

**Nunc pro tunc opinion. Please see original opinion at 2009-Ohio-6445**

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-VS-	:	
	:	Case No. 2009-CA-00078
JAMES M. HAYMOND	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Canton Municipal Court, Case No. 2008CRB01143

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: December 22, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Gwin, J.,*

{¶1} Defendant-appellant James M. Haymon appeals from the judgment of the Canton Municipal Court overruling his motion to return property. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On or about March 2, 2008, appellant was charged In The Canton Municipal Court with two counts of Domestic Violence, misdemeanors of the first degree in violation of R.C. 2919.25, one count of Assault, a misdemeanor of the first degree in violation of R.C. 2903.13, one count of Using Weapons While Intoxicated, a misdemeanor of the first degree in violation of R.C. 2923.15 and one count of Criminal Damaging or Endangering, a misdemeanor of the first degree in violation of R.C. 2909.06. The charges arose from a situation wherein the boyfriend of appellant's teenage daughter and his male companion presented themselves at the appellant's home to take the appellant's daughter to have a pregnancy test.

{¶3} On April 11, 2008, the prosecutor dismissed the two counts of domestic violence. Appellant then entered pleas of no contest to the remaining charges. The trial court found appellant guilty, and sentenced him to one hundred eighty (180) days in jail and court costs, with all but one day suspended and the Court additionally ordered the weapon to remain at the Sheriff's Department.

{¶4} On or about December 30, 2008, the Court found that appellant had complied with all of the terms of his probation and it was ordered that he be granted an early discharge from probation for his good behavior and compliance with the terms of his probation.

{¶15} On February 13, 2009, appellant filed a Request for the Return of Property, to wit, a Military Beretta Pistol that had belonged to his father, who was a veteran of World War II and, which was intended to be handed down to one of the family members. The state did not oppose the motion.

{¶16} On February 25, 2009, the trial court conducted a hearing upon appellant's motion. Appellant and his brother each made statements to the court. Appellant explained that he had felt intimidated by the two males who had appeared at his home on the night in question. (T. at 8). He further explained that he went inside his house while the two individuals remained outside. He retrieved the unloaded handgun from the upstairs bedroom and told his daughter to tell the men to leave. (Id.). Appellant immediately realized his mistake and put the handgun away. (Id.). Appellant never took the handgun outside of the bedroom. Appellant thereafter tried to assist the men to dislodge their truck that had become stuck in the snow in appellant's driveway. (Id.).

{¶17} Appellant's brother told the court that the handgun had been handed down from his father, a World War II veteran. (Id. at 10-11). He further informed the court that he would take custody of the firearm in the event the court decided that it should not be returned to appellant. (Id.).

{¶18} The trial court overruled appellant's motion by Judgment Entry filed March 10, 2009. In denying the motion the court stated, "As the defendant pleaded to the charge of Using Weapons While Intoxicated, the Court finds the gun was an instrumentality of the offenses. Defendant's motion for return of property is overruled."

{¶9} It is from the trial court's March 10, 2009 Judgment Entry denying his motion to return property that appellant has timely appealed raising as his sole assignment of error:

{¶10} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO RETURN [SIC.] ORDER THE RETURN OF A MILITARY BERETTA PISTOL WHICH WAS ORDERED TO REMAIN AT THE SHERIFF'S DEPARTMENT."

I.

{¶11} In his sole assignment of error appellant argues that the trial court abused its discretion by not returning the firearm to him or his brother.

{¶12} Initially, we note that in Ohio, forfeitures are typically not favored in law or equity. *State v. Johns* (1993), 90 Ohio App.3d 456, 459, 629 N.E.2d 1069, citing *State v. Lilloock* (1982), 70 Ohio St.2d 23, 25, 24 O.O.3d 64, 434 N.E.2d 723. "Whenever possible, such statutes must be construed as to avoid a forfeiture of property." *Lilloock*, 70 Ohio St.2d at 26, 24 O.O.3d 64, 434 N.E.2d 723. The Supreme Court of Ohio has cautioned that forfeiture may not be ordered, "unless the expression of the law is clear and the intent of the legislature manifest." *Id.*; see also *Dayton v. Boddie* (1984), 19 Ohio App.3d 210, 19 OBR 354, 484 N.E.2d 171. A forfeiture action, while instituted as a criminal penalty, is a civil proceeding. *State v. Roberts* (1995), 102 Ohio App.3d 514, 518, 657 N.E.2d 547, citing *State v. Casalicchio* (1991), 58 Ohio St.3d 178, 181, 569 N.E.2d 916. Accordingly, due process requires that proceedings seeking a disposition of property in forfeiture comply with the Rules of Civil Procedure. *State v. Gaines* (1990), 64 Ohio App.3d 230, 236, 580 N.E.2d 1158.

{¶13} This Court would note that former R.C. 2933.41(C) which provided that forfeiture was proper when the property is used in the commission of a crime, other than a traffic offense, which involves the owner of the property or the court determines that due to the nature of the property or the circumstances of the person, it would be unlawful for the person to possess the property, has now been repealed and replaced by R.C. 2981.01 through 2981.14. See 2006 Sub.H.B. No. 241 ("H.B. 241"). See, e.g. *State v. Clark*, 173 Ohio App.3d 719, 880 N.E.2d 150, 2007-Ohio-6235 at ¶ 14.

{¶14} R. C. 2981.02, Property subject to forfeiture, provides:

{¶15} "(A) The following property is subject to forfeiture to the state or a political subdivision under *either the criminal or delinquency process in section 2981.04 of the Revised Code or the civil process in section 2981.05 of the Revised Code*:

{¶16} "(1) Contraband involved in an offense;

{¶17} "\* \* \* ;

{¶18} "(3) An instrumentality that is used in or intended to be used in the commission or facilitation of any of the following offenses when the use or intended use, consistent with division (B) of this section, is sufficient to warrant forfeiture under this chapter:

{¶19} "\* \* \* ;

{¶20} "(b) A misdemeanor, when forfeiture is specifically authorized by a section of the Revised Code or by a municipal ordinance that creates the offense or sets forth its penalties;

{¶21} "\* \* \*

**{¶22}** "(B) In determining whether an alleged instrumentality was used in or was intended to be used in the commission or facilitation of an offense or an attempt, complicity, or conspiracy to commit an offense in a manner sufficient to warrant its forfeiture, the trier of fact shall consider the following factors the trier of fact determines are relevant:

**{¶23}** "(1) Whether the offense could not have been committed or attempted but for the presence of the instrumentality;

**{¶24}** "(2) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense;

**{¶25}** "(3) The extent to which the instrumentality furthered the commission of, or attempt to commit, the offense."(Emphasis added).

**{¶26}** R.C. 2981.04 Specification concerning forfeiture petitions, provides,

**{¶27}** "(A) (1) Property described in division (A) of section 2981.02 of the Revised Code may be forfeited under this section *only if the complaint, indictment, or information charging the offense or municipal violation, or the complaint charging the delinquent act, contains a specification of the type described in section 2941.1417 of the Revised Code that sets forth all of the following to the extent it is reasonably known at the time of the filing:*

**{¶28}** "(a) The nature and extent of the alleged offender's or delinquent child's interest in the property;

**{¶29}** "(b) A description of the property;

**{¶30}** "(c) If the property is alleged to be an instrumentality, the alleged use or intended use of the property in the commission or facilitation of the offense.

{¶31} “(2) If any property is not reasonably foreseen to be subject to forfeiture at the time of filing the indictment, information, or complaint, the trier of fact still may return a verdict of forfeiture concerning that property in the hearing described in division (B) of this section if the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice of this fact to the alleged offender or delinquent child under Criminal Rule 7(E) or Juvenile Rule 10(B).

{¶32} “(3) For good cause shown, the court may consider issues of the guilt of the alleged offender or the delinquency of the alleged delinquent child separate from whether property specified as subject to forfeiture should be forfeited.

{¶33} “(B) *If a person pleads guilty to or is convicted of an offense or is adjudicated a delinquent child for committing a delinquent act and the complaint, indictment, or information charging the offense or act contains a specification covering property subject to forfeiture under section 2981.02 of the Revised Code, the trier of fact shall determine whether the person's property shall be forfeited.* If the state or political subdivision proves by a preponderance of the evidence that the property is in whole or part subject to forfeiture under section 2981.02 of the Revised Code, after a proportionality review under section 2981.09 of the Revised Code when relevant, the trier of fact shall return a verdict of forfeiture that specifically describes the extent of the property subject to forfeiture. If the trier of fact is a jury, on the offender's or delinquent child's motion, the court shall make the determination of whether the property shall be forfeited.” (Emphasis added.)

{¶34} In the instant case, the trial court's March 10, 2009 entry does not specifically refer to R.C. 2981.02 or any other statute. Rather, the entry simply provides,

“As the defendant pleaded to the charge of Using Weapons While Intoxicated, the Court finds the gun was an instrumentality of the offenses.” Moreover, the trial court's April 11, 2008 judgment entry of sentence does not address the forfeiture of the firearm except to say that the weapon is to remain at the Sheriff's Department. Further, at no time did the state file either a criminal or a civil petition for forfeiture with respect to the handgun.

{¶35} In the case at bar, the complaint charging the offenses contained no specification covering property subject to forfeiture under section 2981.02 of the Revised Code. Given this deficiency, the trial court has no authority to order the handgun forfeited. *State v. Coleman*, Cuyahoga App. No. 91058, 2009-Ohio-1611 at ¶ 76. In addition, R.C. 2923.15, which defines the offense of Using Weapons While Intoxicated with which appellant was charged, does not specifically authorize forfeiture of the handgun. R.C. 2981.02(A)(3)(b). Finally, the trial court did not order the handgun forfeited as part of appellant's original sentence for the criminal offenses.

{¶36} For the foregoing reasons appellant's first assignment of error is granted, and the State is ordered to return the above listed property to appellant.



{¶37} The judgment of the Canton Municipal Court reversed, and the case is remanded for further proceedings consistent with this opinion.

By Gwin, J.,

Farmer, P.J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE

WSG:clw 1201

HON. JOHN W. WISE