STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0461

Helen Marie Mauch, et al.,
Appellants,

vs.

2015 Chevrolet Silverado,
VIN: 1GC4KZC81FF187398, MN Plate: YNA3873,
Defendant,

Nobles County Sheriff, claimant,
Respondent.

Filed November 26, 2018
Affirmed
Jesson, Judge

Nobles County District Court
File No. 53-CV-15-1096

Richard P. Ohlenberg, Ohlenberg Law Office, P.C., Prior Lake, Minnesota (for appellants)

Kathleen A. Kusz, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

JESSON, Judge

Appellants Helen Mauch (Helen) and David Mauch (David) appeal the forfeiture of their jointly owned $52,110 Chevrolet Silverado truck after David was arrested for driving the Silverado while impaired in 2015.[1] In Minnesota, the vehicle forfeiture law, Minn. Stat. § 169A.63 (2016), allows for the civil forfeiture and automatic seizure of vehicles used during designated crimes including first-degree driving while impaired (DWI). Helen asserts that, as an innocent owner, she should not forfeit the Silverado. David argues that the forfeiture procedure contained in the vehicle forfeiture statute violates the constitutional protection against double jeopardy as applied to him. And the Mauches both contend that the forfeiture procedure violates the constitutional protection of due process. We affirm.

FACTS

In November 2015, David was driving a 2015 Silverado when he was stopped and arrested for DWI in Adrian. The Mauches, mother and son, had recently purchased the Silverado together. At the time of the stop, David provided a breath sample indicating a 0.26 alcohol concentration. He provided a second breath sample at the Nobles County jail, indicating a 0.27 alcohol concentration.[2]

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[1] Civil forfeiture is a process that enables the government to take ownership of property that was involved in suspected criminal actions. *See Black's Law Dictionary* 765 (10th ed. 2014) (defining "civil forfeiture" as "[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity.").

[2] The result of David's test was over 0.16 within two hours of the time of the offense, which qualified as an aggravating factor under Minn. Stat. § 169A.03, subd. 3 (Supp. 2015). Because David had a previous license revocation within ten years of the current offense, stemming from a test result of 0.32 alcohol concentration in 2012, this revocation constituted a second aggravating factor under the statute.

Early the next morning, the Nobles County Sheriff's Office served David with a "Notice of Seizure and Intent to Forfeit" the Silverado. Nobles County took possession of the truck, and David was charged with two counts of gross misdemeanor second-degree DWI.[3] He pleaded guilty to the charges.

In December 2015, the Mauches filed a timely demand for judicial determination of forfeiture of motor vehicle. The district court held a bench trial to determine the legality of the forfeiture in February 2017. In April 2017, before the district court had made a decision, the Minnesota Legislature amended the vehicle forfeiture statute to expand the innocent-owner defense in Minnesota forfeiture cases. 2017 Minn. Laws ch. 12, § 1, at 37-38. The 2017 language provides that "[a] motor vehicle is not subject to forfeiture under this section if *any of its owners* who petition the court can demonstrate by clear and convincing evidence" that they are innocent owners. Minn. Stat. § 169A.63, subd. 7(d) (Supp. 2017) (emphasis added). Prior to amendment, the statute provided a narrower innocent-owner defense.[4] In response to the statutory amendment, and before a ruling had been issued, the district court ordered supplemental briefing regarding the impact of the amendment on the outcome of the Mauches' case. The district court issued its ruling in September 2017, finding in favor of the state and ordering forfeiture of the Silverado.

[3] In violation of Minn. Stat. §§ 169A.20, .25 (2016).

[4] The earlier statute provided that "[a] motor vehicle is not subject to forfeiture under this section if *its owner* can demonstrate by clear and convincing evidence that *the owner* did not have actual or constructive knowledge that the vehicle would be used or operated in any manner contrary to law . . . ." Minn. Stat. § 169A.63, subd. 7(d) (2016) (emphasis added).

The Mauches moved for a new trial. Following a hearing, the district court issued its orders on January 26, 2018, denying the motion for a new trial, and determining the Silverado was legally forfeited according to statute.

The Mauches appeal.

D E C I S I O N

The Mauches raise three issues on appeal: (I) whether the innocent-owner defense is available to Helen; (II) whether civil forfeiture of the Silverado constitutes double jeopardy in violation of the United States and Minnesota Constitutions because David had already been punished for his DWI; and (III) whether the application of the vehicle forfeiture statute violates due process as applied to the Mauches. We address each issue in turn.

I. The 2017 amendment to the vehicle forfeiture statute does not apply retroactively.

Helen argues that the 2017 amendment to the vehicle forfeiture statute should apply retroactively because it is unfair that she is barred from using the innocent-owner defense that was expanded under the amendment. Whether or not a statute applies retroactively is a question of law, which this court reviews de novo. *Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 842 (Minn. App. 2007). In applying this standard, we first turn to the legislative directive that "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21 (2016).

David's DWI occurred in November 2015. At that time, the innocent-owner defense was not available to a joint owner of a vehicle who was unaware of the other owner's unlawful use of the vehicle. *See Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431,

439 (Minn. 2009). In other words, the innocent-owner defense was not available in DWI forfeiture matters unless *all* owners of the vehicle were "innocent." *Id*. But the vehicle forfeiture statute was amended in April 2017 to permit a joint owner to keep a forfeited vehicle if they could demonstrate by clear and convincing evidence that they individually were an innocent owner. *See* 2017 Minn. Laws ch. 12, § 1, at 37-38. The statutory amendment contained no effective date, so the effective date defaulted to August 1, 2017. *See* Minn. Stat. § 645.02 (2016) (mandating an effective date of August 1 unless a different date is specified). Therefore, the only question remaining is whether the legislature clearly and manifestly intended the statutory amendment to apply retroactively. Minn. Stat. § 645.21.

We see no clear and manifest intent on the part of the legislature that the amendment apply retroactively. There is no language in the amendment to suggest any such intent. *See* 2017 Minn. Laws Ch. 12, § 1, at 37-38. We therefore conclude that Helen was not entitled to claim the innocent-owner defense under the statute in effect at the time of David's DWI.

II. David's constitutional challenge of the vehicle forfeiture statute on double jeopardy grounds is forfeited.

David argues that the district court erred in concluding that the forfeiture did not constitute double jeopardy in violation of the United States and Minnesota Constitutions as applied. David contends that, because he only had one prior warning that the Silverado may be forfeited, and because the value of the Silverado is substantial, the forfeiture was so punitive that it violated his constitutional protection against being twice punished for the same offense. *See* U.S. Const. amend. V; Minn. Const. art. I, § 7. But we need not

reach the merits of this argument because David has failed to give proper notice of this constitutional challenge to the Minnesota Attorney General as required by the Minnesota Rules of Civil Appellate Procedure. *See* Minn. R. Civ. App. P. 144.

This rule of appellate procedure protects the attorney general's right to intervene and defend a Minnesota statute by requiring a party who challenges the constitutionality of a statute to "file and serve on the attorney general notice of that assertion within time to afford an opportunity to intervene." *Id*. If an appellant fails to notify the attorney general of a constitutional challenge, this court deems the constitutional challenge waived. *See Losen v. Allina Health Sys.*, 767 N.W.2d 703, 711 (Minn. App. 2009), *review denied* (Minn. Sept. 29, 2009).

The subject of this challenge, a civil forfeiture statute with frequent application in support of the important goal of enhancing public safety, is exactly the type of challenge that the drafters of Minnesota Rules of Appellate Procedure 144 contemplated in requiring notice that affords the attorney general an opportunity to intervene. Here, both parties seek changes to the law in this area based upon their interpretations of the constitution. David challenges the statute's constitutionality based on double jeopardy, while Nobles County implores this court to overturn our own precedent and to clarify this area of the law. Such an exercise would be flawed without providing the attorney general the opportunity to brief the issue as required by Minnesota Rules of Appellate Procedure 144.

David failed to notify the attorney general of this constitutional challenge. Therefore, we will not consider the issue.

III. The Mauches' constitutional challenge to the vehicle forfeiture statute on due-process grounds is forfeited.

The Mauches argue that the vehicle forfeiture statute violates due process as applied to the Mauches in this case. The Mauches concede that this issue was not raised before the district court.

We have refused to address claims raised for the first time on appeal. *See Brocks v. State*, 753 N.W.2d 672, 676 (Minn. 2008). Such claims are forfeited, and the circumstances of this case demonstrate the wisdom of this practice.

The Mauches argue that their due-process rights were violated because the district court took too long to decide their forfeiture case. This argument requires a fully developed record for the appellate court to review in order to account for any scheduling delays. Since the Mauches failed to raise the issue before the district court, no such record exists. In the absence of a properly developed record, it would be impossible to accurately assess the Mauches' argument on the merits. *See Erickson v. Fullerton*, 619 N.W.2d 204, 208-09 (Minn. App. 2000) (declining to address constitutional issue because attorney general was not notified, issue was not adequately considered by the district court, and record was insufficient for review).

Still, the Mauches contend that the traditional rules governing forfeiture of issues raised for the first time on appeal should not apply here because this court issued a ruling in *Olson v. One 1999 Lexus* after the disposition of the Mauches' district court case. 910 N.W.2d 72 (Minn. App. 2018), *review granted* (Minn. June 19, 2018). The *Olson* decision concluded that the vehicle forfeiture statute violated due process as applied to Olson. *Id.* at 76-77. We are not persuaded.

An intervening change in the law can excuse a failure to assert what would have otherwise been a futile objection in the district court, but this exception applies to arguments that have previously and consistently been rejected by the courts of this state. *See State v. Beaulieu*, 859 N.W.2d 275, 281 n.5 (Minn. 2015); *State v. Osborne*, 715 N.W.2d 436, 442 (Minn. 2006). That is not what happened here.

Procedural due-process claims are not a novel concept. *See* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. Neither have the courts of this state consistently rejected such challenges to the DWI statutes. Further, *Olson* does not necessarily represent a change in the law, because the decision in *Olson* ruled that the vehicle forfeiture statute was unconstitutional as applied to the Olsons, not to everyone in general. 910 N.W.2d at 77. In sum, the Mauches cannot take advantage of this exception to the rule that issues must not be raised for the first time on appeal.

Because the Mauches failed to present this issue to the district court, their due-process claim is forfeited.

Affirmed.