

No. 23-1110

IN THE
Supreme Court of the United States

GERALD S. OSTIPOW, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF THE
ESTATE OF ROYETTA L. OSTIPOW,

Petitioner,

v.

WILLIAM L. FEDERSPIEL,

Respondent.

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

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The property claimed by Petitioner Ostipow was sold in 2009 by mandate of a Saginaw County Circuit Court forfeiture order. Following two rounds of appeals in the Michigan courts, it was determined that some items of property were not properly adjudged forfeited, and a revised judgment was entered in 2016. But, this was seven years after sale of the forfeited property pursuant to the original court order.

With physical return of the property then manifestly impossible, it was incumbent upon Petitioner Ostipow to obtain a determination by the State court of the value of the improperly forfeited property, such that monetary compensation could be paid. But, Ostipow has instead sought “damages” from the Sheriff for not paying compensation in amounts unilaterally declared by Ostipow.

The United States Court of Appeals for the Sixth Circuit has *twice* affirmed summary judgment in favor of Respondent Sheriff Federspiel, while directing Ostipow to pursue evaluation and enforcement of his existing 2016 judgment in the State courts. The question is:

- I. Where payment of compensation to Petitioner Ostipow has been withheld only because Ostipow has refused to complete proceedings for determination of the judgment amount in State court, should Ostipow’s Petition be rejected for failure to present any constitutional violation by Respondent Federspiel that could serve as a vehicle to address the Fifth Amendment question that Ostipow proposes?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Gerald S. Ostipow was the Plaintiff below and the Appellant in the United States Court of Appeals for the Sixth Circuit.

Respondent Sheriff William L. Federspiel was the Defendant below and the Appellee in the United States Court of Appeals in the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Respondent is not a publicly owned corporation
or a subsidiary or affiliate of such.

RELATED PROCEEDINGS

1. In Re Forfeiture of a Quantity of Marijuana, No. 291993, Court of Appeals of Michigan. Judgment entered January 11, 2011.
2. In Re Forfeiture of a Quantity of Marijuana, No. 310106, Court of Appeals of Michigan. Judgment entered October 22, 2013.
3. Ostipow v. Federspiel, et al., No. 16-cv-13062, U.S. District Court for the Western District of Michigan. Judgment entered July 16, 2018.
4. Ostipow v. Federspiel, et al., No. 18-2448, United States Court of Appeals for the Sixth Circuit. Judgment entered August 18, 2020.
5. Ostipow v. Federspiel, No. 21-11208, U.S. District Court for the Eastern District of Michigan. Judgment entered May 2, 2022.
6. Ostipow v. Federspiel, No. 22-1414, United States Court of Appeals for the Sixth Circuit. Judgment entered September 29, 2023.

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COUNTER-STATEMENT OF THE CASE

Property of Gerald and Royetta Ostipow was seized in April of 2008, when their son was arrested by the Saginaw County Sheriff's Department for conducting an illegal marijuana growing operation on the Ostipows' premises. (R. 27-2, Page ID 983, Affidavit of Detective Butcher; R. 27-4, Page ID 992 – 1026 Saginaw County Sheriff's Department Crime Report). As acknowledged by Petitioner Gerald Ostipow, there has been no challenge "to the initial 2008 seizure". (Pet., p. 11).

In October 2008, the Saginaw County Prosecuting Attorney initiated forfeiture proceedings against the property. (R. 27-5, Page ID 1028 – 1037, Prosecutor's Forfeiture Complaint). Petitioner Ostipow's representation that the Sheriff's Department filed the forfeiture action (Pet., p. 4) is false.

In fact, Respondent William L. Federspiel had no involvement in the investigation, the seizure or the forfeiture proceedings at all. Federspiel was not elected Sheriff until November 2008, and he did not take office until January 1, 2009. (R. 27-10, Page ID 1081, Federspiel Affidavit, ¶ 2).

The prosecutor's forfeiture action was successful. Two weeks after taking office, Federspiel was confronted by a forfeiture order from the Saginaw County Circuit Court declaring that the "real and personal property" seized in conjunction with the criminal proceedings against the Ostipows' son "*is FORFEITED to the Saginaw County Sheriff's Department and shall be disposed of by said Department as provided by statute, MCL 333.7524*". (R. 27-7, Pg ID 1055, Order of Forfeiture, p. 2).

Significantly, at a subsequent hearing on May 26, 2009, the Saginaw County Circuit Court ruled that the Ostipows could stay execution of the forfeiture sale order by posting a \$150,000.00 bond during the pendency of their appeal. (R. 27-8, Page ID 1071-1072, 5/26/09 Hearing Transcript, pp. 14-15). But the Ostipows did not post the bond. (R. 27-3, Page ID 989, Gerald Ostipow dep., pp. 289; R. 27-9, Page ID 1077, Royetta Ostipow Dep., pp. 115-116). Therefore, at the specific direction of the county prosecutor and in compliance with the standing order of the Saginaw County Circuit Court, the forfeited property was sold in 2009. (R. 27-10, Page ID 1081, Federspiel Affidavit, ¶¶ 4-6; R. 27-11, Page ID 1085, Kelly Suppes Dep., ¶¶ 3-5)

Despite failing to take the necessary action to stay execution of the forfeiture order, the Ostipows found *partial* success with the substance of their appeal. In an opinion issued January 11, 2011, the Michigan Court of Appeals held that material questions of fact remained regarding whether the Ostipows had an “innocent owner affirmative defense” against the forfeiture. (R. 27-12, Pg ID 1095, Mich Ct. App. Opinion, 1/11/11, p. 8).

On remand, the Saginaw County Circuit Court found this defense unsupported by the record. But, the Michigan Court of Appeals subsequently held in an October 22, 2013, opinion that Royetta Ostipow (but *not* Gerald), could claim the innocent owner defense, such that “the trial court clearly erred in forfeiting *her* rights to the property at issue”. (R., 27-14, Pg ID 1109, Mich. Ct. App. Opinion, 10/22/13, p. 6, emphasis added.)

This resulted in a new “Final Judgment” from the Saginaw County Circuit Court confirming that “Gerald Ostipow’s entire interest in the real property shall be forfeited,” while Royetta was “entitled to compensation for her dower interest.” (Pet. App. 59a). Much of the personal property was still found to have been properly forfeited. (Pet. App. 59a – 60a). But a number of long guns and property located “within the outbuildings,” including an automobile and trailer, were declared not to be forfeited. (Pet. App. 60a – 63a).

The next day, August 3, 2016, the Ostipows’ attorney sent a letter to Sheriff Federspiel demanding that the Sheriff “physically assemble all the items previously taken to allow my clients to pick-up and/or arrange to have picked up these items.” Obviously, this was impossible, because the property had been sold seven years earlier by mandate of the State court’s original order that the property “shall” be sold.

Compensation could only be in the form an equivalent amount of money. But the Ostipows have never sought a determination by the State court of the compensatory amount to be paid. Instead, the Ostipows have initiated two successive actions claiming that Sheriff Federspiel has violated the Federal Constitution by not returning their property.

The first case ended with an August 18, 2020, when the United State Court of Appeals for the Sixth Circuit affirmed summary judgment in favor of Sheriff Federspiel against the Ostipows’ claims, with the admonition that the Ostipows could obtain clarification and enforcement of their existing State court judgment from the State court. (Pet. App. 48a).

But, the Ostipows did not do so. Instead, after doing nothing for seven months, the Ostipows' attorney sent Sheriff Federspiel a letter on March 22, 2021, unilaterally declaring that the Ostipows should be compensated \$49,666.69 for Royetta's dower interest in the realty, \$25,356.00 for the automobile and \$158,096.07 for the remaining personal property. No supporting evidence for these unilateral evaluations was provided.

Sheriff Federspiel has no legal authority to pay such an unsubstantiated, unilateral compensatory demand. There must be judicial determination of the compensatory amounts and approval of the disbursement through the County Commission on that basis. No payment was made.

But Gerald Ostipow (Royetta having passed away during the Sixth Circuit proceedings), did not return to the Saginaw County Circuit Court to seek clarification of the compensatory amount he was to be paid or enforcement of the judgment. Instead, Gerald filed suit against Sheriff Federspiel in the Shiawassee County Circuit Court, again asserting the federal Fifth Amendment and substantive due process claims, together with state-law inverse condemnation and "restitution" claims.

In light of the Sixth Circuit having already rejected the federal claims, with the admonition that their remedy should be through clarification and enforcement of their existing judgment from the Saginaw County Circuit Court, Sheriff Federspiel removed the action back to the federal district court. For its part, the district court again granted summary judgment in favor of Sheriff Federspiel. The Sixth Circuit affirmed, while reminding Ostipow that he holds a state-court judgment "that he can

enforce in state court.” As the Sixth Circuit also observed the judgment does not tell Federspiel “the amount owed,” and it does not violate due process “to hold off on paying another until it is clear how much is owed”. (Pet. App. 6a, 9a-10a).

ARGUMENT FOR DENYING PETITION

Petitioner Ostipow proposes that the Sixth Circuit’s decision conflicts with the Third Circuit decision in *Frein v Pennsylvania State Police*, 47 F.4th. 247 (3rd Cir. 2022). Ostipow contends that the *Frein* decision should control the result here. But, the facts of *Frein* and the present case are fundamentally different.

In both *Frein* and the present case, law enforcement officers legally seized property of a criminal suspect’s parents in the course of arresting the suspect for crimes of which the suspect was proven guilty. But the similarities end at that point.

In *Frein*, the government held the parents’ property for purposes of the criminal prosecution, but never sought forfeiture. The government simply kept the property and never returned it. As the *Frein* court explained, [i]f the government wants to keep the property after the conviction becomes final, it needs some justification”. *Frein*, 47 F. 4th at 253. The Third Circuit recognized in *Frein* that criminal or civil forfeiture would create such justification. *Id.* But these were not pursued. The property was simply kept.

In the present case, however, the property of the Ostipows was made the subject of forfeiture proceedings

by the Saginaw County prosecutor. This resulted in a January 13, 2009 “Order of Forfeiture” that declared the “*real and personal property is FORFEITED to the Saginaw County Sheriff’s Department and shall be disposed of by said Department as provided by statute, MCL 333.7524*”. (R. 27-7, Pg ID 1055, Order of Forfeiture, p. 2).

Certainly, the Ostipows appealed the forfeiture order. Seven years later, after two rounds in the Michigan appellate courts, it was determined that Royetta Ostipow (but *not* Gerald) had an “innocent owner” defense requiring a *partial* revision of the original forfeiture order. (R. 27-15, Pg ID 1113, Final Judgment, 8/2/16, p. 2; Pet. App. 58a).

But under Michigan law, “an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals orders otherwise.” Mich Court Rules 7.209(A)(1). The State court had afforded the Ostipows the option to obtain a stay by posting a bond. (R. 27-7, Page ID, 1071-1072, Transcript, pp. 14-15). The Ostipows never posted such bond. (R. 27-3, Page ID 989, Gerald Ostipow Dep., p. 289; R-27-9, Page ID 1077, Royetta Ostipow Dep., pp. 115-116).

This left Respondent Sheriff Federspiel subject to the original order the court that the Ostipows former property “shall” be disposed as required by the forfeiture statute.

The later partial reversal of the forfeiture order is irrelevant. Under Michigan law, “parties to litigation must follow rulings and order of a trial court acting within its jurisdiction, unless and until those rulings and orders are

stayed or reversed.” *Davis v. City of Detroit Financial Review Team*, 296 Mich. App. 568, 623, 821 N.W.2.d. 896, 923 (2012). “A party must obey an ordered entered by a court with proper jurisdiction, *even if the order is clearly incorrect*, or the party must face the risk of being held in contempt and possibly being ordered to comply with the Order at a later date.” *In Re Contempt of Dudzinski*, 256 Mich. App. 96, 110, 667 N.W.2.d. 68, 77 (2003), emphasis added. “A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal.” *Porter v. Porter*, 285 Mich. App. 450, 465, 776 N.W.2.d. 377, 387 (2009).

Likewise, this Court has declared that “all orders and judgments of Court must be complied with *promptly*.” *Maness v. Meyers*, 419 U.S. 449, 458 (1975), emphasis added. “If a person to whom a court directs an order believes that the order is incorrect, the remedy is to appeal, but, absent a stay, he must comply *promptly* with order pending appeal.” *Id.*, emphasis added.

Contrary to the defendants in *Frein*, Sheriff Federspiel did not “retain” property without justification. Respondent Federspiel properly complied with a court order. It was the Ostipows who failed to follow through with the bond option afforded them by the State court. This left Federspiel no other choice but to take the action directed by the order.

The ongoing delay of compensation, again, results entirely from inaction by the Ostipows. As Petitioner Ostipow has been admonished twice by the Sixth Circuit, he already has an enforceable judgment specifying what property was wrongly included in the State court’s

original order. Obviously, none of the physical property can be returned. It is the obligation of Petitioner Ostipow to obtain a judicial determination via evidentiary proceedings of an equivalent monetary compensation. (Whether Royetta Ostipow's contingent dower interest is compensable at all, given that she pre-deceased Gerald, also remains an issue of State law for determination).

As Petitioner Ostipow has been told by the Sixth Circuit, "Michigan law provides numerous mechanisms to assist judgment creditors and debtors in clarifying and enforcing a judgment," and "it is the State court's duty to oversee and ensure the satisfaction of the Ostipows' Judgment." (Pet App. 48a.) But, so far, Ostipow "has seemingly chosen against doing so," and Respondent Federspiel does not violate the Constitution to "hold off on paying . . . until it is clear how much is owned." (Pet. App. 6a, 10a.) The property was "disposed" in 2009, by court order, following the Ostipows' failure to exercise their bond option to obtain a stay. To the extent that compensation has not yet been paid following revision of the judgment, this has been entirely the fault of inaction by the Ostipows, not any unconstitutional action by Respondent Federspiel.

As the First Circuit has applicably observed, "[w]e cannot be sympathetic to a party who elects to forego the hearing provided him, and then complains he received none." *Roslindale Cooperative Bank v. Greenwald*, 38 F.2d 258, 261 (1st Cir. 1981). There is neither basis nor justification for review of Petitioner Ostipow's case by this court.

CONCLUSION

Petitioner Ostipow misrepresents his case and asks this Court to resolve a question that the record does not present. His petition should be denied.

Respectfully submitted,

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