannot be deemed to be a termination in plaintiffs' favor.

Finally, plaintiffs argue that they established a prima facie case that the search warrant leading to the seizure and destruction of the fireworks was unconstitutionally invalid. This issue cannot be raised in an ancillary civil proceeding but, instead, should have been addressed to the court in the criminal case. Since American Eagle pleaded no contest to the charge, any objections to the warrant are deemed waived. *People v New*, 427 Mich 482, 485; 398 NW2d 358 (1986).

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

¹ Plaintiffs have attached an extensive number of documents to their brief on appeal, including portions of depositions, affidavits, a search warrant, and a criminal charging information. However, the trial court decided defendants' motion on the basis of MCR 2.116(C)(8). Since plaintiffs have not moved to expand the record pursuant to MCR 7.210, these materials are outside the scope of the record and may not be considered on appeal. MCR 7.210(A)(1); *Tope v Howe*, 179 Mich App 91, 106; 445 NW2d 452 (1989).

² The Tobacco Products Tax Act, MCL 205.429; MSA 7.411(39), for example, provides that any tobacco product held, owned, or possessed in violation of the act is contraband and may be seized and confiscated. The Natural Resources and Environmental Protection Act, MCL 324.61523; MSA 13A.61523, provides that any illegal oil or gas is subject to confiscation and seizure. The Controlled Substance Act, MCL 333.7525(1); MSA 14.15(7521), provides that illegally possessed schedule 1 narcotics are deemed contraband and are subject to summary forfeiture. Penal statutes governing forgery provide that any item of property bearing a counterfeit mark is subject to seizure under warrant or incident to arrest and is subject to forfeiture. MCL 750.263(6); MSA 28.474(6). Likewise, the statute barring gambling, MCL 750.308a; MSA 28.540(1), permits the destruction of illegal gaming devices upon request of the police and order of the court.