STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0243

LPOE, Inc., et al.,
Appellants,

vs.

City of Duluth,
Respondent,

Various Firearms, et al.,
Respondents.

Filed September 16, 2013
Appeal dismissed; motion granted
Worke, Judge

St. Louis County District Court
File No. 69-DU-CV-11-3507

Randall D.B. Tigue, Mimi Hasselbalch, Golden Valley, Minnesota (for appellants)

Gunnar B. Johnson, Duluth City Attorney, M. Alison Lutterman, Deputy City Attorney, Nathan N. LaCoursiere, Assistant City Attorney, Duluth, Minnesota (for respondent City of Duluth)

Mark Rubin, St. Louis County Attorney, Thomas G. Stanley, Assistant County Attorney, Duluth, Minnesota (for respondent property)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Smith, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellants challenge the summary-judgment dismissal of their claim for the return of property that they allege was wrongfully seized pursuant to a search warrant. Appellants also argue that the district court erred by dismissing their civil-rights claim based on wrongful seizure and retention of their property. The city argues that the appeal should be dismissed because criminal charges related to the seized property have been filed and the district court's dismissal of appellants' civil-rights claim is not appealable. We agree and dismiss.

FACTS

In August 2011, officers were asked to assist in addressing on-going complaints[1] about a crowd that gathered outside of appellant LPOE,[2] Inc., a licensed tobacco retailer, and allegedly smoked synthetic marijuana. On five separate occasions, an investigator fitted with an electronic monitoring device visited LPOE for undercover purchases. During the first visit, the investigator overheard a patron request the "no-name brand"; after which, an employee handed the patron a sealed baggie that contained a leafy substance. The employee then recorded the sale in a notebook. After observing several different varieties of alleged synthetic marijuana displayed for sale, the investigator requested a bag of "no name." In response to the investigator's request for another

[1] Complaints included allegations that LPOE was selling synthetic marijuana, of panhandling by individuals desiring to purchase synthetic marijuana, of blocking of sidewalks by crowds in front of LPOE, and of loitering by LPOE patrons on the stoops of neighboring businesses.

[2] Last Place on Earth.

purchase recommendation, the employee produced a package identified as "Maya Blue," which the employee described as "one of the strongest ones." The investigator purchased a bag of "no name" and a bag of "Maya Blue." The purchased evidence was submitted to the Bureau of Criminal Apprehension (BCA) lab for testing for illegal substances. The substances found in "Maya Blue" were on the schedule of controlled substances for which possession or sale is a crime. The remaining substances tested indicated the presence of AM-2201, a cannabinoid receptor agonist, which was not specifically listed as a controlled substance until August 1, 2012, when AM-2201 was defined as a Schedule I Narcotic. *See* 2012 Minn. Laws ch. 240, § 1, at 771.

On September 21, 2011, officers obtained a search warrant for the premises of LPOE, and its owner, appellant James Robert Carlson. The warrant permitted the search for: controlled substances; business records of the ordering and selling of controlled substances; paraphernalia; records related to the transportation, ordering, purchasing, and distribution of controlled substances; business records reflecting names, addresses, and telephone numbers; business records related to obtaining, transferring, and concealing assets and monies; video and audio tapes; U.S. currency, which could be proceeds from sales of controlled substances; valuables purchased with the proceeds of the controlled-substance transactions, which may be subject to legal forfeiture; indicia of occupancy; photographs of controlled substances; and records of employee schedules. As a result of

the search, officers seized firearms, U.S. currency, business records, and suspected controlled substances packaged/identified in various forms.[3]

On October 7, 2011, appellants filed a complaint against respondents The City of Duluth, Various Firearms, and $83,510 in U.S. currency, and moved to suppress and return the seized items. Appellants framed the claim as a section 1983 action, alleging that the search warrant violated their constitutional rights. Appellants also alleged that the police seized items not specifically authorized by the warrant, and sought a declaration that the firearms and currency seized were not subject to forfeiture. On February 17, 2012, the district court denied appellants' motion to suppress and return the property after finding that the search warrant was valid and that the items seized fit within the scope of the warrant. The district court concluded that law enforcement may retain the property pending the outcome of forfeiture or criminal proceedings.

The city then moved for summary judgment, arguing that appellants' section 1983 claim should be dismissed following the district court's determination that appellants' constitutional rights were not violated with the execution of the search warrant. On December 11, 2012, the district granted the city's motion for summary judgment. The district court stated that appellants failed to present evidence to support their civil-rights-violation claim, but because the ongoing criminal investigation prevented appellants from pursuing discovery, it dismissed "without prejudice [to] allow [appellants] to refile their complaint if appropriate in the future."

[3] Some substances were identified as "potpourri," "incense," "exotic skin treatment," "capsules," and "powder."

After the appeal was filed, this court took judicial notice of the federal indictment of appellant Carlson from December 18, 2012. The city moved this court to dismiss the appeal.

D E C I S I O N

Suppression and return of property

The city argues that this court should dismiss the appeal for lack of jurisdiction. Appellants moved the district court, under Minn. Stat. § 626.21 (2012), to suppress and return the evidence seized, which provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized or the district court having jurisdiction of the substantive offense for the return of the property and to suppress the use, as evidence, of anything so obtained on the ground that (1) the property was illegally seized, or (2) the property was illegally seized without warrant, or (3) the warrant is insufficient on its face, or (4) the property seized is not that described in the warrant, or (5) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (6) the warrant was illegally executed, or (7) the warrant was improvidently issued. . . . . If the motion is granted the property shall be restored unless otherwise subject to lawful detention, and it shall not be admissible in evidence at any hearing or trial.

This court has held that "[a]n order denying a motion to suppress evidence in a criminal case is not an appealable order." *Bonynge v. City of Minneapolis*, 430 N.W.2d 265, 266 (Minn. App. 1988). In *Bonynge*, this court noted that under Minn. Stat. § 626.21, a person may raise an issue regarding the legality of a search and return of seized property. *Id.* But concluded that "a defendant has no right to appeal an order

denying a motion to suppress and return under section 626.21 [when] a criminal prosecution has commenced at the time appealability is considered." *Id.*

Here, the district court denied appellants' motion on February 17, 2012, after finding that the search warrant was valid and that the items seized fit within the scope of the warrant. The district court concluded that "the items may be retained by law enforcement pending the outcome of forfeiture or criminal proceedings." On December 18, 2012, the federal government indicted appellant Carlson on 54 criminal charges. The charges relate to the evidence seized during the search in September 2011. Because a criminal prosecution has commenced and the issue of the legality of the search will be litigated in the criminal prosecution, the district court's ruling on this issue is not binding.

Appellants attempt to distinguish *Bonynge* because in that case the state filed a criminal complaint, and here, appellant Carlson was federally indicted. However, if that is the main force of appellants' argument, it is not persuasive because, as relied upon in *Bonynge*, section 626.21 and its federal counterpart are nearly identical. *Id.* This court noted that criminal proceedings would be seriously disrupted if evidence potentially necessary in a criminal proceeding were returned to an individual when the criminal proceedings were pending. *Id.* (quoting *DiBella v. United States*, 369 U.S. 121, 129, 82 S. Ct. 654, 659 (1962)). This court stated that the return of evidence through a civil proceeding would be proper only if it were in no way tied to a criminal prosecution. *Id.* (quoting *DiBella*, 369 U.S. at 131-32, 82 S. Ct. at 600-61). There is no distinction made in *Bonynge* if the evidence is to be used in a state or federal criminal proceeding.

Therefore, we dismiss this appeal because appellant Carlson has been federally indicted and the charges are directly related to the seized evidence.

Section 1983

Appellants alleged that the city violated their civil rights by executing an unconstitutional search and seizure. In December 2012, the district court granted the city's motion for summary judgment,[4] but dismissed appellants' complaint "without prejudice [to] allow [appellants] to refile their complaint." The city asserts that because the district court dismissed appellants' section 1983 claim without prejudice, that this issue is not appealable and should be dismissed.

In general, a district court order dismissing a complaint without prejudice is not appealable. *Sussman v. Sussman*, 287 Minn. 553, 553, 178 N.W.2d 244, 244 (1970). This is because a dismissal with prejudice finally resolves a case, and an appeal in a civil case should be brought only after the entry of final judgment. *See Brazinsky v. Brazinsky*, 610 N.W.2d 707, 712 (Minn. App. 2000); *see also* Minn. R. Civ. App. P. 103.03(a). A judgment is not "final," and therefore not appealable, unless "the matter is conclusively

[4] The district court purportedly granted the city's motion for summary judgment. However, the district court also dismissed appellants' claim without prejudice. In effect, this results in a dismissal and not a grant of summary judgment. This court has stated that "[a]fter granting summary judgment against a claimant on the merits of a claim, a district court may not dismiss the claim without prejudice but, rather, must enter judgment in favor of the moving party." *Pond Hollow Homeowners Ass'n v. The Ryland Grp., Inc.*, 779 N.W.2d 920, 921 (Minn. App. 2010). Because the district court's dismissal of appellants' civil-rights action was not on the merits, the procedural posture does not affect our review of the appealability of the order. *See Anderson v. Mikel Drilling Co.*, 257 Minn. 487, 497, 102 N.W.2d 293, 300 (1960) (stating that dismissal of a case operating by way of abatement is not appropriate for summary judgment, which is an adjudication on the merits).

terminated so far as the court issuing the order is concerned." *Morey v. Indep. Sch. Dist. No. 492*, 268 Minn. 110, 113, 128 N.W.2d 302, 305 (1964). This court may exercise review of a dismissal without prejudice, however, if the order involves the merits of the action or if the dismissal affected the substantial rights of one of the parties. *Fischer v. Perisian*, 251 Minn. 166, 170, 86 N.W.2d 737, 740 (1957).

Here, the district court did not make a final determination for this court to review regarding the section 1983 claim. Further, the district court pointedly stated that the dismissal was without prejudice to "allow [appellants] to refile their complaint." The district court's order dismissing appellants' section 1983 claim without prejudice is not a final order because appellants may reassert that claim in a future lawsuit. *See In re Trusteeship of Williams*, 591 N.W.2d 743, 750 (Minn. App. 1999) (concluding that language in the district court's order dismissing a claim without prejudice indicated that dismissal did not bar subsequent lawsuit on same claim). Finally, appellants presented no argument that that the district court's order involved the merits of the action or that dismissal affected their substantial rights.

Appeal dismissed; motion granted.