

IN THE COURT OF APPEALS 01/30/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00562 COA

ONE HONDA FOUR-WHEELER, SERIAL NO. 478TE150XMA318729; ONE TED WILLIAMS .22 RIFLE, SERIAL NO. R379074; ONE GLENFIELD .22 RIFLE, SERIAL NO. 22437007 AND ONE HEADLIGHT

APPELLANTS

v.

STATE OF MISSISSIPPI, EX REL. MISSISSIPPI DEPARTMENT OF WILDLIFE, FISHERIES AND PARKS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. FRANK G. VOLLOR

COURT FROM WHICH APPEALED: ISSAQUENA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

TRAVIS T. VANCE, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOAN MYERS

NATURE OF THE CASE: DEFAULT JUDGMENT IN FORFEITURE PROCEEDING

TRIAL COURT DISPOSITION: ENTERED DEFAULT JUDGMENT AGAINST DEFENDANTS AND ALLOWED PROPERTY TO BE FORFEITED TO DEPARTMENT OF WILDLIFE AND FISHERIES

BEFORE BRIDGES, P.J., KING, AND SOUTHWICK, JJ.

BRIDGES, P.J., FOR THE COURT:

This case is before this Court due to a default judgment by default entered by the circuit court of Issaquena County ordering the forfeiture of property seized by the officers of the Mississippi Department of Wildlife, Fisheries, and Parks. The officers seized the property during the arrest of the users of the property for the charge of "headlighting deer." The issue before this Court is whether or not the trial court abused its discretion in granting judgment by default against the Redmonds, the owners of the property, thereby subjecting the property to forfeiture without a hearing. Finding that the lower court erred in its failure to allow testimony as to defenses concerning the seized property, we reverse and remand this case for a new trial on the issue of the civil forfeiture only.

FACTS

Officers of the Mississippi Department of Wildlife, Fisheries and Parks (Department) arrested Elbert Redmond, Jr. (Redmond) and his son on the charge of "headlighting deer" and seized the property used in the crime, a Honda four-wheeler, two rifles, and one headlight.

Redmond received the notice of the forfeiture and hired attorney Travis T. Vance (Vance) to represent him in both the pending criminal charge as well as in the civil forfeiture charge. In response to the notice of forfeiture, Vance wrote to the department's attorney, Joan Myers, (Myers) stating that the forfeited property should be held in abeyance until such time that the court resolved the criminal charges against the Redmonds. Furthermore, Vance claimed that Redmond's wife was the true owner of the Honda four-wheeler and therefore, the property should be returned to her. Myers answered Vance's letter by informing him that she was going to file a petition for forfeiture regardless of the claim of ownership.

Redmond and his wife received a summons and copy of the petition for forfeiture. Thirty-one days after service on the Redmonds, Vance called Myers and asked for a ten-day extension to answer. Myers agreed. A month after Vance asked for an extension, Vance had still failed to answer. On June 2, 1993, Myers wrote Vance to inform him that if he failed to file an answer by June 7, 1993, she would request an application for default. On June 11, 1993, Myers applied for a default and filed a motion for default judgment because Vance had still failed to answer. The court clerk entered the default judgment. Myers sent a copy of the application and the motion to Vance and the Redmonds.

In response, Vance filed an objection to the entry of default and a motion to stay the civil proceedings until the conclusion of the criminal proceedings. A hearing was scheduled for September 10, 1993, at which both Vance and the Redmonds failed to appear. As a result, the court entered judgment by default against the Redmonds.

After being notified of the default judgment against them, the Redmonds filed a motion to set aside the default judgment along with affidavits from Vance and his secretary stating that Vance had not received notice of the September 10, 1993, hearing. Most importantly the Redmonds, at this time, officially asserted the defense of innocent ownership. As a result, the court scheduled another hearing

on the Redmonds's motion to set aside the default judgment.

During the hearing, Vance testified that he had failed to file an answer because he had been negotiating with the county prosecutor about the criminal charges. According to Vance, it was his impression that the civil forfeiture would not be considered until the criminal charges were resolved. In furtherance of their motion, the Redmonds elicited testimony from Vance's secretary and the court clerk that Vance had not received a notice of the September 10, 1993, hearing.

The court found that the original default judgment had been entered without notice to Vance and held a de novo hearing on the issue of default by the Redmonds. The court rejected Vance's argument that he failed to answer because of his reliance on negotiations with the county prosecutor concerning the criminal charge. The court concluded that the Redmonds were indeed in default on June 11, 1993. Furthermore, and most relevant to this opinion, the court refused to hear testimony or allow evidence of the true ownership of the Honda four-wheeler.

What is of main concern to this Court is not the procedural propriety of the default proceedings, but the question of the court's actions in prohibiting an opportunity for a hearing on the issue of ownership of the seized property. We believe that the lower court erred in not allowing an opportunity for a hearing on the issue of true ownership of the Honda four-wheeler, and we reverse on this issue alone.

LAW

After a careful reading of the statutes relevant to forfeiture of property due to hunting and gaming violations, and after an examination of the almost identical drug forfeiture provisions codified in section 41-29-176 of the Mississippi Code, we believe that there is no requirement that an answer be filed in order to be entitled to a hearing on the issue of innocent ownership.

We begin our analysis by discussing the pertinent portions of the Mississippi Code relevant to the issue of the seizure of property due to fish and game violations. Section 49-7-253 of the Mississippi Code sets forth the following:

(1) Except as otherwise provided in Section 49-7-257, an owner of property that has been seized pursuant to section 49-7-103, Mississippi Code of 1972, shall file an answer within thirty (30) days after the completion of service of process. ***If an answer is not filed, the court shall hear evidence that the property is subject to forfeiture and forfeit the property to the Department of Wildlife Conservation or the local law enforcement agency. . . .***

(2) ***If the owner of the property has filed an answer denying that the property is subject to forfeiture, then the burden is on the petitioner to prove that the property is subject to forfeiture. However, if an answer has not been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture.*** The standard of proof placed upon the petitioner in regard to property forfeited under the provisions of this article shall be by a preponderance of the evidence.

Miss. Code Ann. § 49-7-253 (1972). (emphasis added).

Obviously, the lower court interpreted the above statute to mean that there was no requirement that a hearing be held on the issue of innocent ownership where the defendant is in default. We must disagree.

The above statute does not require that an answer be filed in order to hear evidence on the issue of innocent ownership or evidence of other defenses to the forfeiture of the property. We believe the above statute is similar to provisions in the drug forfeiture statute, specifically, section 41-29-176 of the Mississippi Code of 1972, which has been interpreted to mean that an answer is not required in order for the owners to be given an opportunity for a hearing. The effect of these provisions on the failure to file an answer in forfeiture proceedings is that the failure to file a verified answer merely shifts the burden of proof. If no verified answer is filed, the State need only to introduce the petition. The petition serves as prima facie evidence that the property is subject to forfeiture. When no answer is filed, the burden is on the owner to move forward with evidence that the property is not subject to forfeiture. In other words, the failure to file an answer shifts the burden of proof, but does not deprive the owners of the property of an opportunity for a hearing. *See Ervin v. State ex. rel. Mississippi Bureau of Narcotics*, 434 So. 2d 1324, 1325 (Miss. 1983).

In further defense of our position, we submit that the statute states, "if an answer has not been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture." Miss. Code Ann. § 49-7-253 (1972). The term "prima facie" as used in the statute suggests that the petition is sufficient to warrant forfeiture of the property unless the evidence is contradicted by other evidence. In other legal proceedings, the term prima facie means that the evidence stands as true unless other evidence is presented. In other words, the party against whom prima facie evidence is submitted may reply and put on evidence to rebut the prima facie evidence.

We cannot end our discussion of this issue without a constitutional analysis. In *Threlkeld v. State ex. rel. Mississippi Department of Wildlife, Fisheries and Parks*, 586 So. 2d 756 (Miss. 1991), the Mississippi Supreme Court reiterated the need for a hearing where the innocent owner defense is set forth in a civil forfeiture proceeding. The court found that the lack of an innocent ownership exception for forfeitures in illegal hunting and fishing would violate the state due process clause. The court stated, "the appellant does have a remedy even if no innocent ownership exception exists: **to prove that the property is innocent of the crime**. *Threlkeld*, 586 So. 2d at 757. *Threlkeld* makes clear that a court must allow a hearing on the issue of innocent ownership and as to whether or not the owner had consented to the property being used for an unlawful purpose.

In conclusion, we submit that a forfeiture proceeding is an *in rem* proceeding. The only defendant in the proceeding is the seized property. There are no human defendants; therefore, the individuals involved in the suit cannot be governed by the same rules which apply in a normal proceeding in which the defendants fail to answer within the required time. The entry of default is improper in a forfeiture case where the owner is prohibited from presenting evidence of innocent ownership.

For the foregoing reasons, we reverse and remand the case for a hearing on the issue of innocent ownership.

THE JUDGMENT OF THE ISSAQUENA COUNTY CIRCUIT COURT IS REVERSED AND REMANDED. ALL COSTS OF THIS APPEAL ARE TAXED TO ISSAQUENA COUNTY.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.