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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1181**

Jayson Jammer Moore,
Respondent,

vs.

2004 Chevrolet Pickup Truck,
Appellant.

**Filed August 26, 2019
Reversed and remanded
Connolly, Judge**

Wright County District Court
File No. 86-CV-17-2636

Kirk M. Anderson, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for respondent)

Thomas N. Kelly, Wright County Attorney, Greg T. Kryzer, Assistant County Attorney,
Buffalo, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and
Peterson, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the summary judgment granted to respondent owner-driver in this driving-while-impaired (DWI) forfeiture proceeding, arguing that the forfeiture statute was not unconstitutional as applied to respondent. Because recent caselaw indicates that delaying the hearing on respondent's demand for judicial determination of the forfeiture pending resolution of the criminal charges against him did not deprive respondent of due process, we reverse and remand.

FACTS

In May 2017, respondent Jayson Moore was arrested for DWI, served with a notice of seizure and intent to forfeit his vehicle, and charged with felony DWI; he also filed a demand for judicial determination of the forfeiture. The criminal matter was concluded in February 2018, when respondent pleaded guilty and was sentenced to 54 months in prison; the sentence was stayed, and respondent was placed on probation.

Respondent filed a memorandum of law challenging the constitutionality of the forfeiture statute, Minn. Stat § 169A.63 (2016), and asked the district court to dismiss the forfeiture. He did not notify the attorney general of his challenge. Appellant moved for summary judgment.

In April 2018, this court released *Olson v. One 1999 Lexus*, 910 N.W.2d 72 (Minn. App. 2018) (holding that the forfeiture statute did not violate procedural due process on its face but did violate procedural due process as applied to both the vehicle's owner and the

arrested driver, who were denied post-seizure judicial determination of the forfeiture for more than 18 months), *review granted* (Minn. June 19, 2018) (*Olson I*).

Respondent filed a second memorandum challenging the constitutionality of Minn. Stat § 169A.63, again without notifying the attorney general, and the district court held a hearing on appellant's summary-judgment motion.

The district court denied appellant's motion, granted summary judgment sua sponte to respondent, who had not moved for it, and ordered the pickup truck returned to respondent. The appeal from that summary judgment was stayed until the supreme court's filing of *Olson v. One 1999 Lexus*, 924 N.W.2d 594 (Minn. 2019) (affirming this court's determination that Minn. Stat § 169A.63, while not constitutionally invalid on its face, violated the due-process rights of the purportedly innocent owner, but reversing the determination that the statute violated the due-process rights of the arrested and convicted driver) (*Olson II*).

Appellant relies on *Olson II* to challenge the district court's determination that the statute violated respondent's due-process rights and was unconstitutional as applied to him.

D E C I S I O N

On an appeal from summary judgment, this court reviews de novo whether the district court properly applied the law and whether any genuine issues of material fact preclude summary judgment. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

As a threshold matter, appellant argues that respondent's failure to notify the Minnesota Attorney General of his challenge to the constitutionality of a Minnesota statute deprived both the district court and this court of jurisdiction.

A party that files . . . [a] document drawing into question the constitutionality of a . . . state statute must promptly: (1) file a notice of constitutional question stating the question and identifying the document that raises it, if: . . . a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity; and (2) serve the notice and document . . . on the Minnesota Attorney General if a state statute is challenged . . . to afford the Attorney General an opportunity to intervene.

Minn. R. Civ. P. 5A; *see also* Minn. R. Civ. P. 5A 2007 advisory comm. note (“[I]n many instances intervention will not be sought until the litigation reaches the appellate courts.”).

While we agree with appellant that respondent's violation of Minn. R. Civ. P. 5A could have resulted in a dismissal of his complaint by the district court or a dismissal of his appeal by this court, we address the merits of the appeal for the sake of completeness and in the interest of justice under Minn. R. Civ. App. P. 103.04 (“The appellate courts may reverse, affirm, or modify the judgment or order appealed from or take any other action as the interest of justice may require.”).

The district court based its conclusion that the statute was unconstitutional as applied to respondent on *Olson I*, quoting it for the proposition that “the administrative and fiscal burden of requiring a prompt, meaningful judicial review of the initial and continued validity of a prehearing seizure, as required by other vehicle-forfeiture statutes, is minimal.” *Olson I*, 910 N.W.2d at 80. The owner and the driver in *Olson* waited 18 months for judicial review; respondent here waited 11.

But in *Olson II*, the supreme court made a distinction that this court had not made between the two owners of the seized vehicle, one of whom was purportedly innocent while the other was the arrested and convicted driver.

Because [the driver's] private interest in the [vehicle] is less significant, because the State's interest [in keeping drunk drivers off the road] is significant, and because the pre-seizure process for determining whether the ultimate forfeiture is authorized is reliable, we hold that while [the driver] waited for 18 months for a hearing on the demand for judicial determination pending the resolution of her criminal charges, Minn. Stat. § 169A.63, subd. 9(d), is constitutional as applied to her.

Olson II, 924 N.W.2d at 611-12. Respondent's private interest in his vehicle was more significant than that of the driver in *Olson II* because, unlike her, respondent did not have three prior DWI incidents in the last decade, so that factor favors respondent. But the state's interest in keeping drunk drivers off the road is equally significant here, and the pre-seizure process for determining that the forfeiture was authorized is equally reliable, so those two factors favor appellant. Thus, the reasoning of *Olson II* applies and supports reversing the grant of summary judgment.

Reversed and remanded.