

NOTICE

Decision filed 05/10/12. 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.

2012 IL App (5th) 110296-U

NO. 5-11-0296

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 OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Randolph County.
)	
v.)	No. 10-CF-118
)	
MILTON C. MENARD,)	
)	
Defendant)	Honorable
)	Richard A. Brown,
(Nancy A. Menard, Intervenor-Appellant).)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court
Justices Welch and Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court's order of forfeiture of weapons was not contrary to the manifest weight of the evidence, the order is affirmed.

¶ 2 After execution of a search warrant and the recovery of numerous firearms, Milton C. Menard was charged with unlawful possession of weapons by a felon. After Milton pled guilty, the State sought to have the seized firearms and ammunition forfeited. Nancy A. Menard intervened in the forfeiture case, claiming ownership of some of the firearms and ammunition and seeking a return of her property. After a hearing, the court denied Nancy's claim for return of the firearms, finding that her testimony at the hearing was not credible and that the firearms were within Milton's possession and control at the time their seizure.

¶ 3 **FACTS**

¶ 4 Milton C. Menard is a convicted felon. Witnesses reported seeing Milton shooting

one of his guns near his home in Ruma. On August 9, 2010, the circuit court issued a search warrant for the Menard home. The police executed the warrant and seized a total of 69 firearms, ammunition, and related accessories. The next day, Milton was charged with unlawful possession of weapons by a felon. On April 5, 2011, Milton pled guilty to the charge. He was sentenced to pay a fine and court costs and was placed on one year's conditional discharge.

¶ 5 The State sought a forfeiture of the firearms and ammunition seized from the Menard home. On May 5, 2011, Nancy A. Menard filed a petition to intervene in this process alleging that many of the firearms seized belonged to her. She asked the court to order the return of these firearms and related items to her.

¶ 6 Nancy A. Menard is a retired coal miner. She has never been convicted of a felony. She owns her own home in Ruma. She has been married to Milton for 25 years. Milton is not listed as an owner of the home. Nancy has had a valid Illinois firearm owner identification (FOID) card for over 19 years, and her present FOID card is valid until July 1, 2018. She joined the National Rifle Association in April 1992. At the hearing on the State's forfeiture petition, Nancy testified that she owned guns before she was married. She testified that she had bought guns at several auctions and also had acquired guns by inheritance and gifts. Nancy's guns were an investment, as while she had a pension from the coal mine, she had no other monetary assets. The value of her guns was estimated at between \$50,000 and \$60,000. Nancy testified that she kept her firearms in a room of her home, with a locked door. In this locked room, Nancy had gun cabinets, which were also locked. She had the keys to the cabinets, and Milton did not know where she kept the keys.

¶ 7 Randolph County Sheriff's Deputy Shannon Wolff testified at the hearing that when Milton was arrested, Nancy stated that Milton would be very upset if the sheriff's department took his guns because some of the guns had belonged to his father. While the search warrant

was being executed, Deputy Wolff asked Nancy for the keys to the gun cabinets. Nancy responded that she did not know the location of the keys because the gun collection belonged to Milton. Deputy Wolff asked Nancy why guns were kept in a bedroom dresser drawer, and Nancy replied that the dresser drawer was where Milton kept them. Deputy Wolff testified that in addition to the "gun room" in the home, there were a number of guns found throughout the house that were not locked up, including a .22 rifle which was propped up behind the back door of the home.

¶ 8 At the forfeiture hearing, Nancy denied telling Deputy Wolff that the guns belonged to Milton. She denied that Milton had access to a room where many guns were found, despite the fact that when Deputy Wolff was confiscating the weapons, Milton's clothing was scattered about that room.

¶ 9 In an order entered June 17, 2011, the trial court concluded that the firearms, which were in the custody of the Randolph County sheriff's department, should be confiscated as weapons illegally possessed by a felon during the commission of a criminal offense. The court carefully considered Nancy's testimony at the forfeiture hearing—that the guns locked in the "gun room" belonged to her and did not belong to Milton. The court commented upon Deputy Wolff's testimony about Nancy's statements during the seizure. The court noted that those statements differed from Nancy's in-court testimony. Specifically, the court noted that Nancy could not locate the keys to the gun cabinet and informed Deputy Wolff that the guns belonged to Milton as his "collection." The court stated:

"The Court finds that Nancy Menard's testimony at the hearing is contradictory to her statements made the night the guns were seized. Further, the statement made by Nancy Menard that night raises the inference that these firearms were within Defendant's possession and control. [Citation.] The Court does not believe Nancy Menard's testimony that defendant did not have access to these guns even though

they may have been kept in a locked room within his residence. Because the Court finds that defendant could exert possession and control of the firearms which the [S]tate seeks to be confiscated, they shall remain in the custody of the sheriff."

The court ordered that the firearms be transferred to the Randolph County sheriff for destruction or for discretionary preservation by the county.

¶ 10 Intervenor Nancy A. Menard appeals.

¶ 11 **LAW AND ANALYSIS**

¶ 12 Pursuant to section 24-6 of the Illinois Criminal Code of 1961, the State is given the authority to confiscate and dispose of weapons. The wording of the statute is:

"(a) Upon conviction of an offense in which a weapon was used or possessed by the offender, any weapon seized shall be confiscated by the trial court.

(b) *** After the disposition of a criminal case ***, and when a confiscated weapon is no longer needed for evidentiary purposes, and when in due course no legitimate claim has been made for the weapon, the court may transfer the weapon to the sheriff of the county who may proceed to destroy it, or may in its discretion order the weapon preserved as property of the governmental body whose police agency seized the weapon, or may in its discretion order the weapon to be transferred to the Department of State Police for use by the crime laboratory system, for training purposes, or for any other application as deemed appropriate by the Department. ***." 720 ILCS 5/24-6(a), (b) (West 2010).

¶ 13 Although partly civil, a forfeiture action is considered quasi-criminal in nature because the "only objective is to penalize unlawful activity." *People v. Earl*, 121 Ill. App. 3d 254, 257, 459 N.E.2d 342, 345 (1984). Because a forfeiture proceeding is quasi-criminal, the burden of proof is on the State. *People v. Braden*, 243 Ill. App. 3d 671, 676, 611 N.E.2d 575, 579 (1993) (citing *People v. LeShoure*, 143 Ill. App. 3d 839, 844, 493

N.E.2d 687, 690 (1986)). The State is required to prove its right to the contraband property by a preponderance of the evidence. *Id.* On appeal of a contraband forfeiture case, we review the trial court's decision to determine if the order is contrary to the manifest weight of the evidence. *Id.*

¶ 14 Initially, Nancy argues that the order of forfeiture is flawed because there was no finding that the firearms were either contraband *per se* or derivative contraband. She argues that only contraband that has been categorized can be forfeited. *Earl*, 121 Ill. App. 3d at 259, 459 N.E.2d at 345-46.

¶ 15 The distinction between types of contraband was discussed in the Illinois Supreme Court case *People v. Steskal*, 55 Ill. 2d 157, 159, 302 N.E.2d 321, 323 (1973)—a case involving seizure and forfeiture of obscene materials. Contraband *per se* is criminal by its very possession, and no legitimate claim for the return of the firearms could ever be made. *Id.*; *Earl*, 121 Ill. App. 3d at 258, 459 N.E.2d at 345. Derivative contraband weapons are those "used in illegal activity but [are] not inherently unlawful." *Earl*, 121 Ill. App. 3d at 258, 459 N.E.2d at 345; see also *Steskal*, 55 Ill. 2d at 159, 302 N.E.2d at 323. Derivative contraband must have a rational relationship or nexus to an unlawful purpose before it can be forfeited. *Braden*, 243 Ill. App. 3d at 679, 611 N.E.2d at 581. Weapons that are neither contraband *per se* nor derivative contraband "are returnable to persons establishing their possessory rights to them." *Earl*, 121 Ill. App. 3d at 258, 459 N.E.2d at 345 (citing *Biggs v. State*, 207 Tenn. 603, 341 S.W.2d 737 (1960)).

¶ 16 The defendant in *People v. Earl* was charged with and convicted of unlawful use of weapons. *Earl*, 121 Ill. App. 3d at 255, 459 N.E.2d at 343. The 9-millimeter automatic weapon recovered from the passenger compartment of the defendant's vehicle was derivative contraband, because while it is not unlawful to possess such a weapon in Illinois, it was contraband because his conviction established that this weapon was used or possessed in

illegal activity. *Id.* at 258, 459 N.E.2d at 345. The weapons confiscated from the trunk of his vehicle were neither contraband *per se* nor derivative contraband and were potentially returnable to the defendant. *Id.* The specific weapons-based offense of which the defendant was convicted involved the unlawful use of weapons in that it is illegal to have a weapon in the passenger compartment of the car. *Id.* Therefore, the court found that the weapon confiscated from inside the car was connected to that illegal activity and could be confiscated. *Id.* The weapons in the trunk were not linked to the illegal activity, as the charge was not connected to the trunk of the vehicle. *Id.*

¶ 17 We find that Nancy's argument that a seizure cannot be ordered unless the contraband is labeled as *per se* or derivative misconstrues the legal analysis of *People v. Earl*, the case she cites for this proposition. The court explained that the label is necessary to establish the connection, if any, to the crime with which a defendant is convicted, and whether confiscation is appropriate. Samuel Earl was charged with an offense that prohibited the possession of a weapon inside a vehicle because if the weapon was inside the vehicle, an individual would have easy access to the weapon. *Earl*, 121 Ill. App. 3d at 258, 459 N.E.2d at 345. Transportation of weapons that are not immediately accessible—like the weapons in his trunk—was specifically exempt from the offense of which Samuel Earl was convicted. *Id.* Concern over the State's attempt to confiscate all weapons—whether attached to the crime at issue or not—is what led to the following:

"We hold, therefore, that the court's authority to confiscate and destroy weapons under section 24-6 is limited to those weapons which are contraband *per se* or derivative contraband used or possessed in an unlawful manner as determined by a defendant's conviction of an offense involving the particular weapon(s) being considered for destruction." *Id.* at 259, 459 N.E.2d at 346.

The categorization of the weapons confiscated is not the critical factor in these cases. The

critical factor is the tie between the weapons seized and the underlying criminal charge. See *LeShoure*, 143 Ill. App. 3d at 845, 493 N.E.2d at 690-91 (holding that forfeiture of firearms was inappropriate because the underlying criminal charge was drug-related).

¶ 18 The underlying crime is the major distinction between this case and the cases Nancy cites. Milton was charged with a firearms-related offense connected to his status as a convicted felon. A convicted felon cannot own, possess, or have access to firearms. Milton pled guilty to this charge.

¶ 19 The case of *People v. Vanlandingham*, cited by the State, is analogous to the facts of this case. Leslie Vanlandingham pled guilty to unlawful possession of weapons by a felon. *People v. Vanlandingham*, 223 Ill. App. 3d 362, 365, 584 N.E.2d 904, 907 (1991). Following his plea of guilt, the forfeiture proceeding began. *Id.* Leslie's roommate (and now his wife) Martha Vanlandingham intervened, contending that the weapons belonged to her. *Id.* Her request was denied, and she appealed. *Id.* at 368, 584 N.E.2d at 909. The court noted that the State had established a connection between Leslie Vanlandingham's conviction for unlawful possession of weapons by a felon and the weapons possessed. *Id.* at 370, 584 N.E.2d at 910. Noting that the trial court was in the best position to judge the credibility of the testimony of the intervenor and law enforcement officials, the court stated that according to the testimony of law enforcement officials, the intervenor had disclaimed any ownership interest at the time that the property was searched and the items were seized. *Id.* at 371, 584 N.E.2d at 911. The intervenor testified at the forfeiture hearing that the guns were an investment. *Id.* The court concluded that the intervenor failed to establish a legitimate ownership claim to the weapons. *Id.*

¶ 20 As the court in *People v. Vanlandingham* stated, in order to justify the forfeiture, the State must prove that the defendant was convicted, that the offense was one in which a weapon was used or possessed, and that the intervenor failed to show a legitimate claim to

the weapons. *Id.* at 369, 584 N.E.2d at 909 (citing Ill. Rev. Stat. 1989, ch. 38, ¶ 24-6).

¶ 21 The instant defendant was convicted of unlawful possession of weapons by a felon. Therefore, the offense is one in which a weapon is possessed. We turn then to whether Nancy established a legitimate claim to the weapons at issue.

¶ 22 While Nancy testified at the forfeiture hearing that the guns belonged to her, this testimony was vastly different from what she told Deputy Wolff at the time that the weapons were seized. In a hearing before a trial judge, the judge has the duty to assess the credibility of the witnesses, and unless the trial court abused its discretion, we will not disturb the trial court's determination. *People v. Roesler*, 195 Ill. App. 3d 1007, 1014, 552 N.E.2d 1242, 1247 (1990) (citing *People v. Leggett*, 2 Ill. App. 3d 962, 965, 275 N.E.2d 651, 653 (1971)). Additionally, Nancy provided no evidence other than her testimony that she had ownership rights in these weapons. Nancy testified that Milton had no access to the weapons, but the state of the home at the time of the execution of the search warrant belied this assertion. Nancy did not know where Milton kept the key to the gun cases which held his gun collection. Numerous other guns were scattered throughout the home and were out in the open and not locked up. Nancy testified that the defendant did not have access to the room at issue, yet the law enforcement officers determined this statement to be false, because his clothing had been discarded in various places in that room. We note too that Nancy has had a FOID card for approximately 19 years. She testified that she had owned guns before she was married. As Nancy and Milton had been married 25 years, that assertion appears to have been constructed to bolster her ownership claim. Nancy did not provide evidence of having a FOID card before she was married, although the cards have been in existence since 1968. See 430 ILCS 65/0.01 to 16-3 (West 2010). Overall, we find that the evidence adequately supported the trial judge's conclusion that the defendant could exert possession and control of the firearms.

¶ 23 Having reviewed the record, including the testimony from the forfeiture hearing, and all applicable law, we conclude that the trial court's order was not contrary to the manifest weight of the evidence.

¶ 24 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Randolph County is hereby affirmed.

¶ 31 Affirmed.