

**IN THE COURT OF APPEALS  
STATE OF GEORGIA**

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**CASE NO. A23A1301**

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**CALVIN D. WELLS, et al.,**

**Appellants,**

**v.**

**STATE OF GEORGIA, ex rel. JOSEPH K. MULHOLLAND,**

**Appellee.**

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**BRIEF OF APPELLANTS**

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## INTRODUCTION

This case addresses what happens when the State of Georgia seizes a citizen’s property for civil asset forfeiture purposes, loses or abandons its civil asset forfeiture claim, and then refuses to return the property seized under a claim that it is now being held as “evidence” in a criminal investigation. In situations such as these, the State often holds Georgia citizens’ property without ever actually initiating a criminal investigation or indictment for years. And it does so without ever articulating why the property continues to be held, even in circumstances where the property held can easily be copied and preserved by the State for any potential future action. In essence, this case asks whether the State is permitted under any and all circumstances to take private property indefinitely based on an unsubstantiated assertion that the property might be evidence in some future criminal action. The answer to this question, especially based on the record in this case, is “NO.”

In December 2021, the State seized C&W Recycling & Farms, LLC’s business premises in Baker County, Georgia, and all the property inside it—literally padlocking the yard closed. No arrests were made nor were any criminal charges brought at the time of the seizure, and no arrests or charges have come since. The State did attempt to forfeit some of the seized property through a civil action, *see* O.C.G.A. § 9-16-12, but dismissed that case in March 2022 in the face of a motion to dismiss filed by C&W, Calvin Wells, and Belinda Wells (collectively,

“Claimants”) and an answer filed by a secured creditor asserting its interest in the property the State was trying to forfeit.

Despite the dismissal of the forfeiture case, the State has obstinately refused to return all of the seized property, continuing to hold equipment—a computer, an iPad, and a video security system—and files necessary for Claimants to conduct their business. The State’s sole basis for not returning that property is the State’s assertion it needs the property for a criminal investigation, and the trial court allowed the State to retain the property on that basis. However, the State has not shown it has any right to continue to hold property when the forfeiture case against that property resolved in favor of Claimants, or even attempted to show how retaining the physical property—all of which can be forensically scanned or copied—is necessary for evidentiary purposes. The State has not shown these things because it cannot. The State’s unjustified retention of Claimants’ property is punitive and contrary to law. This Court should reverse the trial court and order all the seized property returned.

### **JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this case pursuant to O.C.G.A. § 5-4-34(a). Jurisdiction lies in this Court, as opposed to the Georgia Supreme Court, pursuant to Article VI, § V, ¶ III, and § VI, ¶ III, as this appeal does not arise in a case reserved to the Supreme Court or conferred on other courts.

This appeal of the trial court’s denial of Claimants’ Motion for Immediate Release of Property (the “Motion for Immediate Release”) is timely. The trial court originally entered its order denying the Motion for Immediate Release on October 27, 2022. (V1-143.) However, neither Claimants nor their counsel received notice of the entry of that order, and there is no indication on the docket that order was ever served on anyone. Rather, Claimants’ counsel first learned of the order on February 14, 2023, when counsel’s assistant happened to review the docket ahead of the filing of a Notice of Leave of Absence and noticed the trial court had entered the order.

On February 23, 2023, Claimants filed a Motion to Set Aside and Re-Enter Order so they would have a period in which to file a notice of appeal.<sup>1</sup> (V1-147.) On March 6, 2023, the trial court granted the Motion to Set Aside and Re-Enter Order, setting aside the order from October 27, 2022, and re-entering it as of March 6, 2023. (V1-151 to 152). Claimants timely filed their notice of appeal on March 8, 2023.<sup>2</sup> (V1-1.)

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<sup>1</sup> See *Robinson v. Kemp Motor Sales, Inc.*, 185 Ga. App. 492, 493–94 (1988) (“[W]here no notice is sent by the trial court or by the clerk to the losing party, ... an action may be brought under [OCGA § 9-11-60(d)] to set aside the earlier judgment; and upon a finding that notice was not provided as required by [OCGA § 15-6-21(c)], the motion to set aside may be granted, the judgment re-entered, and the thirty-day period within which the losing party must appeal will begin to run from the date of the re-entry.” (alteration in original)).

<sup>2</sup> See O.C.G.A. § 5-6-38.

**ENUMERATION OF ERRORS**

A. The trial court erred in holding the State could retain possession of Claimants' property that was the subject of the dismissed forfeiture case after that case concluded in Claimants' favor.

B. The trial court erred in holding the State could retain possession of Claimants' property as "evidence" where the State made no showing that continued retention of the physical property, as opposed to digital scans, copies, or other substitutes, was necessary to any ongoing criminal investigation.

## STATEMENT OF THE CASE

### **I. Material Facts and Proceedings Below**

Claimants owned and operated a secondary-metals recycling business in Arlington, Baker County, Georgia. On December 14, 2021, the Baker County Sheriff's Office executed a warrant and seized Claimants' property at the facility. The State seized the real estate (including locking the yard to prevent access), heavy equipment, various scrap secondary metals, an iPad, a computer, Claimants' business files, and a video security system.

On February 11, 2022, the State filed an *in rem* forfeiture complaint against some of the seized property. (V1-6.) Named as defendants were "15 ACRES OF LANDTOGETHER [sic] WITH ALL FIXTURES AND APPURTENANCES THEREON," two industrial scales, a front-end loader, an excavator, "A LARGE QUANTITY OF ALUMINIUM [sic] RIMS OF CARS AND SUVS," "A QUANTITY OF SCRAP AND SALVAGE VEHICLES," "ONE HP PAVILLON [sic] 23 ALL-IN-ONE COMPUTER," "ONE SILVER IPAD," "AND OTHER SCRAPSECONDARY [sic] METALS." (*Id.*)<sup>3</sup>

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<sup>3</sup> The State did not identify the property in the body of the Complaint, instead just referring to the style of the case. (V1-7 ("The properties sought to be forfeited are described in the heading of this Complaint as Defendant *in rem*....").)

On March 23, 2022, First State Bank of Blakely, which held liens on Claimants' property, filed an answer asserting its interest in the property. (V1-21.) On March 28, 2022, Claimants timely filed their own answer (V1-89) and a motion to dismiss (V1-107). Claimants argued the Complaint failed to identify the property subject to forfeiture (e.g., "OTHER SCRAPSECONDARY METALS" does not "describe the property with reasonable particularity," *see* O.C.G.A. § 9-16-12(a)), failed to set out the elements of an offense supporting a forfeiture, failed to connect any alleged wrongdoing to the property the State sought to forfeit, and proposed a forfeiture that would violate the excessive fines clauses of the United States and Georgia Constitutions. (V1-107 *et seq.*)

The next day, the State filed a Notice of Voluntary Dismissal. (V1-120.) As a result, on March 31, 2022, the State unlocked Claimants' business premises, returning to them some of the seized property. However, the State refused to return the iPad, the computer, Claimants' paper files, or the video security system. Because the secondary-metals recycling industry is heavily regulated, with significant recordkeeping and reporting requirements, *see* O.C.G.A. §§ 10-1-353, -359.5, the State's refusal to return these items has significantly harmed Claimants' ability to conduct their business.

After unsuccessfully attempting to attain the release of the property through discussions with the District Attorneys' Office for the South Georgia Judicial

Circuit, Claimants filed the Motion for Immediate Release on April 26, 2022. (V1-122.) Claimants sought the release of the property on two grounds: (1) the property that was named as a defendant in the forfeiture action (the iPad and the computer) should be returned under O.C.G.A. § 9-16-18(b) because the forfeiture action resolved in Claimants' favor; and (2) all the property should be returned under O.C.G.A. § 9-16-7 because the State failed to prosecute a forfeiture action against it within the time required by law and the State has no evidentiary need to retain the property because it could analyze it, make copies, and return the hardware and originals to Claimants. (V1-122 *et seq.*)

The Motion for Immediate Release was fully briefed, and the trial court held a hearing on July 6, 2022. The State's response to the Motion for Immediate Release focused entirely on the iPad and the computer and only addressed Claimants' argument under O.C.G.A. § 9-16-7; the State did not even acknowledge the other withheld property or address the effect of O.C.G.A. § 9-16-18. (*See V1-130 et seq.*) At the hearing, the State acknowledged it was conducting analyses of Claimants' property, but asserted staffing issues were making it take a long time. (Transcript at 14:4–7.) It is worth noting that at the time of the hearing, the State had already been

in possession of Claimants' property—which Claimants need for their business—for 204 days, or nearly seven months.<sup>4</sup>

On October 27, 2022, the trial court entered its order denying the Motion for Immediate Release, holding, “the personal property is being held as evidence as part of an active criminal investigation of Claimants. Said personal property was seized pursuant to a search warrant issued by the Magistrate Court of Baker County.” (V1-143.) As recounted in the Jurisdictional Statement, above, Claimants did not receive notice of this order and did not learn of the order until months after it was entered, and so they filed the Motion to Set-Aside and Re-Enter Order. (V1-147.) That motion was granted and the order re-entered on March 6, 2023. (V1-151.) This appeal timely follows.

## **II. Method of Preservation of Errors**

Claimants have preserved the errors raised in this appeal through the Motion for Immediate Release and related briefing and in their argument at the hearing on the Motion for Immediate Release held on July 6, 2022.

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<sup>4</sup> As of the filing of this brief, the State has deprived Claimants of their property for 503 days.

## **ARGUMENT**

### **I. Standard of Review**

The facts in this appeal are not in dispute and the issues are questions of law. Accordingly, this Court should apply a *de novo* standard of review. *See Bristol Consulting Grp., Inc. v. D2 Property Grp., LLC*, No. A22A1209, slip op. at 13 (Ga. Ct. App. Feb. 22, 2023).

### **II. The State Cannot Retain Property That Was a Defendant in a Forfeiture Case After That Case Has Resolved in Favor of Claimants**

The trial court erred in holding the State could continue to maintain possession of Claimants' iPad and computer, both of which the State named as defendants in the forfeiture case, after the forfeiture case was dismissed. When a forfeiture case resolves in favor of a claimant, O.C.G.A. § 9-16-18(b) requires the court to order the property be returned to the claimant. Specifically, that paragraph provides: "On entry of judgment for a person claiming an interest in property that is subject to a civil forfeiture proceeding, the court shall order that the property or interest in the property be released or delivered promptly to that person free of liens and encumbrances." While the statute uses the term "entry of judgment" and here the case was dismissed, the statutory language must be read in the context of the statutory scheme as a whole, keeping in mind that the forfeiture statutes should be construed narrowly and against State retention of property. *See Dept. of Community*

*Health v. Houston Hosps., Inc.*, 365 Ga. App. 751, 774 (2022) (“[E]ven if words in a statute are apparently plain in meaning, they ‘must not be read in isolation and instead, must be read in the context of the [statute, rule, or] regulation as a whole.’” (second alteration in original)); *Gen. Motors Acceptance Corp. v. State*, 279 Ga. 328, 331 (2005) (“[B]ecause forfeiture of property is disfavored, the statutory scheme must be ‘strictly construed and limited.’”). Because there is no provision in the forfeiture code expressly addressing what should happen to seized property in scenarios like this case—where the State files a forfeiture case but dismisses it before a judgment is entered—O.C.G.A. § 9-16-18(b) should be read broadly to encompass all scenarios where the forfeiture case resolves in the claimants’ favor. To hold otherwise would invite the absurd result of allowing the State to hold property forever so long as it files, and then promptly dismisses, a forfeiture complaint against the property. The forfeiture statutes are intended to “protect the interests of innocent property owners,” *see State v. Alford*, 264 Ga. 243, 245 (1994), and this Court should not embrace an interpretation so completely at odds with that purpose. *See de Paz v. de Pineda*, 361 Ga. App. 293, 298–99 (2021) (“[T]he judiciary has the duty to reject the construction of a statute which will result in unreasonable consequences or absurd results not contemplated by the legislature.”).

In its briefing and argument below, the State never contested that O.C.G.A. § 9-16-18(b) required the return of the iPad and computer, so it has waived the ability

to argue that now. *See, e.g., Roberts v. Farmer*, 127 Ga. App. 237, 241 (1972) (“[I]t should be noted that this contention was not made in the trial court and therefore cannot be considered upon appeal.”). The State’s sole argument against the release of any the withheld property is that the State is entitled to keep it as “evidence” in a criminal investigation.

The State’s argument is based on O.C.G.A. § 9-16-7(c). Under normal circumstances, if the State fails to bring a forfeiture case against seized property within sixty days of the seizure of the property, the State must return the property to its owner. *See* O.C.G.A. § 9-16-7. However, the State may retain seized property even if the State does not file a forfeiture action when the property “is being held as evidence.” O.C.G.A. § 9-16-7(c). On its face, § 9-16-7(c) only applies to situations where the State *does not file* a forfeiture action. The evidence exception therefore does not apply to the iPad and the computer, and it does not override the command of § 9-16-18(b) that property *must* be released where a forfeiture case is filed and resolves in favor of a claimant.

Here, the State seized the iPad and the computer, it filed a forfeiture complaint against them, and it dismissed the forfeiture complaint. Consequently, O.C.G.A. § 9-16-18(b) requires the State to return the iPad and the computer. The Court should order that relief.

### **III. The State Cannot Withhold the Property as “Evidence”**

The State must also return Claimants’ files and the video security system, which the State did not name as defendants in the forfeiture case. Neither of those items are contraband per se, and the State has no statutory basis to continue holding them. The State practically admits as much, as its argument below focused entirely on the iPad and the computer—the State never argued it had any basis for withholding the files and the video security system. (*See* V1-132 to 133 (“[T]he State contends that Claimants are not entitled to return of the two items [referring to the iPad and the computer]...”); *id.* at 133 (“[T]he State retains the authority to hold the two items as evidence.”); Transcript at 12:5–7 (“And that is what this—the iPad and the computer are about.”).) Accordingly, the State has waived any opposition to the return of the files and the video security system.

In addition to the waiver, the law also compels the return of the files and the video security system. The State must return seized property to its owner unless the property is “contraband per se, that is, property ‘the possession of which, without more, constitutes a crime,’” or unless the State can point to lawful authority allowing it to retain the property. *See Norman v. Yeagar*, 335 Ga. App. 470, 473 (2016). Here, none of the retained property—the iPad, the computer, the files, or the video security system—are contraband per se, so the State must point to some authority allowing it to hold onto them. And it can’t.

Below, the State contended it was entitled to retain the property<sup>5</sup> under O.C.G.A. § 9-16-7(c), which, as discussed above, allows the State to retain property “being held as evidence.” As already argued, that statute does not allow the State to retain the iPad and the computer, which must be returned pursuant to O.C.G.A. § 9-16-18(b). And it also cannot be the basis for the State’s retention of any of the property because there is no need for the State to keep these specific, physical pieces of property as evidence.

In making this argument, Claimants do not contend the State must forego the opportunity to search through the computer, the iPad, the video security system, or the files, so long as such a search comports with constitutional limitations. The statute allows the State to retain property “being held as evidence.” But “being held as evidence” must have a limit—the State cannot arbitrarily declare that a person’s property is “evidence” and thus subject to indefinite seizure. *See generally Morgan v. State*, 323 Ga. App. 853, 856–57 (2013) (“Property ownership in the United States is a fundamental constitutional right, and Georgians are entitled to the procedural safeguards enshrined by our state and federal constitutions before the government may lawfully deprive them of their property rights.”). The harm from such a practice is on display in this case, where the State has effectively prevented the Claimants

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<sup>5</sup> Again, the State’s arguments below focused solely on the iPad and the computer. The State never addressed Claimants’ files or the video security system.

from doing business by holding the property without justification for 16 months. The State cannot impose such unfettered punishment and obstinately withhold the return of property—none of which is contraband per se and none of which has been shown to have been involved in any criminal activity—when it can make copies and perform analyses of the property that will provide the State with all the “evidence” that may be drawn from the property. Put another way, O.C.G.A. § 9-16-7(c) should be interpreted to require the State to show that it has a legitimate need to retain the property as evidence. So limited, the statute would allow the State to obtain evidence in its investigations and criminal cases and protect property owners from suffering the destructive effects of the State retaining their property indefinitely without justification.

Moreover, such a rule is not without support in the law. Even outside the forfeiture context, the State is not allowed to seize and hold all the property it wants simply by incanting the word “evidence.” *Cf.* O.C.G.A. § 17-5-50 (discussing scenarios in which property seized as “unlawfully obtained” must be returned to its rightful owner). Instead, the law contemplates that, given the preeminent importance of private property rights, there will be scenarios in which the State may have to use copies, photographs, or other substitutes for seized materials at trial. *See* O.C.G.A. § 17-5-50(c) (“Photographs, video tapes, or other identification or analysis of the property [returned to its owner]...shall be admissible at trial in lieu of the original

property.”). The State’s preference for what it wants to use as evidence does not trump the rights of property owners.

Application of a properly limited rule here compels the conclusion that property rights prevail over the State’s interest. The State can analyze and copy the data on the iPad, computer, and video security system, and make scans or copies of the files, and then return the hardware and originals to Claimants. The law considers such copies and data retrievals the same as originals for evidentiary purposes. *See* O.C.G.A. § 24-10-1001(3) (defining “Original” to include “data...stored in a computer or similar device” presented via “any printout or other output readable by sight, to reflect the data accurately”); O.C.G.A. § 24-10-1003 (addressing the admission of “duplicates”); *Lester v. Groves*, 162 Ga. App. 590, 592 (1982) (holding a photocopy may be admitted into evidence “where there is proof that the copy is identical to the original”). Following that course, the State will lose *nothing*, and Claimants can return to business. Accordingly, as the State has shown no reason why it has any need for the hardware and originals, the Court should require the State to return all of the seized property.

**CONCLUSION**

For the reasons set forth above, Claimants request the Court reverse the trial court and order the iPad, computer, files, and video security system returned to Claimants.<sup>6</sup>

Counsel for Appellant hereby certifies this Brief does not exceed the word count limit imposed by Court of Appeals Rule 24(f).

*[Signature on Following Page]*

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<sup>6</sup> Claimants suggested below that the court order the State to release the property within a limited amount of time to give the State time to conduct its analyses, make copies, etc. As the State has now been in possession of Claimants' property for nearly a year and a half, Claimants submit the State has had sufficient time, and the Court should order the property released immediately.

Respectfully submitted this 1st day of May, 2023.

/s/ Patrick N. Silloway

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2023, I served a copy of the foregoing **Brief of Appellants** upon counsel of record via email to:

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I certify that there is a prior agreement with the State's counsel to allow documents in a PDF format sent via email to suffice for service.

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