

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 17, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-0427 & 95-0428

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

No. 95-0427

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

EDDIE D. CANNON,

APPELLANT,

v.

STATE OF WISCONSIN,

RESPONDENT.

No. 95-0428

**IN RE THE RETURN OF PROPERTY IN
STATE V. MARCUS ANTON HARRIS:**

EDDIE D. CANNON,

APPELLANT,

v.

STATE OF WISCONSIN,

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., Schudson and Curley, JJ.

PER CURIAM. Eddie D. Cannon appeals *pro se* from an order of the trial court dated November 14, 1994, denying his motions for replevin seeking return of certain items of property. He claims that the trial court erred in denying his motions. Because the trial court did not err with respect to all but one of the items, we affirm the order in part. However, because the trial court erred with respect to one item, we reverse that portion of the order and remand for further proceedings.

I. BACKGROUND

This appeal arises from Cannon's motions for replevin seeking return of a 1984 Cadillac, a 1982 Cadillac, a CB car unit and antenna, a cellular

car phone, and photographs.¹ The items were seized subject to a drug arrest. On September 9 and 14, 1994, Cannon filed the motions for replevin at issue here. The trial court denied the motions. Cannon now appeals.

II. DISCUSSION

The issue in this case is whether Cannon has stated a claim for relief in the form of replevin. This is a question of law that we review independently. *Lewis v. Sullivan*, 188 Wis.2d 157, 160-61, 524 N.W.2d 630, 631 (1994). The trial court denied the motion in part because all of the property at issue here (except the vehicles) was the subject of Cannon's other replevin motions.² As such, Cannon is precluded from initiating another replevin action seeking the return of the same property, which is the subject of a still pending separate replevin action. Therefore, the trial court did not err in denying Cannon's motions with respect to the CB car unit and antenna, the cellular phone and the photographs.

¹ Both parties' briefs filed in this case provide confusing and misleading information regarding the subject of this appeal. The briefs reference a decision of this court released on October 14, 1995. See *Cannon v. Milwaukee County Sheriff's Dep't*, No. 94-0272, unpublished slip op. (Wis. Ct. App. Oct. 17, 1995), which reversed in part and remanded a trial court order dated October 19, 1993. The briefs imply that this appeal arises from a trial court order entered following our remand in *Cannon*. Given the date of our decision in *Cannon*—October 17, 1995—and the date of the trial court order on which this appeal is based—November 14, 1994—such assertion is impossible. The trial court order at issue here predates the appellate decision. Despite the confusion in the briefs, we have discerned from the record that this appeal is limited to a review of the trial court's November 14, 1994, order only. The *Cannon* decision arose from a trial court order entered on October, 19, 1993, denying a separate motion for replevin. In effect, it appears that Cannon has filed two separate replevin actions.

² According to the record, Cannon filed a replevin motion on August 28, 1992, seeking the return of twelve items, an amended motion on September 24, 1992, seeking the return of eight items, and another motion on December 17, 1992, seeking the return of 39 items.

We next address whether the trial court erred in denying Cannon's motion for the return of the two vehicles: the 1984 Cadillac and the 1982 Cadillac. The trial court denied the motions as to these vehicles for several reasons. We address each separately.

The trial court determined that Cannon was not entitled to the return of the 1982 Cadillac because it had been forfeited. There is evidence in the record to support this determination. Because the 1982 Cadillac was forfeited, the trial court did not err in denying his motion with respect to this vehicle. *See* § 973.075, STATS. (When property is derived from the commission of a crime, it is subject to forfeiture, and not subject to replevin.)

The trial court's ruling with respect to the 1984 Cadillac, however, is based on erroneous assumptions. The trial court determined that Cannon had not "presented evidence that the non-forfeited vehicle is still in the possession of the Sheriff's Department. That vehicle may also have been forfeited. Even if petitioners could show that the vehicle was in the possession of the Department, they would have to produce additional evidence of ownership (deed or title)."

First, replevin law allows recovery of the value of the property if possession is not possible. *See Lewis*, 188 Wis.2d at 165, 524 N.W.2d at 633 (1994). Thus, the trial court's reasoning that the car is no longer in the possession of the sheriff's department is insufficient to support its order. Second, the trial court reasoned that this vehicle "may also have been forfeited." We need to know whether or not it was forfeited. The consequences based on the answer to that question are very different. If the vehicle was forfeited, then Cannon no longer has a claim to recover the value of it. If the vehicle was not forfeited, however, then Cannon may be able to recover the value of the car. Finally, the trial court

denied Cannon's motion because he failed to prove ownership by providing the court with a deed or title. The trial court prematurely relied on this reason to deny the motion. Cannon's affidavit does aver that he is the owner of the vehicle. This averment is sufficient to satisfy the requirements of § 810.02, STATS.,³ to survive a flat denial of the motion without holding a hearing to receive evidence.

In sum, we conclude that the trial court properly denied Cannon's motion with respect to all items of property with the exception of the 1984 Cadillac. It was proper to deny Cannon's motion as it related to the 1982 Cadillac because that car was forfeited. It was proper to deny Cannon's motion as it related to the remaining property because that same property is the subject of a separate pending replevin action. However, the trial court improperly denied Cannon's motion as it related to the 1984 Cadillac. Accordingly, we reverse that portion of

³ Section 810.02, STATS., provides that the trial court shall order return of the property where an affidavit or verified complaint sets forth "specific factual allegations to show":

(1) That the plaintiff is entitled to the possession of the property claimed, particularly describing it;

(2) That the property is wrongfully detained by the defendant;

(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.

the order and remand to the trial court with the following directions. On remand, the trial court shall determine whether that vehicle has been forfeited. If it has, an order can be entered denying Cannon's motion; if it has not been forfeited, the trial court should conduct an evidentiary hearing to determine whether Cannon can prove ownership.

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.

