

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State ex rel. Demetrick Clinton

Court of Appeals No. E-10-010

Petitioner

v.

Honorable Tygh Tone

DECISION AND JUDGMENT

Respondent

Decided: May 3, 2010

* * * * *

Beverly Newell Hancock, for petitioner.

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for respondent.

* * * * *

OSOWIK, J.

{¶ 1} On February 25, 2010, petitioner, Demetrick Clinton, filed a petition for a writ of mandamus in which he asked this court to order respondent, Erie County Court of Common Pleas Judge Tygh Tone, to set a hearing date on petitioner's motion requesting

the return of certain seized property. On March 2, 2010, respondent filed a response, in which he states that petitioner is not entitled to a writ of mandamus because petitioner has an adequate remedy at law, and has not followed the appropriate "statutory procedural requirements" for seeking the return of his property. On March 9, 2010, this court ordered both parties to file motions for summary judgment on or before April 5, 2010.

{¶ 2} Respondent filed a motion for summary judgment on March 15, 2010, in which he asked this court to dismiss the complaint in mandamus because petitioner has, or had, an alternative remedy through which to seek the return of his property. In support of his request, respondent stated that a petition for civil forfeiture of \$2,497 was filed by the Sandusky Police Department on November 25, 2009, pursuant to R.C. 2981.05 ("Case number 2009-CV-1006"). In support of his motion respondent asserted that, at the time the petition was filed, no criminal case was pending against petitioner with regard to the seizure of \$2,497. However, rather than file a petition to release the property in case number 2009-CV-1006, as allowed by R.C. 2981.05(C), petitioner filed a "Motion for Default Judgment" on January 26, 2010. Petitioner's motion was assigned miscellaneous case number 2009-MS-0080. Attached to respondent's summary judgment motion were respondent's affidavit, which stated that petitioner has not asked the trial court for a hearing on the issue of the release of his property; a copy of the "Petition for Forfeiture of Seized Property" filed on behalf of the Sandusky Police Department on

November 25, 2009; and a copy of the "Motion for Default Judgment" filed by petitioner in case number 2009-MS-0080 on January 26, 2010.

{¶ 3} On April 5, 2010, petitioner filed a response in which he asserted that, pursuant to R.C. 2981.03, respondent is required to hold a hearing on his "motion" that was filed in case number 2009-MS-0080. Attached to petitioner's response was the affidavit of his attorney, Beverly Newell Hancock, in which she stated that respondent promised to hold a hearing on the forfeiture of petitioner's funds on two separate occasions; however, no such hearing was ever scheduled.

{¶ 4} On April 15, 2010, respondent filed a reply, in which he stated that petitioner never requested a hearing in case number 2009-CV-1006, and any discussions regarding a hearing were held in the context of an unrelated criminal case pending against petitioner, which also involved the forfeiture of funds.

{¶ 5} We note at the outset that summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Initially, the party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims.

Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. The motion may be filed "with or without supporting affidavits[.]" Civ.R. 56(A).

{¶ 6} In order to be entitled to a writ of mandamus, a petitioner must establish a clear legal right to the relief requested, a corresponding legal duty on the part of the respondent to institute that action, and the lack of an adequate remedy for the petitioner in the ordinary course of law. *State ex rel. Gilbert v. Cincinnati*, Slip Opinion No. 2010-Ohio-1473, ¶ 15. See, also, *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Comms.*, 115 Ohio St.3d 337, 2007-Ohio-5022, ¶ 15. Pursuant to R.C. 2981.02(A), the state is authorized to 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." *Dayton Police Dept. v. Pitts*, 2d Dist. No. 23213, 2010-Ohio-1505, ¶ 6. "Upon commission of an offense giving rise to forfeiture,' the state or political subdivision acquires provisional title to the property subject to forfeiture." *Id.*, quoting R.C. 2981.03(A)(1). The state or political subdivision acquires full title when the trier of fact renders a verdict or order of final forfeiture. However, that title is still subject to other claims pursuant to R.C. 2981.04, which governs criminal forfeiture proceedings, and R.C. 2981.05, which governs proceedings in civil forfeiture cases. *Id.*

{¶ 7} In this case, the Sandusky Police Department proceeded under the civil forfeiture provision. R.C. 2981.05 states, in relevant part, that;

{¶ 8} "(C) A person with an interest in the property subject to forfeiture may petition the court to release the property pursuant to division (D) of section 2981.03 of the Revised Code. The court shall consider the petition as provided in that section.

{¶ 9} Petitioner seeks the return of his property pursuant to R.C. 2981.03(A), which states, in relevant part:

{¶ 10} "(4) A person aggrieved by an alleged unlawful seizure of property may seek relief from the seizure 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. If the motion is filed before an indictment, information, or complaint seeking forfeiture of the property is filed, the court shall promptly schedule a hearing on the motion, and at the hearing the person shall demonstrate by a preponderance of the evidence that the seizure was unlawful and that the person is entitled to the property * * *."

{¶ 11} Petitioner interprets the above statute to require the trial court to "promptly schedule a hearing" on his request for the return of his property. However, the statute states that a prompt hearing is only required if a motion seeking the property's return is filed before the filing of a complaint seeking its forfeiture. Furthermore, pursuant to R.C. 2981.03(D)(1), a person who claims an interest in property after it has been seized has a maximum of 45 days to request its release and to demonstrate how that person meets the requirements set forth in R.C. 2981.03(D)(3) (a)-(c). In this case, assuming that the

motion filed by petitioner in case number 09-MS-0080 was such a request, it was not timely filed pursuant to R.C. 2981.03(D)(1).

{¶ 12} On consideration of the foregoing, we conclude that petitioner had, but did not timely exercise, a remedy by which he could attempt to recover the \$2,497 seized by Sandusky Police. Accordingly, petitioner is not entitled to a writ of mandamus to compel respondent to hold a hearing.

{¶ 13} On consideration whereof, we find further that, even after construing the evidence presented in a light most favorable to petitioner, respondent is entitled to summary judgment as a matter of law. Petition in mandamus is dismissed at petitioner's costs.

{¶ 14} It is so ordered.

PETITION DISMISSED.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

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