

NOTICE
Decision filed 06/04/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130414-U

NO. 5-13-0414

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE <i>ex rel.</i> BRENDAN F. KELLY,)	Appeal from the
State's Attorney of St. Clair County,)	Circuit Court of
)	St. Clair County.
Plaintiff-Appellant,)	
)	
v.)	No. 13-MR-247
)	
FIVE HUNDRED SEVENTY NINE)	
DOLLARS (\$579) UNITED STATES)	
CURRENCY,)	
)	
Defendant-Appellee)	Honorable
)	Stephen P. McGlynn,
(Natalie L. Turner, Claimant-Appellee).)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justice Stewart concurred in the judgment.
Justice Spomer dissented in part.

ORDER

¶ 1 *Held:* The trial court's determination that the claimant's money was not subject to forfeiture was not against the manifest weight of the evidence, and waiver aside, the State's alternative ground for forfeiture is unsustainable under the circumstances.

¶ 2 **BACKGROUND**

¶ 3 On July 10, 2013, Officer Greg Hosp of the Fairview Heights police department executed a traffic stop of a green Toyota that had a cracked front windshield and an

obstructed driver's view. The claimant, Natalie L. Turner, was driving the vehicle at the time, and her boyfriend, Colin Feazel, was the sole passenger. Both appeared nervous, and a computer check revealed that both had drug histories.

¶ 4 While writing out a warning ticket at the scene of the stop, Hosp called and requested a canine unit to sniff the green Toyota. When the unit arrived, the canine alerted to the odor of drugs in the vehicle. During a subsequent search, a cannabis pipe and 2.5 grams of cannabis were found in the vehicle's center console, 10 alprazolam (Xanax) tablets were found in the driver's-door pocket, and a second cannabis pipe and \$579 were found in the claimant's purse. When the claimant's person was searched, a small amount of heroin was found in her right pocket, and one oxymorphone (Opana) pill was found in her left.

¶ 5 At the scene of the stop, the claimant advised Hosp that all of the discovered contraband was hers and that Feazel was unaware of its presence. She also admitted that she had snorted heroin earlier that day. The claimant later advised Hosp that she had a \$50-per-day heroin habit and that she purchased heroin in Illinois and Missouri with money she makes as a waitress. She also stated that Feazel did not know that she uses heroin.

¶ 6 On July 18, 2013, the State filed a request for preliminary review to determine probable cause that the money found in the claimant's purse may be subject to forfeiture pursuant to the Drug Asset Forfeiture Procedure Act (the Forfeiture Act) (725 ILCS 150/1 *et seq.* (West 2012)). The request alleged that the money was subject to forfeiture because it had been found in close proximity to the heroin, and the claimant had admitted

that the heroin was hers. An affidavit by Hosp recounting the claimant's arrest and admissions was attached as an exhibit to the request, as was proof that on July 10, 2013, the claimant had been given notice of the preliminary review. The State's notice advised the claimant that her \$579 had been seized "for purposes of asset forfeiture" and that the circuit court would conduct a preliminary review on July 19, 2013, at 8:30 a.m.

¶ 7 On July 19, 2013, the cause proceeded to the scheduled hearing, and the claimant appeared *pro se*. When describing the circumstances of the claimant's arrest, the State explained that she had made statements admitting that the heroin found on her person was "her personal use heroin." The State further noted that the heroin had been located in close proximity to the \$579 that had also been found. The State argued that as a result, it believed that the money may be subject to forfeiture.

¶ 8 In her defense, the claimant stated that the police had informed her that she could use the money from her purse to "bond out" if necessary. The claimant testified that she was a waitress, and she indicated that she had earned the money waitressing at the Penthouse Club in Sauget. She further stated that her manager had provided her with a printout of the cash tips she had earned the preceding week. As an exhibit, the claimant produced a printout of the hours she had worked from July 5, 2013, through July 13, 2013, and the amount of cash tips that she had earned each shift. The document was signed by the senior director of the club, and it showed that from July 5, 2013, through July 13, 2013, the claimant earned an average of \$304 in cash tips per shift. The claimant stated that she should have had her manager "go back another week," but she asserted that her exhibit nevertheless showed what she made "on average." The printout and

Hosp's affidavit were both admitted without objection. When asked by the court whether she had been "charged with any crimes yet," the claimant stated that she had not been. At the conclusion of the hearing, the trial court admonished the claimant regarding her heroin use and took the matter under advisement.

¶ 9 The trial court subsequently entered an order stating that there was no probable cause to find that the cash found in the claimant's purse was subject to forfeiture. The court specifically determined that the claimant had offered sufficient evidence to prove that the cash found in her possession at the time of her arrest "was not related to drug activity" but was rather "earned in the course of her job as a waitress." The court accordingly ordered that the money be returned to the claimant. On August 16, 2013, the State filed a timely notice of appeal.

¶ 10 ANALYSIS

¶ 11 In an effort to deter violations of the Illinois Controlled Substances Act (the Controlled Substances Act) (720 ILCS 570/100 *et seq.* (West 2012)), the General Assembly enacted the Forfeiture Act, which establishes uniform procedures for the seizure and forfeiture of drug-related assets. The Forfeiture Act is based on the federal narcotics civil forfeiture statute, and except where their provisions "expressly differ," the provisions of the Forfeiture Act are to be interpreted "in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts." 725 ILCS 150/2 (West 2012). The purpose of the forfeiture provisions of the Controlled Substances Act and the Forfeiture Act is to deter individuals from trafficking in controlled substances by imposing a civil penalty in addition to the criminal penalties already provided. *People*

v. One Residence Located at 1403 East Parham Street, 251 Ill. App. 3d 198, 202 (1993). The Forfeiture Act is to be liberally construed to effectuate its remedial purpose. 725 ILCS 150/13 (West 2012).

¶ 12 Section 3.5 of the Forfeiture Act provides that within 14 days of the seizure of property, the State "shall seek a preliminary determination from the circuit court as to whether there is probable cause that the property may be subject to forfeiture." 725 ILCS 150/3.5(a) (West 2012) ("Preliminary Review"). Section 3.5 further provides that "[t]he rules of evidence shall not apply to any proceeding conducted under this Section." 725 ILCS 150/3.5(b) (West 2012). Section 3.5 also states that the court "may conduct" the preliminary review at a defendant's first appearance on a related criminal offense charged by information or complaint and "may accept a finding of probable cause at a preliminary hearing following the filing of an information or complaint charging a related criminal offense" or upon the return of an indictment charging the related offense. 725 ILCS 150/3.5(c), (d) (West 2012). The Forfeiture Act does not otherwise indicate what procedures the circuit court must follow when making a preliminary determination pursuant to section 3.5. See 725 ILCS 150/1 *et seq.* (West 2012). We note, however, that in the present case, conducting the preliminary review in conjunction with a first appearance or a preliminary hearing was not an option because the claimant had apparently not yet been charged with a related criminal offense by information or complaint when the cause proceeded to a hearing on the State's request for preliminary review. We further note that although a defendant is not required to testify or present a defense at a preliminary hearing (*People v. Wilson*, 132 Ill. App. 2d 537, 542 (1971)), he

or she is not precluded from doing so. See 725 ILCS 5/109-3(c) (West 2012); *People v. Mathis*, 55 Ill. App. 3d 680, 683 (1977). We lastly note that the existence of probable cause may be founded upon evidence that would not be admissible at trial (*People v. Green*, 88 Ill. App. 3d 929, 932 (1980)), and "[w]hether evidence is admissible is within the discretion of the circuit court, and its ruling will not be reversed absent an abuse of that discretion" (*In re A.W., Jr.*, 231 Ill. 2d 241, 256 (2008)).

¶ 13 To establish probable cause for forfeiture, "the State must 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.'" *People v. \$174,980 United States Currency*, 2013 IL App (1st) 122480, ¶ 22 (quoting *People v. Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 505 (2005)). "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. To establish probable cause for forfeiture, "there is no need to tie the property to a specific drug transaction." *People v. \$1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 177 Ill. 2d 314, 336 (1997). "However, suspicions of general criminal activity are not enough; the government must have probable cause to believe that the property is connected specifically to drug activities." *Id.*

¶ 14 Because money is inherently legal, it is not contraband *per se*, but it can be "derivative contraband." *In re Fifty-Three Thousand Two Hundred Sixty Three Dollars*, 159 Ill. App. 3d 114, 118 (1987). "Derivative contraband consists of property which is

innocent in itself but which has been used in the perpetration of an illegal act, *e.g.*, cash derived from the sale of illegal drugs." *People v. United States Currency \$3,108*, 219 Ill. App. 3d 441, 445 (1991). Money is thus forfeitable as derivative contraband when it is "used in the perpetration of an unlawful act." *People v. \$8,450 United States Currency*, 276 Ill. App. 3d 952, 956 (1995).

¶ 15 "Currency is subject to forfeiture if it is furnished or intended to be furnished in exchange for a substance in violation of the Illinois Controlled Substances Act or if it is proceeds traceable to such an exchange." *People v. \$5,970 United States Currency*, 279 Ill. App. 3d 583, 587 (1996). Pursuant to section 7 of the Forfeiture Act (725 ILCS 150/7 (West 2012)), "[a] presumption arises that currency was furnished or intended to be furnished in exchange for drugs when the currency is found in close proximity to forfeitable substances." *Id.* That statutory presumption, however, may be rebutted by a preponderance of the evidence. *Id.*

¶ 16 "In reaching its ruling in a forfeiture case, the trial court may draw reasonable inferences and reach conclusions to which the evidence lends itself." *Id.* at 588. "In addition, the trial court, as the trier of fact, determines the credibility of the witnesses." *Id.* "[A] reviewing court will not reverse an order of forfeiture unless it is against the manifest weight of the evidence," and "[a] reviewing court may not overturn a judgment merely because the reviewing court might disagree with the judgment, or, had the reviewing court been the trier of fact, might have come to a different conclusion." *1945 North 31st Street*, 217 Ill. 2d at 508, 510. "A judgment is against the manifest weight of the evidence only if the opposite conclusion is apparent or when findings appear to be

arbitrary, unreasonable, or not based on the evidence presented at trial." *Fox v. Heimann*, 375 Ill. App. 3d 35, 46 (2007).

¶ 17 At the outset, we acknowledge that the proceedings in the present case may not have strictly adhered with the procedure as anticipated under the Forfeiture Act. The State provided the claimant with notice of the preliminary review hearing, and the claimant appeared. The trial court allowed the claimant to be heard and to present evidence that no probable cause existed for the forfeiture of her property. Section 3.5 of the Forfeiture Act does not specifically allow or disallow such a procedure. Arguably, by proceeding in this expedited manner, the trial court proceeded as if the hearing were a judicial *in rem* procedure. See 725 ILCS 150/9 (West 2012). The State did not object, however, and the State raises no procedural arguments on appeal. Moreover, under the doctrine of invited error, a party cannot acquiesce to the manner in which a trial court proceeds and then claim on appeal that the court's course of action was erroneous. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004); *People v. Liekis*, 2012 IL App (2d) 100774, ¶ 24.

¶ 18 On appeal, the State argues that the trial court erred in finding that the claimant had sufficiently rebutted the presumption that the cash found in her purse was furnished or intended to be furnished in exchange for drugs. We disagree. In our view, this case is analogous to *People ex rel. Waller v. 1989 Ford F350 Truck*, 162 Ill. 2d 78 (1994). In that case, a small amount of cocaine and \$55.99 were found in the claimant's front-right pants pocket when he was arrested for driving under the influence of alcohol. *Id.* at 80. The State subsequently brought a forfeiture action that included the money, and

following a hearing, the trial court entered judgment in the State's favor. *Id.* at 81. On appeal, "the appellate court held that the trial court properly found that the \$55.99 in cash was subject to forfeiture, as there was a statutory presumption that currency found in such close proximity to a controlled substance is subject to forfeiture." *Id.* at 83. On appeal to the supreme court, the claimant argued that there was no evidence that the \$55.99 "was anything more than an amount ordinarily carried on his person for unexpected needs while away from his home or business." *Id.* at 84. Reversing the lower courts' judgments on the issue, the supreme court agreed with the claimant and held that he had sufficiently rebutted the statutory presumption. *Id.* at 84-85, 91. The court stated that the amount of money in question was "insignificant" and that the claimant's assertion that the money was an amount that he normally carried was credible. *Id.* at 85. The court further stated:

"The fact that the cash was in close proximity to the drugs bears less presumptive weight in this case than in cases where large amounts of cash are kept in the same or nearby safe as illicit drugs. [Citation.] In those cases, it is reasonable to infer from the large amounts of cash and the proximity of the drugs that there is an integral connection between the two. In the case at bar, however, what is involved is pocket money and it is more than reasonable that it would be found in a person's pocket. We find that defendant has overcome the statutory presumption, and because the State has not introduced any evidence indicating that the money is related to any illicit transaction, we hereby reverse the order of forfeiture with respect to the \$55.99 in cash." *Id.*

¶ 19 Here, the claimant presented evidence that she earns an average of \$304 in cash

tips per shift in the course of her employment as a waitress, and she indicated that the cash found in her purse was her tip money. The trial court obviously found the claimant's representations credible (*cf. \$5,970 United States Currency*, 279 Ill. App. 3d at 588 (noting that "the trial court specifically found that [the] claimant's innocent explanation for possessing the currency was not credible")), and the court's determination that the money "was not related to drug activity" is not against the manifest weight of the evidence. Although \$579 is not as insignificant as \$55.99, it is not unreasonable that a waitress who earns hundreds of dollars in cash tips per shift would have such an amount in her purse.

¶ 20 On appeal, the State suggests an alternative basis for reversing the trial court's judgment that the cash found in the claimant's purse was not subject to forfeiture. Referencing the claimant's admissions that she is a heroin addict and that she buys her heroin with money she earns as a waitress, the State suggests that the \$579 found in the claimant's purse is forfeitable because she intended to use the money to purchase heroin. Assuming, *arguendo*, that the claimant's admissions can be deemed evidence of her unequivocal intent to use at least some of the \$579 to purchase heroin at some point in the future, however, we perceive two problems with this argument.

¶ 21 First of all, this theory was not specifically pled or advanced in the trial court. At the hearing on the State's request for preliminary review, after the claimant presented her case that the source of the money was not drug-related, the trial court gave the State the opportunity to respond. The State did not respond with evidence or argument that the claimant intended to use the money to purchase heroin. It is well settled that an issue not

presented to or considered by the trial court is deemed waived and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996); *Cosentino v. Price*, 136 Ill. App. 3d 490, 494 (1985). "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 (2005).

¶ 22 Secondly, principles of waiver aside, we cannot conclude that the cash found in the claimant's purse would be subject to forfeiture on the basis of her admissions alone. In *United States v. \$30,354 in United States Currency*, 863 F. Supp. 442, 445-47 (W.D. Ky. 1994), the district court held that pursuant to 21 U.S.C. § 881, to "trigger forfeiture" on a theory that money was intended to be furnished in exchange for a controlled substance, a claimant's statement of intent to use the money to facilitate a drug transaction is insufficient. Accord *Erinkitola v. United States*, 901 F. Supp. 80, 82, 85 (N.D.N.Y. 1995) (holding that cash was properly forfeitable as "an instrumentality of the crime" where the claimant "carried [the money] with him to [a] parking lot where [a prearranged] drug transaction was to occur" and it was "undisputed that [he] intended to use the [money] *** to facilitate a drug transaction"). As previously noted, except where their provisions "expressly differ," the provisions of the Forfeiture Act are to be interpreted "in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts" (725 ILCS 150/2 (West 2012)).

¶ 23 Other than the claimant's admissions suggesting that she might have used the

money in her purse to purchase heroin at some point in the future, "the State has not introduced any evidence indicating that the money is related to any illicit transaction" (*1989 Ford F350 Truck*, 162 Ill. 2d at 85) or was otherwise "used in the perpetration of an unlawful act" (*\$8,450 United States Currency*, 276 Ill. App. 3d at 956). "[M]ore than a statement of intent is necessary to trigger forfeiture" (*\$30,354 in United States Currency*, 863 F. Supp. at 447), and we reject the State's alternative basis for reversing the trial court's judgment.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, we hereby affirm the trial court's judgment that the \$579 found in the claimant's purse was not subject to forfeiture.

¶ 26 Affirmed.

¶ 27 JUSTICE SPOMER, dissenting:

¶ 28 I respectfully dissent. As the majority notes, this case involves the State's request, pursuant to section 3.5(a) of the Forfeiture Act (725 ILCS 150/3.5(a) (West 2012)), for a preliminary determination from the trial judge as to whether probable cause existed that the \$579 in question in this case may be subject to forfeiture. Upon a finding of probable cause, subsequent forfeiture proceedings may then be instituted by the State, and the property in question may be held by the State until the conclusion of those proceedings. 725 ILCS 150/3.5(e) (West 2012). Accordingly, in my view, the sole purpose of a request for preliminary review is to determine if sufficient probable cause exists to justify subsequent forfeiture proceedings and the holding of the property in question during the

pendency thereof. Section 3.5, however, provides no guidance for what sort of evidence is to be considered when making a probable cause determination, other than to state that "[t]he rules of evidence shall not apply to any proceeding conducted under this Section." 725 ILCS 150/5.3(b) (West 2012). Nevertheless, I find the rules governing probable cause determinations pursuant to other provisions of the Forfeiture Act to be instructive. The first sentence of section 9(B) (725 ILCS 150/9(B) (West 2012)) states that "[d]uring the probable cause portion of the judicial in rem proceeding wherein the State presents its case-in-chief, the court must receive and consider, among other things, all relevant hearsay evidence and information." There is no provision that allows evidence from a claimant to be presented during the probable cause portion of a proceeding under section 9, nor do I believe it is permissible to allow a claimant to present evidence during a probable cause determination pursuant to section 3.5.¹ To the contrary, and pursuant to section 9(G), it is only after probable cause has been shown that the burden shifts to the claimant to show "by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture." 725 ILCS 150/9(G) (West 2012). It is at this second stage of proceedings that the claimant presents his or her case. Accordingly, in my view the trial judge in this case erred when he allowed the claimant to present "evidence"—to the extent her unsworn "testimony" at the brief hearing may be construed

¹In my view, it would be helpful if the General Assembly clarified the interplay between section 3.5 and section 9, as to not only this issue, but as to other issues that will no doubt arise with regard to the integration of these sections.

as evidence—as to the source of the funds in question, when the sole question before the trial judge was whether the State had provided sufficient evidence to support a finding of probable cause. In this case, the State clearly did. Therefore, I would reverse the judgment of the trial court and remand with instructions to enter an order finding probable cause. Should the State institute subsequent proceedings, the claimant would then be entitled, in those proceedings, to try to prove by a preponderance of the evidence that her interest in the money in question is not subject to forfeiture.