[Cite as *Dayton Police Dept. v. Thomas*, 2010-Ohio-1506.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

DAYTON POLICE DEPARTMENT :

Plaintiff-Appellant : C.A. CASE NO. 23289

v. : T.C. NO. 08 CV 2246

TOBY THOMAS, et al. : (Civil appeal from Common Pleas Court)

Defendant-Appellee :

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<u>O P I N I O N</u>

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

TOBY THOMAS, 4649 Prescott Avenue, Dayton, Ohio 45406
Defendant-Appellee

. . . .

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 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} Toby Thomas was arrested on February 25, 2008, for possession of heroin and trafficking in heroin. At the time of his arrest, he was driving a 1996 Dodge Intrepid owned by Sherelle Gabriel. On March 6, 2008, the police department filed a complaint for forfeiture of the vehicle and of $268 in U.S. currency confiscated from Thomas.[1] On April 3, 2008, Gabriel filed a request for conditional release of the vehicle, and the matter was referred to a magistrate for a hearing. However, when Gabriel learned that the accrued storage fees totaled more than $1,500, she withdrew her request for conditional release. Thomas was eventually convicted of possession of heroin and trafficking in heroin.

{¶ 4} In December 2008, the magistrate held a hearing on the forfeiture, at which Gabriel presented evidence that Thomas had been operating the vehicle without her permission; the police department did not refute this evidence. On January 7, 2009, the magistrate concluded that the police department had failed to prove by a preponderance of evidence that it was entitled to forfeiture of the vehicle. The magistrate ordered that the car be returned to Gabriel and that the police department pay

[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.

the storage charges.

{¶ 5} The police department filed objections to the magistrate's decision on January 23, 2009, contesting only the order that it pay storage fees. The trial court found that the police department's objections were untimely and adopted the magistrate's decision, including the order that the police department pay the storage fees of the vehicle.

II

{¶ 6} The police department appeals, challenging the trial court's order that the police department pay 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 storage on the police department for a conditionally released vehicle and that the court abused its discretion in doing so. The police department does not discuss the untimeliness of its objections. Gabriel has not filed a brief.

{¶ 7} Civ.R. 53((D)(3)(b)(iv) provides that, "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion *** unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(a)(ii)." Thus, the police department waived all but plain error by failing to timely object to the magistrate's decision. *State ex rel. Booher v. Honda of Am. Mfg., Inc.* (2000), 88 Ohio St.3d 52, 53-54, 2000-Ohio-269. "*Civil plain error* is error which, though not objected to, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the judicial process itself." (Citations omitted and emphasis sic.) *Hulcher v. Hulcher* (May 5, 2000), Montgomery App. No. 17956. The police department has not presented any argument that the trial court's imposition of storage fees compromised the integrity of the judicial process or

called into question the legitimacy of the judicial process itself, and we see no basis for such a conclusion. Thus, the police department has waived the alleged error, and we find no civil plain error.

{¶ 8} We addressed the same substantive issue raised in this case with respect to the payment of storage fees in *Dayton Police Dept. v. Pitts*, Montgomery App. No. 23213, 2010-Ohio-_____. We will reiterate that discussion here.

{¶ 9} 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. It has been long held that 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, 217; *Piatt v. Piatt* (1839), 9 Ohio 37.

{¶ 10} 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

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

the state or political 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.

{¶ 11} "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.

{¶ 12} It appears that the proper procedures were followed in this case or that the police department kept Gabriel's car safe until the court ordered its release. The police department's argument focuses on who must pay the 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.

{¶ 13} 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

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

until 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."

{¶ 14} 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.

{¶ 15} 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. 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). How the agency satisfies that requirement apparently is left to the 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 the manner and cost of the vehicle storage. Because the statute does not impose liability for storage fees on the owner of a vehicle who is not a criminal defendant, "the recovery of those expenses would seem to be a

[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).

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 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).

{¶ 16} 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 police department encourages the department to expedite the release of vehicles in which a third party has an ownership interest. In *Pitts*, the owner made a motion, which was granted, for conditional release. Here, such a motion was withdrawn precisely because the lawful owner could not afford the fees that had accrued to that date; the court eventually found, many months later, that the vehicle was not subject to forfeiture.

{¶ 17} The police department seized Gabriel'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 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 storage fees.

III

The judgment of the trial court will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

Laura G. Mariani
Toby Thomas
Sherelle Gabriel
Hon. Michael L. Tucker

Case Name: *Dayton Police Department v. Toby Thomas, et al.*
Case No.: Montgomery App. No. 23289
Panel: Donovan, Brogan, Froelich
Author: Jeffrey E. Froelich