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February 26, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2016AP792

State of Wisconsin v. Henry William Hartshorn, III
(L.C. # 2014CV266)

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Henry Hartshorn, III, appeals an order granting default judgment against him in this civil forfeiture action, as well as an order denying Hartshorn's motion to vacate the default judgment. Hartshorn also requests that this court exercise its power of discretionary reversal under Wis.

STAT. § 752.35 (2015-16).¹ Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

On October 17, 2014, the State initiated a circuit court action seeking forfeiture of a Ford truck owned by Hartshorn. The forfeiture complaint alleged that Hartshorn had used the truck to aid in the commission of the crime of sexual assault. Detective James Baldwin of the Marinette County Sheriff's Department served Hartshorn with the summons, complaint, and accompanying affidavit. Hartshorn did not file an answer.

In criminal proceedings against him, Hartshorn entered a no contest plea to one count of first degree sexual assault of a child under the age of twelve. He was sentenced on December 21, 2015. On December 22, 2015, the State filed a motion for summary judgment and supporting affidavit in the forfeiture case. Although the motion is labeled a summary judgment motion, it appears to be a motion for default judgment, as it seeks entry of judgment on the basis that Hartshorn failed to file an answer. Accordingly, we will refer to the State's motion filed on December 22, 2015 as a motion for default judgment. The sheriff's department served Hartshorn with the notice of motion and motion for default judgment on December 22, 2015. Hartshorn did not appear at the motion hearing on January 20, 2016. The court granted default judgment in favor of the State, ordering forfeiture of the Ford truck to the Marinette County Sheriff's Department.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

On March 16, 2016, Hartshorn filed a motion for return of the Ford truck and other seized property. On April 4, 2016, the court held a hearing on Hartshorn's motion, which the court construed as a motion to vacate the default judgment. After hearing arguments from both sides, with Hartshorn appearing by video, the court denied the motion. Hartshorn now appeals.

Whether to grant default judgment, and whether to vacate a default judgment, are decisions addressed to the sound discretion of the circuit court. See *Brandon Apparel Grp., Inc. v. Pearson Props., Ltd.*, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544 (affirming default judgment); *Baird Contracting, Inc. v. Mid Wis. Bank of Medford*, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994) (affirming circuit court's decision to vacate default judgment). We will not reverse a discretionary determination unless the circuit court has erroneously exercised its discretion. *Schmidt v. Schmidt*, 2001 WI App 78, ¶9, 242 Wis. 2d 565, 626 N.W.2d 14.

A circuit court may enter a default judgment in a forfeiture proceeding if the defendant fails to answer the complaint. See WIS. STAT. § 973.076(1)(b)4. A party moving for default judgment also must show that the complaint was served and filed in a timely manner, and that the complaint contained allegations sufficient to state a claim of relief against the defendant. *Davis v. City of Elkhorn*, 132 Wis. 2d 394, 398-99, 393 N.W.2d 95 (Ct. App. 1986).

Here, Hartshorn's truck was seized on September 22, 2014. The State filed its summons and complaint on October 17, 2014, thus satisfying the requirement under WIS. STAT. § 973.076(1)(b)1. that the action be commenced within 30 days after seizure of the property. The complaint alleged that Hartshorn had used his truck to transport and facilitate the sexual assault of a child, which is a crime under WIS. STAT. § 948.02. Thus, the complaint stated a

claim for forfeiture of a vehicle pursuant to WIS. STAT. § 973.075(1)(b)1m.c. Detective Baldwin filed an affidavit of service indicating that he served Hartshorn with the summons, complaint, and accompanying affidavit on October 22, 2014, which is well within the 90-day time frame required under § 973.076(1)(b)1. It is undisputed that Hartshorn failed to file an answer to the complaint. Based on all the above, we are satisfied that the circuit court did not erroneously exercise its discretion in granting default judgment to the State.

Similarly, the circuit court did not erroneously exercise its discretion in denying Hartshorn's motion to vacate the default judgment. A defendant may obtain relief from a default judgment by showing excusable neglect and a meritorious defense to the action. *Baird Contracting*, 189 Wis. 2d at 324. Hartshorn's motion to vacate the default judgment did not contain any explanation for his failure to respond to the complaint. His status as an incarcerated, pro se litigant does not excuse his failure to answer the complaint. In addition, the complaint alleged that Hartshorn's truck was used in the commission of a crime, and Hartshorn's failure to file an answer constitutes an admission of the facts alleged, establishing a factual basis for the judgment. *See* WIS. STAT. § 802.02(4).

At the motion hearing, Hartshorn testified that he was never served with the summons and complaint, despite Baldwin averring the contrary in his affidavit of service. The circuit court did not find Hartshorn's testimony to be credible, and we will not disturb the circuit court's credibility determination on appeal. *See State v. Wachsmuth*, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992) (generally, it is not the province of the reviewing court to determine issues of credibility). We are satisfied, based on the record, that the circuit court did not err in finding that Hartshorn failed to demonstrate excusable neglect. Therefore, his motion to vacate the default judgment was properly denied.

Finally, we decline to exercise our authority for discretionary reversal under WIS. STAT. § 752.35. We exercise our authority of reversal under § 752.35 scarcely, and only in the most exceptional cases. *State v. Schutte*, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469. Nothing in the record or in Hartshorn's briefs persuades us that discretionary reversal is warranted under the circumstances.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals