

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 140148-U

NO. 4-14-0148

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 25, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
JOHN T. HATCHER III,)	No. 13MR161
Defendant-Appellant.)	
and)	
FOUR HUNDRED DOLLARS (\$400) United States)	
Currency; SIG-SAUER RIFLE; MOSSBERG)	Honorable
SHOTGUN; and GLOCK 9MM PISTOL,)	Rudolph M. Braud,
Defendants.)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in granting the State's petition for forfeiture of defendant's firearms.
- ¶ 2 On February 23, 2013, police seized \$400 and three firearms from the residence of defendant, John T. Hatcher III, after discovering a cannabis-growing operation in his basement. Thereafter, the State brought an action pursuant to the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (725 ILCS 150/1 to 14 (West 2012)), seeking a judgment the currency and firearms should be forfeited to the State. During the February 11, 2014, forfeiture hearing, the State withdrew its action as to the \$400. At the conclusion of the hearing, the trial court granted forfeiture of the firearms.

¶ 3 Defendant appeals, arguing (1) the forfeiture of his firearms constituted an excessive fine under the eighth amendment and (2) the trial court incorrectly considered defendant's status as a felon in making its forfeiture determination. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On February 23, 2013, the Sangamon County sheriff's tactical response and negotiations units were dispatched to a call of several shots fired at approximately 5:45 a.m. at defendant's residence. Police attempted to make contact with defendant, whom they observed inside the residence, but he refused to talk with anyone. Police observed shell casings outside the back door and obtained a search warrant, which they executed at approximately 11:45 a.m. In defendant's basement, police discovered a drug operation to harvest cannabis. Andrew Danes, a detective with the Sangamon County sheriff's office, explained defendant's grow operation consisted of grow lights, timers, and a hydration station, which was contained in an insulated area to maintain warmth. Police also discovered fertilization chemicals and plants in an insulated cabinet with an exhaust fan. Police found a number of cannabis plants in a crawl space and containers containing cannabis. Police also located boxes of ammunition, a digital scale, and plastic Baggies in the area of defendant's work bench.

¶ 6 In defendant's bedroom police recovered a Sig-Sauer AR-15-style semi-automatic assault rifle, a Glock-9 millimeter handgun, ammunition, a jar containing 900 grams of cannabis, miscellaneous drug paraphernalia, and \$400 in cash. The weapons were located next to the bed in plain view. Police also located a 12-gauge Mossberg pump shotgun under the couch in the living room. All of the firearms were loaded. Police seized the firearms, defendant's firearm

owners identification (FOID) card, \$400 cash, and items associated with the cannabis-growing operation.

¶ 7 According to the Sangamon County circuit clerk's website, the State charged defendant with manufacture/delivery of cannabis (720 ILCS 550/5(f) (West 2012)), possession of cannabis (720 ILCS 550/4(f) (West 2012)), unauthorized possession of cannabis sativa plants (720 ILCS 550/8(b) (West 2012)), reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2012)), and resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)).

¶ 8 On May 29, 2013, the State filed a complaint for forfeiture of the subject property. In its complaint, the State alleged the firearms and cash were, *inter alia*, "used or intended for use in a felony violation of the Controlled Substance Act or the Cannabis Control Act," or "were furnished or intended to be furnished for a substance in violation of the Controlled Substance Act, or to commit, or in any manner facilitate a felony violation of the Controlled Substance Act or the Cannabis Control Act." On the State's motion, the forfeiture proceedings were stayed pending the outcome of the underlying criminal charges.

¶ 9 On November 27, 2013, defendant pleaded guilty to reckless discharge of a firearm, a Class 4 felony. The remaining charges were dismissed.

¶ 10 During the February 11, 2014, hearing on the State's forfeiture complaint, the following colloquy took place:

"Q. (By [the State]:) Detective [Danes], do you have prior experience at investigating drug crimes?

A. Yes.

Q. And is it common to find firearms in the same proximity as drugs?

A. Yes, it is.

Q. What's the relationship of firearm[s] to drug activity?

A. My experience, it seems, that guns, drugs, money all kind of hang out together. Firearms are used, basically, for security and to provide protection for the investments."

¶ 11 Defendant testified he had been growing cannabis in his basement for personal use on and off since 1994. He purchased the Sig-Sauer rifle for sport shooting, which he did at a local gun range with his father. Defendant also testified his father purchased the Mossberg shotgun and Glock handgun for him as Christmas gifts. The State stipulated defendant provided receipts documenting the purchase of the firearms. According to defendant, the firearms were not used to further his cannabis-growing activities. Instead, defendant testified he used the shotgun for deer and turkey hunting and the handgun for target shooting. Defendant introduced into evidence a number of Illinois licenses for both deer and turkey hunting. Defendant maintained he did not use the firearms to protect his cannabis-growing operation.

¶ 12 Defendant also testified the \$400 cash did not come from growing cannabis. Defendant was employed as a contractor and had received \$400 in cash for hanging drywall for the father-in-law of his friend, Ralph Hughes, just prior to the day of the search. Defendant's exhibit No. 1, an estimate for the work in the amount of \$400, was admitted into evidence. Hughes then testified and corroborated defendant's account. At that point, the State withdrew its claim regarding the \$400.

¶ 13 Defendant's father, John Hatcher II, testified he and defendant had gone shooting together at the gun range. Hatcher testified he purchased the Glock handgun for defendant for target shooting and the Mossberg shotgun so they could go hunting together. A copy of Hatcher's FOID card was introduced into evidence on the theory that if the firearms were returned, defendant could transfer ownership of them to his father. Due to defendant's felony conviction in the underlying case, he could not now legally own firearms.

¶ 14 At the conclusion of the hearing, the State emphasized it was not trying to prove the firearms were purchased with money from drug sales. Instead, the State argued it had met its burden of establishing probable cause to believe the firearms helped facilitate a felony violation of the Cannabis Control Act in that they were used for security of the cannabis. The State correctly noted and defendant acknowledges the fact defendant was not convicted of manufacturing cannabis was irrelevant to the forfeiture proceedings (see 725 ILCS 150/9(J) (West 2012) ("An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this Act[.]")).

¶ 15 Defendant's trial counsel conceded the State met its probable-cause burden and focused instead on the fact defendant used the firearms for hunting and sport shooting. Defendant's counsel acknowledged the firearms could not be returned to defendant if the court found in his favor due to his underlying felony conviction for reckless discharge of a firearm. Counsel then requested the firearms be returned to defendant's father, through a transfer of ownership from defendant.

¶ 16 The State clarified its intention the firearms be forfeited and not turned over to defendant's father. The trial court, noting defendant's felony status, inquired whether the

firearms could be returned to defendant for transfer to his father if the court ruled in defendant's favor. The State advised the court because of defendant's felony conviction it had no authority to return the firearms even for the limited purpose of transferring ownership to his father. The court then stated the following:

"I think the hunting thing is a red herring, and I'm just not willing to tie myself to it this morning. [The State is] right. I mean, by confession, by agreement, the [State has] met their burden, initially, with probable cause. The burden shifts to you [(addressing defendant)] *** [and] I'm not caught off guard by this hunting red herring. *** I think that [('facilitates')] is the key language here, and again, three weapons in a home and an admitted grow operation, personal use or not, charged felony, manufacture delivery of cannabis or not. Whatever, [the State has] succeeded or you have failed in your burden to overcome with respect to preponderance of the evidence. So, [the State's] complaint for forfeiture is granted."

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues (1) the forfeiture of his guns constituted an excessive fine under the eighth amendment and (2) the trial court incorrectly considered defendant's status as a felon in making its forfeiture determination.

¶ 20 A. Forfeiture

¶ 21 Forfeiture proceedings are civil in nature; they are *in rem* proceedings against items

used in the commission of crimes. *People v. 1998 Lexus GS 300, VIN JT8D68S4W0028350*, 402 Ill. App. 3d 462, 465, 930 N.E.2d 582, 585 (2010). In such proceedings, "[t]he State brings the action against the seized property pursuant to the legal fiction that the property itself is guilty of facilitating a crime." *People v. Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 497, 841 N.E.2d 928, 938 (2005). A circuit court's findings in a forfeiture proceeding will not be disturbed unless they are against the manifest weight of the evidence. *People v. One 1999 Lexus, VIN JT8BH68X2X0018305*, 367 Ill. App. 3d 687, 689, 855 N.E.2d 194, 197-98 (2006).

¶ 22 Forfeiture proceedings under the Forfeiture Act involve a two-step process. 725 ILCS 150/9 (West 2012); *People v. 1998 Chevrolet Corvette, VIN 1G1YY22G2W5108366*, 331 Ill. App. 3d 453, 459, 772 N.E.2d 331, 336 (2002). In the first step of the forfeiture proceedings, the State bears the initial burden to "show the existence of probable cause for forfeiture of the property." 725 ILCS 150/9(G) (West 2012); *People v. \$174,980 United States Currency*, 2013 IL App (1st) 122480, ¶ 22, 996 N.E.2d 1102.

¶ 23 To satisfy the Forfeiture Act's probable-cause requirement, the State is required to allege and prove "facts providing reasonable grounds for the belief that there exists a nexus between the property and illegal drug activity, supported by less than *prima facie* proof but more than mere suspicion. [Citation.] Probable cause in this context requires only a probability or substantial chance of the nexus and not an actual showing." *1945 North 31st Street*, 217 Ill. 2d at 505, 841 N.E.2d at 942. If the State meets its threshold requirement and establishes probable cause, the burden then shifts to the claimant to show by a preponderance of the evidence the property is not subject to forfeiture. 725 ILCS 150/9(G) (West 2012); *\$174,980 United States*

Currency, 2013 IL App (1st) 122480, ¶ 24, 996 N.E.2d 1102. A claimant can "satisfy this burden by establishing one of the innocent-owner defenses provided in Section 8 of the Forfeiture Act." *1945 North 31st Street*, 217 Ill. 2d at 498, 841 N.E.2d at 938; 725 ILCS 150/8 (West 2012).

¶ 24 Under section 8 of the Forfeiture Act, a claimant will be deemed an "innocent owner" if he can establish that he "is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur." 725 ILCS 150/8(A)(i) (West 2012). However, "[i]f the State does show existence of probable cause and the claimant does not establish by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act, the court shall order all property forfeited to the State." 725 ILCS 150/9(H) (West 2012).

¶ 25 At the hearing, defendant conceded the State met its probable-cause burden and admits on appeal he did not present an "innocent owner" defense. Defendant does not challenge the trial court's findings in this regard on appeal. Instead, defendant argues the forfeiture of his firearms violated the excessive-fines clause of the eighth amendment to the United States Constitution (U.S. Const., amend. VIII ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted")).

¶ 26 However, defendant failed to raise this issue in the trial court. See *Sherman v. Indian Trails Public Library District*, 2012 IL App (1st) 112771, ¶ 21, 975 N.E.2d 1173 (in civil cases, constitutional issues not presented to the trial court are deemed forfeited and may not be raised for the first time on appeal). "To allow a party to change his or her trial theory on review would weaken the adversarial process and the system of appellate jurisdiction, and could also

prejudice the opposing party, who did not have an opportunity to respond to that theory in the trial court." *In re Marriage of Schneider*, 214 Ill. 2d 152, 172, 824 N.E.2d 177, 189 (2005); *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536, 662 N.E.2d 1248, 1253 (1996) (an issue not presented to the trial court is waived and may not be raised for the first time on appeal). As such, defendant's argument is forfeited. Forfeiture aside, the penalty in this case did not constitute an excessive fine so as to violate the eighth amendment.

¶ 27

B. Excessive Fines

¶ 28 A fine is considered excessive " 'if it is grossly disproportional to the gravity of a defendant's offense.' " *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 856, 869 N.E.2d 964, 980 (2007) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).

"Application of the constitutional standard for determining excessiveness to a given set of facts presents a question of law subject to *de novo* review." *People v. One 2000 GMC, VIN 3GNFK16T2YG169852*, 357 Ill. App. 3d 873, 875, 829 N.E.2d 437, 440 (2005).

¶ 29 Our supreme court has adopted the following nonexhaustive list of three factors to be considered in assessing whether a forfeiture constitutes an excessive fine:

" '(i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use.' " *People ex rel. Waller v. 1989 Ford F350 Truck*, 162 Ill. 2d 78, 90, 642 N.E.2d 460, 466 (1994) (quoting *United States*

v. Real Property Located at 6625 Zumirez Drive, 845 F. Supp. 725, 732 (1994)).

¶ 30 The supreme court has emphasized "the trial court is not precluded from considering factors not specifically listed," and "[t]he inherent case-by-case nature of these drug forfeiture actions precludes simple cookbook application of any method of review." *Waller*, 162 Ill. 2d at 90, 642 N.E.2d at 466. For the following reasons, we find the forfeiture of defendant's firearms did not constitute an excessive fine sufficient to violate the eighth amendment.

¶ 31 *1. First Factor*

¶ 32 The first factor concerns the inherent gravity of the offense compared to the harshness of the penalty. *Waller*, 162 Ill. 2d at 90, 642 N.E.2d at 466. In evaluating the harshness of the penalty, courts agree forfeiture of personal property is less harsh than forfeiture of real property. *One 2000 GMC*, 357 Ill. App. 3d at 876, 829 N.E.2d at 440; *People v. \$5,970 United States Currency*, 279 Ill. App. 3d 583, 592, 664 N.E.2d 1115, 1122 (1996). While "comparing the maximum fine for the offense with the value of the seized property is not a proper way to gauge excessiveness, *** the maximum fine *** is relevant to determining the gravity of the offense." *One 2000 GMC*, 357 Ill. App. 3d at 876, 829 N.E.2d at 440.

¶ 33 In this case, the underlying conduct, *i.e.*, the reason for the seizure of the firearms, was defendant's admitted cannabis-growing operation. While defendant maintained he grew the cannabis only for personal use, he also testified he would occasionally provide cannabis to friends who would come to his house. We note the fact defendant was not convicted of manufacturing cannabis does not preclude forfeiture proceedings in this case. See 725 ILCS 150/9(J) (West 2012). The maximum fine for the offense of manufacturing more than 500 grams

but less than 2,000 grams of a substance containing cannabis is \$100,000. See 720 ILCS 550/5(e) (West 2012). The forfeiture of three firearms of an unspecified but relatively low value cannot be considered harsh under the circumstances presented in this case.

¶ 34

2. *Second and Third Factors*

¶ 35 "Both the second and third factors embody an instrumentality or nexus test. Under an instrumentality test, the forfeited property must have a sufficiently close relationship to the illegal activity." *\$5,970 United States Currency*, 279 Ill. App. 3d at 592, 664 N.E.2d at 1122 (citing *United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974, 982 (9th Cir. 1995)). The second factor relates to whether the property was an integral part of the commission of the crime. *Waller*, 162 Ill. 2d at 90, 642 N.E.2d at 466. The third factor considers the time period over which the firearms were used as well as their spatial use. See *Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. at 738 (narcotics found in five bedrooms demonstrated evidence of a spatially extensive use of the real property for illegal activity).

¶ 36

Defendant admitted growing cannabis in his basement "[o]ff and on since 1994." Defendant testified he purchased the Sig-Sauer in March 2012. The Mossberg and Glock were obtained in December 2011 or 2012. Police discovered the cannabis operation in February 2013. Thus, a proper inference can be made defendant was growing cannabis at a time the firearms were present in the residence.

¶ 37

While defendant argues the guns were for hunting and sport shooting only, police found them uncased and loaded in his residence. The shotgun was found under the couch in the living room. The handgun and rifle were located in plain view in defendant's bedroom near a jar

containing 900 grams of cannabis. Defendant testified he kept the firearms loaded. Detective Danes testified in his experience firearms are used for security and protection of drugs. A reasonable argument can be made the firearms were being used at least for the protection of the home, which included the grow operation in the basement. Thus, the firearms can reasonably be seen as integral to protecting defendant's unlawful cannabis-growing operation.

¶ 38 Considering the factors adopted by the supreme court in *Waller*, the forfeiture of defendant's firearms was not so grossly disproportionate to the gravity of the offense as to violate the excessive-fines clause.

¶ 39 C. Defendant's Felony Status

¶ 40 Finally, defendant argues the trial court improperly considered his status as a felon in making its forfeiture determination. Specifically, defendant contends the court erred in presuming there was no alternative to forfeiture because defendant was a felon who could no longer possess firearms.

¶ 41 For purposes of his argument, defendant cites the following colloquy between the trial court and the State:

"THE COURT: Again, let me make sure that I'm clear, per my order, the only remedy I would have to rule in their favor is to return these guns back to [defendant,] which he can't possess anyway. I don't have authority to give them to [defendant's father.]

MR. GAB [(Assistant State's Attorney)]: I don't believe you have authority to give them to [defendant's father.]

THE COURT: I don't."

¶ 42 Defendant maintains the trial court's belief in this regard was a misapprehension of the law. However, this exchange was in reaction to defendant's request to the court that the firearms be returned to defendant's father in the event the court denied the State's petition. The State responded it did not believe any relevant authority existed to support defendant's request.

¶ 43 Defendant concedes he cannot cite any Illinois law supporting his proposal. Instead, defendant cites *United States v. Miller*, 588 F.3d 418 (7th Cir. 2009), a federal case, as persuasive authority. However, *Miller* is distinguishable. No forfeiture proceedings took place in *Miller* because the United States failed to timely file the forfeiture petition. *Miller*, 588 F.3d at 418-19. Thus, the firearms were *not* forfeited. As such, the defendant maintained his possessory interest in them. See *Miller*, 588 F.3d at 420. They simply could not be returned to the defendant as a result of his underlying felony conviction. The United States argued the functional equivalent of forfeiture was necessary due to the felony conviction. *Miller*, 588 F.3d at 419. The court determined an equitable way to proceed would be, *inter alia*, to allow him to gift the firearms to a friend or relative. *Miller*, 588 F.3d at 420. In this case, however, the State timely filed its petition and the trial court found the firearms forfeited. Defendant conceded the State met its probable-cause burden and admits on appeal he did not present an innocent-owner defense. As a result, defendant's argument fails.

¶ 44 III. CONCLUSION

¶ 45 For the foregoing reasons, we affirm the trial court's judgment.

¶ 46 Affirmed.