

No. 13-06-00158-CV

IN THE
COURT OF APPEALS FOR THE
THIRTEENTH DISTRICT
AT CORPUS CHRISTI-EDINBURG, TEXAS

GREGORIO HUERTA,
Appellant,

v.

THE STATE OF TEXAS,
Appellee

APPEAL OF CAUSE NO. C-1200-02-I
FROM THE 398th DISTRICT COURT
OF HIDALGO COUNTY, TEXAS

APPELLEE'S BRIEF

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**SUMMARY OF APPELLEE’S RESPONSE TO
APPELLANTS’ GROUNDS OF ERROR**

The trial court properly denied Intervenor’s Motion for No-Evidence Summary Judgment, properly granted the State’s Motion for Judgment Notwithstanding the verdict and properly denied Intervenor’s Motion to Disregard the Jury Answer to Question No. 3

and for Verdict for \$281,420.00. Further, the trial court should have granted the State's motion for instructed verdict made at the conclusion of the evidence as Intervenor had not put forth any evidence showing he had standing to contest the forfeiture proceeding.

This court should uphold the trial court's ruling denying Intervenor's Motion for No-Evidence Summary Judgment in that; 1) a no-evidence summary judgment is not the proper vehicle to address a claim of failure to comply with the statute of limitations, 2) Intervenor was neither an owner or interest holder in the seized currency and not entitled to notice of the forfeiture proceedings, 3) even if Intervenor were found to be a necessary party the exclusive remedy he had available was the granting of a motion for new trial, and 4) the State present sufficient evidence on the issue as to whether or not the currency was contraband.

This court should uphold the trial court's granting of the State's Motion for Judgment Notwithstanding the Verdict in that Intervenor failed to show at trial that had had any standing to contest the forfeiture proceeding. Intervenor was not the owner of the money, nor was he an interest holder as defined by the forfeiture statute. Accordingly, he should not have been awarded any portion of the currency and the trial court was correct in granting the Judgment NOV.

Intervenor's Motion to Disregard the Jury Answer to Question No. 3 and for Verdict for \$281,420.00 was also properly denied. The Texas Rules of Civil Procedure do provide that upon motion the trial court may enter an order disregarding certain jury answers, but the relief Intervenor requested is beyond that permitted by the rules. Intervenor desired to have the trial court change the jury's answer, not merely disregard the answer. Accordingly the trial court properly denied the motion.

Each of Intervenor's Grounds of Error submitted to this court are without basis in law and fact and should be overruled. The judgment of the trial court should be affirmed.

I. APPELLEE’S RESPONSE TO APPELLANT’S GROUND OF ERROR 1

Appellants’ Ground of Error 1 states that “[t]he trial court erred when it denied Intervenor’s Motion for No-Evidence Summary Judgment.” Appellant then sets out three distinct sections in support of its first Ground of Error. Appellee will address each section of Appellant’s Ground of Error 1 as they appear in Appellant’s brief, however, the first two sections are intimately related and intertwined.

A. Appellant’s First Argument in Support of his Ground of Error 1:

In his first ground for relief seeking to have the trial Court grant his Motion for No-Evidence Summary Judgment, Appellant contends that the State violated the statute of limitations requirement of Chapter 59 of the Texas Code of Criminal Procedure. More particularly, Appellant asserts that he was in possession of the currency in question immediately prior to the seizure and should have been named as a respondent in the States original pleadings. As a note, in the body of his Appellant’s Brief, appellant’s counsel consistently cites and refers to an “Art. 59.01(j)” in support of his position under this ground of error. However, there is in fact no subpart “j” of Article 59.01 of the Texas Code of Criminal Procedure.

Appellee’s Response to Appellant’s First Argument in Support of his Ground of Error 1:

A No-Evidence Motion for Summary Judgment is not the proper method to address a violation of the Statute of Limitations. Rule 166a(i), Texas Rules of Civil Procedure, concerns “No-Evidence” summary judgment and states as follows:

(i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at

trial. The Motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Failure to comply with the Statute of Limitations is an affirmative defense that must be properly pled and proven by the party making such a defense. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex.1988). A no-evidence summary judgment should not be used based upon an affirmative defense that the movant has the burden to prove at trial. *Thomas v. Omar Inv., Inc.*, 156 S.W.3d 681, 684 (Tex.App.-Dallas 2004, no pet). Appellee herein was the “adverse party” at the trial court level. Appellee did not have the burden of proof of establishing that the Statute of Limitations had been complied with, but rather Appellant had the burden of pleading and proving a violation of the statute of limitations via an affirmative defense. Such being the case, a motion for no-evidence summary judgment was not the proper vehicle to assert such a claim at the trial court level and the lower court was correct in denying the motion.

B. Appellant’s Second Argument in Support of his Ground of Error 1:

Appellant’s second argument in support of his Ground of Error 1 is again that his Motion for No-Evidence Summary Judgment should have been granted because Appellant was a necessary party to the forfeiture action by virtue of his purported “possession” of the subject currency, but was not named as a party respondent until after he had intervened in the lawsuit. Appellant’s counsel then repeatedly cites the phantom statutory authority (59.01(j)) and a litany of off-point appellate decisions in support of his argument.

Appellee’s Response to Appellant’s Second Argument in Support of his Ground of Error 1:

Art. 59.04(a), Texas Code of Criminal Procedure provides as follows:

If a peace officer seizes property under this chapter, the attorney representing the state shall commence proceedings under this section not later than the 30th day after the date of seizure.

The record reflects that the State's initial pleading in this matter, the Original Petition and Notice of Seizure and Intended Forfeiture, was filed within the 30 day requirement set forth in Art. 59.04(a). (C.R. No. 12)

Art. 59.04(b), Texas Code of Criminal Procedure, states in part the following:

...the attorney representing the state shall cause certified copies of the notice to be served on the following persons in the same manner as provided for the service of process by citation in civil cases:

- (1) the owner of the property; and***
- (2) any interest holder in the property.***

“Owner” is defined by the forfeiture statute as “a person who claims an equitable or legal ownership interest in property, while an “interest holder” is defined to mean “the bona fide holder of a perfected lien or a perfected security interest in the property.” Art. 59.01(4) and (6), Tex.C.Crim.Pro.

Appellant testified that he was not the “owner” of the subject currency and there was no evidence that appellant was an “interest holder” in either the currency or the truck-tractor in which the currency was found. In fact the record shows that both the person who hired Appellant to transport the truck-tractor (and the currency hidden within) and the registered owner of the truck-tractor were properly served with citation in the case and that default judgments were entered against both of those individuals. (C.R. No. 186).

Appellant contends that he was legally in some type of constructive possession of the currency because of a bailor-bailee relationship with either the person who had hired him or the registered owner of the truck-tractor, notwithstanding the fact that Appellant did not know that the currency was in the truck-tractor and his only direct contact with the currency was in assisting state and local authorities in removing the bolts to the truck-tractors wheel housing where the currency was hidden.

While Art. 59.04(j), Tex.C.Crim.P., does state that “a person who was in possession of the property at the time it was seized shall be made a party to the proceeding”, it does not set forth a definition as to what is meant by possession, nor require the State to cite and serve every person or entity who could possibly have been in some type of actual or constructive possession at the time of seizure. However, the legislature in drafting the Texas forfeiture law did apparently foresee instances wherein a party having an interest in a forfeiture proceeding, either claiming ownership or claiming a *bona fide* interest in the contraband, might not have been identified in the pleadings, and provided an exclusive remedy for such instances. Art. 59.02(2) and (4) provide as follows:

(2) An attorney representing the state who has reasonable belief that property subject to forfeiture is described by Subdivision (1) and who has reasonable belief as to the identity of the rightful owner or interest holder of the property shall notify the owner or interest holder as provided by Article 59.04.

(4) The exclusive remedy for failure by the attorney representing the state to provide the notice required under Subdivision (2) is submission of that failure as a ground for new trial in a motion for new trial or bill of review.

The situations set forth in Art 59.02 are analogous to Appellant’s claim in that they all involve an “innocent owner” situation. Appellant claims that he had some right to the subject currency by virtue of his business relations with the person who hired him

to transport the truck-tractor and that he should have been made a party to the forfeiture litigation. Clearly the legislature foresaw situations wherein a party having a potential right to seized property would want to have its “day in court” to put forth evidence as to its purported interest in the property, but that party’s identity and/or interest would have been unknown to the state’s attorney at the time the forfeiture action was instigated. Assuming that Appellant did have valid claim to having ownership or interest in the subject currency and/or was in possession of the currency at the time it was seized, the forfeiture statute protects his interest by giving him an almost automatic new trial if the property had been forfeited without his involvement in the trial of the cause, but the legislature said the granting of the new trial was the exclusive remedy in under such a scenario.

In the instant case Appellant was made a party to the forfeiture proceeding (by virtue of his plea in intervention) and he was able to present evidence to the trial court. Appellant is not entitled to some “King’s X” remedy wherein the entire forfeiture proceeding fails due to what Appellant perceives as a procedural defect by Appellee. For said reason the denial of Appellant’s Motion for No-Evidence Summary Judgment was proper and should not be reversed.

C. Appellant’s Third Argument in Support of his Ground of Error 1:

Appellants third argument in support of Ground of Error 1 is that Appellee failed to show in its reply to the Motion for No-Evidence Summary Judgment that the currency is “contraband”.

Appellee’s Response to Appellant’s Second Argument in Support of Ground of Error 1:

Appellant misstates the standard for defeating a no-evidence motion for summary judgment in that Appellee was not required to “show” or prove via affidavit or summary judgment evidence that the currency was contraband, but rather was merely required to put forth some evidence of the allegation. In the context of responding to a no-evidence motion for summary judgment, the nonmovant is not required to marshal all of its evidence before the trial court and engage in a trial by affidavit. *Latrell v. Chrysler Corp.*, 79 S.W.3d 141, 147 (Tex.App.-Texarkana 2002 pet denied). The nonmovant must however present evidence to the trial court that amounts to more than a mere scintilla as to the challenged element of its claim. *Southwestern Electric Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

In order for the State to prevail in a forfeiture action alleging that cash is contraband, the State must establish a link or nexus between the cash and criminal activity. *\$8,500.00 v. State*, 744 S.W.2d 788, 792 (Tex.App.-Houston [14th] 1989). When there is no direct evidence linking the currency to criminal activity, the State may meet its burden of proof by presenting sufficient circumstantial evidence. *Antrim v. State*, 868 S.W.2d 809, 814 (Tex.App.-Austin, 1993, rehearing overruled), *\$47,200.00 v. State*, 883 S.W.2d 302, 309 (Tex.App.-El Paso, 1994, writ denied).

The States response to Appellant’s Motion for No-Evidence Summary Judgment included the deposition testimony of Trooper Cesar Torres. (C.R. No. 121). The Court denied the motion based upon the evidence, apparently finding that there was at least sufficient circumstantial evidence to establish that the currency was contraband.

Accordingly, Appellant’s Ground of Error 1 should be overruled.

II. APPELLEE'S RESPONSE TO APPELLANT'S GROUND OF ERROR 2

Appellant contends in his second ground for error that the trial court erred when it granted Plaintiff's Motion for Judgment NOV.

**Argument in Support of the Court's Granting Plaintiff's
Motion for Judgment NOV**

At the conclusion of the evidence, Appellee moved for a directed verdict asking the trial court to find that Appellant did not have standing to contest the forfeiture action and that Appellant's intervention in the case should be stricken. The Court denied the motion, but stated that it might reconsider it later.

At trial Appellant did not present any evidence showing that Appellant was the owner of the currency or that he was an interest holder in the money as defined by Art. 59.01(4). Rather Appellant's argument to the jury was that he was either; 1) in possession of the currency at the time of the seizure by virtue of sticking his finger into the wheel housing and feeling something, or 2) deserving of a "reward" from the DPS because of his cooperation in the events that led to the discovery of the currency. The jury's verdict clearly reflected that they wanted to give Appellant some type of a reward for his assistance, but that they did not believe he had been the owner of the currency nor had he proven himself to be an interest holder. In order to get to that result the jury had to find that the currency was not contraband and that Appellant was in "actual or joint possession of the currency at the time of seizure." At the time the jury returned its verdict, the trial court had entered default judgments against the two individuals named as respondents in the State's pleadings and had found that the currency was contraband. (C.R. No. 186).

It is well settled that where a directed verdict would have been proper, the trial court may render a judgment notwithstanding the verdict. *Fort Bend County Drainage Dist. V. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991). The trial court may grant motion for judgment notwithstanding the verdict on grounds not included in the motion. *McDade v. Texas Commerce Bank*, 822 S.W.2d 713, 718 (Tex.App.-Houston [1st Dist.] 1991, writ

denied). However, in upholding the granting of a judgment notwithstanding the verdict, the appellate court must find that no evidence support's the jury's finding. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990).

In the case at hand the trial court properly granted the State's Motion for Judgment Notwithstanding the Verdict. At trial, the Appellant was an intervenor who insisted that he was entitled to the currency because he either was the last person in possession of the currency at the time it was seized or ,alternatively, was entitled to a reward. While Appellant claimed that he had been promised a reward for his cooperation in the seizure of the currency, he choose not to file a lawsuit or counter-claim for breach of contract against the State, but rather merely intervened in the pending forfeiture action. Clearly the trial court strongly considered granting the State's motion for instructed verdict and would have been proper in doing so as Appellant had not presented any legal basis as to why he should have been entitled to recover any of the seized currency. Accordingly, the Judgment Notwithstanding the Verdict should be upheld and Appellants Ground of Error 2 should be overruled.

III. APPELLEE'S RESPONSE TO APPELLANT'S GROUND OF ERROR 3

In his third Ground of Error Appellant contends that the trial court erred when it denied Intervenor's Motion to Disregard the Jury Answer to Question No. 3 and for a Verdict for \$281,420.00

Argument in Support of the Court's Denying Intervenor's Motion to Disregard:

Question No. 3 submitted to the jury asked, "What amount of money should be awarded to the Intervenor.[sic] (Write in a figure between \$0.00 and \$281,420.00)." The

jury responded by answering with an answer of “\$70,000”. Appellant contends that Jury Question No. 3 was rendered immaterial by virtue of the fact that the jury answered “No” to question No. 1.

Though Appellant has moved for a motion to disregard the answer, he in fact asked the trial court to completely change the answer. Appellant cites no legal authority for this request, but instead restates his argument found in Ground of Error 1 regarding the sufficiency of the evidence at the summary judgment hearing, claims Appellant has a “storage lien” on property abandoned in his possession (without citing any factual or legal support) and begins a 1 and a half page discussion of “the *Bazan* case”. “The *Bazan* case” did not involve a motion to disregard jury question, a tow truck driver making a claim of constructive possession or anything remotely related to Appellant’s Ground of Error 3.

Rule 301, Texas Rules of Civil Procedure, provides in part as follows:

...Provided, that upon motion and reasonable notice the court may render judgment non obstante verdicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence.

The rule does not provide a mechanism whereby the answer to Jury Question No. 3 can be changed as Appellant sought the trial court to do with his post-trial Motion to Disregard. Accordingly, the trial court was correct in denying said motion, that ruling should not be disturbed on appeal and Appellant’s Ground of Error 3 should be overruled.

IV. APPELLEE'S RESPONSE TO APPELLANT'S GROUND OF ERROR 4

In his fourth Ground of Error Appellant contends that the trial court erred when it entered a judgment providing that Appellant recovers noting.

Appellee's Argument in Response to Ground of Error 4:

In this Ground of Error Appellant essentially argues that if the Court happens not to agree with any of his previous Grounds of Error he should still recover at a minimum the \$70,000.00 as per the jury's answer to Jury Question No. 3. Appellant cites no legal authority in support of this ground of error.

In that the trial court properly granted Judgment NOV in the case, Appellee contends that Appellant should recover nothing as was set forth in the final judgment entered by the trial court. Appellant presented no evidence at trial showing any legal justification for him having a right to any of the currency made the basis of this forfeiture action. Appellant denied ownership of the currency, denied prior knowledge of the currency and failed to produce any evidence of an contractual obligation on the part of the State to give him a “reward”. Accordingly Appellant’s Ground of Error 4 should be overruled.

V. APPELLEE’S CROSS-POINT

Summary of Appellee’s Argument:

Pursuant to Rule 38.2, Texas Rules of Appellate Procedure, Appellee brings forward its cross-point arguing that overwhelming preponderance of the evidence established that Appellant had no right to recover any of the subject currency. Appellee in filing its Cross-Point does not seek a more favorable verdict than was rendered at the trial court, but rather seeks to uphold the final judgment entered at the lower court level.

Discussion of Appellee’s Cross-Point:

Appellee strongly contends that the trial court properly granted Appellee's Motion for Judgment Notwithstanding the Verdict and that Appellant has not shown a viable basis for setting aside the judgment of the trial court. However, in the alternative, Appellee argues that the trial court judgment should be affirmed on the basis that Appellant did not show he had any legal standing to recover any of the currency and Appellant should not have been permitted by the trial court to have been a party to the proceeding. Stated otherways, the trial court should have granted the State's motion for instructed verdict, stricken the intervenor's claims and entered final judgment consistent with the default judgments that had been previously entered.

The effect of denying the State's motion for instructed verdict and submitting the case to the jury was to confuse the issues and it is clear that the jury simply arrived at the verdict they did in order to provide Appellant with a "reward" for his assistance and cooperation. However, Appellant specifically denied any ownership interest in the subject currency and failed to put forth any evidence that he was an interest holder in the currency. As such he is not entitled to maintain standing in a forfeiture case and is not entitled to any portion of the subject currency. Accordingly, the jury verdict would have been vitiated and could not have been affirmed if the trial court had rendered judgment on the verdict.

CONCLUSION

The State of Texas brought this action seeking the forfeiture of \$281,420.00 located in the wheel housing of a truck-tractor being towed from Alvin, Texas to Mercedes, Texas during the middle of the night. The persons known to have a potential interest in the currency, the registered owner of the truck-tractor and the individual who

paid to have the truck-tractor transported were properly notified of the forfeiture proceeding and did not appear to contest. Default judgments were entered against both individuals.

Appellant, the driver of the vehicle towing the truck-tractor in question, intervened in the forfeiture lawsuit claiming not that he was the owner of the currency or a bona fide interest holder, but rather that he should have been made a party to the lawsuit or had standing in the lawsuit by virtue either of a bailee-bailor relationship Appellant had or because possession of the currency was established by Appellant when he stuck his finger into the wheel housing and felt a package. Appellant's most compelling argument was that he was entitled to an "award" from the Texas Department of Public Safety and it appears the jury agreed with him on that part. However, Appellant's status as an intervenor in the forfeiture case, absent the filing of a counter-claim for breach of contract was not the proper method to litigate his claim for a reward.

The rulings of the trial court in denying Appellant's Motion for No-Evidence Summary Judgment, granting Plaintiff's Motion for Judgment Notwithstanding the Verdict, denying Intervenor's motion to Disregard the Jury Answer to Question No 3 and Enter Judgment of Intervenor, and entering judgment that Intervenor take nothing were all proper and sound based upon the law and evidence presented to the trial court. Accordingly, each of Appellant's Grounds of Error should be overruled.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas respectfully requests this honorable Court overrule each of Appellant's grounds of error brought forth

in his appeal, that the court uphold the final judgment of the trial court and for such other relief, both at law and in equity, to which she might be entitled.

Respectfully submitted,

Rene Guerra
Criminal District Attorney
Hidalgo County, Texas

By: /s/ Timm Davis
Timm Davis, Assistant
Criminal District Attorney
Texas Bar No. 00790570

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellee's Brief has been delivered to lead appellate counsel for Appellant, Edward Mallett, at JP Morgan Chase tower, 600 Travis Street, Suite 1900, Houston, Texas 77002 on this 23rd day of May, 2007 in a manner and means prescribed by the Texas Rules of Appellate Procedure.

/s/ Timm Davis
Timm Davis

