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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

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Ieisha Smith

v.

Renter's Realty

**Appeal from Madison Circuit Court
(CV-18-69)**

PER CURIAM.

Ieisha Smith appeals from a judgment of the Madison Circuit Court ("the circuit court") affirming a judgment of the Madison District Court ("the district court"), which

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denied Smith's claim of exemption in connection with a writ of garnishment.

In the district court, Renter's Realty ("Renter's") had prevailed against Smith in its unlawful-detainer action against her. The district court initially entered an order of possession in favor of Renter's. On December 22, 2016, it entered a judgment ordering Smith to pay damages and costs in the amount of \$5,145. Smith did not appeal from the December 22, 2016, judgment. There is no record that Smith paid the judgment or attempted to arrange a payment schedule with Renter's. Thus, on May 17, 2017, Renter's filed a process of garnishment in the district court. A writ of garnishment was issued on May 18, 2019, to Smith's employer. On June 12, 2017, Smith filed in the district court a motion to stay the garnishment, a verified declaration, and a claim of exemption. In her claim of exemption, Smith asserted that her biweekly wages were approximately \$900 or less and that she used all of her income to pay current expenses for her family and herself. She said that she did not accumulate wages from paycheck to paycheck. Citing Art. 10, § 204, of the Alabama Constitution

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of 1901 ("§ 204"), Smith claimed that her wages were exempt from garnishment.

The district court granted the stay in an order entered on June 13, 2017. On June 15, 2017, Renter's filed an objection to the claim of exemption, arguing, among other things, that Smith was barred from claiming wages as personal property subject to exemption by the application of § 6-10-6.1, Ala. Code 1975. Approximately one year later, on June 27, 2018, after a number of hearings, the district court entered a judgment denying the claim of exemption and reinstating the writ of garnishment. On July 2, 2018, Smith appealed to the circuit court from the district court's judgment and included the record created in the district court. The record indicates that on July 17, 2018, Smith filed a "response" to Renter's challenge to her claim of exemption. In her response, Smith argued that her wages could be claimed as a personal exemption under § 204 and Alabama caselaw dating to 1884.

Smith and Renter's filed trial briefs in the circuit court regarding the constitutionality of § 6-10-6.1, Ala. Code 1975. That statute provides:

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"(a) Wages, salaries, or other compensation of a resident are not personal property for the purposes of exemption from garnishment, levy, sale under execution, or other process for the collection of debt.

"(b) It is the intent of this section to exclude from the meaning of personal property the wages, salaries, or other compensation of a resident for the purposes of the personal property exemption under Section 6-10-6[, Ala. Code 1975,] and Section 204 of the Constitution of Alabama of 1901."

On August 10, 2018, the circuit court held a hearing on Smith's claim of exemption and Renter's contest of the claim. On August 13, 2018, the circuit court entered a judgment stating that the attorneys for the parties had appeared before it on August 10, 2018, and had "consented to the Court rendering a decision on claim of exemption without further hearing." The circuit court then denied Smith's claim of exemption, citing § 6-10-6.1 and noting that that statute had become law on June 11, 2015, before the writ of garnishment had been issued.

Smith filed a timely motion to alter, amend, or vacate the circuit court's judgment. The circuit court scheduled a hearing on the motion; however, it appears that the motion was denied by operation of law before the hearing was held. Smith then filed a timely appeal to this court.

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On appeal, the only issues Smith raises concern the constitutionality of § 6-10-6.1. Alabama law requires that, in any proceeding in which a "statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall ... be served with a copy of the proceeding and be entitled to be heard." § 6-6-227, Ala. Code 1975 (emphasis added).

"[S]ervice on the Attorney General, pursuant to § 6-6-227, is mandatory and jurisdictional.' Barger v. Barger, 410 So. 2d 17, 19 (Ala. 1982). Although § 6-6-227 is found within the Declaratory Judgment Act, when the constitutionality of a statute is challenged, service on the attorney general is required regardless of whether the action was in the nature of a declaratory judgment action. Wallace v. State, 507 So. 2d 466 (Ala. 1987)."

Tucker v. Personnel Bd. of Dothan, 644 So. 2d 8, 9 (Ala. Civ. App. 1994). Therefore, before we can consider the merits of the appeal, this court must determine whether the requirements of § 6-6-227 were met.

In Ex parte Jefferson County, 767 So. 2d 343 (Ala. 2000), our supreme court discussed the purpose of § 6-6-227 and what constitutes providing the attorney general with a sufficient opportunity to be heard, stating:

"Section 6-6-227 provides that when the constitutionality of a state statute is challenged

the attorney general must be served with a copy of the complaint, in order to allow him to represent the interests of the people of the State of Alabama. See Board of Trustees of Employees' Retirement System of the City of Montgomery v. Talley, 291 Ala. 307, 280 So. 2d 553 (1973). In interpreting § 6-6-227, this Court has consistently held that the failure to serve the attorney general will deny the trial court jurisdiction to resolve any claim based on the constitutional challenge. See Bratton v. City of Florence, 688 So. 2d 233, 234 (Ala. 1996). Any ruling that a trial court makes on a constitutional issue, when the attorney general has not been given notice and the opportunity to intervene, is void. See Ex parte St. Vincent's Hosp., 652 So. 2d 225 (Ala. 1994); Fairhope Single Tax Corp. v. Rezner, 527 So. 2d 1232 (Ala. 1987). See, also, Busch Jewelry Co. v. City of Bessemer, 266 Ala. 492, 493, 98 So. 2d 50, 51 (1957). However, nowhere in § 6-6-227 or in Alabama caselaw do we find any requirement that the attorney general be served at any specific time during the litigation. This Court has stated:

"[Section 166, Title 7, Code of 1940 (Recomp. 1958) (the predecessor to § 6-6-227)] does not say when [the attorney general] must be served or that the respondents cannot plead until he has been served. We will not now attempt to say when he must be served.'

"Ex parte Dothan-Houston County Airport Auth., 282 Ala. 316, 321, 211 So. 2d 451, 455 (1968); see, also, City of Mobile v. Salter, 287 Ala. 660, 664, 255 So. 2d 5, 7 (1971) ('The fact that the attorney general is not served or does not file a waiver early in the proceedings does not deprive the trial court of jurisdiction.');

Armstrong v. Roger's Outdoor Sports, Inc., 581 So. 2d 414 (Ala. 1990) (where this Court remanded for the appellant, pursuant to § 6-6-227, to notify the attorney

general of his constitutional challenge within 90 days of the remand).

"The record before us indicates that the taxpayers served the attorney general on April 20, 1998. The record and briefs also indicate that hearings to determine the constitutionality of Act No. 406 and the corresponding county ordinance were held both before and after the attorney general had been served. The trial court did not rule on the constitutional issue until November 12, 1998, approximately six and one half months after the attorney general had been served. The attorney general clearly had notice of the action; the record indicates that he was notified in sufficient time that he could have moved to intervene in the case if he had felt that it was necessary to do so. However, the record does not indicate that he filed a motion for a continuance, a motion to intervene, or any other motion that would indicate that he wished to be heard on the matter. See Talley, supra, wherein this Court addressed the issue whether the trial court lost jurisdiction because the attorney general had not been served with two amendments to the complaint:

"The purpose of the provisions of Title 7, § 166 [Code of 1940 (Recomp. 1958), the predecessor to § 6-6-227] is to give notice of the filing of the [complaint], and protect the state and its citizens should the parties be indifferent to the outcome of the litigation. This purpose has been served in this case, and the Attorney General has filed no answer or other pleadings in the case indicating that he wished to be heard, nor has he complained of the lack of service of the amendments [to the complaint]. Under such circumstances this court can only conclude that there was certainly a substantial

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compliance with the provisions of Title 7,
§ 166....'

"291 Ala. at 310, 280 So. 2d at 555. (Citations omitted.) Therefore, based on the record before us, we conclude that the trial court had subject-matter jurisdiction."

767 So. 2d at 345-46 (emphasis added; footnotes omitted).

We recognize that, under Rule 4(i)(2)(ii), Ala. R. Civ. P., Smith properly served the attorney general a copy of the proceedings by certified mail. See also Ex parte Gentry, 238 So. 3d 66, 73 (Ala. Civ. App. 2017). This case is troublesome, however, because it does not appear from the record that the attorney general was given an opportunity to be heard or to waive participation in the case. The record indicates that on July 18, 2018, Smith's attorney filed an "affidavit of certified mailing," stating that, on that date, she had served certain documents by certified mail on the Executive Division of the Office of Attorney General for the State of Alabama. The documents included the process of garnishment, the writ of garnishment issued by the district court, Smith's claim of exemption, Renter's contest to the claim of exemption, Smith's responsive pleadings, the district

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court's judgment denying Smith's claim of exemption, and the notice of appeal to the circuit court.

The record indicates that the attorney general's office received the mailing on Tuesday, August 7, 2018--three days before the hearing in this matter. Cf. Ex parte Jefferson County, supra (noting that the attorney general received notice of the constitutional challenge six months before the hearing to decide that issue). Nothing in the record indicates that the attorney general was aware of the Friday, August 10, 2018, hearing. Smith's mailing to the attorney general did not include the trial date. The certified mailing "green card" showing that the attorney general's office had received the mailing was filed in the circuit court on Monday, August 13, 2018, after the August 10 hearing. The record does not show that the attorney general waived further service in the action, and it does not indicate whether the attorney general desired to be heard in the matter. See, e.g., Ex parte Dothan-Houston Cty. Airport Auth., 282 Ala. 316, 319-20, 211 So. 2d 451, 453-54 (1968); see also Gordon v. Gordon, 231 So. 3d 347, 351 n.4 (Ala. Civ. App. 2017) (the record on appeal contained an acceptance and waiver filed by the attorney

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general pursuant to § 6-6-227). Furthermore, Smith did not request a continuance of the August 10, 2018, hearing to give the attorney general notice or time to decide whether he would participate in the action. Additionally, we note that the attorney general was never served in the district-court action, in which the primary record in this cause was created. The attorney general also was not included on the notice of appeal, although Smith served a copy of her appellate briefs on the attorney general. We note that Renter's did not serve a copy of its brief on the attorney general.

"'A constitutional issue can be reached by [an appellate] Court only when it has been raised by a party at the trial level and the attorney general has been served pursuant to § 6-6-227 and Rule 44, Ala. R. App. P. When a party challenging the constitutionality of a statute fails to serve the attorney general, the trial court has no jurisdiction to decide the constitutional claim, and any judgment regarding that claim is void.'"

Ex parte Northport Health Serv., Inc., 682 So. 2d 52, 55 (Ala. 1996) (quoting Ex parte St. Vincent's Hosp., 652 So. 2d 225, 228 (Ala. 1994)); see also Myers v. Myers, 260 So. 3d 55, 65 (Ala. Civ. App. 2018) (same).

In its judgment, the circuit court did not make a finding regarding the constitutionality of § 6-10-6.1. The circuit

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court did note, however, that that statute became law on June 11, 2015, and that the district-court judgment denying Smith's claim of exemption and reinstating the writ of garnishment was entered in this case on June 27, 2018. A review of the record indicates that Smith's defense was dependent upon whether § 6-10-6.1 was constitutional, and the parties' briefs to the circuit court were centered around the constitutional argument. We conclude that three days was insufficient notice to allow the attorney general to participate in this matter. There is no evidence in the record indicating that the attorney general had notice of the August 10, 2018, hearing, and the attorney general did not have sufficient opportunity to participate in the action or to decline such participation. The purpose behind requiring service on the attorney general was frustrated by the failure to provide the attorney general sufficient time to participate in this matter or to indicate a desire not to participate.

In Armstrong v. Roger's Outdoor Sports, Inc., 581 So. 2d 414 (Ala. 1990), Roger L. Armstrong raised in a postjudgment motion a constitutional challenge to two statutes regulating punitive damages. Armstrong did not serve the attorney

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general as required by § 6-6-227, but the trial court in that case ruled on the issue anyway. On appeal, the supreme court noted that the failure to serve the attorney general prevented its review of any constitutional issues. Rather than addressing the judgment on the merits or dismissing the appeal, the supreme court remanded the case to the trial court, instructing Armstrong "to notify the attorney general of his challenge within 90 days of th[e] remand" and stating that Armstrong could then "resubmit to th[e] supreme court] his constitutional arguments, as well as other arguments." 581 So. 2d at 414.

In this case, Smith served the attorney general, but the matter proceeded to trial in the circuit court before the attorney general could act on that notice. Smith again raised the issue of the constitutionality of § 6-10-6.1 in her postjudgment motion, to which the attorney general did not file a response. On the authority of Armstrong, we remand this case to the circuit court for 90 days to give the attorney general an opportunity to intervene in the action or to waive any right to intervene and for the circuit court to render a valid judgment on the issue of the constitutionality

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of § 6-10-6.1. Due return to this court shall be made at or before the end of the 90-day period.

REMANDED WITH INSTRUCTIONS.

All the judges concur.