COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1995

NOTICE

No. 94-0272

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE RETURN OF PROPERTY
IN STATE V. JOSEPHINE JOHNSON:

EDDIE CANNON,

Appellant,

v.

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT,

Respondent.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Eddie D. Cannon, *pro se*, appeals from the trial court order denying his motion for replevin seeking the return of property. He argues that the trial court erred in determining that he was not the owner of

four items in the possession of the Milwaukee County Sheriff's Department. He also argues that the trial court erred in failing to determine the ownership of other items that he alleged had been seized together with those four items. We reject his first argument but agree that the trial court also should have determined the merits of his claim regarding the other property.

The factual background is undisputed. On January 25, 1989, State of Wisconsin probation and parole agents, together with members of the Milwaukee County Sheriff's Department, conducted a search of a residence in Milwaukee. They recovered cocaine, marijuana, and thousands of dollars in cash. At the time of the search, Josephine Johnson and Darlene Morgan were in the residence; Cannon was incarcerated at the House of Corrections. Johnson was charged with two drug offenses. She pled guilty to the charges and was sentenced on March 13, 1991.

On August 28, 1992, Cannon filed a Motion for Replevin seeking the return of personal property and, on December 17, 1992, he filed an amended Motion for Replevin seeking numerous additional items.[1] By a letter dated May 28, 1993, the Milwaukee County Corporation Counsel provided the trial court with a March 25, 1993 memo from Milwaukee County Sheriff's Detective Donald Hurrle that advised that "[a] number of items mentioned on the motion for replevin were never seized," and that only four items were "still in our inventory and not yet destroyed or sold at a Sheriff's auction." The four items were: (1) $925 in cash; (2) a Realistic CB base station; (3) a Realistic 200 channel scanner; and (4) a Realistic hand held scanner.

The trial court held a hearing on Cannon's motion on September 7, 1993. The trial court first questioned Cannon and an assistant district attorney regarding the information in Detective Hurrle's memo:

> [Assistant District Attorney]: The only items that I know of are those items listed in [Corporation

[1] The record also contains an amended Motion for Replevin subscribed and sworn to by Cannon on September 24, 1992. The record and case docket, however, do not reflect that this amended motion was filed.

Counsel's] correspondence to the Court. That was $925 in United States currency, a Realistic CB base station, a Realistic 200-channel scanner, and a Realistic hand-held scanner.

THE COURT: Is that your understanding also, Mr. Cannon? Those are the items that we're talking about?

MR. CANNON: Well that's some of them, but—There's more than that—that the Sheriff's Department had confiscated or seized.

THE COURT: There was an additional amount of money, but that has been forfeited through—

MR. CANNON: No, not the money....

....

MR. CANNON: ... I have a police report listing some of the items the Sheriff's Department also has in their custody, and here we only have four items, but this here, 30 of them.

THE COURT: What date is the date on the police report?

MR. CANNON: 1-25-89.

THE COURT: The date on the letter from [corporation counsel]—

[Assistant District Attorney]: [Corporation counsel's] letter is dated May 28, 1993, and incorporates a memorandum to him from Detective Donald Hurrle ... of the Sheriff's Department, and that memorandum is dated March 25, 1993.

THE COURT: ....

Do you have any other information that would support a finding that those items still exist in the possession of the Sheriff's Department?

MR. CANNON: No, other than I spoke with Detective Hurrle also, and he informed me that these list of items was also in their custody—still in his custody.

THE COURT: What date was that conversation?

MR. CANNON: It was prior to this letter here from [corporation counsel].

Although Cannon apparently was seeking to have the trial court determine ownership of all the property, the trial court confined the hearing to the four specific items once it was satisfied that they were the only ones remaining in the custody of the Sheriff's Department. The trial court then conducted most of the questioning of Cannon and Morgan, limited its examination to questions regarding the four specified items, and concluded "[t]hat the preponderance of the credible evidence adduced for the court establishes that the ownership of the foregoing items ... is owned by Darlene Morgan, and same should be returned to her."

Cannon first argues that the trial court erred in failing to find that he owned the cash and the Realistic equipment. "[W]hich party is entitled to possession of the disputed property becomes the ultimate fact question in a replevin action." ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 468, 405 N.W.2d 354, 382-383 (Ct. App. 1987). Although the trial court considered Cannon's motion as one for replevin, it also proceeded under § 968.20(1), STATS., which provides:

> Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 951.165, returned if:
>
> (a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or
>
> (b) All proceedings in which it might be required have been completed.

In this case the four items were not contraband or property covered under any of the statutory exclusions, and they were no longer needed as evidence. Thus, the only issue was whether Cannon established that "the person seeking return has a right to possession of the property." *See* ***In re Return of Property in State v. Benhoff***, 185 Wis.2d 600, 603, 518 N.W.2d 307, 308 (Ct. App. 1994) (listing the elements of § 968.20). The trial court considered the testimony of Cannon and Morgan and concluded:

> In looking at the testimony and the inferences to be drawn, I think the credible evidence does not support [Cannon's] claim. I think the more credible testimony is that the items belonged to Miss. Morgan, so Mr. Cannon's motion for replevin is denied.

This case presented a credibility call for the trial court. "It is the trial court's responsibility to weigh the evidence and to determine credibility, and its findings in these areas will not be disturbed on appeal unless they are clearly erroneous." ***Johnson v. Miller***, 157 Wis.2d 482, 487, 459 N.W.2d 886, 888 (Ct. App. 1990). We conclude that the trial court's determination and findings were not clearly erroneous.

In their testimony, Cannon and Morgan each claimed ownership of the property. Morgan testified that she lived at the residence from which the property was seized. Morgan said she had a purse with "over $900 or so" that belonged to her. She also testified that she had bought the CB scanner and the hand-held scanner less than a month before they were seized from her residence. Morgan said that Johnson lived with her and that they paid the rent. Cannon also testified that he owned the items and that, prior to being incarcerated, he had been living and paying rent at the residence where the items were seized. He contended that Morgan had lied in an effort to protect him. Neither Cannon nor Morgan offered any documentation of their ownership claims. The record offers nothing to suggest that the trial court's finding that Morgan owned the four items was clearly erroneous.[2]

[2] We note that Cannon filed a motion for reconsideration based on newly-discovered evidence.

Cannon next argues that the trial court erred in failing to address the merits of his motion for replevin regarding the other property. He is correct. Section 810.14, STATS., provides:

> **Judgment in replevin.** *In any action of replevin judgment for the plaintiff may be for the possession or for the recovery of possession of the property, or the value thereof in case a delivery cannot be had,* and of damages for the detention; and when the property shall have been delivered to the defendant, under s. 810.06, judgment may be as aforesaid or absolutely for the value thereof at the plaintiff's option, and damages for the detention. If the property shall have been delivered to the plaintiff under ss. 810.01 to 810.13 and the defendant prevails, judgment for the defendant may be for a return of the property or the value thereof, at the defendant's option, and damages for taking and withholding the same.

(Emphasis added.) In both his motion and amended motion for replevin, Cannon complied with the statutory requirements of § 810.02, STATS., which, in relevant part provides:

> The affidavit or verified complaint shall set forth specific factual allegations to show the following:
>
> **(1)** That the plaintiff is entitled to the possession of the property, particularly describing it;
>
> **(2)** That the property is wrongfully detained by the defendant;

(..continued)
The trial court denied the motion. Although in his brief to this court Cannon refers to what he views as the newly-discovered evidence, he does not appeal from the trial court's denial of his motion for reconsideration.

> **(3)** The alleged cause of detention according to the plaintiff's best knowledge, information and belief;
>
> **(4)** That the property has not been taken for a tax, assessment or fine or seized under any execution or attachment against the property of the plaintiff, or that if so seized that it is exempt from the seizure;
>
> **(5)** The value of the property; and
>
> **(6)** The location of the property claimed by the plaintiff with sufficient specific factual allegations for the judge or judicial officer to determine that there is reason to believe that the property is in the location described or in the possession of the defendant or any person acting on behalf of, subject to or in concert with the defendant.

Together, §§ 810.02 and 810.14, STATS., clearly establish that a plaintiff seeking return of property in a replevin action also can be seeking the value of the property if return of the property is not possible. Cannon's complaints sought return of the property and also alleged value, as required by § 810.02(5), STATS. To gain the trial court's determination regarding property no longer in the Sheriff's Department's possession, he was not required to specifically state that he was seeking "the value thereof in case a delivery cannot be had." Section 810.14, STATS. As the supreme court explained in ***Lewis v. Sullivan***, 188 Wis.2d 157, 524 N.W.2d 630 (1994), a case in which a *pro se* prisoner also brought a replevin action:

> The type of relief the plaintiff seeks is not readily apparent. The complaint clearly and specifically requests a judgment in replevin, which can entail recovery of possession of the property or the value of the property if possession is not possible, and damages for detention of the property.

Id. at 165, 524 N.W.2d at 633.

In this case, Detective Hurrle's memo commented "that since his property was taken on 01/25/89, the Sheriff's Department inventory system has changed a total of three (3) times, with properties being stored in three (3) different locations since 1989." It also stated that "[a] number of items mentioned on the motion for replevin were never seized," that $5,850.00 in cash which had been seized "was awarded to the Sheriff's Department by the U.S. Government," and that the Sheriff's Department was only "able to locate" the $925 in cash and the Realistic equipment "still in our inventory and not yet destroyed or sold at a Sheriff's auction."

The trial court found "[t]hat the only items claimed by Petitioner, Eddie D. Cannon that are still in the possession of the Milwaukee County Sheriff's Department are" the $925 in cash and the three items of Realistic equipment. The trial court made no findings regarding whether the other items had been seized, their ownership, or "the value of the property if possession is not possible." The mere fact that the other items were no longer in the possession of the Sheriff's Department did not relieve the trial court of the responsibility to make findings and render judgment, under § 810.14, STATS., regarding the other items of property Cannon was seeking.[3]

Accordingly, while we affirm the trial court order regarding the $925 in cash and the Realistic equipment, we remand this case to the trial court for further proceedings regarding the other allegedly seized property.

By the Court. – Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] The County argues that the trial court properly limited its review to the four items because Cannon failed to comply with the requirements of § 893.80, STATS., for making claims against governmental bodies. The County, however, never raised this objection in the trial court. Further, although such compliance might have been required for a claim for damages, it is not required in a claim for recovery of property or the value thereof. *See* ***Lewis v. Sullivan***, 188 Wis.2d 157, 167-169, 524 N.W.2d 630, 633-634 (1994) (distinguishing a replevin claim for possession of the property or its value from a replevin claim for damages, and concluding that the latter requires compliance with § 893.82).