2013 IL App (3d) 120499-U

Order filed October 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHNATHAN M. BATES, GRUNDY COUNTY STATE'S ATTORNEY,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0499 Circuit No. 12-MR-11
MARKO RUSIMOVIC and $1,412.00 UNITED STATES CURRENCY,	)	The Honorable Sheldon R. Sobol, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant in a civil forfeiture proceeding was not entitled to be appointed counsel. Because defendant did not raise the argument before the trial court, defendant forfeited argument that he was improperly shackled during the civil forfeiture hearing. The trial court's finding of probable cause to forfeit $1,412 to the State was not against the manifest weight of the evidence.

¶ 2 During a traffic stop on Interstate 80, police discovered approximately 5.8 kilograms of cannabis and $1,412.00 in a rental truck driven by defendant Marko Rusimovic. After defendant pled guilty to criminal possession of cannabis with intent to deliver, the State initiated a forfeiture proceeding regarding the currency seized in the truck pursuant to the Drug Asset Forfeiture Procedure Act (725 ILCS 150/9). During the forfeiture hearing, the court denied defendant's request to be appointed counsel, and defendant represented himself while he was allegedly shackled. The trial court granted the complaint for forfeiture, and defendant appeals. We affirm.

¶ 3 FACTS

¶ 4 On October 20, 2011, Illinois State Police Trooper Matthew Wierzbinski initiated a traffic stop of a white rental truck driven by defendant Marko Rusimovic. During the stop, Trooper Wierzbinski learned that defendant was not listed as an authorized driver on the rental agreement, and also discovered that defendant's drivers license was expired. Trooper Wierzbinski called for the assistance of a canine unit, and when it arrived, the dog alerted to the presence of narcotics in the vehicle. The troopers searched the truck and discovered nine packages of a green leafy substance in the rear cargo area of the vehicle, which the troopers believed to be cannabis. Defendant was placed under arrest, and pursuant to a custodial arrest search, the troopers found $1,412 in defendant's pants pocket.

¶ 5 An analyst with the Illinois State Police Forensic Science Lab tested the substance found in the truck and identified it as cannabis. All told, over 5,869 grams of cannabis were recovered in the truck driven by defendant. The State filed criminal charges, and on January 12, 2012, defendant pled guilty to possession of cannabis with intent to deliver (720 ILCS 550/5 (West

2012). Defendant was sentenced to a six year term in the Department of Corrections.

¶ 6 The State had given defendant a notice of forfeiture regarding the currency found during the traffic stop, and defendant responded with a claim asserting his interest in the money. See 725 ILCS 150/6(C) (West 2010). On February 14, 2012, the State filed a complaint for forfeiture in the circuit court of Grundy County pursuant to the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (725 ILCS 150/9 (West 2012)). The complaint alleged that the $1,412 found on defendant during the traffic stop was intended to be used for a violation of the Illinois Cannabis Control Act (720 ILCS 550/1 et seq. (West 2012)), or was furnished in exchange for a violation of that Act. The State sought to have the $1,412 in cash discovered on defendant forfeited to the State, and to extinguish defendant's interest in the money.

¶ 7 The court held a hearing on the forfeiture complain on May 14, 2012. The Department of Corrections transported defendant from the Big Muddy Correctional Center to the Grundy County Courthouse for the hearing. The case was initially set before Judge Peterson. Judge Peterson disclosed to defendant that the State's Attorney for Grundy County was the judge's cousin, and defendant requested a different judge. The case was then transferred to Judge Sobol, who presided over the hearing. At the outset of the hearing, defendant requested that counsel be appointed to represent him. The court denied that request, and defendant proceeded *pro se.*

¶ 8 The State called Trooper Wierzbinski to testify. Trooper Wierzbinski stated that on October 20, 2011, he stopped a white rental truck on Interstate 80 for following too closely. Defendant was the driver of the truck. Trooper Wierzbinski learned that defendant was not the authorized driver on the truck's rental agreement, and further learned that defendant's California driver's license was expired. Defendant told Trooper Wierzbinski that he was traveling to

Harrisburg, Pennsylvania with a friend, who was following in a different car. Trooper Wierzbinski then requested the assistance of a Grundy County canine unit because defendant displayed signs of "heightened nervousness."

¶ 9 Once the canine unit arrived, the dog alerted to the presence of narcotics in the vehicle. Defendant then stated he had a small amount of cannabis in the cab of the truck, which Trooper Wierzbinski found when he searched defendant's backpack. The troopers then searched the cargo area of the truck. Defendant stated that he did not have a key to the lock on the rear door, so Trooper Wierzbinski cut the lock with bolt cutters. Insider the cargo area, Trooper Wierzbinski found nine cardboard boxes, along with some furniture and a bike. Inside each box, Trooper Wierzbinski found plastic, vacuum-sealed bags containing a green, leafy substance, which he believed was cannabis. The troopers placed defendant in custody. Trooper Wierzbinski searched defendant's person and found $1,412 in defendant's pants pocket.

¶ 10 Trooper Wierzbinski testified that defendant said that he was being paid travel expenses along with additional costs for taking the trip to Pennsylvania. In addition, defendant said he knew of the cannabis in the truck, although his friend told him only that there was furniture in the truck. Trooper Wierzbinski read an arrest report prepared by Sergeant Dan Devine, in which defendant told Sergeant Devine that his friend brought defendant to his house, where the truck was already packed, then handed the keys to defendant and told him to drive to Harrisburg, Pennsylvania. Defendant stated that he knew his friend grew cannabis at the home.

¶ 11 The State then admitted lab reports which showed that the green leafy substance from defendant's truck was cannabis, and also admitted a certified copy of defendant's conviction for possession of cannabis with intent to deliver.

¶ 12 On cross-examination, defendant asked Trooper Wierzbinski if defendant initially denied that he knew anything about cannabis in the truck. Trooper Wierzbinski agreed, stating the defendant said he thought it was just furniture in the rear of the truck. He also stated that defendant told him that the $1,412 in cash was defendant's money, and was not related to the back of the truck.

¶ 13 The State rested. Defendant asked the court to review an affidavit from Trisha Sterry, in which she averred that she made a personal loan of $1,600 to defendant, as well as pay stubs from Ms. Sterry. The court reviewed the documents. Defendant presented no other evidence. During closing arguments, defendant stated that his companion, who was following the truck in another car, paid for defendant's travel expenses, but the court noted that there was no evidence to support that part of defendant's argument. The court found that there was sufficient evidence to conclude that the money found on defendant was being used in conjunction with the delivery of cannabis to Pennsylvania. Accordingly, the court ordered the $1,412 forfeited to the State. On June 11, 2012, defendant filed his notice of appeal.

¶ 14 ANALYSIS

¶ 15 I. Constitutional Issues

¶ 16 On appeal, defendant first argues that his constitutional rights were violated when the trial court refused to appoint an attorney to represent him. We disagree. A forfeiture action is civil in nature. *People v. $52,204.00 U.S. Currency*, 252 Ill. App. 3d 778, 781 (1993). Accordingly, the sixth amendment does not apply in this case, as it only grants the right to assistance of counsel to defendants in criminal prosecutions. U.S. Const, amend. VI. See also *United States v. 7108 W. Grand Ave., Chicago, Ill.*, 15 F.3d 632, 635 (7th Cir. 1994) ("The sixth

amendment does not entitle owners to counsel at public expense whenever the government lays claim to their property" in a civil forfeiture proceeding); *United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995). We know of no controlling authority holding that a defendant in a civil forfeiture proceeding has a due process right to counsel.[1] Furthermore, an indigent prisoner is not entitled to appointed counsel for all civil cases. See *Newsome v. Illinois Prison Review Bd.*, 333 Ill. App. 3d 917, 922 (2002). Accordingly, we cannot conclude that defendant was entitled to appointed counsel in this case.

¶ 17 Second, defendant argues that he was shackled with hand restraints during the trial despite the fact that there was no demonstrated need for the restraints. He further argues that the shackling impaired his ability to effectively represent himself. The State correctly notes that defendant did not object to being shackled at the hearing, and therefore defendant has forfeited any claim of error on appeal. Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 24.

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[1] The Supreme Court of South Dakota has held that the due process clause of the fourteenth amendment entitled an indigent defendant to assistance of counsel where the state initiated forfeiture proceedings prior to a criminal prosecution. *State v. $1,010.00 in American Currency*, 2006 S.D. 84, ¶¶ 32-34, 722 N.W.2d 92 (2006). In contrast, several other courts have rejected the argument that due process entitles indigent defendants to counsel in a civil forfeiture proceeding. See, *e.g.*, *Commonwealth v. $9,847.00 U.S. Currency*, 550 Pa. 192, 201, 704 A.2d 612, 617 (1997); *United States v. Forfeiture, Property, All Appurtenances & Improvements, Located at 1604 Oceola, Wichita Falls, Tex.*, 803 F. Supp. 1194, 1197 (N.D. Tex. 1992).

¶ 18 While defendant did not object to being physically restrained at the hearing, an avenue still exists for this court to review the purported error. Under the plain error doctrine, a court may review a claim of error which the appellant has not properly preserved if a clear and obvious error occurred and (1) the evidence is so closely balanced that the error tipped the scales against the defendant, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Plain error is ordinarily applicable in criminal proceedings, and it is "exceedingly rare" to apply the doctrine in civil cases. (Internal quotation marks omitted.) *Reed v. Ault*, 2012 IL App (2d) 110744, ¶ 33. Plain error doctrine "is applied in civil cases only where the act complained of was a prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process itself." *Lange v. Freund*, 367 Ill. App. 3d 641, 649 (2006). Under plain error review, the defendant bears the burden of persuasion. *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 19 After reviewing the record in this case, we cannot conclude that defendant's shackling deprived him of a fair trial, as we can find no indication in the record that the restraints hindered defendant in putting on his defense or otherwise prejudiced him. In fact, the record is silent as to whether defendant was actually shackled. The defendant made no request for removal of shackles. Indeed, neither defendant nor the trial court gave any indication that he was shackled during the hearing, although the State has not disputed in this appeal that defendant was, in fact, shackled. Because we cannot discern either error or prejudice from the record before us, we hold that defendant has not met his burden of persuasion under the plain error doctrine and, therefore,

the allegation of error is forfeited.[2]

¶ 20 II. Finding of Forfeiture

¶ 21 Defendant also challenges the trial court's order forfeiting the currency to the State as an abuse of discretion. First, he argues that the trial court abused its discretion by not considering the documents he presented at the hearing. This argument lacks merit as the record clearly demonstrates that the trial judge reviewed the affidavit and pay stubs submitted by defendant.

¶ 22 Next, defendant argues that the trial court erred by determining that the money in question was subject to forfeiture. A hearing under the Forfeiture Act is a two-step process. First, the State must show probable cause for forfeiture, during which the court must receive and consider, among other things, all relevant hearsay evidence and information. 725 ILCS 150/9(B), (G) (West 2012). To satisfy the probable cause requirement under the Forfeiture Act, the State must allege and prove "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. Parcel of Property Commonly Known as 1945 N. 31st Street, Decatur, Macon County*, *Illinois*, 217 Ill. 2d 481, 505 (2005). A trial court's finding of probable cause only requires some nexus between the money and the drug activity, not a substantial connection, and the evidence need not exclude all other plausible sources of the money. *1945 N. 31st Street*,

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[2]While a credible argument night possibly be raised that the shackling restrictions set out in *People v. Boose*, 66 Ill. 2d 261 (1977) and *People v. Staley*, 67 Ill. 2d 33 (1977) should apply in a civil forfeiture situation. Because the trial court was not called on to decide whether the shackles should be removed and the issue has been forfeited for appeal, this case is not the appropriate context for such an analysis.

217 Ill. 2d at 505. A trial court's finding of probable cause is based on the totality of the circumstances. *1945 N. 31st Street*, 217 Ill. 2d at 505. If the State succeeds in making a showing of probable cause, a hearing under the Forfeiture Act proceeds to the second step, in which the claimant must 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).

¶ 23 In a forfeiture hearing, the trial court sits as the trier of fact, and the court is entitled to assess the credibility of witnesses and draw reasonable inferences and conclusions from the evidence presented. *1945 N. 31st Street*, 217 Ill. 2d at 507-08; *People v. $52,204.00 U.S. Currency*, 252 Ill. App. 3d 778, 782 (1993). "Because the circuit court bases its conclusion upon its assessment of the evidence, a reviewing court will not reverse an order of forfeiture unless it is against the manifest weight of the evidence." *1945 N. 31st Street*, 217 Ill. 2d at 508. A finding is against the manifest weight of the evidence only if it is clearly apparent from the record that the trial court should have reached the opposite conclusion, or if the finding itself is unreasonable, arbitrary, or not based upon the evidence presented. *In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 43.

¶ 24 The Cannabis Control Act provides that all money which is "used, or intended for use in a felony violation of this Act" is subject to forfeiture. 720 ILCS 550/12(a)(4) (West 2012). Thus, the State merely had to show probable cause that the money found on defendant's person was used or intended to be used to violate the Cannabis Control Act. We conclude that the trial court's determination that the $1,412 was found on defendant was subject to forfeiture was not against the manifest weight of the evidence. Defendant was stopped driving a rental truck in which police found over 5.8 kilograms of cannabis. Defendant told the trooper at the scene that

he was being paid to drive the truck to Harrisburg, Pennsylvania, and gave conflicting statements as to whether he knew about the drugs in the truck's cargo area. He also told another officer that he picked up the truck at a known cannabis-grower's home, was given the keys, and told to drive to Harrisburg. While defendant admitted an affidavit stating that the money came from a personal loan, this alone does not show that the money was not being used to help facilitate the transport of the drugs. Furthermore, although defendant attempted to argue that an unidentified companion was paying for all travel expenses, there was no evidence to support this argument. Under these circumstances, it was reasonable for the trial court to conclude that the money found on defendant was being used, or intended to be used, to deliver cannabis to Pennsylvania.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Grundy County is affirmed.

¶ 27 Affirmed.