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2013 IL App (3d) 120961-U

Order filed August 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois,
)	
v.)	Appeal No. 3-12-0961
)	Circuit No. 12-MR-1630
1998 CHEVROLET MALIBU,)	
)	Honorable
Defendant-Appellee.)	Roger D. Rickmon,
)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Wright and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Subpoena power is available to a claimant at a preliminary civil forfeiture review hearing (720 ILCS 5/36-1.5 (West 2012)).

¶ 2 After arresting claimant, Bruce Madsen, and seizing his vehicle, the State initiated civil forfeiture proceedings against the vehicle. See 720 ILCS 5/36-1 *et seq.* (West 2012). Claimant subpoenaed the arresting officer to appear and bring documents to claimant's preliminary civil forfeiture review hearing (720 ILCS 5/36-1.5 (West 2012)). The State moved to quash the

subpoena, arguing that the subpoena power of the court is unavailable at a preliminary review hearing. The trial court denied the State's motion. The officer refused to comply with the subpoena, and the court held him in indirect civil contempt to allow the State to appeal the court's ruling on the subpoena. The State appeals from the contempt order. We affirm.

¶ 3

FACTS

¶ 4 On July 24, 2012, claimant was arrested while driving his 1998 Chevrolet Malibu. The State seized the vehicle pursuant to article 36 of the Criminal Code of 1961 (720 ILCS 5/36-1 (West 2012)) (civil forfeiture statute). In accordance with the recently amended version of article 36, the State scheduled a preliminary review hearing to determine whether probable cause existed to bring a forfeiture action against the vehicle. See 720 ILCS 5/36-1.5 (West 2012).

¶ 5 In anticipation of the preliminary hearing, claimant issued a subpoena requesting that: (1) the arresting officer appear at the hearing to testify; and (2) the arresting officer bring certain documents, including the police report, to the hearing. The State filed a motion to quash the subpoena, and a hearing was held on that motion. At the hearing, the State argued that claimant was using the subpoena request to skirt the discovery rules. Additionally, the State claimed that the subpoena power should be unavailable at a section 36-1.5 hearing, in part because compliance with the subpoenas could unduly burden the State. The State estimated that it conducts 700 civil forfeiture proceedings per year in Will County. For officers to appear at an additional hearing in those cases, the State would need to spend significant resources. Claimant, for his part, argued that due process guaranteed him subpoena power at the hearing.

¶ 6 The court denied the motion to quash. The State requested that the officer be held in civil contempt, allowing the State to appeal the court's underlying denial of the motion to quash. The

court complied and held the officer in contempt. The State appeals the court's contempt order.

¶ 7

ANALYSIS

¶ 8 The State appeals from the order of contempt, arguing the trial court erred when it denied the motion to quash, because: (1) the subpoena power is unavailable at a section 36-1.5 hearing; and (2) even if the subpoena power is available, there is good cause to quash the subpoena.

Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010) vests this court with jurisdiction to hear appeals from contempt orders. Although no appellee's brief has been filed, we choose to decide the merits of this appeal. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

¶ 9 Whether the subpoena power is available at a section 36-1.5 hearing is a matter of first impression in Illinois. The primary rule of statutory construction is to ascertain and give effect to the legislature's intent. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497 (2003). The best indication of that intent is the statute's language. *Id.* Therefore, we begin our analysis by examining the statutory language of the civil forfeiture statutes. 720 ILCS 5/36-1 (West 2012).

¶ 10

A. Recent Statutory History of Article 36

¶ 11 Article 36 of the Criminal Code of 1961 (720 ILCS 5/36-1 (West 2010)) governs the State's power to seize and bring civil forfeiture proceedings against vehicles used in the commission of certain driving offenses. Those proceedings include a hearing at which the State is required to show by a preponderance of the evidence that the claimant used the vehicle in the commission of an enumerated offense. 720 ILCS 5/36-2 (West 2010).

¶ 12 Effective January 1, 2012, section 36-1.5 was added to article 36 by Public Act 97-544 and later amended on March 16, 2012, by Public Act 97-680. See 720 ILCS 5/36-1.5 (West

2012). Section 36-1.5 adds a mandatory preliminary review hearing—conducted within 14 days of the vehicle's seizure—at which the State is required to establish "probable cause that the property may be subject to forfeiture." 720 ILCS 5/36-1.5(a) (West 2012). The finding of probable cause allows the State to maintain possession of the seized vehicle until a section 36-2 forfeiture hearing is held.

¶ 13 Section 36-1.5 sets some procedural guidelines for the preliminary review hearing. The rules of evidence do not apply. 720 ILCS 5/36-1.5(b) (West 2012). In addition, a finding of probable cause at a claimant's preliminary criminal hearing (725 ILCS 5/109-1 (West 2012)) is sufficient to satisfy the probable cause showing required at the section 36-1.5 hearing (720 ILCS 5/36-1.5(d) (West 2012)), and the two hearings may be held simultaneously in one proceeding (720 ILCS 5/36-1.5(c) (West 2012)). Both the section 36-1.5 hearing and the section 36-2 hearing are civil in nature, despite their connection to a related criminal cause of action. *People v. 1995 Ford Van, VIN 1FTJE34GOSHA15603*, 318 Ill. App. 3d 303 (2004).

¶ 14 Article 36 makes no mention of the subpoena power or discovery tools. We therefore must look beyond the statutory language to determine the legislature's intent.

¶ 15 B. Subpoena Power

¶ 16 In criminal cases the right to subpoena witnesses is guaranteed by the sixth amendment of the United States Constitution. U.S. Const., amend. VI. In civil cases, no such constitutional right exists, and the subpoena power is governed by statute. See 735 ILCS 5/2-1101 (West 2012). Section 2-1101 suggests that the subpoena power is available in "any court in which an action is pending." *Id.*

¶ 17 Although a section 36-1.5 hearing is a relatively uncomplicated proceeding, there is

nothing in the statute to suggest that the legislature intended to deny the parties the power to subpoena witnesses or documents. We can find nothing in the statute that alters the typical subpoena process or deviates from the rule that the subpoena power is available in any court in which an action is pending. As to the State's argument that the subpoena power creates an undue burden on the State, the legislature has the power to amend the statute as it sees fit, should the subpoena power prove burdensome. In addition, the trial court retains the power to quash subpoenas "[f]or good cause shown." 735 ILCS 5/2-1101 (West 2012). The subpoena power is available at a section 36-1.5 preliminary hearing.

¶ 18 Claimant's use of the subpoena power at a section 36-1.5 preliminary hearing is not an improper attempt by claimant to bypass the discovery rules. Discovery is unavailable prior to the time all parties have appeared or are required to appear. Ill. S. Ct. R. 201(d) (eff. July 1, 2002); *Bruske v. Arnold*, 44 Ill. 2d 132 (1969). Therefore, discovery was unavailable to claimant prior to the section 36-1.5 hearing. By using a subpoena, claimant was taking advantage of the only tool available to secure the witness and documents necessary to make his case at the hearing. Discovery was not available to him as an alternative means of gathering evidence.

¶ 19 The State has forfeited its argument that the subpoena should have been quashed for good cause based upon the four factors laid out in *People v. Nixon*, 418 U.S. 683 (1974), because the State failed to raise that argument in its motion to quash. See generally *Chandler v. Doherty*, 299 Ill. App. 3d 797 (1998) (issues not presented to the trial court in nonjury civil cases are forfeited).

¶ 20 Subjecting one's self to contempt proceedings is an appropriate method for obtaining appellate review of a trial court's ruling. *People v. Shukovsky*, 128 Ill. 2d 210 (1988). When the subject of a public official's contempt is purely formal and intended to secure appellate review, a

reviewing court can vacate the contempt citation. *People v. Mitchell*, 297 Ill. App. 3d 206 (1998). We therefore vacate the court's order of contempt and any fines imposed.

¶ 21

CONCLUSION

¶ 22 The judgment of the circuit court of Will County is affirmed.

¶ 23 Affirmed.