SUMMARY
September 10, 2020

**2020C0A134**

**No. 19CA1360, *Woo v. El Paso County Sheriff's Office* — Replevin; Government — Colorado Governmental Immunity Act; Constitutional Law — Due Process**

A division of the court of appeals considers whether the Colorado Governmental Immunity Act (CGIA) bars the plaintiff's replevin action against the local sheriff's office and district attorney's office. After he was prosecuted and sentenced in a criminal case, the plaintiff filed this civil action in replevin to gain possession of property that law enforcement officers had legally seized from him during and after his arrest. The division concludes that the CGIA bars the replevin action and that applying the CGIA's bar does not violate the plaintiff's due process rights because he had an alternative remedy to recover the property in the related criminal case. The division further concludes that the district court

properly dismissed the replevin action with prejudice because the defendants enjoy sovereign immunity from that action.

COLORADO COURT OF APPEALS **2020C0A134**

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Court of Appeals No. 19CA1360
El Paso County District Court No. 19CV103
Honorable Larry E. Schwartz, Judge

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James Woo,

Plaintiff-Appellant,

v.

El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office,

Defendants-Appellees.

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JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE NAVARRO
Fox and Casebolt*, JJ., concur

Announced September 10, 2020

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James Woo, Pro Se

Diana K. May, County Attorney, Mary Ritchie, Assistant County Attorney, Colorado Springs, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 Plaintiff James Woo appeals the district court's judgment dismissing his replevin claim against the El Paso County Sheriff's Office and the Fourth Judicial District Attorney's Office. He sought the return of property seized during and after his arrest. We conclude that (1) the Colorado Governmental Immunity Act (CGIA), §§ 24-10-101 to -120, C.R.S. 2019, bars Woo's replevin claim; (2) applying the CGIA to bar his claim does not violate his due process rights because he had a meaningful post-seizure remedy in a related criminal case; and (3) the district court properly dismissed his claim with prejudice. Accordingly, we affirm.

## I. Factual and Procedural History

¶ 2 In April 2016, officers arrested Woo at the Seattle airport on suspicion of first degree murder. Officers seized his luggage and later searched his apartment.

¶ 3 A trial in the criminal case concluded in February 2018, and a jury convicted Woo of first degree murder.[1] A week later, the court sentenced him to life in prison without the possibility of parole. Thereafter, Woo's counsel filed a motion in the criminal case

[1] Woo appealed his conviction in case number 18CA0584, which remains pending as of the date of this opinion.

seeking permission to return certain computer hard drives to Woo. The record does not make clear how that motion was resolved.

¶ 4 In April 2019, Woo filed this replevin action against the defendants. He alleged that the items seized during his arrest and from his apartment included personal documents, jewelry, an iPad, a camera, clothing, cash, credit cards, and a computer. According to his allegations, those items were his property, were not used as evidence in the criminal trial, and should be returned to him because they lack any evidentiary value for future proceedings. He also sought damages from the alleged wrongful detention of the property.

¶ 5 Citing the CGIA, the defendants moved to dismiss under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction. The motion asserted that Woo had failed to comply with the CGIA's 182-day notice of claim requirement and, in the alternative, that the defendants are immune from replevin actions. Woo responded that he had filed a notice within 182 days of his discovery of the injury (which he alleged was in February 2019). He also argued that the CGIA violates his due process rights if it bars his replevin action.

¶ 6 Without holding a hearing, the district court dismissed Woo's complaint with prejudice on the ground that he "[a]pparently" failed to provide proper notice to the defendants before filing this action and, thus, the court lacked jurisdiction. The court also concluded that "the return of property, if any," should be resolved in Woo's criminal case.

¶ 7 Applying somewhat different reasoning, we affirm.

## II. The Colorado Governmental Immunity Act

¶ 8 Governmental immunity raises a jurisdictional issue. *Springer v. City & Cty. of Denver*, 13 P.3d 794, 798 (Colo. 2000). When the jurisdictional issue involves a factual dispute, we apply the clearly erroneous standard of review in considering the district court's findings of jurisdictional fact. *Id.* If the alleged facts are undisputed or the issue is purely one of law, we review the jurisdictional matter de novo. *Id.*

¶ 9 Here, the parties presented factual disputes as to when Woo discovered his alleged injury and when he gave the defendants notice of his claim. The district court, however, did not hold an evidentiary hearing to resolve those disputes based on the evidence. So, we are in the same position as the district court to address the

jurisdictional question, and we review the court's legal conclusions de novo. *See Colo. Ins. Guar. Ass'n v. Menor*, 166 P.3d 205, 209 (Colo. App. 2007). Additionally, whether the CGIA deprives a court of jurisdiction to hear a particular type of claim is a question of statutory interpretation that we review de novo. *See City of Colorado Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000).

¶ 10 The CGIA provides that, subject to specific enumerated exceptions, "sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant." § 24-10-108, C.R.S. 2019; *see also* § 24-10-106, C.R.S. 2019 (enumerating exceptions). "Through the CGIA, the General Assembly sought to protect public entities not only from the costs of judgments but the costs of unnecessary litigation as well." *Hernandez v. City & Cty. of Denver*, 2018 COA 151, ¶ 5.

¶ 11 Woo filed a "verified complaint in replevin." Replevin is a possessory action in which a claimant seeks to recover possession of personal property that has been wrongfully taken or detained, as well as damages for its unlawful detention. C.R.C.P. 104(b); *City &*

*Cty. of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 763 (Colo. 1992). The "basic elements" of a replevin claim are "the plaintiff's ownership or right to possession, the means by which the defendant came to possess the property, and the detention of the property against the rights of the plaintiff." *Desert Truck Sales*, 837 P.2d at 764.

¶ 12 Woo did not allege that the initial seizure of the property was wrongful; rather, he alleged that the defendants' continued detention of it had become wrongful. Thus, he pleaded an action in replevin *in detinet* — "[r]eplevin . . . where defendant rightfully obtained possession of property but wrongfully detains it." *Id.* at 765 (citation omitted). He also sought monetary damages for the wrongful detention and for any damage the items sustained during that detention.

¶ 13 Our supreme court has held that replevin *in detinet*, including a claim for damages, is an action which lies or could lie in tort. *Id.* As a result, the CGIA bars such an action unless a waiver applies. *Id.* But, as the supreme court further explained, the CGIA does not waive immunity for an action in replevin to obtain possession of

property validly seized pursuant to a public entity's police power and to recover damages for its detention. *Id.* at 767.

¶ 14 For these reasons, the CGIA bars Woo's replevin action against the defendants.[2]

## III. Due Process

¶ 15 Because the CGIA bars Woo's replevin action to recover the property and damages, we must address his contention that barring his action violates his federal and state constitutional rights against deprivations of property without due process of law. *See* U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25. He does not present a facial challenge to the law; so, we must decide whether the CGIA is unconstitutional as applied to his claim.

¶ 16 Given that Woo preserved this constitutional claim in the district court, we review it de novo. *See People v. Perez-Hernandez*, 2013 COA 160, ¶ 10. We presume a statute is constitutional, and the challenger bears the burden to prove its unconstitutionality

[2] Because the defendants are immune from Woo's replevin action, section 24-10-108, C.R.S. 2019, requires the dismissal of the replevin action regardless of whether he timely filed a notice of claim under section 24-10-109, C.R.S. 2019. We therefore need not address the timeliness or sufficiency of his notices.

beyond a reasonable doubt. *TABOR Found. v. Reg'l Transp. Dist.*, 2018 CO 29, ¶ 15. To show a procedural due process violation, a plaintiff must first identify a liberty or property interest that has been interfered with by the state. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Next, the plaintiff must show that the procedures attendant to that deprivation were constitutionally insufficient. *Id.*

¶ 17 We assume for the sake of our analysis that the property Woo seeks to obtain belongs to him. Under that assumption, he suffered a deprivation of a property interest when the state seized and did not return the property. Woo does not argue that the initial seizure was unconstitutional. The question thus becomes whether applying the CGIA to preclude Woo's replevin action to recover the property violates his due process rights. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) ("For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.").

¶ 18 On this question, *Desert Truck Sales* is again instructive because the supreme court considered whether applying the CGIA

to preclude the replevin action violated the purported property owner's due process rights. 837 P.2d at 768. Like Woo, the plaintiff in that case argued that barring a replevin action denied due process because it was the only remedy to recover the property — there, a vehicle seized by police on suspicion of theft and then detained because its vehicle identification number had been removed. *Id.* at 762. The supreme court rejected that argument, reasoning that the plaintiff had a statutory right to a post-seizure hearing to prove ownership and obtain possession of the car, and that the hearing was mandatory. *Id.* at 767-68 (citing § 42-5-110, C.R.S. 2019). The court concluded that this procedure adequately protected the plaintiff's due process rights. *Id.*; *cf. Hudson*, 468 U.S. at 533 ("[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.").

¶ 19 Likewise, Woo had an adequate post-seizure remedy. He could have sought (and, as to some property, he did seek) return of the property in his criminal case. Though no statute or rule sets out

the procedure available to a criminal defendant to recover property that was legally seized, longstanding Colorado case law recognizes that a criminal defendant may file a motion for return of such property in the criminal court. *See, e.g.*, *People v. Hargrave*, 179 P.3d 226, 228-29 (Colo. App. 2007); *People v. Fordyce*, 705 P.2d 8, 9 (Colo. App. 1985); *People v. Wiedemer*, 692 P.2d 327, 329 (Colo. App. 1984); *People v. Rautenkranz*, 641 P.2d 317, 318 (Colo. App. 1982); *People v. Buggs*, 631 P.2d 1200, 1201 (Colo. App. 1981); *cf. People v. Angerstein*, 194 Colo. 376, 379, 572 P.2d 479, 481 (1977) (tacitly approving this practice but holding that, as to some categories of legally seized property, there is no right to have it returned).[3]

¶ 20 To recover property seized as part of a criminal proceeding, a defendant may file a verified motion seeking the return of that property with the same court in which the charges were brought. *Rautenkranz*, 641 P.2d at 318. The court should then hold an evidentiary hearing to determine the parties' rights. *Id.* The defendant makes a prima facie case of ownership by showing that

[3] In addition, Crim. P. 41(e) allows an aggrieved person to move the district court for the return of illegally seized property.

the items were seized from him at the time of his arrest and that they are being held by law enforcement authorities. *Fordyce*, 705 P.2d at 9. The burden then shifts to the prosecution to prove by a preponderance of the evidence that the items were the fruit of an illegal activity or that a connection exists between those items and criminal activity. *Id.*

¶ 21 This procedure in the criminal court provides adequate protection against the risk of an erroneous deprivation of property. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process."). Crim. P. 41(d)(5)(VI) requires officers who seize property under a warrant to issue a receipt listing the properties taken, so a defendant will have notice of what property should be included in the motion for return of property. The defendant may present evidence of ownership at the hearing, and the burden to establish a prima facia case is not high. *See Fordyce*, 705 P.2d at 9. The aggrieved party may file a timely appeal of the district court's ruling on the motion, providing the opportunity to correct an erroneous order. *See Buggs*, 631 P.2d at 1201.

¶ 22 Still, Woo contends that this procedure is insufficient because, unlike the post-seizure proceeding discussed in *Desert Truck Sales*, a hearing on a motion for return of property is not mandatory. But our supreme court said that the hearing in *Desert Truck Sales* was mandatory in the sense that it must be granted "upon request." 837 P.2d at 768. Similarly, where a timely motion for return of property and any response present pivotal factual disputes, a hearing would be necessary. *See Rautenkranz*, 641 P.2d at 318 ("[O]n the filing of the motion an evidentiary hearing should be held."). Hence, divisions of this court have reversed district courts' rulings that declined to hold a hearing on a motion for return of property or that denied such a motion even though the prosecution did not present evidence refuting the defendant's prima facie showing. *See id.*; *Buggs*, 631 P.2d at 1201.

¶ 23 Woo also maintains that the procedure in the criminal court is inadequate because that court might no longer have jurisdiction to entertain his motion for return of the property given that he has been sentenced already. True, divisions of this court have divided over whether a criminal court retains jurisdiction to hear a post-sentence motion for return of property. *See People v.*

*Chavez*, 2018 COA 139, ¶¶ 9-14 (discussing the split and answering in the negative). *Compare Wiedemer*, 692 P.2d at 329 (holding that the imposition of a sentence ends a criminal court's jurisdiction to hear a motion not authorized by Crim. P. 35), *with Hargrave*, 179 P.3d at 230 (holding that a criminal court has ancillary jurisdiction to entertain a post-sentence motion for return of property). So far, our supreme court has not resolved this debate.

¶ 24 Even if, however, the criminal court now lacks jurisdiction to consider any motion for return of property filed by Woo, barring his replevin action does not violate his due process rights. Our supreme court in *Desert Truck Sales* recognized that the availability of a post-seizure remedy to recover seized property satisfies the alleged owner's due process rights. Such a remedy was available to Woo in the criminal court, at least before he was sentenced. That this remedy might not be perpetual does not mean that it is constitutionally inadequate. *See In re Estate of Ongaro*, 998 P.2d 1097, 1105-06 (Colo. 2000) ("[A] statute of limitations does not deprive a claimant of its rights to due process unless the time for bringing the claim is so limited as to amount to a denial of

justice."); *cf. Cacioppo v. Eagle Cty. Sch. Dist. Re-50J*, 92 P.3d 453, 464 (Colo. 2004) ("[W]e hold that the five-day time limit imposed by section 1-11-203.5 is also not 'manifestly so limited as to amount to a denial of justice.'") (citation omitted). Indeed, his defense counsel's motion for release of certain items to Woo in the criminal case shows that his counsel knew of this procedure, though the motion might have been tardy.[4]

¶ 25 Finally, to the extent Woo argues that barring his damages claim for wrongful detention of the property violates his due process rights, we disagree. The statute at issue in *Desert Truck Sales* did not permit damages for the property's detention, *see* 837 P.2d at 767 n.9 (citing § 42-5-110), yet the supreme court found it sufficient to satisfy due process. Moreover, parties do not have a constitutionally protected property right to sue the government for damages for their alleged injuries. *See Norsby v. Jensen*, 916 P.2d 555, 563 (Colo. App. 1995); *see also State v. DeFoor*, 824 P.2d 783,

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[4] While we hold that the CGIA bars Woo's replevin action, we express no opinion on the CGIA's applicability to other civil actions pertaining to property seized by a public entity. *Cf. People v. Chavez*, 2018 COA 139, ¶ 14 n.5 (suggesting that a civil action regarding the post-sentence return of property might be available where a criminal court lacks jurisdiction).

795 (Colo. 1992) ("There is no constitutional right for persons to sue and recover a judgment against the state for the state's tortious conduct.") (Rovira, C.J., specially concurring in part). Rather, the right to maintain a tort action or tort-like action against a public entity is derived from statute. *Fritz v. Regents of Univ. of Colo.*, 196 Colo. 335, 339, 586 P.2d 23, 26 (1978); *see Desert Truck Sales*, 837 P.2d at 767 ("In enacting the [CGIA], the General Assembly described in minute detail the circumstances that can result in tort liability for a public entity or its employees."). As discussed, the CGIA bars Woo's replevin action, including his damages claim.

¶ 26 In sum, Woo has failed to show beyond a reasonable doubt that the CGIA is unconstitutional as applied to his replevin action.

## IV. Dismissal With Prejudice

¶ 27 Lastly, Woo contends that the district court's dismissal "with prejudice" was error. He reasons that, because the dismissal was due to lack of subject matter jurisdiction, the dismissal was not an adjudication on the merits of his replevin claim. Because the dismissal did not adjudicate the merits, he concludes that the dismissal must be "without prejudice" so that he may refile his

complaint.[5] Although his premise is correct, his conclusion does not follow.

¶ 28 Woo is right that the dismissal for lack of jurisdiction does not operate as an adjudication on the merits of his replevin claim. *See* C.R.C.P. 41(b)(1); *see also W. Colo. Motors, LLC v. Gen. Motors, LLC*, 2019 COA 77, ¶ 19 ("Although dismissal for lack of subject matter jurisdiction does not adjudicate the merits of the claims asserted, it does adjudicate the court's jurisdiction.") (citation omitted). Because the dismissal was based on the defendants' sovereign immunity, however, dismissal with prejudice was proper.

¶ 29 Generally, a dismissal for lack of jurisdiction does not bar subsequent proceedings and, thus, dismissal with prejudice is improper. *See Mkt. Eng'g Corp. v. Monogram Software, Inc.*, 805 P.2d 1185, 1185-86 (Colo. App. 1991). This principle reflects the possibility that the plaintiff may be able to refile the complaint (in the same court or another) and plead facts that cure the jurisdictional defect. *See id.* (dismissal for lack of personal jurisdiction); *see also Grant Bros. Ranch, LLC v. Antero Res.*

[5] Woo does not say how a new complaint might differ from his first.

*Piceance Corp.*, 2016 COA 178, ¶ 35 (dismissal for failure to exhaust administrative remedies).

¶ 30 Where, however, an insurmountable barrier exists to a court's jurisdiction — such as a statute of limitations — dismissal without prejudice would serve no purpose. In that situation, dismissal with prejudice is appropriate. *See People in Interest of T.L.H. v. F.P.V.*, 701 P.2d 87, 88 (Colo. App. 1984) (dismissing with prejudice the People's action where the statute of limitations barred their claim but dismissing without prejudice as to other parties' potential claims that were not barred).

¶ 31 Here, the district court lacks jurisdiction to hear the merits of Woo's replevin claim because the CGIA bars the claim. That bar is "immunity from suit," meaning that he cannot maintain a replevin action against the defendants. *See State v. Nieto*, 993 P.2d 493, 507 (Colo. 2000); *Hernandez*, ¶ 5; *see also Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 923 (Colo. 1993) (recognizing that the CGIA "is not a tort accrual statute" but a "nonclaim statute"). The dismissal of his claim is thus similar to a dismissal based on the expiration of a statutory limitations period.

¶ 32 Consequently, we conclude that where, as here, a public entity objects to jurisdiction on sovereign immunity grounds, and the plaintiff's complaint or amended complaint does not allege facts that would constitute a waiver of immunity, the district court's dismissal on sovereign immunity grounds "is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined." *Harris Cty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004); *see Ex parte Boaz City Bd. of Educ.*, 82 So. 3d 660, 662 (Ala. 2011) (Because the public entity and employees demonstrated that "they have immunity from the claims asserted against them, they have established a clear legal right to have the claims against them dismissed with prejudice."); *cf. Graham v. Waters*, 805 F. App'x 572, 579 (10th Cir. 2020) (holding that the district court properly dismissed the plaintiff's claims with prejudice because the defendants were immune from damages liability); *Janis v. Gonzales*, 168 F. App'x 810, 811 (9th Cir. 2006) (same).

¶ 33 The district court did not err.

## V. Conclusion

¶ 34 The judgment dismissing Woo's complaint with prejudice is affirmed.

JUDGE FOX and JUDGE CASEBOLT concur.