

RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000156-MR

CAROL ADAMS

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 01-CI-00130

CITY OF SPRINGFIELD, KENTUCKY;
LARRY TOUSIGNANT, INDIVIDUALLY;
LARRY TOUSIGNANT, AS CHIEF OF POLICE OF CITY OF SPRINGFIELD;
PAUL O'BRYAN, INDIVIDUALLY;
PAUL O'BRYAN, AS SERGEANT OF CITY OF SPRINGFIELD POLICE
DEPARTMENT APPELLEES

OPINION AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

COMBS, CHIEF JUDGE: Carol Adams appeals from an order entered by the Washington Circuit Court on December 22, 2003, granting summary judgment to the City of Springfield; the Springfield Police Department; Larry Tousignant, individually and in his

official capacity as chief of police; and Paul O'Bryan in his official capacity as police sergeant. Having concluded that there were no genuine issues as to any material fact with respect to Adams's claims against the appellees, we affirm.

On February 18, 2000, the appellant's son, Michael Dawson, was arrested on drug charges by patrol officers of the Springfield Police Department. The vehicle that Dawson was driving at the time of his arrest, a 1994 Chevrolet Impala, was deemed to be subject to forfeiture and was also seized. Dawson was later indicted on charges of possession of drug paraphernalia and trafficking in cocaine.

Dawson was arraigned in the Washington Circuit Court on March 9, 2000. At the arraignment, Dawson was represented by counsel, Dan Kelly. Kelly also represented Dawson's mother, Carol Adams, who held legal title to the vehicle which was seized at Dawson's arrest. The prosecutor acknowledged that Adams demonstrated some claim of ownership but contended that she was a "sham" owner of the car rather than a legitimate owner. He contended that Dawson, a notorious drug dealer, in fact exercised total control and dominion over the Impala rendering him the true owner of the car. Therefore, he reasoned that the vehicle was subject to forfeiture under Kentucky's

Controlled Substances Act (KRS¹ 218A.010 *et. seq.*). On Adams's behalf, Kelly requested the court to conduct an evidentiary hearing to determine the proper disposition of the vehicle.

The trial court granted the request for a hearing, but before it could be held, Dawson again appeared before the Washington Circuit Court with attorney Kelly. The prosecutor informed the court that the parties had reached a plea agreement. As part of the agreement, the parties stipulated that the Impala would be forfeited. Kelly raised no objection.

Before the judgment and sentence were entered, Adams contacted the court directly regarding the disposition of the Impala. In a letter to the court, Adams claimed that she was entitled to the immediate return of the car. The court advised Adams that a hearing in the matter would be held on July 6, 2000. According to her sworn statement, Adams understood that the hearing would pertain only to the proper disposition of the automobile. She said that she discussed the matter with her attorney, Dan Kelly, on July 6, 2000. Based on Kelly's advice, she did not attend the hearing. In her deposition, Adams indicated that Kelly instructed her to remain in his office rather than to attend the court proceedings. "Because, like I said, Dan Kelly took me over to his office and kept me there

¹ Kentucky Revised Statutes.

through the whole procedures." (Adam's deposition at p. 46.)

Under further questioning, she related the following:

A. I never saw inside [the courthouse]. I never knew what they were talking about until I went upstairs and got a copy of what went on. He [Kelly] did come over there and ask me would I sign the car over.

Q. Who asked you that?

A. Dan Kelly.

Q. Came where and asked you that?

A. To his office where he had me held over there.

* * * *

Q. What did he tell you was going on?

A. He told me that they would not hear of any agreement unless I signed over my car. They wasn't making any agreement, and the discussion was he was trying to get me to sign a paper to sign over my car.

On August 10, 2000, Dawson entered a guilty plea to two counts of trafficking in a controlled substance. The Commonwealth recommended the minimum sentence of five-years' imprisonment on each count -- to run concurrently -- and shock probation after six months. The Commonwealth also recommended that Dawson be given work-release. Pursuant to his plea agreement, Dawson was required to pay restitution of \$320.00 to the Springfield Police Department and to forfeit both the Impala

and a handgun retrieved from the car. When the trial court asked about Adams's interest in the Impala, Kelly said that Adams had been reluctant at an earlier point in time but that she was now willing to surrender her interest in the Impala for her son's benefit.

On October 6, 2000, judgment and sentence were entered. The court sentenced Dawson in accordance with the Commonwealth's recommendations and ordered forfeiture of the Impala and the gun. Dawson was ordered to report to the Marion County Detention Center on October 23, 2000, and transfer of the automobile was to be completed as of that date.

On October 24, 2000, Carol Adams transferred the Impala to the City of Springfield. The Springfield Police Department retained it for official use pursuant to the provisions of KRS 218A.420(3)(a) and KRS 218A.435(11). It was put into service as a patrol vehicle and was eventually marked on the rear window with the words, "confiscated from a drug dealer."

On October 24, 2001, Adams filed a complaint against the City of Springfield; the Springfield Police Department; Larry Tousignant, "individually and as Chief of Police of City of Springfield, Kentucky;" and "Paul O'Bryan, Sergeant." Adams claimed that she had been:

the victim of unlawful coercion, if not extortion, in that [she] was coerced and pressured with threats that her son would go to jail for 10 years or more if she did not cooperate and forfeit [the vehicle]."
(Complaint at 3.)

She asserted a private cause of action based on the defendants' alleged violation of the provisions of KRS 514.080. She also contended that she had been deprived of the automobile without due process of law; that the defendants had slandered her title to the automobile; that the defendants' actions amounted to an abuse of process; and finally that the defendants had libeled and slandered her by indicating that she was a drug dealer and "by parad[ing] the vehicle around as having been confiscated from a drug dealer." Id.

On July 22, 2003, the defendants filed a motion for summary judgment, arguing that each of Adams's claims failed as a matter of law. On December 22, 2003, the Washington Circuit Court granted the defendants' motion for summary judgment. This appeal followed.

After drawing all factual inferences in favor of the non-moving party, a court may enter summary judgment only if it can conclude that there are no issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fischer v. Jeffries, 697 S.W.2d 159 (Ky.App. 1985); CR²

² Kentucky Rules of Civil Procedure.

56.03. The proper function of summary judgment is to terminate litigation when it appears that as a matter of law it would be impossible for the non-movant to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

On appeal, Adams contends that the trial court erred by granting the motion for summary judgment against her claim that the appellees' conduct amounted to unlawful coercion and extortion.³ We disagree.

The provisions of KRS 514.080 define theft by extortion to include the wrongful use of one's position as a public officer to obtain the property of another. Having carefully reviewed the record, we find no evidence to support Adams's allegation that the City, Larry Tousignant, individually or as chief of police, or Paul O'Bryan wrongfully used an official position to obtain Adams's property. The prosecutor, as representative of the Commonwealth, sought solely to enforce the duly enacted statutory provisions related to the unlawful sale and transport of controlled substances.

Pursuant to the provisions of KRS 218A.410, property subject to forfeiture includes "vehicles . . . which are used, or intended for use, to transport or in any manner to facilitate the transportation, for the purpose of sale or receipt" of

³ Adams concedes that the claims against the police department were properly dismissed.

controlled substances. The Impala seized by police in conjunction with Dawson's arrest was wholly subject to forfeiture pursuant to Kentucky's Controlled Substances Act. The Commonwealth's Attorney pursued the forfeiture in good faith and was statutorily entitled to include the seizure of the car in the course of plea negotiations.

Adams admitted in her deposition that no representative of the police department had ever made any threat to her regarding the car. In that deposition, she stated as follows:

When I come through from Danville, he was on his way to work. I just started crying. He made it out, but was hard for me to go there that day. I had to make a decision to go down there that day and sign over the car, something I had saved for, but my son - they wanted that car so bad, but I wanted my son to get that job. (Deposition at p. 68.)

She candidly acknowledged in her brief that she agreed to relinquish the car only "because her son would lose an advantageous job if he did not report to work."

(Brief at p. 8.)

The police refused to agree to the prosecutor's plea offer to Dawson unless it included forfeiture of the vehicle. While the resulting forfeiture harmed Adams rather than Dawson, their refusal does not amount to a wrongful use of their official positions in violation of KRS 514.080. The

prosecutor's decision to defer to the adamant insistence by the police as to forfeiture does not constitute blackmail or extortion. As to this claim, the appellees were indeed entitled to judgment as a matter of law.

Next, Adams argues that the court erred by dismissing her claim that the vehicle was taken without due process of law. We disagree.

The Fourteenth Amendment to the Constitution of the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. As the Supreme Court of Kentucky observed in Harbin v. Commonwealth, 121 S.W.3d 191, 195 (Ky. 2003) (internal citations omitted):

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. In Fuentes v. Shevin, the United States Supreme Court stated, "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."

The provisions of KRS 218A.460(2) require notice and an ancillary hearing before a court may order the forfeiture of any property seized pursuant to the Controlled Substances Act.

An individual whose property has been seized is afforded procedural due process and has the burden of proving by a preponderance of the evidence that the asset is not forfeitable.

The record reveals that Adams was aware that the court had scheduled and was prepared to hold a hearing to determine the proper disposition of the Impala. While Adams did not attend the proceedings personally, she does not contend that her interests were not adequately represented by counsel. Adams was provided proper notice of the contemplated forfeiture proceedings; she had an opportunity to present evidence to prove that the vehicle was not forfeitable. The statutory due process protections were fully satisfied. Thus, Adams cannot demonstrate that she has been denied due process of law. The court did not err by concluding that the appellees were entitled to judgment as a matter of law on this issue.

Adams also contends that the trial court erred by granting summary judgment to the appellees with respect to the claim of abuse of process. Again, we disagree.

Abuse of process is defined as "the irregular or wrongful employment of a judicial proceeding." Simpson v. Laytart, 962 S.W.2d 392, 394 (Ky. 1998). Its elements include "(1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." Id. It amounts to "the employment of legal process for some

other purpose than that which it was intended by the law to effect." Raine v. Drasin, 621 S.W.2d 895, 902 (Ky. 1981).

Adams has presented no factual, objective basis to substantiate her subjective belief that the officers used criminal tactics against her son in an effort to acquire the Impala. She does not cite -- nor does the record suggest -- any evidence in support of her allegation that the drug charges initiated by the Commonwealth were being utilized for any ulterior purpose. The prosecution of a drug conviction against Michael Dawson was wholly authorized by law. Consequently, the appellees were entitled to judgment as a matter of law as to the claim of abuse of process.

Adams next contends that the court erred by granting summary judgment to the appellees with respect to her claim of defamation. She objects to the words printed on the Impala, "confiscated from a drug dealer," as amounting to an untrue statement that *she* was involved with the illegal sale of controlled substances. The appellees, however, assert that the phrase is literally true and bears no insinuation or implication of anything defamatory as to Adams. They contend that the trial court did not err by entering summary judgment since the statement itself is not actionable.

The law is well settled that a written or printed publication which is false and defamatory, and calculated to expose one to

ridicule or contempt, or to render him odious, or injure him in his business or calling, or in his social standing, is a libel." Register Newspaper Co. v. Worten, 33 Ky. 840, 111 S.W. 693 (Ky. 1908).

A true statement does not give rise to liability. Bell v. Courier Journal & Louisville Times, 402 S.W.2d 84 (Ky.App. 1966).

The allegation of defamation is based on the statement painted on the window of the Impala after the automobile had been forfeited to the authorities. The statement indicated that the vehicle had been "confiscated from a drug dealer." This information is neither false nor defamatory; it is an accurate statement of fact. It is undisputed that the Impala was seized by the authorities from Michael Dawson -- a convicted drug dealer. The seizure entailed a confiscation; *i.e.*, an appropriation by the state as a consequence of Dawson's criminal conviction.

We do not agree with Adams that the statement unfairly implied wrongdoing on her part in the minds of her fellow citizens or that it became false by implication. The statement contains no innuendo that Adams rather than her son, Dawson, was the drug dealer from whom the vehicle was seized. As the statement is not ambiguous, its construction is one of law for the court. Baker v. Clark, 186 Ky. 816, 218 S.W. 280 (Ky.

1920). Since there is no material dispute of fact as to the truth of the statement, the appellees were entitled to summary judgment on Adams's claim of defamation.

Finally, we consider Adams's contention that the trial court erred by dismissing her claim of slander of title. She contends that the appellees "slurred her and thus the title to her car by stating it was confiscated from a drug dealer." (Brief at p. 13.)

In order to maintain an action for slander of title, the plaintiff must plead and prove that the defendant has knowingly and maliciously communicated a false statement that has the effect of disparaging the plaintiff's title to property -- either real or personal. Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765 (Ky.App. 1980). The plaintiff must also plead and prove that he has incurred special damage as a result of the false statement. Id. If special damage has not been incurred, the action cannot be maintained. Id. The special damage may consist either of a loss by the plaintiff of a sale of his property or of a diminution in its fair market value.

Adams's claim fails on several grounds. However, we need only discuss one: that the allegations of her complaint do not include the necessary element of a reference to special damage. Adams alleges that she was embarrassed and humiliated

when the car was driven around Springfield. In her complaint, she sought to recover a sum equal to the value of the Impala along with compensatory, consequential, and punitive damages. However, nowhere in the complaint is there any allegation that she lost a sale of the car or that she suffered a decrease in the car's fair market value. Indeed, Adams had already forfeited her interest in the Impala by the time that the offending statement was printed on it. The trial court did not err by dismissing Adams's claim for slander of title.

Because we have found no viable causes of action against the appellees, it is unnecessary to analyze their claim for immunity. Accordingly, we have not addressed Adams's argument that the trial court erred by dismissing her claim for punitive damages or by construing her complaint as stating claims against Sergeant O'Bryan in his official capacity.

The judgment of the Washington Circuit Court is affirmed in its entirety.

SCHRODER, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN RESULT ONLY: While I concur in the result reached by the majority, I write separately to voice my concern about the methods utilized by the Commonwealth Attorney for Washington County and the police

department in the city of Springfield. In my opinion, involving the forfeiture of a vehicle in the plea bargaining process of a criminal matter seriously compromises the integrity of the judicial process. Had the Commonwealth requested cash instead of the vehicle or had the defendant proposed such an exchange, the parties involved would probably be facing criminal charges. The integrity of the plea bargaining system must not be so compromised that public trust is lost. While the case is different only in that the forfeiture of the vehicle may have occurred anyway at a later date, this type of scenario could easily be perceived as crossing the line of acceptable plea negotiations by the general public. I write to strongly discourage such type of action by the police and especially by the Commonwealth.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Harley N. Blankenship
Louisville, KY

BRIEF FOR APPELLEES:

Robert T. Watson
David P. Bowles
Jennifer A. Peterson
Louisville, KY

ORAL ARGUMENT FOR APPELLEES:

David P. Bowles
Louisville, KY