

THIRD DIVISION
October 14, 2015

No. 1-14-3478

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)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court
Respondent-Appellee,)	of Cook County.
)	
v.)	No. 13 CR 13331
)	
JEREMY LYDON,)	Honorable
)	James B. Linn,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* This court affirmed the judgment of the circuit court ordering the forfeiture and destruction of defendant's weapons because defendant could not establish ownership or valid possession of the weapons. Defendant forfeited arguments as to constitutional violations.

¶ 2 Here, we consider whether defendant Jeremy Lydon is entitled to the return of weapons, including 12 guns and ammunition, after he was found not guilty of drug charges but lacked a valid FOID card and presented conflicting evidence as to gun ownership. For the reasons that follow, we affirm the trial court's order to confiscate and destroy the weapons.

¶ 3

BACKGROUND

¶ 4 Defendant was arrested after he allegedly pointed a handgun at his girlfriend's face and stated, "I'll blow your face off," while in their Chicago apartment. When he saw the police enter, defendant ran, gun in hand, to the bathroom and attempted to dispose of the gun. Police detained him and then, pursuant to a valid search, discovered 12 guns (including an AK47), magazines, and live ammunition, in addition to marijuana in plain sight, all of which were inventoried. The State sought to charge defendant with a number of weapons offenses, aggravated assault, and drug possession. After his girlfriend refused to cooperate, a grand jury indicted defendant for unlawful use of a weapon and drug possession/delivery. The State ultimately pursued only the drug charges and the case proceeded to a bench trial. Following the testimony of two officers, the court found the evidence insufficient and found defendant not guilty.

¶ 5 Immediately after the verdict on August 7, 2014, the State requested to confiscate and destroy defendant's guns, stating they were "contraband." The State noted it had sent an "ATF" request (presumably an Alcohol, Tobacco, and Firearm request) as to the guns. The State also presented a certified State Police report showing defendant's FOID card had expired in 2010. The State noted defendant's new application was not granted. Defense counsel, Daniel Radakovich, responded the guns belonged to defendant's father, Michael Lydon, who had a valid FOID card, and asked that the guns be returned to Michael. Defense counsel also stated defendant's FOID card was valid up to 2019, but was confiscated and revoked as a result of defendant's arrest in this case.

¶ 6 The court noted it had evidence that defendant was "running around the apartment with a crying woman with a handgun and running away from the police" and that "[n]obody is getting

these guns." Defense counsel responded defendant or his father¹ would be bringing an action in replevin to recover the guns and requested that the court suspend destruction of the weapons.

The court stated there was no evidence, including an affidavit or otherwise, that the guns belonged to Michael and, even assuming Michael's ownership, the court was concerned about permitting defendant's misuse of the guns. Defense counsel volunteered to have Michael testify under oath right then, which the court allowed. Michael testified that he resided in Naperville, IL, and was the "legal owner" of the guns with a valid FOID card and had proof of purchase as to each gun. He transferred them to his son while at the shooting range. Following this testimony, the court stated that assuming Michael owned the guns, he was at the very least careless in allowing them to be in Chicago. The court entered a confiscate and destroy order, but stayed the order pending the civil replevin action until the agreed date of August 25.

¶ 7 On August 25, defense counsel did not appear. The case was continued. The next day, Matthew Fletcher, defendant's counsel in the replevin action, appeared on his behalf. Fletcher requested the court to stay the confiscate and destroy order until a final order was entered in the replevin action. During the hearing, the court again asked who owned the guns, and counsel responded it was defendant, not Michael. The court asked to see the pleading filed in the replevin action that same day because he was "not putting this over."

¶ 8 At the following hearing on September 12, Fletcher appeared as counsel for defendant. The court noted it had read the replevin petition wherein defendant asserted he owned the guns, contrary to Michael's earlier testimony. When the court inquired about this discrepancy, counsel Fletcher responded, "the problem is *** that the father's I think having some mental issues." The court stated defendant sat through his father's testimony at the initial hearing without disclosing

¹ Defense counsel stated "Mr. Lydon" would bring the replevin action; it is unclear whether he meant Michael, Lydon senior, or defendant. Presumably, counsel meant Michael, since counsel claimed the guns were his.

this information, and "I'm concerned greatly about misrepresentations being made to me about the status of the weapons." Counsel stated that defendant's FOID card had been revoked but stated defendant had appealed and was awaiting a decision, while the State countered that defendant never had a valid FOID card at the time of this case because it expired in 2010 and thus the guns were contraband. Defense counsel suggested transferring the weapons to a third party, acknowledging that defendant could not take physical possession of the weapons. The court stated the perjury did not inspire confidence in the Lydons and he had "no confidence in anything that they're telling me now." The court said given that the civil petition was "absolutely contrary to what I heard in this courtroom," he would order the weapons destroyed. The court stated it felt it had been "grossly taken advantage of" and "lied to."

¶ 9 On September 12, consistent with his oral pronouncement, Judge Linn entered a written order lifting the stay and to confiscate and destroy the weapons according to law. Judge Linn noted the Illinois State Police certification indicated that defendant did not have a valid FOID card, as it had expired in February 2010, and thus the weapons qualified as contraband subject to destruction. Judge Linn likewise prohibited returning the weapons to defendant's father. Defendant filed a motion to reconsider, which was denied.

¶ 10 ANALYSIS

¶ 11 Forfeiture proceedings are *in rem* and therefore civil in nature. *People v. Ziomek*, 179 Ill. App. 3d 303, 306 (1989). The relevant statute, section 24-6 of the Criminal Code of 2012 provides, "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." 720 ILCS 5/24-6(a) (West 2012). Section 24-6(b) also states, "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 destroy or preserve the weapon." The State must prove its right to the items by a preponderance of the evidence, and the trial court's decision will be upheld unless contrary to law or contrary to the manifest weight of the evidence. *Ziomek*, 179 Ill. App. 3d at 306.

¶ 12 Defendant argues that because he was not convicted of any offense, he is entitled to the return of his weapons. He asserts he legally owned the weapons and stored them in his apartment.

¶ 13 The State responds that four of the guns and the silencer constituted contraband *per se*, as they were prohibited by Chicago ordinance or State statute. The State argues, moreover, that defendant did not establish valid possessory rights or ownership of the remaining eight guns/ammunition since defendant did not have a valid FOID card when arrested and his father testified he in fact owned the guns, not defendant.

¶ 14 *Per se* contraband consists of those items whose possession alone constitutes a criminal offense. *People v. Stankovich*, 20 Ill. App. 3d 162, 164 (1974). Even if improperly seized, such articles need not be returned since to do so would frustrate a clear expression of public policy. *Id.* Derivative contraband, by contrast, is not inherently unlawful and can be forfeited only if used in illegal activity. *People v. Mudd*, 54 Ill. App. 3d 603, 604 (1977).

¶ 15 Here, defendant possessed a Bushmaster model XM15-E25 rifle; an armalite model M15 rifle; a Ewbank model AK47 semi-automatic gun; a military armament MAC10 semi-automatic gun; and a silencer. Chicago ordinance bans possession, sale, or transfer of these assault weapons and silencers. See Chicago Municipal Code §§ 8-20-010 (defining assault weapons), 8-20-060(a) (declaring silencers unlawful), 8-20-075(a) (declaring assault weapons unlawful)

(2013); see also 720 ILCS 5/24-1(6) (West 2014) (banning silencers). The ordinance specifically states such weapons and silencers are "contraband and shall be seized by and forfeited to the city." Chicago Municipal Code §§ 8-20-060(c), 8-20-075(d) (2013).

¶ 16 Defendant does not deny that these four guns and the silencer were seized at his apartment and are among the items he now wishes to be returned, nor that they are prohibited by Chicago ordinance. Rather, he contends, without citing any legal authority, that we cannot consider the guns contraband *per se* because the trial court made no such "judicial finding." Defendant notes that the State *nolle prosecuted* the three gun charges relating to unlawful use of a weapon (for possessing the MAC10, AK47, and silencer) and surmises this was prompted by defendant's firearm expert's opinion that the guns were in compliance with Illinois law. Yet, defendant acknowledges in his reply brief that he has not included any report or transcript from a firearm expert in the record on appeal. The only support for his assertion is a "criminal disposition sheet" listing the gun charges and stating the evidence was inspected by defense expert witnesses with "D to tender written expert report and slate inspection of evidence."²

¶ 17 An appellant bears the burden to present a sufficiently complete record on appeal, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a factual basis; we construe any resultant ambiguity against defendant as appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *Village of Mundelein v. Bogachev*, 2011 IL App (2d) 100346, ¶ 30; see also *People v. Manning*, 334 Ill. App. 3d 882, 893-94 (2002) (matters outside the record cannot be considered on direct appeal).

² In his opening brief, defendant supported his claim that the State dropped certain charges based on the expert report by pointing to the circuit clerk's notes in the common law record, which simply say that the State *nolle prossed* counts 1, 2, and 3. This part of the record says nothing about retaining a firearm expert, the expert's written report, or that the weapons complied with Illinois law, and thus reveals defendant's blatant violation of Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013), which requires that facts be stated accurately and fairly with appropriate reference to the pages of the record on appeal.

Moreover, a reviewing court is not bound by the trial court's reasons for its judgment, and a trial court judgment may be affirmed upon any ground warranted in the record regardless of whether it was relied on by the trial court. *Kruse v. Kuntz*, 288 Ill. App. 3d 431, 434 (1996); see also *In re Rita P.*, 2014 IL 115798, ¶ 51 (the lack of factual findings does not preclude appellate review, and it is the judgment of the lower court that is reviewed and " 'not what else may have been said.' "). Given the record, which shows defendant possessed guns that are banned by Chicago ordinance, and defendant's lack of denial as to this conclusion, we hold the weapons were contraband *per se*.

¶ 18 Regardless, we emphasize defendant would not be entitled to the return of his weapons. A gun that is not contraband *per se* can be confiscated and destroyed only after there has been a criminal conviction, but significantly, *when there is no contest over ownership*. *People v. Wynn*, 98 Ill. App. 3d 567, 568 (1981); *Mudd*, 54 Ill. App. 3d at 606 (same). As the State notes, in this case there was a contest over ownership. Defendant's father stated under oath that he was the rightful owner of the weapons and asserted he held a valid FOID card. In a separate civil proceeding, by contrast, defendant asserted he was the rightful owner of the weapons (notably, the civil pleading does not appear in the record). Defense counsel later stated defendant's father was not in fact the owner and had mental problems. Defendant now points this court to documents showing his "proof of purchase," including transactions slips and a purchase form, which were attached to his posttrial motion. This is too little too late. Defendant did not then and has not now developed any argument as to how the weapons on these forms correspond to the weapons actually confiscated. See *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993) (this court is not a repository into which an appellant may foist the burden of argument and research or search the record for error). In addition, these documents do not necessarily preclude the

weapons' sale or transfer in ownership to defendant's father. Given the duplicitous assertions in the record regarding gun ownership, there is inadequate evidence establishing ownership of the weapons and thus no legitimate claim as to the weapons. See 720 ILCS 5/24-6(b) (West 2012).

¶ 19 Defendant has also failed to establish he can legally possess the weapons. The trial court found defendant did not have a valid FOID card (No. 54280308) based on a certified report of the Illinois State Police showing the card expired in 2010, and thus, the weapons constituted contraband *per se*. See 430 ILCS 65/2(a)(1) (West 2012); see, *e.g.*, *Ziomek*, 179 Ill. App. 3d at 311 (unregistered weapons are contraband *per se*); see also *City of Chicago v. Taylor*, 332 Ill. App. 3d 583, 592-93 (2002) (same); *but see Wynn*, 98 Ill. App. 3d at 568 (unregistered gun was not contraband *per se*); see also *People v. Braden*, 243 Ill. App. 3d 671, 681 (1993) (indicating weapons with lack of FOID card are not contraband *per se*). Defendant acknowledges that State Police report, cited as an exhibit in the court's September 12 order, is not in the record.

Defendant, however, asserts his card was in fact valid and points to the photocopy of his FOID card (No. 97410779), attached to his motion to reconsider, which shows the expiration date of December 2019. Notably, the FOID card numbers cited by the trial court and defendant are different. Whether defendant had a valid FOID card at the time the weapons were collected is a point that should have been clarified before the trial court. In the face of conflicting evidence and an incomplete record, we presume the trial court was correct in its judgment. See *Foutch*, 99 Ill. 2d at 391-92; *Bogachev*, 2011 IL App (2d) 100346, ¶ 30.

¶ 20 In addition, defendant's FOID card was not valid when the forfeiture proceedings concluded, which defense counsel admitted would have precluded defendant from taking possession of the weapons. See 430 ILCS 65/2 (West 2014); *People v. Fowler*, 222 Ill. App. 3d 157, 166 (1991) (noting possession of a firearm absent a valid FOID card is a criminal offense).

Although case law indicates defendants can convey their interest in weapons to someone else who can possess them (see *People v. LeShoure*, 143 Ill. App. 3d 839, 845 (1986)), here defendant did not designate anyone to take the weapons other than his father, who did not live in-state and had mental issues. His father could not possess the weapons. Based on the foregoing, the trial court had the authority to conduct forfeiture proceedings in this case and order the weapons confiscated and destroyed.

¶ 21 Defendant next contends the hearing on September 12, 2014, did not afford him "sufficient due process of law." Defendant asserts the hearing was conducted *sua sponte* without information regarding the nature or purpose of the September 12 court date. He contends he lacked the opportunity to present documents to counter the State's evidence showing there was no valid FOID card.

¶ 22 The State argues, and we agree, that defendant forfeited this argument for review by failing to contemporaneously raise the issue before the trial court and in his posttrial motion. See *People v. Denson*, 2014 IL 116231, ¶¶ 18, 21 (reaffirming *People v. Enoch*, 122 Ill. 2d 176, 186-88 (1988)). Moreover, we cannot say any error occurred because the record reveals that defendant and/or his counsel were present at the various forfeiture hearings and had ample opportunity to present witnesses, arguments, and evidence. See *Braden*, 243 Ill. App. 3d at 677 (due process requires notice, an opportunity to respond, and a meaningful opportunity to be heard). Defendant's contentions regarding the September 12 hearing are utterly disingenuous since counsel appeared at the August 26 hearing and was made aware of the conflicting ownership claims over the weapons. The court asked to immediately review the civil pleading that day, and the clerk's notes show a hearing was set September 12. That counsel did not

present winning arguments or evidence does not mean defendant was stripped of his due process rights.

¶ 23 We likewise reject defendant's argument that the trial court's ruling so broadly defines contraband as to violate the second amendment. Defendant writes, the court "essentially ruled that any person with a FOID card who has a firearm in his home is in possession of contraband." This assertion is contrary to the court's findings and our analysis above. Moreover, defendant did not raise this argument before the trial court or in his posttrial motion, thus forfeiting it. See *Denson*, 2014 IL 116231, ¶ 18. Defendant also fails to cite any legal authority to support his argument, which results in forfeiture. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (arguments must be supported by legal authority); *People v. Ward*, 215 Ill. 2d 317, 332 (2005). In addition, recent cases have upheld banning possession of semi-automatic assault weapons in the face of a second amendment challenge (*Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (2015)) and upheld requiring FOID cards as a sensible regulation that does not run afoul of the second amendment (see *In re Jordan G.*, 2015 IL 116834, ¶ 13; *People v. Mosley*, 2015 IL 115872, ¶¶ 31, 36). Defendant's argument fails.

¶ 24 CONCLUSION

¶ 25 Based on the foregoing, we affirm the decision of the trial court ordering the forfeiture and destruction of the weapons discovered in defendant's apartment upon his arrest.

¶ 26 Affirmed.