IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA EX REL. M. LANDO VOYLES,
Plaintiff/Appellee,

v.

GEOFFREY TURNER,
Claimant/Appellant.

No. 2 CA-CV 2016-0090
Filed January 5, 2017

Appeal from the Superior Court in Pinal County
No. S1100CV201500706
The Honorable Daniel A. Washburn, Judge

REVERSED AND REMANDED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Alex Mahon, Deputy County Attorney, Florence
Counsel for Plaintiff/Appellee

Robbins & Curtin, P.L.L.C., Phoenix
By Joel B. Robbins and Andrew L. Gartman
Counsel for Claimant/Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 In this civil-forfeiture action, Geoffrey Turner appeals from the trial court's denial of his motion to vacate an order of forfeiture entered after he failed to timely file an answer. On appeal, Turner argues the court erred "by finding that [his] use of the U.S. Postal Service for filing" was inexcusable neglect.[1] For the reasons that follow, we reverse the order denying the motion to vacate and remand this case for further proceedings.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the trial court's denial of the motion to vacate. *See Ezell v. Quon*, 224 Ariz. 532, ¶ 2, 233 P.3d 645, 647 (App. 2010); *In re $26,980 U.S. Currency*, 199 Ariz. 291, ¶ 2, 18 P.3d 85, 87 (App. 2000). In April 2015, the state filed a notice of pending forfeiture and notice of seizure for forfeiture based on allegations of organized crime and drug sales.[2] Turner and two others filed claims to the seized property, and, on July 8, the state mailed its complaint. After receiving their answers, the state sent the following email to the claimants' attorneys:

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[1]Turner also argues the trial court should have set aside the forfeiture order for extraordinary circumstances, *see* Ariz. R. Civ. P. 60(c)(6), but we need not reach this issue because we grant relief on Turner's first argument.

[2]Turner later pled guilty to attempted sale or transportation of dangerous drugs and conspiracy to manufacture dangerous drugs in a related criminal action.

> All:
>
> Please find copies of the Motions to Strike Answers I filed today. If you are of a mind to file Amended Answers that comply with the DRAFT Order, I will withdraw my Motions, annotating my agreement to the filing of the Amended Answers.
>
> . . . .
>
> [To Turner's counsel: W]hile I received a mailed copy of . . . Turner's Answer, the copy did not have the Clerk's filed stamp on it. When I checked the Clerk's file today, there was no filed Answer for . . . Turner in it—you may want to check on this.

¶3 Turner filed a motion to amend his answer with the trial court on August 14.[3] On August 27, the state filed an application for an order of forfeiture and a response to Turner's motion, arguing Turner had "failed to timely file an answer to the [s]tate's [c]omplaint," it was too late to amend the answer, and the amended answer was deficient in any event. In the days that followed, Turner filed several answers and motions in an attempt to avoid default. After oral argument, the court entered an order of forfeiture against Turner.[4]

[3]The other defendants did not amend their answers.

[4] The trial court's order of forfeiture was first filed on October 29, 2015. The state timely filed a motion to amend the order, and the court entered a corrected order on November 23.

¶4 Turner hired new counsel, and filed a motion to vacate the order of forfeiture pursuant to Rule 60(c), Ariz. R. Civ. P.[5] Turner also submitted an affidavit from his former counsel, who avowed he had mailed Turner's answer to the state and the court on July 22 and he could not "explain why copies of the [a]nswer were received by the [s]tate and not by the clerk's office even though they were mailed at the same time." He also asserted that he had relied on the state's email when he decided to file a motion to amend. The trial court denied the motion, finding that, although Turner had acted promptly, he "should have immediately investigated" after receiving the state's email and it was unreasonable to interpret the state's email as an extension of time.[6] Turner appealed the denial of his motion. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).

Discussion

¶5 Turner argues the trial court erred by denying his motion to vacate the order of forfeiture. Generally, we review the denial of a motion to vacate a judgment for an abuse of discretion. *See Blair v. Burgener*, 226 Ariz. 213, ¶ 7, 245 P.3d 898, 901 (App. 2010). An abuse of discretion occurs when the court misapplies the law or makes a decision that is "unsupported by facts or sound legal policy." *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985) (where question presented is "one of law or logic," we must "look over the shoulder" of trial court), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶6 To obtain relief pursuant to Rule 60(c)(1), the moving party must demonstrate that (1) the default resulted from mistake,

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[5]The Arizona Rules of Civil Procedure were revised effective January 1, 2017. *See* Ariz. Sup. Ct. Order No. R-16-0010 (Sept. 2, 2016). We cite the version of the rules in effect at the time of this litigation.

[6]In the same ruling, the trial court also denied the state's request to amend its complaint to include additional property not listed in its original notice and complaint.

inadvertence, surprise, or excusable neglect, (2) the party promptly sought relief after discovery of the default, and (3) the party has a meritorious defense. *See Johnson v. Elson*, 192 Ariz. 486, ¶ 15, 967 P.2d 1022, 1025-26 (App. 1998). "[T]he test of what is excusable is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under similar circumstances." *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984).

¶7 In considering these matters, the trial court must resolve "all doubts . . . in favor of the moving party." *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992); *see also Ruiz v. Lopez*, 225 Ariz. 217, ¶ 8, 236 P.3d 444, 447 (App. 2010) (law favors resolution of case on merits). As *Osterkamp* explains, Arizona courts often applied this rule—the resolution of doubt in favor of the moving party—before the civil rules were amended to include a ten-day grace period because "[t]he prior rule did not require that a defendant be given notice that default was to be entered." 172 Ariz. at 189-90, 836 P.2d at 402-03 (grace period "virtually eliminates any claim of lack of notice as a basis for setting aside a default"); *see* Ariz. R. Civ. P. 55(a)(3), (4); 144 Ariz. XXXV-XXXVI (1985). However, our legislature has not included a grace period in the civil-forfeiture statutes, *see State ex rel. Horne v. Anthony*, 232 Ariz. 165, ¶¶ 20-21, 303 P.3d 59, 63 (App. 2013), and, in turn, the "resolution of doubt" rule remains applicable here.

Excusable Neglect

¶8 Section 13-4311(G), A.R.S., provides that, in a civil-forfeiture action, a claimant must file an answer "twenty days after service of the complaint." Service may include "personal service, publication or the mailing of written notice." A.R.S. § 13-4307; *see* § 13-4311(A) (state may serve complaint pursuant to § 13-4307 or rules of civil procedure). If a claimant fails to timely file an answer, the state can then seek an order of forfeiture.[7] § 13-4311(G); *see* A.R.S. §§ 13-4314, 13-4315.

[7] Section 13-4311(G) also states that any claimant should receive "ten days' notice" of the application for an order of forfeiture. Unlike the civil rules, however, this provision does not

¶9 In this case, the state mailed its complaint to Turner on July 8, 2015. Because the state mailed its complaint, Turner had until August 3 to file an answer. *See* Ariz. R. Civ. P. 6(a), (e); *In re $47,611.31 U.S. Currency*, 196 Ariz. 1, ¶¶ 11-16, 992 P.2d 1, 3-4 (App. 1999) (five-day extension under Rule 6(e) applicable in civil forfeiture after receiving service by mail under § 13-4307). Turner's counsel mailed his answer to the trial court and a copy to the state on July 22, twelve days before the deadline. Although the state received its copy, the answer mailed to the court was never filed.[8]

¶10 In its ruling denying the motion to vacate, the trial court stated that Turner "improperly believes that . . . mailing amounts to filing of the [a]nswer." We disagree with this characterization for two reasons. First, Turner did not challenge whether the answer was actually filed, nor could he. Instead, although Turner could not "provide an explanation for why only the [state] received [his] answer when he placed the original and the copy in the mail on the very same day," he argued "[t]he fact that the [state] timely received its copy[] demonstrates that [he] made a good faith effort to timely file the [a]nswer with the court." In short, Turner did not suggest that he filed the answer by mailing[9] but, rather, that his failure to timely file amounted to mistake, inadvertence, surprise, or excusable neglect under Rule 60(c)(1).

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create a grace period in which the claimant can remedy the failure to answer. *See Anthony*, 232 Ariz. 165, ¶¶ 20-21, 303 P.3d at 63; *see also* Ariz. R. Civ. P. 55(a)(4).

[8]It was not clear whether the post office failed to deliver the answer to the clerk or the answer was lost or misfiled after it was received in the clerk's office.

[9]As the state notes, in Turner's answers filed on August 28 and September 2—days after the state applied for an order of forfeiture—Turner's original counsel included a certification incorrectly suggesting the answers were "filed" on July 22. Turner did not make this assertion, however, in his motion to set aside the order of forfeiture, which is the motion on review in this appeal.

¶11 Second, we agree that ignorance of the rules of procedure is not excusable neglect, *Baker Int'l Assocs., Inc. v. Shanwick Int'l Corp.*, 174 Ariz. 580, 584, 851 P.2d 1379, 1383 (App. 1993), but "[t]he rules do not prohibit mail as a form of filing," *Lee v. State*, 218 Ariz. 235, ¶ 13, 182 P.3d 1169, 1172 (2008); *see M-11 Ltd. P'ship v. Gommard*, 235 Ariz. 166, ¶ 7, 330 P.3d 356, 358 (App. 2014) (discussing filing by mail in Superior Court for Maricopa County). In fact, the rules do not give any guidance as to how parties should deliver a document to the court, so long as the document actually arrives in the clerk's hands. *See* Ariz. R. Civ. P. 5(h). As a practical matter, we must allow attorneys to rely on the services of others in the performance of their duties. For example, attorneys are entitled to rely on their administrative assistants, so long as they design procedures "to ensure that answers [are] timely filed," *Sax v. Superior Court*, 147 Ariz. 518, 520, 711 P.2d 657, 659 (App. 1985), even though "errors . . . inevitably occur," *Geyler*, 144 Ariz. at 332, 697 P.2d at 1082. Accordingly, we see no reason to hold as a matter of law that reliance on the U.S. Postal Service is per se unreasonable. The better inquiry is whether a reasonably prudent attorney would believe that specific circumstances required reliance on the postal service and whether he or she took the proper steps to confirm its delivery. *See Daou*, 139 Ariz. at 359, 678 P.2d at 940; *Garden Dev. Co. v. Carlaw*, 33 Ariz. 232, 234, 263 P. 625, 625 (1928).

¶12 Here, Turner was simultaneously preparing his defense in a related criminal proceeding in Maricopa County. His attorneys were located in Maricopa County, and in his claim to the property, Turner contested whether venue in Pinal County was proper. Thus, it was reasonable for Turner's counsel to rely on the U.S. Postal Service to send his answer from Maricopa County to the Pinal County Superior Court. Moreover, Turner's counsel did so in a timely manner: He mailed the answer on July 22, fourteen days after the state mailed its complaint to him and twelve days before the expiration of the filing deadline.[10]

[10]Although it may not have been unreasonable for Turner to mail the answer to the trial court for filing, given that he did so twelve days before the filing deadline, his failure to confirm that the answer in fact had been filed is a separate matter we address below.

¶13 The state, however, argues the record conflicts with the affidavit submitted by Turner's counsel and therefore suggests he did not mail the answer to the court. It points to the envelope that Turner's counsel used to mail the copy of the answer to the state. That envelope was marked with the return address of Turner's criminal-defense attorney, not the civil-forfeiture attorney. We fail to see how this apparent collaboration between Turner's attorneys contradicts Turner's assertion that his counsel sent the answer in the mail.

¶14 The state also argues that, "in the face of non-delivery, the converse of the 'mail delivery rule' logically contradicts the assertions that the letter was actually properly addressed, stamped, and deposited with the [U.S. Postal Service]" because "the Clerk did not receive" the answer. *See Lee*, 218 Ariz. 235, ¶ 8, 182 P.3d at 1171 (under mailbox delivery rule, properly mailed document presumed to arrive, unless addressee denies receipt). We disagree. Even if the legal presumption does not apply because the answer was not timely filed, the state acknowledges that it received a copy, and this fact, coupled with the affidavit of Turner's counsel, provides substantial evidence of its mailing. *See id.* (if presumption fails, "fact of mailing still has evidentiary force"). Notably, the trial court did not find counsel's avowal incredible that he had mailed the answer to the court. As stated above, we are required to resolve "all doubts . . . in favor of the moving party" in this context. *Osterkamp*, 172 Ariz. at 188, 836 P.2d at 401.

¶15 Lastly, there is merit to the state's argument that Turner should have checked with the clerk of the court before the August 3 deadline to confirm it had received his mailed answer. Our supreme court has acknowledged, however, that "the mail almost always works." *Lee*, 218 Ariz. 235, ¶ 11, 182 P.3d at 1171; *see also Richas v. Superior Court*, 133 Ariz. 512, 515, 652 P.2d 1035, 1038 (1982) (attorneys not required to explain actions of non-agents). This case apparently was an exception. Nevertheless, Turner's failure to confirm with the clerk of the court did not *cause* the failure to file. *See Geyler*, 144 Ariz. at 331, 697 P.2d at 1081 ("Counsel's failure to consult his file or call the clerk to find the date of [a judgment's] filing was the result of the mistake, not its cause."). Accordingly, the

trial court erred when it concluded that Turner's use of the U.S. Postal Service amounted to inexcusable neglect. *See Johnson*, 192 Ariz. 486, ¶ 15, 967 P.2d at 1025-26.

Prompt Action

¶16 Next, we consider whether Turner acted promptly once he discovered the default. *See id.*; *Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, ¶ 5, 961 P.2d 1059, 1062 (App. 1998) (this court must affirm if trial court's ruling legally correct for any reason). The state filed its application for an order of forfeiture on August 27, 2015. The following day, Turner filed an unverified answer, and, on September 2, Turner filed a verified answer, a motion to amend, and a motion to relate the answer back to July 22, the date he had mailed the original answer. Thus, Turner's response to the state's application was prompt. *See Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶¶ 16-17, 994 P.2d 1030, 1035 (App. 2000) (four-week delay between learning of default judgment and moving to vacate it reasonable).

¶17 The state argues, however, that Turner should have taken immediate action once he received the state's August 6 email, which informed him that the answer was not filed with the court. We recognize that this statement, standing alone, should have obligated Turner to investigate what had happened with the answer. But in that same email, the state's counsel also addressed "[a]ll" of the claimants' attorneys and suggested the state would accept an amended answer from each if they filed one. Turner's counsel avowed that he had relied on that statement and promptly drafted the amended answer the next day; he then filed the amended answer the following week. Like other civil proceedings, waiver of a filing deadline is permissible in the civil-forfeiture context. *See State ex rel. Horne v. Campos*, 226 Ariz. 424, ¶¶ 22-23, 250 P.3d 201, 207 (App. 2011) (waiver of deadline for filing claim). And if a party initially agrees to waive a deadline, confusion may result when that party later decides to act—seeking default or dismissal—without clearly communicating that intention. *See Johnson*, 192 Ariz. 486, ¶¶ 13-14, 967 P.2d at 1025. Under such circumstances, relief from default may be appropriate. *See id.*; *see also Geyler*, 144 Ariz. at 332,

697 P.2d at 1082 ("The purpose of the rule is to provide relief for those mistakes and errors which inevitably occur despite diligent efforts to comply with the rules.").

¶18 Despite our deferential standard of review, we are not obligated to defer to the trial court's legal interpretation of the email from the state's counsel to Turner's. *See Geyler*, 144 Ariz. at 328-29, 697 P.2d at 1078-79. Thus, resolving all doubts in favor of Turner, as we must, Turner's apparent belief that the state would not oppose a motion to amend or seek a default pursuant to § 13-4311(G) was reasonable under the circumstances. *See Osterkamp*, 172 Ariz. at 188, 836 P.2d at 401. Thus, the court abused its discretion when it concluded that counsel's course of conduct in response to the email was "inexcusable."

Meritorious Defense

¶19 We turn, therefore, to the final element of the test under Rule 60(c). A party seeking relief must provide an affidavit, deposition, or testimony, "which, if proved at the trial, would constitute a defense." *United Imps. & Exps., Inc. v. Superior Court*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982). "Although the showing of a meritorious defense need not be strong, it must amount to more than mere speculation." *U-Totem Store v. Walker*, 142 Ariz. 549, 553, 691 P.2d 315, 319 (App. 1984).

¶20 Section 13-4304, A.R.S., provides that "[a]ll property, including all interests in such property, described in a statute providing for its forfeiture is subject to forfeiture." One such statute, A.R.S. § 13-2314(D)(6), lists the type of property that may be seized related to organized crime and racketeering:

> (a) Any property or interest in property acquired or maintained by the person in violation of [A.R.S.] § 13-2312.
>
> (b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind

> affording a source of influence over any enterprise or other property which the person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.
>
> (c) All proceeds traceable to an offense included in the definition of racketeering in [A.R.S.] § 13-2301, subsection D, paragraph 4 and held by the person and all monies, negotiable instruments, securities and other property used or intended to be used by the person in any manner or part to facilitate commission of the offense and that the person either owned or controlled for the purpose of that use.
>
> (d) Any other property up to the value of the subject property described in subdivision (a), (b) or (c) of this paragraph.

¶21 In this case, the trial court did not reach the issue of whether Turner had presented a meritorious defense because it denied his motion to vacate based on inexcusable neglect. The record is sufficient, however, to conclude on appeal that Turner demonstrated a meritorious defense under § 13-2314(D)(6) for Rule 60(c) purposes. In an affidavit submitted with his motion to vacate, Turner described his employment since the late 1990s and claimed those wages were the source of a retirement account seized by the state. If his assertion is true, those funds fall outside the scope of §§ 13-2314(D)(6)(a)-(c) and 13-4304.

¶22 The state nevertheless argues it is entitled to the retirement account and other funds as substitute property pursuant to A.R.S. §§ 13-4313 or 13-2314(D)(6)(d). That statute allows the state to seize substitute property "up to the value of the claimant's [other] property that the court finds is subject to forfeiture." § 13-4313(A).

But again, the showing of a meritorious defense under Rule 60(c) "is not intended to be a substitute for a trial of the facts" and must only rise to the level of a substantial defense. *Richas*, 133 Ariz. at 517, 652 P.2d at 1040, *quoting Union Oil Co. of California v. Hudson Oil Co.*, 131 Ariz. 285, 289, 640 P.2d 847, 851 (1982). In this case, if Turner's defense is supported by the evidence at trial, the state will be required to prove the value of the property directly related to his illegal conduct, including the amount of profit from the enterprise, and that any of the following apply to the property:

> 1. It cannot be located.
>
> 2. It has been transferred or conveyed to, sold to or deposited with a third party.
>
> 3. It has been placed beyond the jurisdiction of the court.
>
> 4. It has been substantially diminished in value by any act or omission of the defendant.
>
> 5. It has been commingled with other property which cannot be divided without difficulty.
>
> 6. [Or i]t is subject to any interest that is exempt from forfeiture.

§ 13-4313(A). Therefore, Turner presented a meritorious defense.[11] *See U-Totem Store*, 142 Ariz. at 553, 691 P.2d at 319. Accordingly, the

[11]Turner also argues that the state's allegation that he raised $2,000,000 from the criminal enterprise was unsupported. The affidavit he submitted below, however, does not discuss the details of the criminal enterprise or contradict the state's assertion, and therefore we do not consider his argument on appeal. *See United Imps. & Exps., Inc.*, 134 Ariz. at 46, 653 P.2d at 694. Nevertheless, we

trial court erred in denying his motion to vacate the order of forfeiture. *See Blair*, 226 Ariz. 213, ¶ 7, 245 P.3d at 901.

Disposition

¶23 For the foregoing reasons, we reverse the trial court's denial of Turner's motion to vacate and remand the case for further proceedings. Accordingly, we deny the state's request for attorney fees and costs as a sanction against Turner's counsel for bringing a frivolous appeal pursuant to Rule 25, Ariz. R. Civ. App. P.

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note that the criminal action against Turner was not complete when he filed the motion to vacate the order of forfeiture, and Fifth Amendment considerations may have hindered his ability to provide this detail. *See State v. Ott*, 167 Ariz. 420, 427, 808 P.2d 305, 312 (App. 1990). The criminal action is now complete, however, and Turner presumably will be able to present a full defense on this issue on remand.