STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2177

Joshua Scott Rizzs,
Appellant,

vs.

One 2002 Black Lincoln Continental,
VIN No. 1LNHM87A42Y69616, MN Plate No. RED 283,
Respondent.

Filed August 18, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-08-5043

Rory Patrick Durkin, Giancola Law Office, PLLC, 403 Jackson Street, Suite 403, Anoka, MN 55303 (for appellant)

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Johnson, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Joshua Scott Rizzs challenges the district court's summary judgment order forfeiting his vehicle to the state because of appellant's participation in a drive-by shooting. Appellant argues that there are genuine issues of material fact that preclude

summary judgment and that the district court erred in its application of the law. We affirm.

D E C I S I O N

Appellant pleaded guilty to aiding and abetting a drive-by shooting in violation of Minn. Stat. §§ 609.66, subd. 1e, 609.05 (2006). The state seized appellant's vehicle and appellant made a demand for judicial determination of forfeiture under Minn. Stat. § 609.5318 (2006). Counsel representing the respondent property moved for summary judgment. The district court granted respondent's motion for summary judgment, finding that there were no issues of material fact and that appellant's vehicle was subject to forfeiture under Minn. Stat. § 609.5318.

On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists when "reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The nonmoving party

"may not rest upon mere averments or denials" of the pleadings "but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

The following facts are undisputed: On November 15, 2006, appellant and two friends, Ankit Sehgal and Matthew Fleming, went looking for J.K. in appellant's vehicle in order to get J.K. to confess to sexually assaulting appellant's girlfriend. Appellant was driving his vehicle, Mr. Sehgal was seated beside appellant in the front passenger seat, and Mr. Fleming was sitting in the back seat. The three men brought a bat, a cricket paddle, and a loaded 9mm firearm into the car for self-defense and in order to facilitate J.K.'s confession. Appellant and his friends eventually located J.K. traveling in J.K.'s vehicle. Appellant chased J.K.'s vehicle, and during the chase, Mr. Sehgal shot at the vehicle.

A vehicle is subject to forfeiture if the prosecutor establishes by clear and convincing evidence that the vehicle was used in violation of Minn. Stat. § 609.66, subd. 1e, the drive-by shooting statute. Minn. Stat. § 609.5318, subd. 1. A conviction of the owner under the drive-by shooting statute creates a presumption that the vehicle was used in a drive-by shooting. *Id.* Here, therefore, there is a presumption that appellant's vehicle was used in the drive-by shooting and is subject to forfeiture.

But a vehicle is subject to forfeiture "only if the registered owner was privy to the act upon which the forfeiture is based, [or] the act occurred with the owner's knowledge or consent . . . ." *Id.*, subd. 5(b). This so-called "innocent owner defense" is an affirmative defense. *See Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 520 (Minn. 2007) (discussing the innocent owner defense in section 609.5311).

Appellant argues that a genuine issue of material fact exists as to whether he was privy to the drive-by shooting because he testified at his guilty plea hearing that he did not want the firearm in his car, did not plan for his passenger to shoot the firearm, and stopped the vehicle immediately after his passenger shot at J.K. We conclude that appellant has not established the existence of a genuine issue for trial.

Aiding and abetting liability applies when a "person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. And one is privy who is "[m]ade a participant in knowledge of something private or secret." *The American Heritage Dictionary* 1422 (3d ed. 1992). It is undisputed that (1) it was appellant's idea to find J.K.; (2) appellant's vehicle was used in the shooting; (3) appellant's firearm was used in the shooting; (4) appellant's girlfriend was the alleged assault victim; (5) appellant was driving the vehicle, and (6) appellant pleaded guilty to aiding and abetting a drive-by shooting. Viewing the evidence in the light most favorable to appellant, we conclude that appellant was privy to the drive-by shooting and that reasonable people could not agree otherwise.

Appellant next argues that a genuine issue of material fact exists as to whether the drive-by shooting occurred with his knowledge and consent because he testified at his guilty plea hearing that he never planned for Mr. Sehgal to shoot at J.K. But forfeiture is permitted if appellant is either privy to, has knowledge of, or consents to, the crime of drive-by shooting. Minn. Stat. § 609.5318, subd. 5(b). Because we conclude that appellant was privy to the crime of drive-by shooting, we need not reach his arguments regarding knowledge and consent.

Appellant also argues that because the district court failed to mention the evidence presented by him—two transcripts and two police reports—in its summary judgment order, the court improperly weighed evidence and made improper credibility determinations. We disagree. After a thorough review of the record, we conclude that the evidence, viewed in the light most favorable to appellant, establishes that appellant participated in the drive-by shooting and was privy to the crime. Moreover, on appeal we do not presume error. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997).

Because there are no genuine issues of material fact for trial and because the district court did not err in concluding that appellant's car was subject to civil forfeiture under Minn. Stat. § 609.5318 as a matter of law, we affirm.

Affirmed.