[Cite as *Dayton Police Dept. v. Grigsby*, 2010-Ohio-2504.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

DAYTON POLICE DEPARTMENT :

Plaintiff-Appellant : C.A. CASE NO. 23362

v. : T.C. NO. 2008 CV 7020

ROGER GRIGSBY, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 4th day of June, 2010.

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CATHERINE WILSON, 7691 Richard Oswald Lane, Trotwood, Ohio 45426
Defendant-Appellee

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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 returning 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} Roger Grigsby was arrested on July 4, 2008, for possession of crack cocaine.[1] At the time of his arrest, he was driving a 1992 Isuzu Rodeo owned by his former girlfriend, Catherine Wilson. Wilson had taken the vehicle to a repair shop for some work, and Grigsby picked up the vehicle without her permission. Wilson had reported the theft of her vehicle to the police.

{¶ 4} On July 31, 2008, the police department filed a complaint for forfeiture of the vehicle and of $819 in U.S. currency confiscated from Grigsby.[2] Wilson filed an answer, and the matter was referred to a magistrate for a hearing. In December 2008, the magistrate held a hearing on the forfeiture, at which Wilson presented evidence that she was an innocent owner of the vehicle. The police department did not refute this evidence, nor did it offer evidence that the vehicle was an instrumentality of the offense. On January 9, 2009, the magistrate concluded that the police department had failed to prove that it was entitled to forfeiture of the vehicle. The magistrate ordered that the

[1]In October 2008, Grigbsy was convicted of possession of crack cocaine in an amount greater than ten grams and less than or equal to twenty-five grams.

[2]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." Since a department of a city is not a political subdivision, it is not capable of suing under the forfeiture statutes. *In re Moncreif*, Montgomery App. No. 23621, 2010-Ohio-1792. However, this issue was not raised at the trial or appellate levels.

car be returned to Wilson and that the police department pay the towing and storage fees.

{¶ 5} The police department filed objections to the magistrate's decision on January 23, 2009, contesting only the order that it pay the towing and storage fees. On March 6, 2009, the trial court adopted the magistrate's decision, including the order that the police department pay the towing and storage fees for the vehicle.

II

{¶ 6} The police department raises one assignment of error on appeal, which challenges 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 authorizes the court to impose the costs of towing and storage on the police department when a lawfully seized vehicle is returned to its owner and that the court abused its discretion in doing so. Wilson has not filed a brief.

{¶ 7} In *Dayton Police Dept. v. Pitts*, Montgomery App. No. 23213, 2010-Ohio-1505, the police department recently raised these same arguments, and we addressed the substantive issue of the payment of towing and storage fees. We will reiterate that discussion here.

{¶ 8} 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.

{¶ 9} 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). "Provisional title authorizes 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.

{¶ 10} "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.

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

{¶ 12} 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 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 towing and storage fees. The police department contends that "the obligation [for the fees] is between the tow yard, which imposes and collects the fees, and the vehicle owner."

{¶ 13} 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.

{¶ 14} 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 towing and 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.

{¶ 15} A law enforcement agency that confiscates a vehicle is charged with the

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[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).

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.

{¶ 16} 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 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 is 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).

{¶ 17} 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.

{¶ 18} The police department seized Wilson'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 towing 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 innocent, non-defendant owner of the impounded vehicle, responsible for the towing and storage fees.

III

{¶ 19} The judgment of the trial court will be affirmed.

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FAIN, J. and WILLAMOWSKI, J.

(Hon. John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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Hon. Mary L. Wiseman