[Cite as *Dayton Police Dept. v. Pitts,* 2010-Ohio-1505.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

DAYTON POLICE DEPARTMENT :

Plaintiff-Appellant :

C.A. CASE NO. 23213

v.

: T.C. NO. 08 CV 8062

DAMEIN PITTS, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 2nd day of April, 2010.

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LAURA G. MARIANI, Atty. Reg. No. 0063204, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellant

RICHARD S. SKELTON, Atty. Reg. No. 0040694, 130 W. Second Street, Suite 1818, Dayton, Ohio 45402
Attorney for Defendants-Appellees

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FROELICH, J.

{¶ 1} The Dayton Police Department appeals from a judgment of the Montgomery County Court of Common Pleas, which, upon releasing a car to its owner in a civil forfeiture case, ordered the police department to pay the towing and storage fees that had accrued while the vehicle was impounded.

{¶ 2} For the reasons discussed below, the judgment of the trial court will be affirmed.

I

{¶ 3} On August 15, 2008, Damein Pitts was arrested on drug charges while he was driving Denise Radich's car; the car and $2,050 in U.S. currency were seized. Radich had dated Pitts in the past, but it was undisputed that he did not have permission to drive her car because his license had been suspended. On September 2, 2008, the police department filed a complaint seeking forfeiture of the currency and Radich's car, a 2000 Chevrolet Impala.[1] On October 1, 2008, Radich filed a request for Immediate Hearing on Release of Vehicle. A magistrate promptly held a hearing and, on October 21, 2008, she ordered that the car be conditionally released to Radich, with the costs of impoundment to be paid by the police department. The police department did not object to the conditional release of the vehicle, but it did object to the order that it pay the costs of impoundment. On December 18, 2008, the trial court overruled the police department's objections and affirmed the magistrate's decision.

II

[1]Many filings in this case list the Dayton Police Department as the plaintiff, but we note that R.C. 2981.02 provides only for "forfeiture to the state or a political subdivision." Moreover, since a department of a city is not sui generis, it is not capable of suing or being sued. See, e.g. *Richardson v. Grady* (December 18, 2000), Cuyahoga App. Nos. 77381, 77403. However, this issue was not raised at the trial or appellate levels.

{¶ 4} The police department appeals, challenging the trial court's order that the police department pay towing and storage fees on a vehicle that it had lawfully seized. The police department contends that neither the forfeiture statutes nor case law authorize the court to impose the costs of towing and storage on the police department for a conditionally released vehicle and that the court abused its discretion in doing so. Radich responds that, because the statutes do not specify who must pay the fees, the trial court acted within its discretion in ordering the police department to pay.

{¶ 5} When a trial court interprets a statute, we utilize a de novo standard of review and give no deference to the trial court's conclusions of law. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, at ¶8; *Star Bank, N.A. v. Matthews* (2001), 144 Ohio App.3d 246, 250. "If it is ambiguous, we must then interpret the statute to determine the General Assembly's intent. If it is not ambiguous, then we need not interpret it; we must simply apply it." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, at ¶13. When a statute is silent on a pertinent issue, the trial court may act within its discretion to resolve the matter. See *Neff v. Cincinnati* (1877), 32 Ohio St. 215, 216; *Piatt v. Piatt* (1839), 9 Ohio 37.

{¶ 6} The state or a political subdivision may seize contraband involved in a criminal offense, proceeds derived from or acquired through the commission of a criminal offense, or an instrumentality that is used in or intended to be used in the commission or facilitation of certain criminal offenses. R.C. 2981.02(A). "Upon commission of an offense giving rise to forfeiture," the state or political subdivision acquires provisional title to the property subject to forfeiture. R.C. 2981.03(A)(1).[2] "Provisional title authorizes the state or political

[2]This language raises the interesting question of whether the state or a political subdivision acquires provisional title when the offense was committed

subdivision to seize and hold the property, and to act to protect the property, ***" Id. Title to the property vests with the state or political subdivision when the trier of fact renders a final forfeiture verdict or order, but that title is subject to claims of third parties under either R.C. 2981.04, which governs criminal forfeiture proceedings, or R.C. 2981.05, which governs civil forfeiture proceedings. Id. The police department in this matter proceeded under the civil forfeiture provision.

{¶ 7} "A person aggrieved by an alleged unlawful seizure of property may seek relief from the seizure of property by filing a motion in the appropriate court that shows the person's interest in the property, states why the seizure was unlawful, and requests the property's return." R.C. 2981.03(A)(4). Where property is lawfully seized and is in the custody of a law enforcement agency, R.C. 2981.11(A) requires the agency to safely keep the property until it is no longer needed as evidence or for another lawful purpose and can be disposed of pursuant to statute.

{¶ 8} The parties do not dispute that the proper procedures were followed in this case or that the police department kept Radich's car safe until the court ordered its release. The disagreement centers on who was responsible to pay the towing and storage fees incurred as a result of the seizure and storage of the car, which were owed to a third party, when the car was released. The forfeiture statutes are silent on this issue. The trial court ordered the police department to pay the storage fees.

{¶ 9} The police department claims that it has limited space for storing vehicles seized for forfeiture and "it became necessary to store the car at a private storage facility until

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even if physical possession of the car was not obtained until some time later; regardless, in this case, the city simultaneously seized the vehicle, took possession of it, held it, and had provisional title to it.

the case was heard and decided," in keeping with its obligation to keep the vehicle safe. It further asserts that the forfeiture statutes neither permit nor require the court to order the police department to bear the burden of paying the storage fees. The police department contends that "the liability for the fees is a matter between the owner of the car and the tow yard, not the owner and the police. *** [T]he court cannot read into the statute the obligation for one party or the other to pay."

{¶ 10} In support of its position, the police department has cited *State v. Yoder* (1998), 127 Ohio App.3d 72, where the defendant was arrested for driving with a suspended license, his car was seized pursuant to R.C. 4507.38, and the car was placed in a "private immobilization lot." Yoder was subsequently found not guilty of the charge and, in this circumstance, R.C. 4507.38(D)(1) required that his vehicle be released from immobilization. Like the statute at issue herein, R.C. 4507.38 did not indicate who was responsible to pay the cost of the storage of the vehicle. R.C. 4507.38(B) allowed the law enforcement agency to seize the vehicle, and R.C. 4507.38(F) specifically provided that "the vehicle owner may be charged expenses or charges incurred in the removal and storage of the immobilized vehicle" and provided a mechanism for the title to be transferred from the owner on the condition that the transferee "pay any expenses or charges incurred in the vehicle's removal and storage." The municipal court ordered the BMV to pay, but the appellate court reversed, holding that "the governing statute provide[d] no authority for such an imposition" of fees on the BMV. The case does not reflect whether the BMV was ever a party, and the appellate court did not address an assignment that any claim against the BMV properly rests with the Court of Claims.

{¶ 11} The police department correctly observes that the forfeiture statutes are silent on the question of who must pay the cost of storage and that, in *Yoder*, the analogous statute

was also silent on this issue.[3] In our view, however, this cannot be the end of the inquiry. R.C. 2981.03 and the former R.C. 4507.38 likewise did not place the burden of paying the storage fees on the owner of the vehicle, which is the practical effect of concluding that the police department does not have to pay. Were the police department's argument correct, a vehicle owner, whose property was seized by the police, but who had been convicted of no crime or whose vehicle was allegedly used in a crime without the owner's permission or knowledge, would bear the expense of actions for which he or she was not responsible. Radich asserts that there "are strong policy arguments for requiring police departments that are pursuing a forfeiture action to pay the storage and towing costs of seized vehicles of third parties." Radich argues that, without responsibility for such costs, the police "would have unfettered discretion to seize vehicles of third parties that may or may not be connected with criminal activity" because there would be no adverse consequence to the police for doing so. Radich also points out that, if the police department is successful in the forfeiture action, it will receive the value of the property seized to offset the costs incurred. She contends that the responsibility for such fees would force the police to engage in a "cost/benefit analysis" when contemplating a forfeiture action against a third party.

{¶ 12} A law enforcement agency that confiscates a vehicle is charged with the safekeeping of that vehicle until the forfeiture action is resolved. R.C. 2981.11(A). The statutes do not address how the agency satisfies that requirement, and it is apparently left to the

[3]R.C. 4507.38 has since been amended to R.C. 4510.41, which provides more specific guidelines for the imposition of impoundment fees. Generally, these fees are charged to the arrested person *if the car is registered in his or her name,* and the statute does not require an owner who is not the arrested person to pay such fees, R.C. 4510.41(F)(1); it further provides that the law enforcement agency pay all expenses if impoundment were not authorized under this section. R.C. 4510.41(D)(5).

agency's discretion. The agency may store the vehicle on its own property or, as in this case, negotiate the terms of an agreement and contract with a third party to store the vehicle. In this respect, it is misleading for the police department to argue that the payment of fees to retrieve the vehicle "is an issue between the vehicle owner and the tow yard" over which the police department has no responsibility or control. Indeed, the police department had primary control over and made an explicit choice concerning the manner and cost of the vehicle storage. Because the statute does not impose liability for storage and impoundment fees on the owner of a vehicle who is not a criminal defendant, "the recovery of those expenses would seem to be a simple matter of contract law between the third party towing company and the entity with whom it contracted to provide those services (i.e. the state or one of its subdivisions)." *State v. Estep* (June 26, 1995), Ross App. No. 94CA2007 (interpreting the former R.C. 4705.38, which did not require a defendant to pay impoundment fees in order to recover a vehicle). See, also, *D&B Immobilization Corp. v. Dues* (1997), 122 Ohio App.3d 50 (holding that the provider of immobilization services has recourse against the city, with which it contracted to provide those services, to recover its fees, rather than against a defendant against whom charges were dismissed); *State v. Britton*, 135 Ohio App.3d 151, 154, fn. 2 (concluding that liability for towing and storage fees are a matter between the police department and/or the city and the third-party towing and storage company with which it contracted to provide those services, where the person entitled to possession of the vehicle is an innocent third party and the criminal charges related to the use of the motor vehicle were dismissed).

{¶ 13} Further, as between the police department and the owner of the vehicle, the police department is in a better position to expedite the release of a vehicle, and thus to mitigate

the damages, once it is determined that the defendant is not the owner of a vehicle. Placing the cost of prolonged storage of a vehicle on the entity that seized the property encourages it to expedite the release of vehicles in which a third party has an ownership interest.

{¶ 14} The police department seized Radich's property, maintained possession of the property, had provisional title to the property, and was under a statutorily-imposed affirmative duty to safeguard the property. Because the forfeiture statutes do not address who bears the responsibility for impoundment and storage fees, the trial court, with the facts before it, acted within its discretion in ordering the police department to pay those fees. There were sound legal reasons for holding the police department, rather than the non-defendant owner of the impounded vehicle, responsible for the impoundment and storage fees.

III

The judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Laura G. Mariani
Richard S. Skelton
Hon. Michael L. Tucker

Case Name:	*Dayton Police Department v. Damein Pitts, et al.*
Case No.:	Montgomery App. No. 23213
Panel:	Brogan, Fain, Froelich
Author:	Jeffrey E. Froelich