

Rel: December 11, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190180

State of Alabama

v.

Two White Hook Wreckers and Two Red Rollback Wreckers,
seized from Gary Lamar Smith, Jr., and Gary Lamar Smith, Sr.

Appeal from Mobile Circuit Court
(CV-19-902705)

PER CURIAM.

1190180

The State of Alabama appeals from a temporary restraining order ("TRO") allowing Gary Lamar Smith, Jr., and SOS Towing, Inc. ("SOS"), the family business owned and operated by Smith, Jr., to recover seized personal property during the pendency of a forfeiture action. We reverse and remand.

Smith, Jr., owns SOS, a towing business located in Mobile that he took over from his father, Gary Lamar Smith, Sr. SOS would sometimes tow vehicles for the Mobile Police Department; in September 2019, the Smiths were arrested in Mobile for alleged insurance fraud regarding that work. The City of Mobile alleged that the Smiths had committed fraud by charging insurance companies towing and storage fees that were greater than the maximum fees allowed under a city ordinance. The police seized three tow trucks owned by SOS and a tow truck owned by Smith, Sr., and used by SOS. The State later filed a complaint seeking the forfeiture of the four trucks.

Smith, Jr., and SOS moved for a TRO or a preliminary injunction, seeking the return of the tow trucks during the pendency of the forfeiture action. The parties disagreed about whether Alabama's forfeiture statutes

1190180

provide the exclusive means of obtaining the return of seized personal property during forfeiture proceedings; that is the key dispute in this case. The State noted that, under § 28-4-287, Ala. Code 1975, a claimant seeking to possess a seized vehicle during a forfeiture proceeding "shall have the right to execute a bond in double the value" of the vehicle to obtain possession of the vehicle. The State argued that this provision is the exclusive means by which Smith, Jr., and SOS may obtain possession of the tow trucks during the forfeiture proceedings. However, Smith, Jr., and SOS disagreed and argued that the trial court could travel outside the statutory remedy by granting injunctive relief under Rule 65, Ala. R. Civ. P. Smith, Jr., testified that SOS needs the tow trucks to stay in business and that the approximate total value of the four tow trucks is \$220,000, which would make the statutory bond \$440,000. The State stipulated that the total value of the tow trucks is \$96,500, which would make the statutory bond \$193,000.

The trial court concluded that § 28-4-287 does not provide the exclusive means for a claimant to obtain possession of seized property during forfeiture proceedings. Thus, the trial court considered Smith, Jr.,

1190180

and SOS's arguments and evidence indicating that they are entitled to a TRO under Rule 65 ordering the return to them of the tow trucks. The trial court subsequently issued a TRO, ordering that the tow trucks be returned to Smith, Jr., and SOS during the pendency of the action.¹ That is, the trial court determined that Smith Jr., and SOS would suffer immediate and irreparable injury without the entry of the TRO, that they had no adequate remedy at law, that they had at least a reasonable chance of success on the ultimate merits of the forfeiture case, and that the hardship imposed on the State by the TRO would not unreasonably outweigh the benefit accruing to Smith, Jr., and SOS. See Lott v. Eastern Shore Christian Ctr., 908 So. 2d 922, 927 (Ala. 2005) (discussing the elements of a TRO). The trial court concluded that the statutory bond provision does not provide an adequate legal remedy based on the court's finding that Smith, Jr., and SOS could not obtain the statutory bond despite their efforts to do so. The trial court did order Smith, Jr., and SOS to post a \$5,000 bond to receive their tow trucks, and they did so. The tow

¹Nothing in the record indicates why the tow truck owned by Smith, Sr., was returned to Smith, Jr., and SOS and not Smith, Sr.

1190180

trucks were returned pending the forfeiture action, and the State appealed.

"The elements required for the issuance of a TRO are the same as the elements required for the issuance of a preliminary injunction." Lott, 908 So. 2d at 927. Accordingly, this Court has reviewed a trial court's decision on a motion for a TRO and a motion for a preliminary injunction in the same manner on appeal. See Miller v. Riley, 37 So. 3d 768, 775 (Ala. 2009). Generally, "[t]he decision to grant or to deny a preliminary injunction [or TRO] is within the trial court's sound discretion. In reviewing an order granting a preliminary injunction [or TRO], the Court determines whether the trial court exceeded that discretion." Holiday Isle, LLC v. Adkins, 12 So. 3d 1173, 1175–76 (Ala. 2008) (quoting SouthTrust Bank of Alabama, N.A. v. Webb–Stiles Co., 931 So. 2d 706, 709 (Ala. 2005)). However,

"[t]o the extent that the trial court's issuance of a preliminary injunction [or TRO] is grounded only in questions of law based on undisputed facts, our longstanding rule that we review an injunction solely to determine whether the trial court exceeded its discretion should not apply. We find the rule applied by the United States Supreme Court in similar situations to be persuasive: 'We review the District Court's

1190180

legal rulings de novo and its ultimate decision to issue the preliminary injunction for abuse of discretion.' Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)"

Holiday Isle, 12 So. 3d at 1176.

The dispositive issue in this case is whether the statutory double-value bond provision provides the exclusive means for the return of the seized tow trucks to Smith, Jr., and SOS during the pendency of the forfeiture action. If the bond provision provides the exclusive remedy, the injunctive relief granted by the trial court is unavailable. Because that issue presents a question of law, this Court's review is de novo.

In 2014, the legislature passed the Alabama Comprehensive Criminal Proceeds Forfeiture Act, § 15-5-60 et seq., Ala. Code 1975. That comprehensive forfeiture act incorporates some preexisting statutory provisions to serve as procedures under the act: "Except as provided otherwise in this article, [i.e., § 15-5-60 through § 15-5-65,] the manner, method, and procedure for the seizure, forfeiture, condemnation, and disposition shall be the same as that set out in Section 20-2-93, [Ala. Code 1975,] and Sections 28-4-286 through 28-4-290, [Ala. Code 1975,] inclusive

1190180

...." § 15-5-63, Ala. Code 1975. One of those incorporated provisions, § 20-2-93(h), Ala. Code 1975, provides, in pertinent part: "Except as specifically provided to the contrary in this section, the procedures for the condemnation and forfeiture of property seized under this section shall be governed by and shall conform to the procedures set out in Sections 28-4-286 through 28-4-290" In turn, § 28-4-287 provides the key passage here: "Whenever a ... vehicle ... is seized ..., the defendant in the proceedings or the claimant of the property shall have the right to execute a bond in double the value of such property"

The State argues that the double-value bond provision in § 28-4-287 is the exclusive method by which a claimant may obtain seized personal property during the pendency of a forfeiture action. Thus, the State argues, the trial court erred by traveling outside the statutory remedy and entering the TRO ordering the tow trucks to be returned to Smith, Jr., and SOS during the pendency of the action. Conversely, Smith, Jr., and SOS argue that § 28-4-287 does not provide the exclusive means of obtaining seized property and, thus, that the trial court was permitted to enter a TRO under Rule 65. For the reasons explained below, we agree

1190180

with the State. Because we find this issue to be dispositive, we pretermitt the numerous other issues raised by the State.

Rule 81(a), Ala. R. Civ. P., resolves the dispute in this case. Rule 81(a)(12) provides that the Alabama Rules of Civil Procedure apply to forfeiture proceedings "to the extent that the practice in such matters is not provided by statute." See, e.g., Reeder v. State ex rel. Myers, 294 Ala. 260, 314 So. 2d 853 (1975) (citing Rule 81(a)(12) in noting that a proceeding to forfeit an automobile was controlled by the Alabama Rules of Civil Procedure insofar as the practice in such a proceeding is not provided by statute). Thus, we must determine whether the double-value bond provision in § 28-4-287 provides for the practice at issue here, i.e., the procedure for obtaining seized personal property during the pendency of a forfeiture action.

Although there is not an Alabama decision directly on point, this case is analogous to United States v. Contents of Accounts, 629 F. 3d 601 (6th Cir. 2011), which concerns federal forfeiture law. As the United States Court of Appeals for the Sixth Circuit noted in that decision, federal civil-forfeiture cases are subject to the Supplemental Rules for

1190180

Admiralty or Maritime Claims and Asset Forfeiture Actions. Supp. R. A(1)(B), Fed. R. Civ. P. Under Supplemental Rule A(2), Fed. R. Civ. P., the Federal Rules of Civil Procedure also apply to such forfeiture cases "except to the extent they are inconsistent with these Supplemental Rules." Supplemental Rule G(8), Fed. R. Civ. P., incorporates 18 U.S.C. § 983(f) as the means to petition for the release of seized property in a forfeiture case. The court in Contents described the issue presented as one of "first impression": "[W]hether the exercise of preliminary injunctive relief under Rule 65[, Fed. R. Civ. P.,] to order the release of seized property would be 'inconsistent' with the procedure set out in Supplemental Rule G for the release of seized property, namely, a petition for release under § 983(f)." 629 F.3d at 606. The court concluded that there would be a conflict in that situation.

The court in Contents noted that § 983(f) provides specific requirements that a claimant must meet to obtain the seized property. The court concluded that § 983(f) and Rule 65 are " 'inconsistent' in that § 983(f) provides relief under much more narrow circumstances than potentially permissible under Rule 65." 629 F.3d at 608. Further, the

1190180

court noted that Supplemental Rule G also states that "'[t]o the extent that [Supplemental Rule G] does not address an issue ... the Federal Rules of Civil Procedure also apply.'" Id. Thus, the court observed, "it is only where Rule G does not address an issue that the Civil Rules set the procedure governing forfeiture actions." Id. The court then stated that "[i]t is unclear how Rule G, which specifically invokes § 983(f) as the mechanism to 'Petition to Release Property,' does not 'address' the issue of obtaining the release of seized property." Id.

Rule 81(a), similar to the supplemental rules addressed in Contents, provides that the Alabama Rules of Civil Procedure govern forfeiture proceedings "to the extent that the practice in such matters is not provided by statute." Section 28-4-287, similar to the statutory provision in Contents, specifically governs how a claimant may obtain possession of a seized vehicle during the pendency of a forfeiture proceeding: by "execut[ing] a bond in double the value of such property." That simple procedure is very different from the procedure required for obtaining a TRO under Rule 65. Section 28-4-287 plainly "provide[s]" the practice at issue here, i.e., the procedure for obtaining seized personal property

1190180

during the pendency of a forfeiture action. Thus, § 28-4-287 provides the exclusive means for obtaining seized personal property during the pendency of a forfeiture action, and injunctive relief under Rule 65 is unavailable as a means for a claimant to obtain such property. Accordingly, we must conclude that the trial court erred by entering a TRO ordering the four tow trucks to be returned to Smith, Jr., and SOS during the pendency of the action. Therefore, we reverse the judgment and we remand the case.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Sellers, Mendheim, and Mitchell, JJ., concur.

Wise, Bryan, and Stewart, JJ., concur specially.

1190180

BRYAN, Justice (concurring specially).

I concur fully in the main opinion. As the main opinion notes, Rule 81(a)(12), Ala. R. Civ. P., provides that the Alabama Rules of Civil Procedure apply to forfeiture proceedings only "to the extent that the practice in such matters is not provided by statute." I must conclude that the procedural practice here -- the procedure for obtaining possession of seized property during the pendency of a forfeiture action -- is provided for by the double-value bond provision found in § 28-4-287, Ala. Code 1975. Thus, a claimant may not obtain possession of seized property by way of injunctive relief under Rule 65, Ala. R. Civ. P. Therefore, as does the main opinion, I must conclude that the trial court erred in granting injunctive relief in this case.

However, I find aspects of this case troubling. SOS Towing, Inc. ("SOS"), is a towing business, and the seizure of the four tow trucks deprived SOS and its owner Gary Lamar Smith, Jr., of an essential part of that business. The double-value bond provision in § 28-4-287 provides Smith, Jr., and SOS a means of obtaining possession of the tow trucks during the pendency of the forfeiture action. However, there is evidence

1190180

indicating that the requirement that Smith, Jr., and SOS post a bond in double the total value of the trucks presents a significant hurdle. Smith, Jr., and SOS submitted evidence indicating that their attempts to obtain the statutory bond were unsuccessful. The trial court, in evaluating whether Smith, Jr., and SOS had satisfied the requirements for injunctive relief under Rule 65 (relief that we conclude today is unavailable), found that evidence persuasive. The trial court stated:

"Pursuant to the affidavits, [Smith, Jr., and SOS] have attempted to obtain a surety bond with the assistance of E-Z Insurance Agency, Inc., and with Petra Risk Management. The efforts of Petra are not described, but they are reported to have been unsuccessful. E-Z submitted requests to its two in-house providers, Old Republic and Worldwide. These companies declined to issue a surety bond. E-Z also sent requests to an undisclosed number of other companies seeking a bond. One company responded, but it required, in addition to the premium, that [Smith, Jr., and SOS] provide collateral equal to 100% of the bonded value in the form of a letter of credit with an approved bank. [Smith, Jr., and SOS] state they are not able to obtain a letter of credit because they have no income due to the fact that their tow trucks have been taken from them. [They] argue that they are in a 'Catch 22' situation. They cannot get a bond because they don't have their trucks; they cannot get their trucks because they can't get a bond.

"At this point the Court is convinced that [Smith, Jr., and SOS] have made bona fide and reasonable efforts to obtain a

1190180

surety bond and that they have been unsuccessful in doing so, either because no company is willing to issue the bond, or because the conditions for collateral are impossible to meet. Specifically, the Court is persuaded that the State has taken away [Smith, Jr., and SOS's] ability to generate income, and that therefore [they] cannot meet the underwriting requirements of a bank to obtain the necessary letter of credit."

The State submitted the affidavit of its attorney below, W. Christopher McDonough III, and that affidavit may suggest that Smith, Jr., and SOS's situation may not be as dire as the trial court's order indicates. McDonough testified that he contacted Bayside Surety Brokerage, Inc., a local broker that represents 28 sureties. McDonough further testified:

"After explaining [the] nature of the underlying action, I inquired about the cost of obtaining a bond in this case. I was informed that the industry standard is \$30.00 per \$1,000.00 based on creditworthiness and underwriting, but was further advised that applicants with good credit can and do pay less than the industry standard."

The parties disputed the total value of the four tow trucks. If the total value of tow trucks is \$96,500, as the State stipulated, then the statutory bond would be \$193,000. McDonough's affidavit suggests that a \$193,000 bond could be obtained for a premium of \$5,790 ($\$193,000 \div \$1,000 \times \30)

1190180

= \$5,790). It is unclear whether Smith, Jr., and SOS are in a position to pay such a premium.

The financial burden that Smith Jr., and SOS actually face in obtaining the statutory bond is unclear. However, there is evidence indicating that obtaining the statutory bond presents a considerable challenge for them and that, without the use of the tow trucks, SOS will go out of business. Smith, Jr., testified that "[t]he seizure of the tow trucks has effectively shut down SOS Unless the tow trucks are immediately returned, SOS ... will be out of business, and will be forced to permanently close." I question whether the legislature, in passing the bond provision, envisioned a situation in which the existence of a small business was threatened by the business's struggles to recover essential property before a court finally decides the fate of the property in a forfeiture action. It is unclear how the forfeiture case and the criminal case against Smith, Jr., will be resolved; it is possible that Smith, Jr., may ultimately prevail in those cases but nevertheless lose his business if he cannot obtain the necessary statutory bond.

1190180

It appears that the tow trucks were seized pursuant to a warrant issued under Rule 3.8, Ala. R. Crim. P. A warrant may be issued under Rule 3.8 if, among other reasons, "there is probable cause to believe that the property sought ... [w]as or is expected to be used as the means of committing or attempting to commit any offense under the laws of the State of Alabama or any political subdivision thereof." That is a relatively light burden on the seizing authority. However, in some cases, the double-value bond provision may create a heavy burden on businesses and business owners trying to recover seized property that is essential to their business, before their case is even adjudicated. The evidence here seems to suggest that this is one of those cases. Although I must conclude that the law requires the result reached by the main opinion, the legislature may want to consider if that is the result it anticipated in adopting the double-value bond provision.

Wise and Stewart, JJ., concur.