COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 96-2012

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE RETURN OF PROPERTY IN
STATE V. DELORES C. CANNON & EDDIE D. CANNON:

EDDIE D. CANNON,

APPELLANT,

V.

STATE OF WISCONSIN,

RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Eddie D. Cannon appeals from an order dismissing his petition for return of property pursuant to § 968.20, STATS.,[1] and an order

[1] Section 968.20, STATS., provides:

> **Return of property seized. (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. 951.165, 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; or
>
> (b) All proceedings in which it might be required have been completed.
>
> **(1m)** (a) In this subsection:
>
> 1. "Crime" includes an act committed by a juvenile or incompetent adult which would have been a crime if the act had been committed by a competent adult.
>
> 2. "Dangerous weapon" has the meaning given in s. 939.22(10).
>
> (b) If the seized property is a dangerous weapon or ammunition, the property shall not be returned to any person who committed a crime involving the use of the dangerous weapon or the ammunition. The property may be returned to the rightful owner under this section if the owner had no prior knowledge of and gave no consent to the commission of the crime. Property which may not be returned to an owner under this subsection shall be disposed of under subs. (3) and (4).
>
> **(1r)** If the seized property is a firearm seized under s. 51.20 (13) (cv), the court that issued that order shall order the firearm returned if the prohibition under s. 51.20 (13) (cv) 1. has been canceled under s. 51.20 (13) (cv) 2. or (16) (gm).
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> **(2)** Property not required for evidence or use in further investigation, unless contraband or property covered under sub. (1m) or (1r) or s. 951.165, may be returned by the officer to the

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person from whom it was seized without the requirement of a hearing.

(3) (a) First class cities shall dispose of dangerous weapons or ammunition seized 12 months after taking possession of them if the owner, authorized under sub. (1m), has not requested their return and if the dangerous weapon or ammunition is not required for evidence or use in further investigation and has not been disposed of pursuant to a court order at the completion of a criminal action or proceeding. Disposition procedures shall be established by ordinance or resolution and may include provisions authorizing an attempt to return to the rightful owner any dangerous weapons or ammunition which appear to be stolen or are reported stolen. If enacted, any such provision shall include a presumption that if the dangerous weapons or ammunition appear to be or are reported stolen an attempt will be made to return the dangerous weapons or ammunition to the authorized rightful owner. If the return of a seized dangerous weapon other than a firearm is not requested by its rightful owner under sub. (1) and is not returned by the officer under sub. (2), the city shall safely dispose of the dangerous weapon or, if the dangerous weapon is a motor vehicle, as defined in s. 340.01 (35), sell the motor vehicle following the procedure under s. 973.075 (4) or authorize a law enforcement agency to retain and use the motor vehicle. If the return of a seized firearm or ammunition is not requested by its authorized rightful owner under sub. (1) and is not returned by the officer under sub. (2), the seized firearm or ammunition shall be shipped to and become property of the state crime laboratories. A person designated by the department of justice may destroy any material for which the laboratory has no use or arrange for the exchange of material with other public agencies. In lieu of destruction, shoulder weapons for which the laboratories have no use shall be turned over to the department of natural resources for sale and distribution of proceeds under s. 29.06.

(b) Except as provided in par. (a) or sub. (1m) or (4), a city, village, town or county or other custodian of a seized dangerous weapon or ammunition, if the dangerous weapon or ammunition is not required for evidence or use in further investigation and has not been disposed of pursuant to a court order at the completion of a criminal action or proceeding, shall make reasonable efforts to notify all persons who have or may have an authorized rightful interest in the dangerous weapon or ammunition of the application requirements under sub. (1). If, within 30 days after the notice, an application under sub. (1) is not made and the seized dangerous weapon or ammunition is not returned by the officer under sub. (2), the city, village, town or county or other custodian may retain the dangerous weapon or ammunition and authorize its use by a law enforcement agency, except that a dangerous weapon used in the commission of a homicide or a handgun, as defined in s. 175.35 (1) (b), may not

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denying reconsideration of the same action. Cannon claims the trial court erroneously exercised its discretion in dismissing his petition for return of property and in failing to properly respond to his motion for reconsideration. Because the trial court failed to conduct a hearing in this matter pursuant to § 968.20, we reverse and remand for further proceedings consistent with this opinion.[2]

> be retained. If a dangerous weapon other than a firearm is not so retained, the city, village, town or county or other custodian shall safely dispose of the dangerous weapon or, if the dangerous weapon is a motor vehicle, as defined in s. 340.01 (35), sell the motor vehicle following the procedure under s. 973.075 (4). If a firearm or ammunition is not so retained, the city, village, town or county or other custodian shall ship it to the state crime laboratories and it is then the property of the laboratories. A person designated by the department of justice may destroy any material for which the laboratories have no use or arrange for the exchange of material with other public agencies. In lieu of destruction, shoulder weapons for which the laboratory has no use shall be turned over to the department of natural resources for sale and distribution of proceeds under s. 29.06.
>
> **(4)** Any property seized which poses a danger to life or other property in storage, transportation or use and which is not required for evidence or further investigation shall be safely disposed of upon command of the person in whose custody they are committed. The city, village, town or county shall by ordinance or resolution establish disposal procedures. Procedures may include provisions authorizing an attempt to return to the rightful owner substances which have a commercial value in normal business usage and do not pose an immediate threat to life or property. If enacted, any such provision shall include a presumption that if the substance appears to be or is reported stolen an attempt will be made to return the substance to the rightful owner.

[2] The City and the County both claim that Cannon did not properly serve them with the petition and, therefore, failed to obtain personal jurisdiction. They also claim that Cannon's failure to serve a notice of appeal on them constitutes a certification that they were not a party to these proceedings. We reject both arguments. Section 968.20, STATS., provides that 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." Therefore, even if Cannon failed to properly serve the City and the County, the trial court is obligated to provide notice to the appropriate parties. Further, failure to serve a notice of appeal on the City and the County did not prejudice either. Both filed briefs responding to Cannon's claims and, therefore, under the circumstances of this case, we reject their request to dismiss the appeal.

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I. BACKGROUND

This appeal represents an attempt by Cannon to seek the return of personal property seized by law enforcement authorities.[3] On February 9, 1987, in connection with his arrest on the same date for possession of a controlled substance (cocaine) with intent to deliver (PTAC), the police seized $434, seven photographs, and sixteen bottles of liquor. Cannon was found guilty of the same charge plus possession of a firearm by a felon and habitual criminality. He was subsequently sentenced to thirty-two years in prison.

On March 19, 1996, Cannon filed a petition for the return of these same items of personal property including the sum of $434 and seven photographs or, in the alternative, that Milwaukee County and the City of Milwaukee pay him $1,349 which represents the value of the property. The trial court denied the petition by written order without a hearing based on "a representation" from the City that it was no longer in possession of the property. The trial court also determined that Cannon's action was barred by the six-year statute of limitation. Cannon filed a motion for reconsideration, alleging that the six-year limitation period was tolled by § 893.16, STATS., based on his disability–imprisonment. The trial court denied this order, concluding:

Further, the City argues that because Cannon alternatively sought monetary damages of $1,349, he was required to comply with the notice requirements of § 893.80, STATS. We disagree. Although compliance with the notice of claim statute is required for a claim for damages, it does not apply here. Section 968.20, STATS., merely allows for a determination of ownership and the return of property. It does not provide authority for awarding monetary damages.

[3] The factual background for this appeal is not to be confused with two earlier replevin actions that were the subject of this court's Oct. 17, 1995, No. 94-0272 and June 17, 1997, Nos. 95-0427, 95-0428 decisions. In addition, we note that the instant case deals with § 968.20, STATS., which merely allows for the return of the property and should not be confused with the replevin statute, § 810.14, STATS., which allows for the recovery of property *or the value thereof*.

> Due to the City's representation that it no longer has the property, having been destroyed after six years, there is no subject matter for which the court to make any determinations under sec. 968.20, Wis. Stats. An application for return of property pursuant to sec. 968.20 may not be used as a vehicle for challenging the City's actions after property ceases to exist. Defendant's remedy lies in the civil code.

He now appeals.

II. DISCUSSION

Cannon claims the trial court erred in denying his § 968.20, STATS., application seeking the return of property seized on September 9, 1987. In examining this statute, we note that § 968.20(1) explicitly provides that a court "shall hold a hearing to hear all claims to [the] true ownership" and "the right to possession" of seized property. The trial court here failed to so. It did not hold a hearing to determine "true ownership" and "the right to possession." The trial court ruled without hearing any sworn testimony or reviewing any documentary evidence. In fact, it is unclear from the record exactly how the City "advised" the trial court that it no longer had possession of the property. The only reference to this fact is contained in the trial court's orders. The record is void of any affidavit or other evidentiary documentation attesting to the City's representation. Thus, the trial court's findings of fact were not supported by any evidence because it failed to conduct the required hearing. *See generally* ***State v. Benhoff***, 185 Wis.2d 600, 518 N.W.2d 307 (Ct. App. 1994).

Regardless of who has actual possession, the statute mandates that Cannon is entitled to a hearing to determine "true ownership" and whether he had

"the right to possession." Accordingly, this case is remanded to the trial court with directions that it conduct the statutorily required hearing.[4]

By the Court.—Orders reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[4] We also conclude that the trial court erred in finding that Cannon's application was untimely based on § 893.35, STATS., the six-year statute of limitation for recovery of personal property. The property was seized September 9, 1987, and he filed his motion on March 19, 1996, approximately nine years later. The six-year statute of limitation was tolled pursuant to § 893.16, STATS., which provides in pertinent part:

> If a person entitled to bring an action is, at the time the cause of action accrues, … imprisoned on a criminal charge the action may be commenced within 2 years after the disability ceases, except that where the disability is due to … imprisonment, the period of limitation prescribed in this chapter may not be extended for more than 5 years.

Because Cannon is still imprisoned, the five-year repose provision would apply, extending the six-year statute of limitation to eleven years. Therefore, his application seeking the return of property was timely filed. If the City no longer has the property, the trial court's suggestion that Cannon's remedy lies in the civil code was appropriate.