IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE ONE RESIDENCE LOCATED AT 17055 S. IRVING AVENUE

Nos. 2 CA-CV 2013-0149 and 2 CA-CV 2014-0119 (Consolidated)
Filed June 29, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20131984
The Honorable Carmine Cornelio, Judge

AFFIRMED

COUNSEL

Robert S. Wolkin, Tucson
Counsel for Appellants

Barbara LaWall, Pima County Attorney
By Kevin S. Krejci, Tucson
Counsel for Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 In this consolidated appeal, appellants Xavier and Alejandro Mendez challenge the trial court's judgments declaring Xavier's interest in property located at 17055 South Irving Avenue forfeit.[1] For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the verdict reached by the trial court." *In re 4030 W. Avocado*, 184 Ariz. 219, 219, 908 P.2d 33, 33 (App. 1995). In 2013, the state commenced an in rem forfeiture action based on allegations that the real property located at 17055 South Irving Avenue (the property) was involved in the offenses of "theft; trafficking in stolen property; conducting a chop shop; participating in a criminal syndicate; and money laundering." The state constructively seized the property by recording an in rem notice of seizure for forfeiture in March 2013. At the time the alleged offenses were committed and when the property was seized, it was owned by Xavier and Alejandro Mendez as joint tenants with rights of survivorship.[2]

¶3 In April 2013, the state brought this judicial in rem forfeiture action by filing a notice of seizure for forfeiture and notice of pending forfeiture and serving it on Alejandro and Xavier by sending two copies via certified mail to the property's address, where they both resided. The state also "posted the notice on the . . . property" and "published the notice in one issue of a newspaper of general circulation in Pima County." In May, Alejandro and Xavier, through an attorney acting on both their behalves, filed a timely notice of claim and application for order to show cause, asserting

[1]We refer to Xavier and Alejandro Mendez by their first names where necessary to distinguish between them.

[2]Alejandro and his late wife originally purchased the property in 1987. In 2002, Alejandro executed a joint tenancy deed conveying the property to himself and Xavier, his son, as joint tenants.

joint ownership of the subject property and indicating they would "accept future mailings from the Court or Attorney for the State" at their attorney's address.[3] Pursuant to A.R.S. § 13-4310(B), the state elected not to show cause, and on May 28, the trial court issued an order releasing the property to the Mendezes' custody "pending the outcome of . . . judicial proceedings." That same day, Xavier executed a quitclaim deed transferring his entire interest in the property to Alejandro, which was recorded on May 29.

¶4 The state filed its complaint in June and served both Alejandro and Xavier by sending "a single copy of the complaint" via certified mail to their attorney. Alejandro timely answered; Xavier did not file an answer. In July, the state filed an application for order of forfeiture against Xavier's interest in the property. Xavier filed a "motion to quash service of process" and an "opposition to application for order of forfeiture," arguing the state failed to properly serve him with the complaint, and he no longer had an interest in the property to forfeit, as a result of the quitclaim deed. The trial court denied Xavier's motion, granted the state's application for forfeiture of Xavier's interest in the property, and entered judgment against him in September.[4]

¶5 Alejandro continued to litigate his interest in the property, and in October 2013, the trial court granted summary judgment in his favor, finding his interest exempt from forfeiture pursuant to A.R.S. § 13-4304. In March 2014, the state filed a motion for summary judgment "on the issue of the putative quitclaim deed executed by Xavier." The trial court granted the state's motion and entered an order of judgment, finding the quitclaim deed had conveyed no interest to Alejandro and affirming its earlier order

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[3]Their claims were listed separately but contained in a single notice.

[4]The Mendezes timely appealed from that judgment. Upon request of the parties, this court suspended the appeal and remanded to "allow[] the trial court to enter orders on pending matters."

finding Xavier's interest in the property forfeit. The Mendezes timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1), 5(a).[5]

Discussion

Standing to Appeal

¶6 At the outset, we address the state's argument that the Mendezes lack standing to seek review of the issues asserted on appeal. The state contends Xavier "has no standing to protest anything by appeal" because he "abandon[ed] his interest in the property" before the complaint was even filed. It further contends Alejandro cannot contest the issues raised on appeal because they "bear only on decisions related to [Xavier's] interest . . . in the subject property" and since the trial court found Alejandro's interest exempt from forfeiture, he cannot proffer any claim of error.

¶7 Rule 1(d), Ariz. R. Civ. App. P., provides that "[a]ny party aggrieved by a judgment may appeal as provided under Arizona law and by these Rules." *See Kondaur Capital Corp. v. Pinal Cnty.*, 235 Ariz. 189, ¶ 6, 330 P.3d 379, 382 (App. 2014) (appellate jurisdiction confined to appeals by party aggrieved by judgment). "'For appellant to qualify as an aggrieved party, the judgment must operate to deny her some personal or property right or to impose a substantial burden upon her.'" *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 8, 160 P.3d 223, 226 (App. 2007), *quoting In re Gubser*, 126 Ariz. 303, 306, 614 P.2d 845, 848 (1980); *cf. Chambers v. United Farm Workers Org. Comm.*, 25 Ariz. App. 104, 107, 541 P.2d 567, 570 (1975)

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[5]The state argues this appeal should be dismissed because the Mendezes' opening brief did "not set forth any basis for the Court's jurisdiction of the[i]ssues as required . . . by law. . . and by Arizona Rules of Civil Appellate Procedure 13(a)(4)." Although they did not specifically cite §§ 12-120.21 and 12-2101, the Mendezes' brief and notices of appeal identify the judgments and orders they are appealing from, which we conclude is sufficient. *See In re Shaheen Trust*, 236 Ariz. 498, n.2, 341 P.3d 1169, 1171 n.2 (App. 2015).

("court's ruling which is favorable to a party may not be appealed by that party").

¶8 Although perhaps a close question, we conclude the Mendezes have standing to appeal from the judgments entered below. They both submitted timely and valid claims against the property, conferring upon them the status of "claimant" with the right to contest the action. *See* A.R.S. § 13-4311; *In re $70,269.91 U.S. Currency*, 172 Ariz. 15, 19, 833 P.2d 32, 36 (App. 1991) (one acquires standing in civil in rem forfeiture action by filing claim alleging interest in property). Though Xavier eventually relinquished his right to further challenge the forfeiture proceedings by declining to file an answer to the state's in rem complaint, his failure to file an answer did not deprive him of the ability to contest the order of forfeiture on appeal. *See $70,269.91 U.S. Currency*, 172 Ariz. at 19-20, 833 P.2d at 36-37 (one need only file a claim to acquire standing in a civil in rem forfeiture action); *but see In re $5,500 U.S. Currency*, 169 Ariz. 156, 159, 817 P.2d 960, 963 (App. 1991) (person challenging forfeiture proceedings under § 13-4311 must file both claim and answer).

¶9 And while the trial court found Alejandro's property interest exempt from forfeiture, he is an aggrieved party for purposes of this appeal because the judgments finding Xavier's interest forfeit and the quitclaim deed void affect his right to use and enjoy his property. *See Gries v. Plaza Del Rio Mgmt. Corp.*, 236 Ariz. 8, ¶ 14, 335 P.3d 530, 534 (App. 2014) (party aggrieved if judgment denied party personal or property right). As a joint tenant, Alejandro previously enjoyed an equal, undivided right to the property. *See State v. Superior Court*, 188 Ariz. 372, 373, 936 P.2d 558, 559 (App. 1997) ("Joint tenants hold an equal, undivided interest in the subject property."); *see also Graham v. Allen*, 11 Ariz. App. 207, 208, 463 P.2d 102, 103 (1970) (In joint tenancy, "two or more persons . . . hold property as if they were one person"; "[e]ach person[] owns an individual whole."). And his right was burdened when Xavier's interest was found forfeit; thus, Alejandro is an aggrieved party who has standing to challenge the portions of the trial court's judgments that adversely affected his property interest. *See Harris*, 215 Ariz.

344, ¶ 8, 160 P.3d at 226 (appellant can only appeal from parts of judgment by which he is aggrieved).

Insufficiency of Process as to Xavier

¶10 The Mendezes first contend the trial "court err[ed] in finding that the [complaint] was properly issued and served on . . . Xavier."[6] They argue that by addressing and mailing one copy of the complaint to their attorney on both their behalves, the state failed to comply with A.R.S. §§ 13-4307 and 13-4311(A).

¶11 The statute governing judicial in rem forfeiture proceedings allows the complaint to be served by certified mail. *See* § 13-4311(A) (allowing service of complaint "in the manner provided by § 13-4307 or by the Arizona rules of civil procedure"); § 13-4307(1)(b) (allowing service by certified mail). The state mailed the complaint via certified mail to the Mendezes' counsel at the address provided in their notices of claim. The Mendezes acknowledge the state was entitled to serve the complaint in that manner, but argue § 13-4307 required sending a copy to each of them at their known address. They thus maintain that mailing one copy of the complaint to their attorney failed to provide notice to Xavier.[7]

¶12 As the trial court noted, "unlike regular civil actions, the complaint is not [necessarily] the first filing" in a civil in rem forfeiture action. "The notice of forfeiture and the notice of claim [often] precede the [c]omplaint." *See* § 13-4311(A) (if forfeiture authorized by law, "it shall be ordered by a court on an action in rem brought by the state pursuant to a notice of pending forfeiture *or* a verified complaint for forfeiture") (emphasis added). And as

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[6]In the heading to their argument, the Mendezes assert the trial court "erred in finding that the notice of forfeiture was properly served" on Xavier. Their argument, however, pertains only to the adequacy of service of the complaint—not the notice of forfeiture.

[7] Though notice was provided in the same manner to Alejandro, the Mendezes do not contest service as to him.

mentioned previously, the state served the notice of pending forfeiture upon the Mendezes by sending two copies of the notice to their address by certified mail pursuant to §§ 13-4311(A) and 13-4307. The Mendezes then, through their attorney, submitted a joint notice containing both their claims, directing the state to send future mailings to their attorney's address. The trial court correctly found the notice requirements of § 13-4307 satisfied.

¶13 Moreover, even assuming arguendo that due process required that the state mail two separate copies of the complaint to the Mendezes, they were not prejudiced by its failure to do so. *See In re Estate of Dobert*, 192 Ariz. 248, ¶ 32, 963 P.2d 327, 334 (App. 1998) ("'[O]ne having actual notice is not prejudiced by and may not complain of the failure to receive statutory notice.'"), *quoting In re Estate of Ivester*, 168 Ariz. 323, 327, 812 P.2d 1141, 1145 (App. 1991). The Mendezes do not dispute that their attorney received the complaint, and they received actual notice of the forfeiture action, as evinced by the timely answer filed by Alejandro. *See State ex rel. Horne v. Rivas*, 226 Ariz. 567, ¶ 15, 250 P.3d 1196, 1200 (App. 2011) (notice provisions of forfeiture chapter intended to give interested persons opportunity to contest forfeiture). Thus, the state's single mailing of the complaint to the Mendezes' attorney provided adequate notice of the forfeiture action.

¶14 The Mendezes also argue the state was required to issue a summons with its complaint, pursuant to Rule 4(a), Ariz. R. Civ. P. Citing § 13-4311(B), they contend the Rule 4(a) summons requirement applies to civil in rem forfeiture actions because a different procedure is not specifically provided in the statutory scheme. *See* § 13-4311(B) (judicial in rem forfeiture proceedings governed by Arizona rules of civil procedure unless different procedure provided by law).

¶15 We disagree with the Mendezes' characterization of the summons requirement as being wholly separate from service of process; instead, the summons is a mechanism employed to ensure "due process minimum notice requirements." *Mervyn's, Inc. v. Superior Court*, 144 Ariz. 297, 300, 697 P.2d 690, 693 (1985); *see also Safeway Stores, Inc. v. Ramirez*, 99 Ariz. 372, 380, 409 P.2d 292, 297

(1965) (purpose of service of process rules to give party notice of proceedings against him). Furthermore, because the statute governing in rem forfeiture actions delineates a more specific procedure for service, the more general procedural rules governing service—including Rule 4's summons requirement—do not apply. *See* § 13-4311(A) (permitting service pursuant to § 13-4307); § 13-4307 (making no reference to summons requirement); *In re $47,611.31 U.S. Currency*, 196 Ariz. 1, ¶ 11 & n.3, 992 P.2d 1, 3 & n.3 (App. 1999) ("the procedural rules for service of papers do not apply to service [under § 13–4307]"); *see also In re 1974 Chevrolet Camaro*, 121 Ariz. 232, 233, 589 P.2d 475, 476 (App. 1978) ("Specific statutory provisions for service of process supersede the general requirements of Rule 4."). Accordingly, Xavier was properly served.

Application for Forfeiture

¶16 The Mendezes next argue the state failed to establish "[p]robable cause for forfeiture against Xavier" because it presented insufficient evidence of his "involvement in actions subjecting his interest in real property to forfeiture." They also apparently take issue with the trial court's finding that Xavier, but not Alejandro, forfeited his interest in the property, claiming "no difference exists between the evidence that was presented against [Xavier's] property interest . . . and that of [Alejandro]." The state responds that the Mendezes "plainly misstate[] the issue before the trial court" because it was not tasked with determining whether there was probable cause for forfeiture against Xavier; instead, the issue was whether probable cause existed to forfeit the property. We agree.

¶17 When a claimant fails to file a timely answer to a civil in rem complaint, the state may proceed with forfeiture by filing an application for forfeiture ten days after providing notice to any person who timely filed a claim but did not file an answer. § 13-4311(G); *see also State ex rel. Horne v. Anthony*, 232 Ariz. 165, ¶¶ 14, 17, 303 P.3d 59, 62 (App. 2013). Before granting a forfeiture application, the trial court "must make determinations concerning notice, jurisdiction, and facts sufficient to establish probable cause for forfeiture." *Anthony*, 232 Ariz. 165, ¶ 26, 303 P.3d at 64, *citing* A.R.S. § 13-4314(A).

¶18 When the forfeiture application is based on racketeering allegations, the state's only burden is to show probable cause that an act of racketeering occurred and that the property was used in any manner or part to facilitate the commission of that offense. *See In re $24,000 U.S. Currency*, 217 Ariz. 199, ¶¶ 7-8, 171 P.3d 1240, 1242-43 (App. 2007). "'To meet this burden, the [S]tate must demonstrate reasonable grounds for its belief that the property is subject to forfeiture, supported by more than a mere suspicion, but less than prima facie proof.'" *Id.* ¶ 11, *quoting In re $315,900.00*, 183 Ariz. 208, 211, 902 P.2d 351, 354 (App. 1995) (alteration in *In re $24,000*). The state is not required, however, to prove the claimants were involved in the actions that gave rise to forfeiture. *See Anthony*, 232 Ariz. 165, ¶ 27, 303 P.3d at 64; *cf. In re 319 E. Fairgrounds Dr.*, 205 Ariz. 403, ¶ 17, 71 P.3d 930, 936 (App. 2003) (state not required to show who wrongdoers are, nor that any wrongdoer has interest in property).

¶19 Here, the state had no obligation to establish probable cause as to Xavier's personal involvement in the underlying allegations. As the state correctly notes, its only burden in the forfeiture application "was to show probable cause the property was used . . . to facilitate . . . a racketeering offense or that it was used . . . to conduct a chop shop." And since the Mendezes do not challenge the trial court's finding of probable cause that the property was so used, we need not address whether the state did in fact meet that burden. Having found no reason to disturb the trial court's probable cause finding, we affirm its order of judgment of forfeiture as to Xavier.

Effect of the Quitclaim Deed

¶20 Finally, the Mendezes argue the trial court "erred in finding that the May 28, 2013[,] quitclaim deed co[n]veyed no interest in the subject real property." In support, they rely only on the court's May 28, 2013, order in which it released the property "to the custody of [the Mendezes], pending the outcome of judicial proceedings." The Mendezes apparently interpret that order as having unconditionally released the property to them, and without citing any authority, they contend "the real property [wa]s transferable between its only custodians[, and that t]o hold

otherwise is to negate the meaning of 'custody' being released to the claimants." To the extent we understand this argument, it is unpersuasive. *See* Ariz. R. Civ. App. P. 13(a) (argument in opening brief must contain "supporting reasons for each contention," with citations to authority, statutes and relevant portions of record); *see also Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) (failure to provide citations to authority, statutes and parts of the record relied on in an opening brief can constitute waiver of claim).

¶21 When property is seized for forfeiture without a prior judicial determination of probable cause, as was the case here, the trial court, upon application by an owner or interest holder, may "issue an order to show cause to the seizing agency for a hearing on the sole issue of whether probable cause for forfeiture of the property then exists." § 13-4310(B). The state may elect not to contest the issue, in which case "the property seized for forfeiture from the applicant shall be released to the custody of the applicant *pending the outcome of a judicial proceeding pursuant to this chapter*." *Id.* (emphasis added).

¶22 As the state points out, a plain language reading of § 13-4310(B) clearly reflects that it does not provide for "an unconditional return or release of the property," and as the court stated, its order "releasing custody of the real property to . . . [the] Mendez[es] was not a release of the *in rem* claim by the State." *See State v. Lewis*, 236 Ariz. 336, ¶ 32, 340 P.3d 415 (App. 2014) (when statute's language clear, courts must apply it unless application of plain meaning renders impossible or absurd results). Instead, the property remained subject to the pending judicial proceedings, including the prohibition against "replevin, conveyance, sequestration or attachment," § 13-4306(A). *See also State ex rel. Indus. Comm'n of Ariz. v. Galloway*, 224 Ariz. 325, ¶ 7, 230 P.3d 708, 711 (App. 2010) (statutory provisions must be construed in manner consistent with related provisions). Because the May 28, 2013 quitclaim deed operated as a conveyance, it was prohibited by law, §13-4306(A); it did not transfer Xavier's interest to Alejandro unencumbered; and, it did not prevent the state from proceeding in

its forfeiture action against the property.[8] Accordingly, there is no reason to disturb the trial court's order finding Xavier's interest in the property forfeit, regardless of the execution of the quitclaim deed.

Disposition

¶23 For the foregoing reasons, the trial court's judgments are affirmed. All parties have requested an award of attorney fees on appeal. Under § 13-4314(F), a "claimant who fails to establish his entire interest is exempt from forfeiture under § 13-4304" must pay "the state's costs and expenses of investigation and prosecution of the matter, including reasonable attorney fees." Accordingly, Xavier is ordered to pay the state's reasonable attorney fees and costs on appeal upon its compliance with Rule 21, Ariz. R. Civ. App. P.

[8]As the state noted in supplemental briefing to the trial court and referenced on appeal, even had the quitclaim deed conveyed Xavier's interest in the property to Alejandro, he would have acquired only any interest Xavier had at the time of the conveyance; "an interest fully encumbered by the forfeiture action and the operation of its statutes." *See SWC Baseline & Crimson Investors, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, ¶ 29, 265 P.3d 1070, 1079 (App. 2011) (quitclaim deed conveys to grantee no greater rights to property conveyed than grantor possessed).