IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

THURSTON ANDREW HELMS, Plaintiff/Appellant, VS. MICHAEL C. GREENE, COMMISSIONER, TENNESSEE DEPARTMENT OF SAFETY, Defendant/Appellee.	)	Davidson Chancery No. 92-3515-I Appeal No. 01A01-9505-CH-00194

FILED

January 31, 1997

Cecil W. Crowson
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

For the Plaintiff/Appellant:

E.E. Edwards, III
James A. Simmons
EDWARDS & SIMMONS

For the Defendant/Appellee:

Charles W. Burson
Attorney General and Reporter

Rebecca Lyford
Counsel to the State

AFFIRMED AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

O P I N I O N

This appeal involves the forfeiture of over $31,000 seized from the bank accounts of a suspected cocaine trafficker. The Commissioner of Safety summarily ordered the forfeiture after no one filed a timely claim for the money. Shortly thereafter, the person from whose bank accounts the money had been seized filed a claim and requested the Commissioner to reconsider the forfeiture because he had not received adequate notice of the forfeiture proceeding. The Commissioner denied the request, and the claimant filed a petition for review in the Chancery Court for Davidson County challenging the adequacy of the notice and the constitutionality of the administrative forfeiture procedure. The trial court upheld the constitutionality of the forfeiture statutes and the validity of the forfeiture proceeding. We affirm the judgment.

I.

On May 4, 1992, Nashville police officers seized seven packets of cocaine and other drug paraphernalia from Thurston A. Helms's home at 3447 Golf Club Lane. Two days later, the local prosecutor obtained an ex parte order from a criminal court judge directing NationsBank to freeze $30,808.09 in three of Mr. Helms's accounts because there was probable cause to believe that the money was traceable to illegal drug trafficking.

On August 6, 1992, following two hearings attended by Mr. Helms and his lawyer, the criminal court judge entered an order finding that the money in the bank accounts was subject to forfeiture pursuant to Tenn. Code Ann. § 53-11-451 (Supp. 1996)[1] and directing NationsBank to surrender the money to the Nashville police. The judge also directed the police to prepare and deliver the required notices of seizure and to commence administrative forfeiture proceedings

[1]Tenn. Code Ann. § 53-11-451(a)(6)(A) (Supp. 1996) permits the forfeiture of "[e]verything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of the Tennessee Drug Control Act of 1989, as amended . . . all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act . . ."

promptly. NationsBank paid over the funds to the Nashville police in two cashier's checks, one for $30,808.09 and the other for $215.06.

Mr. Helms was no longer living at 3447 Golf Club Lane by this time. As far as this record shows, the authorities were not aware of Mr. Helms's new address even though the assistant district attorney representing the State in the criminal court proceeding knew that he had moved. Thus, upon receiving the cashier's checks from NationsBank, the police prepared two notices of seizure identifying Mr. Helms as the owner of the seized money and listing his address as 3447 Golf Club Lane. The notice of seizure for the $30,808.09 was mailed by certified mail to Mr. Helms at 3447 Golf Club Lane on August 13, 1992, while the notice of seizure for the $215.06 was mailed by certified mail to Mr. Helms at the same address on August 15, 1992.

The post office did not deliver the notice concerning the $30,808.09 to Mr. Helms at 3447 Golf Club Lane because he had submitted a change of address form giving as his new address 286 April Lane. No one was at 286 April Lane when the post office attempted to deliver the notice of seizure on August 20, 1992, and so the post office left a notice that the letter could be picked up at the Woodbine post office. The post office left a second notice approximately one week later and then returned the letter to the police on September 4, 1992 after Mr. Helms did not retrieve the letter.[2]

The Department of Safety did not conduct a forfeiture hearing with regard to the money in Mr. Helms's NationsBank accounts because no one filed a timely claim for the money. On September 29, 1992, the Commissioner of Safety filed an order forfeiting the entire $31,023.15. On October 12, 1992, Mr. Helms's lawyer requested the Commissioner to reconsider the forfeiture order and to

[2]Curiously, the notice concerning the seizure of the $215.06 was delivered to Mr. Helms even though it too was mailed to 3447 Golf Club Lane. While the record contains no proof that this notice was forwarded to Mr. Helms's 286 April Lane address, the record contains a return receipt card bearing Mr. Helms's signature showing that the notice was delivered on August 22, 1992. Mr. Helms did not disavow his signature on the notice but asserted that he could not state under oath that the signature was his and that he could not recall receiving a notice of seizure concerning any of his NationsBank accounts.

provide Mr. Helms a hearing on the merits of his claim for the money. After the Commissioner denied his request, Mr. Helms filed a petition for review in the Chancery Court for Davidson County asserting that the forfeiture statutes were unconstitutional on their face and as applied to him. The trial court found that Mr. Helms had received adequate notice of the forfeiture proceeding, that he did not have the right to a jury trial, and that the record contained substantial and material evidence supporting the Commissioner's forfeiture order.

II.

ADEQUACY OF THE NOTICE

Mr. Helms asserts that he was deprived of a meaningful hearing on his claim for the money in his bank accounts because he did not receive constitutionally adequate notice of the administrative forfeiture proceedings. When the money was seized from Mr. Helms's bank accounts,[3] the seizing authorities were required to provide a notice of seizure to the person found in possession of the property[4] and to exert reasonable efforts to provide notice to other persons who might have an interest in the property.[5] There is no question that the authorities provided the possessor, NationsBank, with a notice of seizure, thus the only issue before us in this case is whether the police exerted reasonable efforts to notify Mr. Helms of the pending administrative forfeiture proceeding.

Adequate notice is an essential ingredient in forfeiture proceedings because of the private property interests at stake. In order to satisfy basic due process requirements, the method for providing notice must, under all the circumstances, be reasonably calculated to appraise all interested persons of the proceeding in

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[3]The General Assembly enacted a new civil forfeiture procedure in 1994. Act of Apr. 20, 1994, ch. 925, 1994 Tenn. Pub. Acts 848 (codified at Tenn. Code Ann. §§ 40-33-201, -214 (Supp. 1996)). This new procedure did not become effective until October 1, 1994 and, therefore did not apply to this proceeding. *See* Act of Apr. 20, 1994, ch. 925, § 5, 1994 Tenn. Pub. Acts 848, 856.

[4]Tenn. Code Ann. § 53-11-201(a)(1)(A) (Supp. 1996).

[5]*Fell v. Armour*, 355 F. Supp. 1319, 1329 (M.D. Tenn. 1972); *Redd v. Tennessee Dep't of Safety*, 895 S.W.2d 332, 334-35 (Tenn. 1995); *Brown v. Tennessee Dep't of Safety*, App. No. 01A01-9102-CH-00043, 1992 WL 63444, at *4 (Tenn. Ct. App. April 1, 1992).

order to enable them to present their claims or objections. *Redd v. Tennessee Dep't of Safety*, 895 S.W.2d at 334-35. Instead of requiring a particular notice mechanism, both the state and federal constitutions require the government to use a procedure that equals or exceeds one that would be employed by persons desiring to actually inform someone of a pending proceeding. *See Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988); *Potts v. Gibson*, 225 Tenn. 321, 329, 469 S.W.2d 130, 133 (1971).

The government must satisfy more stringent notice standards when the identity of a person with an interest in the proceeding is known or easily ascertainable. Constructive notice is constitutionally insufficient. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18, 70 S. Ct. 652, 658-59 (1950); *Love v. First Nat'l Bank*, 646 S.W.2d 163, 165 (Tenn. Ct. App. 1982). For these persons, any type of notice less reliable than mail will not satisfy minimum due process requirements. *Schroeder v. City of New York*, 371 U.S. 208, 212-13, 83 S. Ct. 279, 282 (1962); *Baggett v. Baggett*, 541 S.W.2d 407, 410 (Tenn. 1976). The reasonableness of the government's notification efforts depends on (1) its knowledge of the ownership of the property, (2) the means available to the government to ascertain the identity of persons who might claim an interest in the property, and (3) the practical difficulty of giving notice in a way that will actually inform the affected persons of the pending proceeding. *Brown v. Tennessee Dep't of Safety, supra*, 1992 WL 63444, at *4.

The police knew that Mr. Helms had an interest in the money because they seized it from his bank accounts. Thus they were constitutionally obligated, at a minimum, to give Mr. Helms notice of the pending administrative forfeiture proceeding by mail. However, the manner in which the police used the mail must also have been reasonably calculated, under all the circumstances, to provide Mr. Helms with actual notice of the forfeiture proceeding.

Sending a letter to a person's last known address will ordinarily not constitute adequate notice when the police know that the person no longer lives at that address and when they know or can easily ascertain the person's new

address. Thus, were it not for the evidence concerning Mr. Helms's change of address form, we would find that sending a copy of the notice of seizure to Mr. Helms's Golf Club Lane address was insufficient. The government's agents in this case knew when they mailed the letter that Mr. Helms no longer lived at the address to which they mailed the notice, and they could have ascertained his current address without appreciable difficulty. The evidence of the change of address form, however, provides a basis for upholding the adequacy of the mailed notice in this case.

After moving from 3447 Golf Club Lane, Mr. Helms filed a change of address form with the post office stating that his new address was 286 April Lane. Accordingly, the post office forwarded mail addressed to Mr. Helms at 3447 Golf Club Lane to his new address. The record contains undisputed evidence that the change of address form was in effect when the police mailed the notices of seizure to Mr. Helms and that the post office was actually delivering mail to Mr. Helms's new address even though it bore his former address. Thus, the evidence of the valid change of address form supports the conclusion that mailing a notice to Mr. Helms's Golf Club Lane address was a reasonable method of providing him with actual notice of the pending forfeiture proceeding.

An otherwise valid notice that has been mailed is effective even if the addressee has not actually received or read the notice. The government has discharged its constitutional obligation as long as it has chosen a means for giving notice that is reasonably contemplated to result in actual notice. *Weigner v. City of New York*, 852 F.2d at 649; *Brown v. Tennessee Dep't of Safety, supra*, 1992 WL 63444, at *4. Thus, notice by certified mail is sufficient even if the addressee fails or refuses to accept the notice. *See Kyle v. Tennessee Dep't of Safety*, App. No. 01A01-9504-CH-00150, 1995 WL 581069, at *3-4 (Tenn. Ct. App. Oct. 4, 1995) (No Tenn. R. App. P. 11 application filed) (notice by certified mail is effective even if party's lawyer failed to retrieve the letter); *see also Arizona Osteopathic Med. Ass'n v. Fridena*, 463 P.2d 825, 827 (Ariz. 1970); *Bartolotta v. County of Wyoming*, 647 N.Y.S.2d 622, 622 (App. Div. 1996); *Andrews v. Wallace*, 657 A.2d 24, 25 (Pa. 1995).

Mr. Helms was in court when the criminal court judge ordered the police to institute administrative proceedings to forfeit the money seized from his bank accounts. Thus, he knew that forfeiture proceedings were imminent and that he would be receiving the statutorily required notice of these proceedings. He actually received the certified letter containing the notice of seizure for the $215.06, and the post office's two notices of its attempts to deliver the second certified letter put him on notice of the government's efforts to provide him with a similar notice with regard to the $30,808.09. Rather than supporting the conclusion that the government failed to use notification procedures reasonably calculated to provide Mr. Helms with actual notice of the forfeiture proceedings, the evidence indicates that Mr. Helms was purposely attempting to derail the forfeiture proceeding by frustrating the government's efforts to provide him notice. Accordingly, the trial court correctly held that the police provided Mr. Helms with constitutionally adequate notice of the forfeiture proceedings involving the money in his accounts at NationsBank.

III.

RIGHT TO A JURY TRIAL

Mr. Helms also asserts that the forfeiture statutes violate his right to a jury trial as guaranteed by Tenn. Const. art. I, § 6. We have already resolved this issue adversely to Mr. Helms. Claimants of personal property subject to forfeiture are not entitled to a jury trial because the forfeiture statutes provide a special remedy for the recovery of seized or confiscated property that supersedes the constitutionally protected common-law right to a jury trial. *Jones v. Greene,* App. No. 01A01-9505-CH-00187, 1996 WL 694157, at *5-6 (Tenn. Ct. App. Dec. 4, 1996).

IV.

FORM OF THE COMMISSIONER'S ORDER

Finally, Mr. Helms challenges the Commissioner's forfeiture order on the grounds that it bears a stamped replica of the Commissioner's signature rather

than an original signature and because it does not contain concise and explicit findings of fact to support its conclusions. These arguments were not raised in the trial court and, therefore, cannot be asserted here for the first time. *Simpson v. Frontier Community Credit Union,* 810 S.W.2d 147, 153 (Tenn. 1991); *Book-Mart of Fla., Inc. v. National Book Warehouse, Inc.,* 917 S.W.2d 691, 694 (Tenn. Ct. App. 1995).

V.

We find that the forfeiture statutes did not infringe on Mr. Helms's constitutional right to a jury trial, that the government's efforts to give Mr. Helms notice of the administrative forfeiture proceeding met minimum constitutional standards, and that the record contains substantial and material evidence supporting the Commissioner's forfeiture order. Accordingly, we affirm the forfeiture order and remand the case for whatever further proceedings may be required and tax the costs of this appeal to Thurston Andrew Helms for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUDGE

CONCURS:

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HENRY F. TODD, P.J., M.S.

FILES SEPARATE PARTIAL DISSENT:

BEN H. CANTRELL, JUDGE