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IN THE
COURT OF APPEALS OF INDIANA

ADRIAN L. KEARNEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0711-CV-00949
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49F15-9611-FD-173067

July 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Adrian L. Kearney appeals the denial of his motion for return of property, challenging that ruling as the sole issue on appeal.

We affirm.

The facts are that on November 8, 1996, Kearney was pulled over for a traffic stop, which ultimately led to the discovery of cocaine in his vehicle. After a search of Kearney's person, deputies of the Marion County Sheriff's Department at the scene confiscated $434.00 in cash and two pagers from Kearney's pockets. Kearney was charged with possession of cocaine and pleaded guilty to that offense on October 17, 1997. He was sentenced on November 13, 1997. On August 31, 2006, Kearney submitted a Motion For Return Of Defendant's Property, seeking the return of the cash found in his pocket on November 8, 1996. The trial court denied Kearney's motion following a hearing.

Kearney contends the trial court erred in denying his motion for the return of his cash. A trial court's denial of a motion for return of property is reviewed under the clearly erroneous standard. *State v. Poxon*, 514 N.E.2d 652 (Ind. Ct. App. 1987), *trans. denied*. "A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts." *Kondamuri v. Kondamuri,* 852 N.E.2d 939, 944 (Ind. Ct. App. 2006); *see also* Trial Rule 52(A). In determining whether a judgment is clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom. *Miller's Turnkey Transp., Inc. v. Cybertek, Inc.,* 878 N.E.2d 280 (Ind. Ct. App. 2007). We will not reverse if the judgment is sustainable on any legal theory supported by the record. *Merlington v. State*, 839 N.E.2d 260 (Ind. Ct. App. 2005).

The following facts appear to have been established at the brief hearing conducted on

Kearney's motion: (1) Deputies took $434.00 from Kearney and that money was never returned; (2) there was no official documentation reflecting that the money had been the subject of forfeiture proceedings; and (3) officials could not locate or account for the money upon receipt of Kearney's motion for its return. At the hearing, the State claimed that Kearney had abandoned and therefore forfeited the money. This argument was based upon police policy and Ind. Code Ann. § 35-33-5-5 (West, PREMISE through 2007 1st Regular Sess.).

The police policy in question was that of the Indianapolis Police Department (IPD) concerning the return of seized property and was explained as follows:

> [B]ased on the Indianapolis Police Department's policy of once property is seized and it is not forfeited, they give notice to collect that property within 90 days and with this being back in 1996 they would have given that notice and after that notice is given, if it's not collected within that 90 days its [sic] deemed abandoned.

Appellant's Appendix at 20. The foregoing policy was based upon I.C. § 35-33-5-5(c), which states, in pertinent part:

> (1) Property which may be lawfully possessed shall be returned to its rightful owner, if known. If ownership is unknown, a reasonable attempt shall be made by the law enforcement agency holding the property to ascertain ownership of the property. After ninety (90) days from the time:
>
> (A) the rightful owner has been notified to take possession of the property; or
>
> (B) a reasonable effort has been made to ascertain ownership of the property;
>
> the law enforcement agency holding the property shall, at a convenient time, dispose of this property at a public auction. The proceeds of this property shall be paid into the county general fund.

In summary, the particular procedure employed by the IPD here was implicitly

authorized by I.C. § 35-33-5-5(c)(1)(A). It involved as a first step notifying Kearney that he could collect his cash. As a final step, it called for forfeiture if the property remained unclaimed ninety days after notification. Both steps of this policy are authorized by statute. Kearney does not challenge the IPD policy or the applicability of I.C. § 35-33-5-5. In fact, the linchpin of Kearney's argument on appeal addresses a factual issue that may be reduced to this single sentence in his brief: "Absent statements and comments by the prosecutor, there is simply no evidence that Mr. Kearney was given notice to collect his property." *Appellant's Brief* at 6.

During the hearing on Kearney's motion, the State explained the IPD policy and indicated that pursuant to standard procedures, the State would have sent notice to Kearney, although it acknowledged that it no longer has a record of having done so. The State's lack of documentation is perhaps not surprising in view of the fact that it had been almost nine years since Kearney was sentenced. Kearney did not explain why he took that long to initiate proceedings to recover the money. Moreover, Kearney did not claim at the hearing that he had not received notice, although he did state in a motion in support of his request for a return of the money that the Marion County Sheriff's Department "ha[d] not attempted to notify Mr. Kearney before disposal of his property[.]" *Appellant's Appendix* at 33. It appears, then, that the evidence upon which the trial court was required to base its decision regarding notice consisted of (1) the State's claim that it would have sent notice to Kearney in the ordinary course of business and (2) Kearney's assertion in the memorandum in support of his motion for return of the money that law enforcement officials did not attempt to notify him before disposing of his property. From this evidence, we conclude the trial court was

entitled to find that the State sent the requisite notice.

As a final matter, we note that the State advances a plausible argument that Kearney's claim should be barred by laches. The doctrine of laches operates to bar consideration of the merits of a claim or right of one who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done. *Kirby v. State*, 822 N.E.2d 1097 (Ind. Ct. App. 2005), *trans. denied*. In order for laches to apply, the State must prove by a preponderance of the evidence that the petitioner unreasonably delayed in seeking relief and that the State is prejudiced by the delay. *Id*. Although a lapse of time does not by itself constitute laches, a long delay in filing for relief may be sufficient to infer that the delay was unreasonable. *See id*.

Kearney waited almost nine years to seek return of the money and offers no explanation or justification for the long delay. Not surprisingly, in view of that significant lapse of time, the judge who presided over Kearney's trial has since retired and the deputy prosecutor in charge of the case can locate only limited records concerning Kearney's case. Clearly, these consequences of the long delay prejudiced the State's ability to prove its claim that it sent notice to Kearney. Thus, even if the trial court's determination was not sustainable on the merits, it may be affirmed by application of the doctrine of laches.

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur