

A06-1507
A06-1757

STATE OF MINNESOTA

IN COURT OF APPEALS

David Torgelson,

Respondent,

vs.

Real Property Known As 17138 880th Avenue, Renville County, Minnesota,

Defendant.

Kent Vernon Feigum,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

JOHN E. MACK

Mack & Daby P.A.
26 Main Street
New London, Minnesota 56273

ATTORNEY FOR APPELLANT

MIKE HATCH

Minnesota Attorney General

JAMES B. EARLY

Assistant Attorney General

445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 296-8429 (Voice)
(651) 282-2525 (TTY)DAVID J. TORGELSON
Renville County Attorney
Commerce Building
P.O. Box D
Olivia, Minnesota 56277

ATTORNEYS FOR RESPONDENT

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LEGAL ISSUE

Is Minnesota's drug forfeiture statute unconstitutional insofar as it permits the forfeiture of a person's homestead property?

The district court ruled in the negative.

Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986)

State v. Fingal, 666 N.W.2d 420 (Minn. Ct. App. 2003), *rev. denied*
(Minn. Oct. 21, 2003)

State v. Rhude and Fryberger, 266 Minn. 16, 123 N.W.2d 196 (1963)

Independent School District of White Bear Lake v. The City of White Bear Lake, 208 Minn. 29, 292 N.W. 777 (1940)

STATEMENT OF THE CASE

The county attorney commenced an *in rem* forfeiture action against the defendant real estate property. The owner, appellant Kent Feigum, interposed an answer and claimed that the property was exempt from forfeiture under Minn. Const. art. 1, § 12, as implemented by Minn. Stat. § 510.01 (2004), which together provide for a homestead exemption from seizure or sale for the payment of any debt or liability. The matter was heard in Renville County District Court, the Honorable Randall J. Slieter presiding. The sole issue raised by appellant was whether it is constitutional for the state to forfeit homestead property pursuant to the drug forfeiture statute. The court ruled that the Minnesota drug forfeiture statute was not unconstitutional for forfeiting homestead property.

Appellant now brings this direct appeal.

STATEMENT OF FACTS¹

On March 16, 2006, appellant pled guilty to controlled substance crime in the third degree, in violation of Minn. Stat. § 152.023 (2004). Appellant admitted to possessing approximately twenty-three pounds of marijuana on his homestead property.

Appellant's property meets the definition of homestead property as provided under Minn. Const. art. 1, § 12, and Minn. Stat. § 510.01. Appellant has stipulated that the respondent has produced, or would be able to produce, evidence to meet the statutory requirements for forfeiture under Minn. Stat. § 609.5311, subd. 2, and that none of the limitations on forfeiture set forth in Minn. Stat. § 609.5311, subd. 3 apply. Further, the parties agree that the property value is less than \$200,000.00, which is the maximum amount that appellant could homestead. *See* Minn. Stat. § 510.02.

ARGUMENT

THE MINNESOTA DRUG FORFEITURE STATUTE IS NOT UNCONSTITUTIONAL FOR FORFEITING HOMESTEAD PROPERTY.

A. The Forfeiture Statute Provides For The Forfeiture Of The Defendant Property In This Case.

Minn. Stat. § 609.5311, subd 2(a) (2004), provides that, "All property, real or personal, that has been used, or is intended for use, or has in any way facilitated in whole or part," various activities involving illegal controlled substances "is subject to forfeiture under this section, except as provided in subdivision 3." The exceptions in subdivision 3 include defenses of (1) allowing the forfeiture of real property "only if the retail value of

¹ The facts are taken from page 2 of the district court's June 23, 2006 order and memorandum.

the controlled substance or contraband is \$1,000 or more,” (2) a good faith owner, (3) a good faith secured party, and (4) a good faith purchaser for value. *See, e.g.*, Minn. Stat. § 609.5311, subd. 3(b),(d),(e), and (f) (2004). Appellant stipulated in the district court that his drug activities had a sufficient connection with his homestead property in order to satisfy the requirements for forfeiture and that none of the exceptions, including the foregoing, apply to his situation.

B. Appellant Faces A High Burden In Claiming That A Statute Is Unconstitutional.

Appellant challenges the drug forfeiture statute’s constitutionality insofar as it is used to forfeit homestead property. Appellant’s challenge is based upon the following provisions: Article 1, § 12 of the Minnesota Constitution provides that, “[a] reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law.” Insofar as the homestead exemption is concerned, this constitutional provision is implemented by Minn. Stat. ch. 510 (2004). Minn. Stat. § 510.01 (2004), defines the homestead exemption as, “[t]he house owned and occupied by a debtor as the debtor’s dwelling place, together with the land upon which it is situated to the amount of area and value hereinafter limited and defined, shall constitute the homestead of such debtor and the debtor’s family, and be exempt from seizure or sale under legal process on account of any debt not lawfully charged thereon in writing”²

² Minn. Stat. § 510.02 (2004), describes the area and value limitations. As stipulated in the district court, the value and area of appellant’s homestead fall within these limits.

This Court's power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary. See *State v. Fingal*, 666 N.W.2d 420, 423 (Minn. Ct. App. 2003), *rev. denied* (Minn. Oct. 21, 2003). The presumption of constitutional validity governs until a statute is proved unconstitutional beyond a reasonable doubt. See *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986).

The question here is whether, in the language of Minn. Const. art. 1, § 12, the drug forfeiture of a homestead is a "seizure or sale for the payment of any debt or liability." This issue is a matter of first impression for Minnesota appellate courts, although the following language regarding the drug forfeiture of a homestead in the unpublished case of *Arney v. One Parcel Known As Lot 3, Block 1, Schumann Addition, Grant Township, Washington County*, 1992 WL 383437, No. CX-92-1355 (Minn. Ct. App. Dec. 29, 1992)³, is helpful in framing the issue:

Appellant correctly asserts that the term "liability," as used in the constitutional exemption provision, is broad. See *Denzer v. Prendergast*, 267 Minn. 212, 220, 126 N.W.2d 440, 445 (1964) (homestead exemption applies to tort as well as contract claims). There is, however, a substantial question whether the exemption encompasses a claim to the property itself, a claim which is not based on the personal liability of the owner but which is imposed as a "penalty" for a criminal offense.

As the following discussion demonstrates, a forfeiture is a claim to the property itself and is not based upon the personal liability of the owner. Thus, the Minnesota drug forfeiture

³ Since *Arney* is unpublished, a copy is attached.

statute creates neither a debt nor a liability. Therefore, the homestead exemption does not bar the forfeiture of homestead property.

C. The Homestead Exemption Does Not Apply Because An *In Rem* Forfeiture Is Neither A Debt Nor A Liability.

1. *In rem* proceedings do not create debts or liabilities.

The forfeiture of both real and personal property under Minnesota's drug forfeiture statutes is *in rem*. See Minn. Stat. § 609.5315, subd. 6a(a) (2004) ("An action for forfeiture is a civil *in rem* action and is independent of any criminal prosecution, except as provided in this subdivision and section 609.5318"); *Johnson v. Multiple Miscellaneous Items Numbered 1-424*, 523 N.W.2d 238, 241 (Minn. Ct. App. 1994) ("respondent forgets that a forfeiture action is 'in rem' and not 'in personam.' In other words, *the property* and not the complainant is the subject of the forfeiture action") (emphasis in original). The provisions of the drug forfeiture statute "must be liberally construed to carry out the following remedial purposes" Minn. Stat. § 609.531, subd. 1a (2004).

An *in rem* action means that the action proceeds against the property itself and is not based upon any personal liability of the property's owner. Since the property's owner has no personal liability in an *in rem* action, the owner (in the terminology of the homestead exception) has no debt and has no liability that the property is being sold to pay. *State v. Rhude and Fryberger*, 266 Minn. 16, 21, 123 N.W.2d 196, 200 (1963), pointed out "the difference between the liability for taxes assessed against personal property and that assessed against real estate" as follows:

The proceeding for the collection of taxes upon personal property is one in personam, and not in rem. This radical distinction must be kept in mind: In the one case the tax is against the person, although estimated in amount according to the value of the personal property possessed, and is never a lien upon the property assessed; in the other the tax is against the land, and becomes a lien thereon, but is never made a personal obligation against the owner.

(Citation and internal quotation marks omitted). *Independent School Dist. of White Bear Lake v. City of White Bear Lake et al.*, 208 Minn. 29, 35-36, 292 N.W. 777, 781 (1940), likewise held:

The liability for the benefits is imposed on the land, not the owner. All the proceedings for levying, collecting and enforcing payment of the assessment are in rem against the land and are not in personam against the owner. The liability thus imposed and the remedy thus provided for its enforcement are exclusive. The statute defines and limits the liability so as to impose it exclusively on the land without any liability in personam on the landowner.

(Citation omitted).

A county attorney or other prosecutor who successfully forfeits real estate, whether a homestead or other real estate, can take the property. However, because the action is *in rem*, the county attorney has no judgment against the drug dealer personally for any amount whatsoever, regardless of the egregiousness of the drug dealer's activities. That being the case, there is no debt nor liability, and the constitutional provision exempting homestead property from seizure or sale for the payment of any debt or liability does not bar the *in rem* forfeiture.

When a person owns a homestead or other property and also has both debts and other liabilities, the liabilities and the debts will remain even if the property were, for example, destroyed or sold. However, the basis for a drug forfeiture of any particular

property (which appellant claims is a “liability”) would disappear if the property were, for example, destroyed or sold, and the drug dealer would have no *in personam* liability (at least under the forfeiture statute) for the drug trafficking that he had done with his property.

To sum up, a drug forfeiture is a claim to the property itself, and is not based upon any debt or liability that is owed by the owner personally.

2. The purpose of the forfeiture statute is to protect the public, and it does not create any kind of debt or liability.

Forfeiture of criminal instrumentalities protects the public from continued crime by diminishing its profits and providing obstacles to its pursuit. For example, when a drug dealer’s car is forfeited he has to find other transportation. Walking or using public transit makes transporting drugs less flexible, more time-consuming, and less secure. The same holds true for a drug dealer’s use of his home to conduct his drug sales out of the public eye. *See Borgen v. 418 Eglon Avenue et al*, 712 N.W.2d 809, 815 (Minn. Ct. App. May 2, 2006) (“The use of the house made the [drug] sales easier to conceal, as they could be kept out of the sight of the public”). The remedial sanctions of the drug forfeiture statute remove the tools of the drug dealer’s trade. *See United States v. Usery*, 518 U.S. 267, 290-91 (1996) (discussing various remedial and non-punitive goals of forfeiture statutes, such as “forfeiture prevents further illicit use of property”) (internal brackets and quotation marks omitted). Without the various property and instrumentalities necessary to conduct his business, the manufacturer or distributor of

illegal drugs will have difficulty remaining in business, and society will be spared the harm inflicted by his crimes.

Since the forfeiture statute is remedial, it follows that it does not create either debts or liabilities. Creating debts and liabilities would not have any direct or immediate effect on drug trafficking. Taking away drug dealers' instrumentalities does.

3. The homestead exemption only applies to contract and tort damages.

Citing *Denzer v. Prendergast*, 267 Minn. 212, 126 N.W.2d 440 (1964),⁴ appellant correctly notes that the homestead exemption applies to both debts and liabilities and that "liability" is broader than "debt." App. Br. at 4-5. However, that hardly means that *in rem* drug forfeitures are a "liability" encompassed by the homestead exemption. While *Denzer* held that "liability" is broader than "debt," and also held that "liability" encompasses tort claims, as well as contract claims, *Denzer* did not hold that *in rem* proceedings are "liabilities" or that the homestead exemption applies to *in rem* actions.⁵ This contract and tort liability is based upon damages. The *in rem* forfeiture of drug

⁴ Appellant mistakenly cites *Denzer* as 125 N.W.2d 440 (1954), instead of 126 N.W.2d 440 (1964).

⁵ In *Denzer*, one of the parties contended that the legislature intended to distinguish between debts, (articulated by *Denzer* as "an obligation to pay money arising from a contract, express or implied,") and other liabilities (articulated by *Denzer* as "arising from a judgment for damages caused by a wrong"). *Id.* at 220-21, 126 N.W.2d at 445. *Denzer* rejected this contention and held that "obligations based on express or implied contract and those based on damages caused by negligence" were both within the purview of the homestead exemption. *Id.* at 221, 126 N.W.2d at 445. That, however, does not assist appellant because damages caused by negligence, and the liability therefor, are not comparable to an *in rem* forfeiture action that does not determine or award any damages, and that does not result in other liability.

instrumentalities is not based upon damages but is rather based upon the remedial public policy of hampering the drug trade, including depriving drug dealers of the tools of the trade. *See Borgen*, 712 N.W.2d at 815; *Usery*, 518 U.S. at 290-91; discussion, *supra* at 7-8. Appellant does not cite any case that has extended the homestead exemption beyond the debts and liabilities, which are based upon damages, that stem from contracts and torts. In particular, appellant does not cite any case that has extended the homestead exemption to *in rem* proceedings.

4. Public policy does not favor extending the homestead exemption to forfeitures.

Citing *Cargill v. Hedge*, 375 N.W.2d 477, 479 (Minn. 1985), appellant points to strong policy reasons for the homestead exemption. However, using one's home for drug trafficking is the very antithesis of these policies. Appellant argues that one's home should be a sanctuary. However, nothing in *Cargill* says that a home is intended to be a sanctuary in which one can commit crimes, whether the crime be child abuse, domestic abuse, or drug trafficking. As for the language that appellant cites in *Cargill* about the homestead exemption fostering the state's welfare and prosperity, as well as positive sentiments among its citizenry, these goals and sentiments are hardly fostered by a drug trafficker's drug activities in his homestead.

5. Without an identifiable creditor or tort victim, there cannot be a debt or liability.

When there is a debt, there is a readily identifiable creditor. Likewise, when there is tort liability, there is a readily identifiable tort victim. In a drug forfeiture proceeding, there is neither. The governmental entities that receive either the defendant property

itself, or the proceeds from its sale, do not receive it because of any monetary loss or other damages suffered at the hands of the property's owner. And, the forfeited value received is determined solely by the value of the forfeited property, not by the amount of harm inflicted by the property's owner.

If a person is liable, that liability does not exist in a vacuum. A person is liable to a specific person(s) and/or entity or entities for a particular amount of damages.

In the case of an *in rem* drug forfeiture, however, a drug dealer is not liable to the recipients of the forfeited property (*i.e.*, the police, the county attorney, or the state general fund earmarked for victims) for any particular damages or liability. The ultimate disposition of forfeited property is without regard to any specific liability of the property's owner to any specific entity or entities. For example, when property is forfeited, there are a number of possible dispositions. *See* Minn. Stat. § 609.5315, subd. 1(a)(1) to (8) (2004). Two of these possibilities are: (1) the forfeited property can be kept "for official use by the [law enforcement] agency and the prosecuting agency," Minn. Stat. § 609.5315, subd. 1(a)(8) (2004); and (2) if the property is sold, the property is distributed 70 per cent to the law enforcement agency, 20 per cent to the prosecuting agency, and 10 per cent to the state's general fund (from which it is directed into a fund for victims). Minn. Stat. § 609.5315, subd. 5 (2004). None of these options need be selected until after the property is forfeited. *See* Minn. Stat. § 609.5315, subd. 1(a)

(2004). These possible, varying dispositions of the forfeited property,⁶ without regard to anything that the property's owner may have done to harm any particular entity, are inconsistent with a drug dealer owing any specific liability to any particular entity or entities.

D. Decisions In Other States Should Not Determine The Constitutionality Of The Minnesota Forfeiture Statute At Issue Here.

A large part of appellant's argument relies upon decisions in other states, which appellant concedes are evenly split and which he characterizes as "decisions on either side appear to be rather result-oriented, and perhaps even somewhat political." App. Br. at 7-13, 13-14, 14. In addition, the constitutions, statutes, and case law of the foreign jurisdictions upon which appellant relies differ from Minnesota.

Appellant quotes at length from a Kansas decision that bars the forfeiture of homestead property. *See* App. Br. at 7-9. However, whereas the Minnesota Constitution states an exemption for "any debt or liability," the Kansas constitution is broader: "A homestead . . . shall be exempted from forced sale under any process of law" Kan. Const. art. 15, § 9. "Any process of law" in the Kansas Constitution is broader than "any debt or liability" in Minnesota's Constitution. Consequently, the Kansas decision holding that "any process of law" included forfeitures is hardly instructive regarding Minnesota's language.

⁶ Among the possible dispositions of the property in regard to the county attorney, the county attorney might (1) keep *all* of the property, (2) get nothing (if the police agency kept the property for official use), or (3) collect 20 per cent of the proceeds. *See* Minn. Stat. § 609.5315, subd. 1(a)(2) and (8), and subd. 5 (2004).

Appellant also relies on Iowa and Florida cases. App. Br. at 9-10. However, appellant acknowledges that the Iowa decision that he cites says: “We are also mindful that forfeitures are severe sanctions not favored by our law,” and, “Chapter 809 [the forfeiture law] is to be strictly construed” App. Br. at 10 (citations omitted). Likewise, the Florida case strictly construes forfeiture statutes. See App. Br. at 11. Both Florida and Iowa differ from Minnesota in this respect, since, as previously discussed, Minnesota’s forfeiture statutes are to be liberally construed. See Minn. Stat. § 609.531, subd. 1a (2004).

Regarding cases in other states, appellant argues “that the specific wording of the state provisions regarding homestead exemption and forfeiture do not appear to have been critical to most of the decisions either way,” and that “what was critical was whether the state court in question viewed the state policy in favor of homesteads more important [than] the state policy in favor of drug forfeitures, or vice versa.” App. Br. at 14. To the contrary, there should be no stark dichotomy, in Minnesota at least, between the importance of homesteads versus the importance of law enforcement. Both can easily be accommodated, since it is hardly pernicious to the state homestead exemption if it does not cover conduct that denigrates the very policies and personal attributes that appellant cites as the strong policy reasons supporting the homestead exemption. See discussion, *supra* at 8.

In any event, the trial court properly concluded that this question should be resolved with reference to Minnesota’s own laws and constitution, not those of a foreign jurisdiction.

E. Appellant's Arguments For Using The Homestead Exemption To Bar Forfeitures Should Be Rejected.

After discussing the foreign jurisdictions at length, appellant lists many reasons (the first four of which he explicitly enumerates) to support his claim that the use of homestead property for drug trafficking constitutes a "liability" within the meaning the Minnesota Constitution. Most of these reasons, however, do not explain why using a homestead for drug trafficking creates a liability. Indeed, few, if any, of these reasons articulate what determines whether something is a liability.

Appellant's first and third enumerated reasons claim that *Denzer* indicated (1) that "liability includes virtually [every] obligation a homesteader may have," and (2) that "liability" refers "to just about any obligation imaginable." *See* App. Br. at 18, 20. To the contrary, as previously discussed, *supra* at 8-9, all that *Denzer* held was that "liability" meant that the homestead exemption applied to "damages caused by a wrong" or "damages caused by negligence" in addition to "obligations based on express or implied contract." 267 Minn. at 221, 126 N.W.2d at 445. *Denzer* did not hold that "liability" included "virtually [every] obligation" or "just about any obligation imaginable."

Appellant's second enumerated reason (*see* App. Br. at 19) is that article 1, section 12 of the state constitution (the exemption provision raised here) is right next to article 1, section 11, which provides:

No bill of attainder, ex post facto law, or any law impairing the obligations of contracts shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

Appellant contends that the language, “forfeiture of estate,” in section 11 “coupled with its proximity to Article 1, § 12 clearly indicates that the legislature [*sic*] was keenly aware of the possible seizure of property for criminal activities and was concerned to limit such seizures.” App. Br. at 19. However, section 11 does not pertain in any way to homesteads or to exempting property from the payment of debts and liabilities. As such, section 11 cannot be deemed to apply to forfeitures of homestead property any more than it would apply to the forfeiture of any other property.

Appellant claims that sections 11 and 12 should be read *in pari materia*. “The doctrine of *in pari materia* is a tool of statutory instruction that allows two statutes with common purposes and subject matter to be construed together to determine the meaning of ambiguous statutory language.” *State v. Lucas*, 589 N.W.2d 91, 94 (Minn. 1999). Thus, in order for the doctrine to be used, the two statutes must have common purposes and subject matter, and there must also be some ambiguity. Assuming for the sake of argument that *in pari materia* also applies to constitutional provisions (and appellant provides no authority that such is the case), it is clear that his argument fails on both prerequisites for *in pari materia*. On the first prerequisite of *in pari materia*, sections 11 and 12 do not have common purposes and subject matter. Section 11’s prohibition of bills of attainder and similar arbitrary and/or harsh measures are a different subject than section 12’s provision allowing debtors to exempt a portion of their property from sale and execution. Regarding the second *in pari materia* prerequisite, there is no ambiguity, particularly as it pertains to the issue in this case. Sections 11 and 12 say nothing at all

(and therefore can hardly say anything ambiguous) regarding *in rem* actions against property.

Appellant's third enumerated reason essentially duplicates, as is discussed, *supra* at 13, appellant's first reason. *See* App. Br. at 20.

Appellant's fourth enumerated reason is that the drug forfeiture statute should have specifically said that it permitted the forfeiture of homestead property. *See id.* This claim has no relevance as to what "liability" in article 1, section 12 of the constitution encompasses. And, indeed, the fact that homestead property is not specifically listed hardly makes the forfeiture statute unconstitutional. The constitution nowhere provides that, in order for any real property statute to apply to homestead property, the statute must explicitly state that it so applies. Moreover, there is no reason why the forfeiture statute should have singled out homestead property in this manner. The drug forfeiture statute applies to *all* real property connected with drug trafficking. "All" means just that. If all real property is included, it is unnecessary, and possibly confusing,⁷ to thereafter list various types of real property. There are some exceptions, but none of these exceptions is homestead property. Therefore, any real property that is an instrumentality of drug trafficking, and that is not encompassed by one of the statutory exceptions, is subject to forfeiture. If the legislature had wished to exempt homestead property that was used for drug trafficking it would have said so, since it certainly knew how to articulate exceptions to the forfeiture of real property. Moreover, there is no reason for the

⁷ By including a list, that might give an opening for an argument that anything not specifically listed is not included.

legislature to say that, in appellant's words, it intended the forfeiture statute "to trump § 510.01." See App. Br. at 20. Section 510.01 nowhere states that it has any applicability to *in rem* actions.

Appellant's fifth reason (unenumerated) is that the drug forfeiture statute provides that drug trafficking property "is subject to forfeiture" instead of providing that "all real property shall be forfeited." See App. Br. at 20. Appellant's argument overlooks the provision in Minn. Stat. § 609.5315, subd. 1(a) (2004), providing that "if the court finds . . . that the property is subject to forfeiture, it shall order the agency to do one of the following," namely selling it, using it, or some other disposition that is listed there. Appellant's reasoning is also fallacious because he does not point out any reason why the language "is subject to forfeiture" would somehow be a defense to the forfeiture of homestead property but would not be a defense to the forfeiture of any other property or any other real property. In addition, there would be no reason for the legislature to provide that all instrumentalities and proceeds are "subject to forfeiture," while at the same time intending that none will, in fact be forfeited.

Appellant's sixth reason (unenumerated) is that forfeiting criminals' homesteads would be counterproductive to their rehabilitation. This argument might be a policy consideration for the legislature, but it is not a reason why "liability" includes *in rem* forfeitures.

Appellant's seventh reason (unenumerated) is that the drug forfeiture statute does not require any "proportionality between the offense and the size of defendant's loss." App. Br. at 22. The alleged absence of proportionality has nothing to do with the scope

of the term “liability.” Moreover, if appellant had wished to invoke proportionality, as the claimant did in *Borgen*, he should have raised it in the trial court along with his homestead appeal. Having failed to do so in the trial court, he has forfeited the issue for appeal.⁸

Appellant’s eighth reason (unenumerated) claims that there may be *Blakely* problems. This claim has no basis. *Blakely* applies to sentences imposed for crimes. This *in rem* forfeiture was not a criminal action, and no sentence was imposed.

In conclusion, appellant has failed to prove, beyond a reasonable doubt, that the drug forfeiture statute is unconstitutional insofar as it forfeits a drug dealer’s homestead.

⁸ In his May 5, 2006 letter to the trial court, appellant discussed *Borgen*, but did not claim that proportionality was lacking in this case.

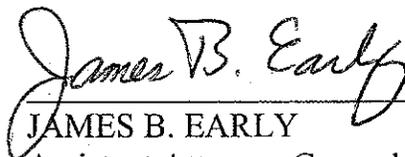
CONCLUSION

The trial court's order upholding the constitutionality of the drug forfeiture statute, insofar as it forfeits homestead property, should be affirmed.

Dated: October 11, 2006

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota



JAMES B. EARLY
Assistant Attorney General
Atty. Reg. No. 25306

445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 296-8429 (Voice)
(651) 282-2525 (TTY)

DAVID J. TORGELSON
Renville County Attorney
Commerce Building
P.O. Box D
Olivia, Minnesota 56277

ATTORNEYS FOR RESPONDENT

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).