

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 2009AP1198
2009AP1199
STATE OF WISCONSIN**

**Cir. Ct. No. 2007CF815
2007CF2439**

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE RETURN OF PROPERTY IN: STATE OF WISCONSIN V. JAMES THOMAS
MORTON, JR.:**

JAMES THOMAS MORTON, JR.,

APPELLANT,

v.

CITY OF MILWAUKEE,

RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County:
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. James Thomas Morton, Jr., *pro se*, appeals orders denying his petition for the return of \$1,872 cash seized when he was arrested on drug

charges. Morton claims that because the City did not file a forfeiture action, the circuit court must order the return of his money. We affirm.

I.

¶2 In February of 2007, Morton was arrested on drug charges. During the arrest, the police seized some personal property from Morton, including \$1,872 in cash. Morton was charged with several counts of possession of controlled substances under WIS. STAT. §§ 961.41–961.42, and a jury found him guilty on most of the counts. In December of 2008, Morton filed a petition asking for the return of his property. The circuit court held a hearing and ordered the police to return some of his personal items, but denied his request for the return of the \$1,872. Morton asked the circuit court to reconsider its decision on the return of the money, but the circuit court denied his request.

II.

¶3 Morton claims the circuit court must order the return of his money because the City did not file a separate forfeiture action under WIS. STAT. § 961.55 or § 973.075.¹ We disagree.

¹ WISCONSIN STAT. § 961.55 provides:

(1) The following are subject to forfeiture: [setting forth specific property that can be forfeited]

(2) ... Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant ...

....

(continued)

¶4 The contention Morton asserts here was rejected by *Return of Property in State v. Jones*, 226 Wis. 2d 565, 594 N.W.2d 738 (1999). *Jones* addressed the interplay between WIS. STAT. §§ 961.55 and 973.075 (governing the return of property when the State elects to initiate a forfeiture action, *see* footnote 1) and WIS. STAT. § 968.20 (governing the return of property when the State has not initiated a forfeiture action). *Jones*, 226 Wis. 2d at 569, 573–581, 594 N.W.2d at 740, 742–746.

(3) In the event of seizure under sub. (2), proceedings under sub. (4) shall be instituted promptly. All dispositions and forfeitures under this section and ss. 961.555 and 961.56 shall be made with due provision for the rights of innocent persons under sub. (1) (d) 1., 2. and 4. Any property seized but not forfeited shall be returned to its rightful owner. Any person claiming the right to possession of property seized may apply for its return to the circuit court for the county in which the property was seized. 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 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.

WISCONSIN STAT. § 973.075 provides:

(1) The following are subject to seizure and forfeiture under ss. 973.075 to 973.077:

(a) All property, real or personal, including money, directly or indirectly derived from or realized through the commission of any crime.

....

(6) Sections 973.075 to 973.077 *do not apply* to crimes committed under ch. 961.

(Emphasis added.)

¶5 WISCONSIN STAT. § 968.20 provides in pertinent part:

(1) 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. 173.12, 173.21(4), or 968.205, 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.

¶6 WISCONSIN STAT. §§ 961.55 and 973.075 are triggered only *if* the State files a separate forfeiture action. *See Jones*, 226 Wis. 2d at 569, 594 N.W.2d at 740. When the State does not bring a forfeiture action, the return of property seized by police is governed by WIS. STAT. § 968.20. *Jones*, 226 Wis. 2d at 569, 585, 594 N.W.2d at 740, 747–748. Further, the State is not obligated to file a “forfeiture action for all property derived from the commission of any crime, drug related or otherwise” because that would make WIS. STAT. § 968.20 “superfluous.” *Jones*, 226 Wis. 2d at 581–582, 594 N.W.2d at 745–746.

¶7 A circuit court's decision on whether property should be returned is discretionary. *See City of Milwaukee v. Dyson*, 141 Wis. 2d 108, 113, 413 N.W.2d 660, 662 (Ct. App. 1987). The circuit court's orders here say: “For the reasons set forth on the record of the March 18, 2009 proceedings, the defendant's motion [for the return of his money] is denied.” The record on appeal, however, does not have a transcript from the March 18, 2009, proceedings, and thus we must assume that the missing material supports the circuit court's decision. *See*

Fiumefreddo v. McLean, 174 Wis. 2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993); WIS. STAT. § 809.11(4) (it is the appellant's responsibility to make sure all relevant transcripts are in the record). Accordingly, Morton has not shown that the circuit court erroneously exercised its discretion.²

By the Court.—Orders affirmed.

Publication in the official reports is not recommended.

² Morton's reliance on *State v. Rosen*, 72 Wis. 2d 200, 240 N.W.2d 168 (1976) is misplaced. The State in *Rosen* filed a separate forfeiture action; thus, the State was required to follow the forfeiture statutes. *Id.*, 72 Wis. 2d at 201, 208, 240 N.W.2d at 169, 172. Morton's case is not controlled by *Rosen* because the City never filed a separate forfeiture action here.