

No. 19-8023 ORIGINAL

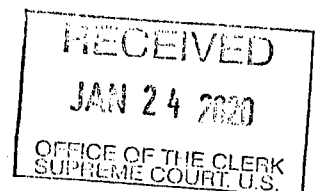
IN THE
SUPREME COURT OF THE UNITED STATES

TOM ELI ORR,
PETITIONER,
VS.
TENNESSEE BUREAU OF INVESTIGATION, et al.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TOM ELI ORR
#11754-042
FCI TALLADEGA
PMB 1000
TALLADEGA, ALABAMA 35160



QUESTION PRESENTED

HAS MR. ORR BEEN AFFORDED PROCEDURAL DUE PROCESS
UNDER THE CONSTITUTION?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TENNESSEE BUREAU OF INVESTIGATION

TENNESSEE DEPARTMENT OF SAFETY & HOMELAND SECURITY

TENNESSEE DEPARTMENT OF TREASURY DIVISION OF UNCLAIMED
PROPERTY

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ issue in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit can be found at Appendix-A herein. The opinion of the United States District Court for the Western District of Tennessee can be found at Appendix-B herein. The opinion of the Court of Appaels of Tennessee can be found at Appendix-C herein. The opinion of the Chancery Court of Davidson County Tennessee can be found at Appendix-D herein. The opinion of the Criminal Court of Shelby County Tennessee can be found at Appendix-E herein.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 2254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. UNITED STATES CONSTITUTION AMENDMENT

Section 1 of the Fouteenth Amendment provides, in part, that -
aa state shall not "deprive any person of life liberty, or property,
without due process of law." U.S.CONST. amend. XIV.

B. CONSTITUTION OF TENNESSEE

Article 1, § 8 of the Constitution of Tennessee states that
"No man shall be ... disseized of his freehold, liberties or
privileges, or ... deprived of his life, liberty or property, but
by the judgment of his peers or the law of the land." TENN. CONST.,
art. 1, § 8.

STATEMENT OF THE CASE

The origin of these proceedings begins with the traffic stop and arrest of Mr. Tom Eli Orr on March 8, 2003, by the Memphis Police Department, for the crime of knowingly possessing over three-hundred (300) grams of cocaine with intent to deliver, in violation of T.C.A. 39-17-417. During the ensuing arrest property was taken from him, including: (1) 2000 Cadillac Deville; (2) Jewelry; (3) Clothes; and (4) \$1800.00, the items valued at approximately \$132,000.00.

After his arrest on state charges, federal proceedings commenced and a jury convicted Orr in federal court of two counts of distribution of cocaine base, in violation of 21 U.S.C. § 841(a), and of conspiracy with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and 841(a). See United States v. Orr, 136 F.App'x 632, 634 (5th Cir. 2005). The case against Mr. Orr in the Criminal Court of Shelby County, Tennessee was dismissed-nolle prosequi, on August 16, 2007, as a result of a failure to deliver Orr in the allotted time as determined by the Interstate Agreement of Detainers Act, Article IV.

On September 4, 2007, Orr filed a motion for return of seized property in the Shelby County Criminal Court requesting the return of the property seized on March 8, 2003, by the Memphis Police. This motion was denied on March 6, 2008, based on the court lacking authority to determine final disposition of the seized property pursuant to Tennessee Code Annotated § 53-11-451(d).

Thereafter, Mr. Orr contacted the Tennessee Department of Safety and Homeland Security to inquire about the forfeited property. On April 20, 2012, the Department responded, noting that the State kept files for only seven years and that the file for his forfeiture case had been destroyed. The attorney for the agency explained that 'notice of property seizure is sent out of this office by certified mail and if it returns with a signature then the judge will accept that, if it is returned unclaimed after three attempts by the U.S. Postal Service that will also be sufficient as notice.' Also in 2012, Orr filed a petition for judicial review in state court, which was dismissed. The Tennessee Court of Appeals affirmed the dismissal, holding that the trial court did not have subject-matter jurisdiction to hear the case because Orr failed to comply with the sixty-day time limit for filing a petition for review under Tennessee Code Annotated § 40-33-203(a). Orr v. Tenn. Dep't of Safety, No. M2012-02711-COA-R3-CV, 2014 WL 468230, at *2 (Tenn. Ct. App. Feb. 4, 2014). Regardless, the Court of Appeals noted that over five years passed before Orr alleged that he had not received notice of forfeiture and that due to Orr's inexcusable delay, the agency no longer had the records to "substantiate its claim that it complied with the statutory procedural requirements." *Id.* at *3.

In 2015, Orr filed a civil action against the Tennessee Bureau of Investigation, the Tennessee Department of Safety, and the Tennessee Department of the Treasury, Division of Unclaimed Property, alleging that state law-enforcement officers unlawfully seized his property after his 2003 arrest. Orr alleged that he never received notice regarding the forfeiture of his property, violating his due process rights under the Fifth Amendment, the Fourth Amendment, and the APA.

The district court screened Orr's complaint pursuant to 28 U.S.C. § 1915(e)(2) and 1915A and dismissed it. The district court concluded that Orr had failed to state a claim upon which relief could be granted under the APA because the defendants are not federal agencies.

In his timely appeal, Orr argued that the district court erred in dismissing his complaint and alternatively, that it should have permitted him to amend his complaint. The Sixth Circuit reviewed the district court's findings and concluded that the petition failed to state a claim under the APA or Federal Constitution. The Appellate Court reasoned that the APA provides for judicial review only for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Because the term "agency" is defined as "each authority of the Government of the United States," the APA does not apply to state agencies. 5 U.S.C. § 701(b)(1). Orr's APA claims against Tennessee state agencies were therefore dismissed. Furthermore, to the extent that Orr asserted due process claims under 42 U.S.C. § 1983, those claims were subject to dismissal because they were held untimely. See Appendix-A at 3.

REASONS FOR GRANTING THE WRIT

The crux of this case centers around the notice required under the due process clause of the Constitution. Upon receiving a favorable disposition from the Shelby County Criminal Court on August 16, 2007, understandably, Mr. Orr sought return of the confiscated property taken at the time of his arrest. Unbeknownst

to Mr. Orr, the Department of Safety and Homeland Security had issued an order forfeiting only the cash seized, noting that no claim had been filed in May of 2003. Under the Uniform Administrative Procedures Act. Tenn. Code Ann. § 40-33-213(b) a petition for review of a administrative forfeiture must be filed within sixty (60) days after the entry of the agency's final order thereon. This behooves the question how does one seek review of a order that they were not notified of?

The Uniform Administrative Procedures Act (UAPA) provides "[a] person who is aggrieved by a final decision in a contested case is entitled to judicial review." Tenn. Code Ann. § 4-5-322(a)(1). This section specifies that review proceedings "are instituted by filing a petition for review in the chancery court" within sixty days after entry of the agency's final order."

Orr had the right to seek judicial review of the Department of Safety's forfeiture order and to raise constitutional challenges in the chancery court on appeal. However, without meaningful notice of these proceedings the aforementioned process is rendered void. Upon favorable termination of his state criminal proceeding Orr sought return of his seized property in the Shelby County Criminal Court. This was the wrong venue for the return of his seized property as the UAPA clearly specifies that a review of a agency's final order will be challenged in the chancery court, however, despite being notified that Orr sought the return of his property as early as 2007 the lower state and federal court's have uniformly held that Mr. Orr has not shown due diligence in seeking the return of his property. This notion is in contravention of the principals

of due process embodied in the United States Constitution.

ARGUMENT

1. HAS MR. ORR BEEN AFFORDED PROCEDURAL DUE PROCESS UNDER THE CONSTITUTION.

The question presented focuses on the notice originally required by the State of Tennessee in 2003 following Mr. Orr's arrest. As noted a forfeiture order was issued by the Tennessee Department of Safety and Homeland Security in May 2003 confiscating only the \$1800.00 taken from Orr in March of 2003. The order in question was not recieved by Mr. Orr whom was in custody following his arrest. The procedure of the Department of Safety and Homeland Security is to send notice of property seizure out by certified mail and if it returns with a signature then it is deemed served, if it is returned unclaimed after three attempts by the U.S. Postal Service that will also be sufficient as notice under Department policy.

Mr. Orr's complaint in federal court, however inartfully drafted, conveyed this basic notion therefore, it should have been allowed to proceed under 42 U.S.C. § 1983 in the district court and decided on the merits. The lower courts dismissal cannot be upheld.

A. SCREENING OF COMPLAINT

Title 28 U.S.C. § 1915A(b) and 1915(e)(2)(B) provides for the dismissal of a prisoner's complaint if it is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. The Court determines whether the complaint should be dismissed

because, even if everything alleged in the complaint is assumed to be true and accurate, Plaintiff is not entitled as a matter of law. Cf. Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993); Nishiyama v. Dickson County, Tennessee, 814 F.2d 277, 279 (6th Cir. 1987).

B. PRO SE PLEADINGS LIBERALLY CONSTRUED

The law is well established that Courts are required to liberally construe pro se complaints to allow the development of a potentially meritorious case. Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007); Haines v. Kerner, 404 U.S. 519, 521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). In addition, when evaluating a pro se complaint, the plaintiff's allegations are presumed to be true. Sistrunk v. City of Strongsville, 99 F.3d 194, 197 (6th Cir. 1996). The mandated liberal construction requires a court to permit a complaint to proceed if it can reasonably read the pleadings to state a claim on which the plaintiff could prevail. Boag v. MacDougall, 454 U.S. 364, 365, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982).

C. 42 U.S.C. § CLAIM

To state a viable claim under 42 U.S.C. § 1983, a plaintiff must allege he was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States by a person acting under color of law, without due process of law. Flagg Brothers Inc. v. Brooks, 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

Mr. Orr brought his § 1983 action claiming a violation of procedural due process. Orr claimed his identified property was seized and forfeited in violation of his due process rights. Mr. Orr filed his § 1983 complaint within the one year statute of limitations. Mr. Orr claimed he was deprived of property without notice. In procedural due process claims, "the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Parratt v. Taylor, 451 U.S. 527, 537, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)("[W]e ... overrule Parratt to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment"). "[U]nauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful [state] postdeprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). Therefore, in order to state a procedural due process claim under § 1983, "the plaintiff must attack the state's corrective procedure as well as the substantive wrong." Meyers v. City of Cincinnati, 934 F.2d 726, 731 (6th Cir. 1991) (quoting Victory v. Walton, 721 F.2d 1062, 1066 (6th Cir. 1983), cert. denied, 469 U.S. 834, 105 S. Ct. 125, 83 L. Ed. 2d 67 (1984)). A plaintiff "may not seek relief under Section 1983 without first pleading and proving the inadequacy of state or administrative

processes and remedies to redress due process violations."

Orr has stated a deprivation of due process claim because he has alleged the inadequacy of state post-deprivation remedies. In his complaint, Orr attacked the Department of Safety and Homeland Security's failure to serve or alert him of the notice of seizure and forfeiture, he also attacked the process of judicial review for the correction of errors by administrative agencies. Orr stated a deprivation of due process claim because he alleged the inadequacy of state post-deprivation remedies. Specifically, Orr alleged the process of judicial review for the correction of such error is inadequate. In fact, Tennessee law provides a means by which individuals may challenge the orders of administrative agencies. The procedure and standard of review are set forth in the Uniform Administrative Procedure Act, codified at Tenn. Code Ann. § 4-5-322.

The Uniform Administrative Procedures Act provides "[a] person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review." Tenn. Code Ann. § 4-5-322(a)(1). This section specifies that review proceedings "are instituted by filing a petition for review in the chancery court" within sixty days after entry of the agency's final order." The Uniform Administrative Procedures Act provides for judicial review of an administrative agency's decision pursuant to the following standard:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the authority; (3) Made upon unlawful procedure; (4) Arbitrary or capricious ... or (5) Unsupported by evidence which is both substantial

and material in the light of the entire record. Tenn. Code Ann. § 4-5-322(h).

Orr was foreclosed of the right to seek judicial review of the agency's forfeiture order and to raise constitutional challenges in the chancery court on appeal.

D. DUE PROCESS CLAIM

Both the United States Constitution and the Constitution of Tennessee contain substantially similar limitations on the power of government entities to deprive persons of their life, liberty, and property. Section 1 of the Fourteenth Amendment provides, in part, that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Article I, § 8 of the Constitution of Tennessee states that "No man shall be ... disseized of his freehold, liberties or privileges, or ... deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." TENN. CONST., art. I, § 8. Tennessee courts have repeatedly stated that the procedural due process protections in both provisions are essentially the same. See Bailey v. Blount County Bd. of Ed., 303 S.W. 3d 216, 230 (Tenn. 2010); see also Whitehouse v. Whitley, 979 S.W. 2d 262, 269 (Tenn. 1989).

This controversy questions the constitutional sufficiency of notice.

Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the state in bringing

any issues as to its fiduciaries to a final settlement can be served only if interest or claims of individuals can somehow be addressed. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.

Against this interest of the State the Court must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by the Supreme Court holding that "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 58 L. Ed. 1368, 34 S. Ct. 779. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Court has not committed itself to any formula achieving a balance between these interest in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has often been held unnecessary as to nonresidents. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

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. Milliken v. Meyer, 311 U.S. 457, 85 L. ed 278, 61 S. Ct. 339, 132 ALR 1357; Grannis v. Ordean, 234

U.S. 385, 394, 58 L ed 1363, 1368, 34 S. Ct. 779; Priest v. Las Vegas, 232 U.S. 604, 58 L ed 751, 34 S. Ct. 443; Roller v. Holly, 176 U.S. 398, 44 L ed 520, 20 S. Ct. 410, The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, 234 U.S. 385, 58 L ed 1363, 34 S. Ct. 779, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, 176 U.S. 398, 44 L ed 520, 20 S. Ct. 410, supra, and cf. Goodrich v. Ferris, 214 U.S. 71, 53 L ed 914, 29 S. Ct. 580. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." American Land Co. v. Zeiss, 219 U.S. 47, 67, 55 L ed 82, 97, 31 S. Ct. 200; and see Binn v. Nelson, 222 U.S. 1, 7, 56 L ed 65, 68, 32 S. Ct. 1.

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare Hess v. Pawloski, 274 U.S. 352, 71 L ed 1091, 47 S. Ct. 632, with Wuchter v. Pizzutti, 276 U.S. 13, 72 L ed 446, 48 S. Ct. 259, 57 ALR 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home

notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication or certified mail sent to a incarcerated person's home address, is a reliable means of acquainting interested parties of the fact that their rights are before a tribunal. It is not an accident that the greater number of cases reaching the Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local mail. In weighing its sufficiency on the basis of equivalence with actual notice it should be regarded as a feint.

At this stage, no one contests the right of the State to have seized the property in the first instance or its ultimate obligation to return it. So rules restricting the substantive power of the States to take property are not implicated by this case. What is at issue is the obligation of the States to provide fair procedures to ensure return of the property when the State no longer has a lawful right to retain it.

E. CONCLUSION

Mr. Orr contends the Department of Safety and Homeland Security deprived him of due process by failing to provide him notice. The petition for a writ of certiorari should be granted.

Dated: 1/13/2020

Respectfully submitted,

Tom Eli Orr
Tom Eli Orr

APPENDIX-A