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Bonner County v. Cunningham Appellant's Brief Dckt. 40642

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BONNER COUNTY IDAHO,)
)
 Plaintiff,)
 v.)
)
 MICHAEL C. CUNNINGHAM)
)
 Real party in interest,)
)
 NINE THOUSAND FIFTY DOLLARS)
 U. S. CURRENCY)
)
 Defendant.)
)

Supreme Court Docket No. 40642-2013

Boundary County District Court
DC No. CV-2006-52

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BOUNDARY

HONORABLE JEFF BRUDIE
District Judge

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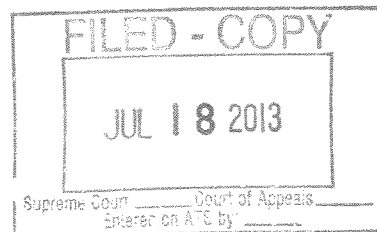


TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS.....	1
ISSUES PRESENTED.....	2
STANDARD OF REVIEW.....	2
ARGUMENT AND AUTHORITY	3
1. Was it error for the district court to affirm the magistrate court's denial of attorney fees, pursuant to I.C. § 12-117, where Cunningham was the prevailing party, and the County's actions were not reasonable?	3
a) The mandatory and jurisdictional nature of the deadline contained in I.C. § 37-2744 is a matter of established law	4
b) It was an abuse of discretion for the magistrate court to find that the County acted reasonably	5
i) It was an abuse of discretion for the magistrate to decide that it was reasonable for the County to file a forfeiture complaint after the time to do so had passed	5
ii) The property was not subject to forfeiture	7
iii) The proper forfeiture procedures were not followed	8
c) Attorney fees pursuant to I. C. § 12-117 are mandatory when the non-prevailing party has acted without reasonable basis in fact or in law	9
2. Is Cunningham entitled to costs and attorney fees pursuant to I.C. § 12-117 on appeal?	10
CONCLUSION	10
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

CASES:	PAGE
<u>City of Osburn v. Randel</u> , 152 Idaho 906, 908, 277 P.3d 353, 355 (2012).	3
<u>Halvorson v. North Latah County Highway Dist.</u> , 254 P.3d 497, 151 Idaho 196 (Idaho 2011). 6	6
<u>Idaho Dept. of Law Enforcement v. Kluss</u> , 125 Idaho 682, 685, 873 P.2d 1336, 1339 (1994). 3,7	3,7
<u>J.R. Simplot Co., Inc. v. Idaho State Tax Com'n</u> , 820 P.2d 1206, 120 Idaho 849 (1991).	3
<u>In re Est. of Kaminsky</u> , 141 Idaho 436, 111 P.3d 121, (2005)	3
<u>Losser v. Bradstreet</u> , 145 Idaho 670, 672, 183 P.3d 758, 760 (2008).	2-3
<u>State, Dept. of Law Enforcement By and Through Cade v. One 1990 Geo Metro, VIN 2C1MR2464L6012694</u> , 126 Idaho 675, 889 P.2d 109 (Idaho App. 1995).	3
<u>State, Dept of Law Enforcement v. One Willys Jeep, V.I.N. 573481691</u> , 100 Idaho 150, 595 P.2d 299 (1979).	3
<u>State ex rel Rooney v. One 1977 Subaru Two Door, VIV A26L-910, 450 114 Idaho 43,</u> 753 P.2d 254 (Idaho 1988).	8
STATUTES:	
Idaho Code § 12-117	2, 3, 9, 10
Idaho Code § 37-2744	4, 7
Idaho Code § 37-2744A	4
COURT RULES:	
I.A.P. Rule 40, 41	10

STATEMENT OF FACTS

A warrant for the search of Mr. Cunningham's property was obtained by Sandpoint City Prosecutor Lori Meulenberg, hereinafter "the city", on behalf of the Sandpoint Police Department. R148, P1, LI.1-2. The warrant was issued on March 30, 2011, and the property was searched in the evening of that same day. R148, P1, LI.1-3. The warrant stated on its face that the purpose of the search was to discover evidence of possession of marijuana and of possession of paraphernalia. The search resulted in the seizure of various jars containing negligible amounts of marijuana, and some items of paraphernalia, including broken pipes and a bong, and a cell phone. R148, P1, LI.8-9. Also seized, but not listed on the inventory report, were monies kept in a safe in the amount of \$9,050.00. R148, P1, LI.5-6. On May 3, 2011, Bonner County Prosecutor Louis E. Marshall, hereinafter "the County", filed forfeiture proceedings against Defendant's \$9,050.00. R148, P1, LI.7-8. The forfeiture proceeding was dismissed, because forfeiture proceedings were not commenced within thirty days of seizure of the subject property. R148, P1, LI. 9-10.

Mr. Cunningham's property was still not returned. R148, P1, L.12. The County denied that it was in possession of the monies, and explained that the property was being held as evidence by the Sandpoint Police Department, or by the City. Mr. Cunningham was therefore forced to file a second motion for return of property pursuant to I.C.R. 41(e), including the City as a party. R148, P2, LI.14-15. Three days prior to the hearing on the matter, and more than four months after Mr. Cunningham's property was first taken from him, the Court entered an Order releasing the property, based upon the City's *ex-parte* motion. R55. Mr. Cunningham timely filed his motion and memorandum of attorney fees and costs pursuant to I.C. § 12-117, or, in the alternative, for an evidentiary hearing pursuant to I.C. § 12-123. R68. The County objected, and

hearing on the matter was held November 23, 2011. The court issued its order denying Cunningham's motion for attorney fees, and denying Mr. Cunninghams alternative request for an evidentiary hearing pursuant to I.C. § 12-123. R99-102. On appeal, the District Court upheld the decision of the magistrate, and Cunningham now appeals to the Supreme Court against that decision.

ISSUES PRESENTED

- 1. Was it error for the district court to affirm the magistrate court's denial of attorney fees, pursuant to I.C. § 12-117, where Cunningham was the prevailing party, and the County's actions were not reasonable?**
- 2. Is Cunningham entitled to attorney fees on appeal pursuant to I.C. § 12-117?**

BRIEF ANSWER

- 1. The district court should have reversed the magistrate's order denying attorney fees. The trial court abused its discretion when it determined, post-judgment, that the agency acted reasonably. The interpretation of the statute is a matter of established law, and it was not reasonable for the County to file a forfeiture complaint after the time to do so had passed. Attorney fees to the prevailing party pursuant to I.C. § 12-117 are mandatory when the governmental agency has acted without reasonable basis in fact or in law.**
- 2. Cunningham is entitled to attorney fees on appeal pursuant to I.C. § 12-117.**

STANDARD OF REVIEW

When reviewing the decision of a district court sitting in its capacity as an appellate court, the Supreme Court reviews the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the

conclusions follow therefrom and if the district court affirmed the magistrate's decision, the Supreme Court will affirm the district court's decision as a matter of procedure. Losser v. Bradstreet, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). Attorney fee awards are reviewed by the district court for abuse of the magistrate court's discretion. City of Osburn v. Randel, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The issue of interpretation of a statute is reviewed *de novo*. J.R. Simplot Co., Inc. v. Idaho State Tax Com'n, 820 P.2d 1206, 120 Idaho 849 (1991).

ARGUMENT AND AUTHORITY

1. Was it error for the district court to affirm the magistrate court's denial of attorney fees, pursuant to I.C. § 12-117, where Cunningham was the prevailing party, and the County's actions were not reasonable?

Idaho Code § 12-117 is not a discretionary statute. It provides that the court *shall* award attorney fees upon a finding that the state agency did not act with a reasonable basis in fact or law. Idaho Dept. of Law Enforcement v. Kluss, 125 Idaho 682, 685, 873 P.2d 1336, 1339 (1994). No factual dispute arose in the matter of the forfeiture, and dismissal was granted as a matter of law. Therefore, the discretion of the trial court in this case centered solely on the issue of whether or not the County's actions were reasonable.

Although *Kluss* involved real property, the issue is similar to the present case before the court in that the agency failed to file a complaint within the time allowed for forfeiture. The Idaho Department of Law Enforcement attempted to solve the dilemma by filing a second notice of the seizure of the real property, which the district court held was not authorized by the statute. The Supreme Court declined to address the issue of whether or not the statute authorized a second notice, because that issue had not been raised on appeal. Instead, the Court found that *Kluss* was the prevailing party, and the agency position was not reasonable, as a matter of law. *Id.*

On appeal in the present case, the underlying issue of statutory interpretation continued to be in dispute. The magistrate dismissed the forfeiture pursuant to the mandatory language of the statute, but "upon reevaluation the court found the thirty day language directory rather than mandatory" and declined to award attorney fees. Opinion and Order on Appeal. The district court upheld that decision because the magistrate had not found that the County acted without a reasonable basis. However, the district court did not review the court's statutory interpretation *de novo*, or review whether the magistrate's conclusion, that the County was reasonable, followed therefrom.

a) **The mandatory and jurisdictional nature of the deadline contained in I.C. § 37-2744 is a matter of established law.**

The magistrate cited the case of State, Dept of Law Enforcement v. One Willys Jeep, V.I.N. 573481691, 100 Idaho 150, 595 P.2d 299 (1979), as indicative that the forfeiture deadline could reasonably be interpreted as directory rather than mandatory, and that the County was therefore not unreasonable in filing an action after the time had run. However, that issue was never raised in *Willys Jeep*. Rather, the issue was whether the forfeiture trial, "shall have priority over other civil cases". The Supreme Court held that, because the trial judge has discretion to expand or shorten procedural deadlines; the priority requirement was directory rather than mandatory. Id., at 154. The *Willys Jeep* case is inapplicable to this case, because the magistrate court had no authority to extend or expand the time allowed. It was an abuse of discretion for the magistrate court to later determine that it likely should not have dismissed the case.

Some of the cases cited involve interpretation of I.C. § 37-2744A, regarding the forfeiture of real property, instead of I.C. § 37-2744, which covers forfeiture of personal property applicable to the case before the Court. However, the Idaho Supreme Court has consistently held that

property rights under require similar protections under both statutes, including even the possibility of the appointment of counsel:

...There have been significant developments in the law of civil forfeitures and the constitutional implications of such cases...See also *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) (a civil forfeiture may constitute a punishment within the meaning of the excessive fines clause of the Eighth Amendment); *United States v. One 1978 Piper Cherokee Aircraft, Tail No. N5538V*, 37 F.3d 489 (9th Cir.1994) (civil forfeiture following conviction in underlying criminal case is barred by double jeopardy); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir.1994) (same). But see *United States v. Tilley*, 18 F.3d 295 (5th Cir.1994) (prior civil forfeiture proceeding would not bar subsequent criminal prosecution under double jeopardy clause). At least one state court has held that these recent developments militate in favor of the appointment of counsel in civil forfeiture cases because they create legal complexities that increase the risk of erroneous deprivation of property. *Commonwealth v. \$9,847.00 U.S. Currency*, 161 Pa.Cmwlth. 548, 637 A.2d 736 (1994).

State, Dept. of Law Enforcement By and Through Cade v. One 1990 Geo Metro, VIN 2C1MR2464L6012694, 126 Idaho 675, 889 P.2d 109 (Idaho App. 1995). That case involved personal property rather than real estate, similar to this one.

Therefore, the established caselaw regarding the time for filing a forfeiture action, be it against personal or real party, is that the deadline is jurisdictional. The County had thirty days in which to file its complaint, and it failed to do so. The court had no choice but to dismiss the forfeiture, as a matter of law. In order to provide guidance to the lower court, the district court should have found that the magistrate court was clearly correct in dismissing the forfeiture, and that the lower court abused its discretion at the later hearing, by failing to follow the applicable legal standard, when the magistrate later determined that the statutory provision was directory rather than mandatory, and that it should likely not have dismissed the case.

b) It was an abuse of discretion for the magistrate court to find that the County acted reasonably.

In reviewing a trial court's decision for abuse of discretion, the district court must consider: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. Halvorson v. North Latah County Highway Dist., 254 P.3d 497, 151 Idaho 196 (Idaho 2011).

In this case, the magistrate court did not act consistently with the legal standards applicable to the specific choices available to it. The forfeiture was dismissed on the grounds that the time to file was jurisdictional and mandatory. It was an abuse of discretion for the magistrate to subsequently reverse her own finding and then decide that the statute is ambiguous, that she likely should not have dismissed, and that it was reasonable to ignore the jurisdictional time requirements. The district court did not review whether the lower court correctly applied the law to her decision on attorney fees, and whether she correctly interpreted the statute. No finding was made on appeal determining whether the magistrate should have dismissed the case, or whether the time for filing was directory or mandatory.

In order to interpret a truly ambiguous statute, the court would have to refer to legislative findings, and make a determination as to the legislative intent. In this case, the statute is unambiguous and well supported by caselaw. The magistrate court correctly interpreted the law in its order dismissing the case. The court then erroneously reversed its own finding. It was an abuse of discretion to find the statute ambiguous in a post-judgement hearing. The mere fact that the magistrate has mistaken the law should not create a presumption of reasonableness in such errors. The district court should have reviewed the statute *de novo*, and settled the issue of whether or not the statute is ambiguous, and whether the thirty-day time requirement is

mandatory and jurisdictional.

- i) **It was an abuse of discretion for the magistrate to decide that it was reasonable for the County to file a forfeiture complaint after the time to do so had passed.**

The forfeiture proceeding in this case was initiated thirty-four days after the seizure of the subject property, and it was not reasonable for the prosecuting attorney to initiate such proceedings after thirty days had passed. The case on point was cited by the magistrate, Idaho Dept. of Law Enforcement v. Kluss, supra, where the DLE had failed to initiate forfeiture proceedings within ninety days of a first notice of seizure and a second notice of seizure was not authorized by statute. Id. The district court in that case granted attorney fees pursuant to I.C. § 12-117, emphasizing the disparity of power between the state and the individual citizen in a forfeiture action and that the state agency must act with unequivocal statutory authorization before seizing a citizen's property. Idaho Dept. of Law Enforcement v. Kluss, supra 125 Idaho at 683. The Idaho Supreme Court, *en banc*, upheld the decision of the district court, ruling that the award of attorney fees was mandatory when the department acted without a reasonable basis in fact or in law. Here, the County filed its complaint after the time to file had run, therefore, the finding that the County was reasonable was not consistent with the applicable legal standard.

- ii) **The property was not subject to forfeiture;**

Even if the forfeiture action had been timely filed, the property would not have been subject to forfeiture. The County never had any evidence creating even a rebuttable presumption of forfeiture.

I.C. § 37-2744 states that money is subject to forfeiture if it is found in close proximity to contraband, or if it is intended to be used in violation of the Uniform Controlled Substances Act. However, the Idaho Supreme Court ruled that close proximity was a necessary, but not sufficient

element for the money to be forfeited: "First, the money must have been found in close proximity to contraband controlled substances; and second, the court must find that the currency was used, or intended for use, in violation of this [the Uniform Controlled Substances] act." State ex rel Rooney v. One 1977 Subaru Two Door, VIV A26L-910, 450 114 Idaho 43, 753 P.2d 254 (Idaho 1988). In that case, the trial court entered a judgment forfeiting an automobile and \$10,300 currency, finding that the auto was used to deliver controlled substances, and that the currency was located in close proximity to contraband. Rooney, at 45. The Supreme Court reversed, holding that close proximity to contraband is insufficient for forfeiture. Id at 46. Here the element of close proximity was not even present.

The money was located in a safe under Cunningham's bed. The warrant return shows that the money was found in only one location, under the bed, separate from the various shelves, closets, and other locations where contraband was alleged to be found. There is no indication that Cunninghams money was connected to evidence of trafficking in any way whatsoever. No felony charges were or have ever been filed against Cunningham. No justification existed for the initiation of forfeiture proceedings.

iii) The proper forfeiture procedures were not followed.

The County argues that the monies were seized pursuant to a search warrant, however, the inventory report did not include a receipt for \$9,050.00. Cunningham was at a complete loss as to what the City had done with his money, until he was served with the forfeiture complaint. After the forfeiture was dismissed, the County still did not surrender possession of the property, denied having possession of the same, and forced Cunningham to pursue further remedy in court. Cunningham was forced to serve the city with a civil motion for the return of his property, which was finally returned to Cunningham upon the City's motion, on the grounds cited by Cunningham

in his motion.

I. C. § 37-2744 states, in pertinent part, as follows:

Property taken or detained under this section shall not be subject to replevin, but *is deemed to be in the custody of the director, or appropriate prosecuting attorney*, subject only to the orders and decrees of the district court, or magistrate's division thereof, having jurisdiction over the forfeiture proceedings...

I. C. § 37-2744, emphasis added.

The County assumed the position of "the appropriate prosecuting attorney" even though the county prosecutor never accepted custody of the property for which he sought forfeiture. The City of Sandpoint apparently authorized the County's action, however the City did not turn the property over to the "appropriate prosecuting attorney" and wrongfully retained custody of the property. The County argued at the forfeiture hearing that the magistrate could not order the return of the property because it was not in possession of the County. Due to the action of the County in filing forfeiture proceedings without accepting custody of the property sought to be forfeited, Mike Cunningham was forced to endure additional litigation against both the City and the County in order to regain possession of his property. Cunningham was entitled to an award of attorney fees expended in order to regain custody of his wrongfully withheld property.

c) Attorney fees pursuant to I. C. § 12-117 are mandatory when the non-prevailing party has acted without reasonable basis in fact or in law.

There is little room for doubt that the Appellant prevailed in this matter, as the forfeiture proceeding was dismissed, and Appellant ultimately achieved favorable relief in that he finally and fully recovered his money. Under those circumstances, an award of attorney fees pursuant to I.C. § 12-117 is mandatory if the county did not act reasonably.

Idaho Code § 12-117 is intended: "...to serve as a deterrent to groundless or arbitrary

unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should ha[ve] made." In re Est. of Kaminsky, 141 Idaho 436, 439-40, 111 P.3d 121, 124-5 (2005) (quoting Bogner v. State Dep't of Revenue & Taxation, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984)). In the *Kaminsky* case, attorney fees were awarded to the Estate pursuant to § 12-117(1) where the Department attempted to establish a claim for reimbursement of medical expenses, eight months after the two-year statute of limitations had expired. Similarly in this case, attorney fees should have been awarded where the County filed its complaint after the thirty-day deadline had expired. The clearly established legal standard is that it is not reasonable for an agency to attempt to establish a claim after the time to do so has passed, and that such action is a basis for awarding attorney fees mandated by § 12-117.

2. Is Cunningham entitled to costs and attorney fees pursuant to I.C. § 12-117 on appeal?

Pursuant to Rules 40 and 41 of the Idaho Appellate Rules, any party seeking costs and attorney fees on appeal, "...must assert such a claim as an issue presented on appeal in the first appellate brief filed...". Cunningham hereby continues to assert that he is entitled to a further award of costs and attorney fees, pursuant to I.C. § 12-117, and Rules 40 and 41 of the Idaho Court Rules, if the Supreme Court determines that the district court erred in upholding the magistrate, and that the County was not reasonable in its defense against this appeal.

CONCLUSION

In this case, Cunningham was erroneously deprived of nine thousand fifty dollars for four months, without interest or other compensation. He did not know who was in possession of his money, and did not receive an inventory report or accounting of the amount taken, until he was served with the forfeiture action. It took over four months to regain his money, and Cunningham

incurred attorney fees of more than six thousand dollars in that effort.

The County's position is supported only by the erroneous post-judgment reevaluation of an unambiguous statute. The Court should find that the district court did not review the magistrate's interpretation of the law in the order denying attorney fees, that the magistrate court abused its discretion in its reinterpretation of the statute, and that the applicable law mandates an award of attorney fees. Cunningham should be compensated, and the department should be discouraged from litigating unsubstantiated causes in an untimely manner. Cunningham is further entitled to an award of attorney fees pursuant to I.C. § 12-117 on appeal where the County continues litigating without a reasonable basis in fact or in law.

DATED this 16th day of July, 2013.

Val Thornton
Val Thornton, Attorney at Law

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on the 16th day of July, 2013, to:

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