

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

TYLER R. SPENCER

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

: Case No. 14-CA-42

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County
Municipal Court, Case Nos.
14CRB00535 and 14CRB00740

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

July 27, 2015

APPEARANCES:

For Plaintiff-Appellee:

AJMERI HOQUE
ASSISTANT PROSECUTOR
CITY OF LANCASTER
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Lancaster, OH 43130

For Defendant-Appellant:

JASON A. PRICE
126 East Chestnut Street
Lancaster, OH 43130

Delaney, J.

{¶1} Appellant Tyler R. Spencer appeals from the July 21, 2014 Entry of the Fairfield County Municipal Court ordering the sale of firearms seized from his home. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal conviction is not necessary to our resolution of this appeal. In connection with a separate misdemeanor domestic violence charge, a temporary protection order was issued against appellant for the protection of his estranged wife, J.S.

{¶3} In the criminal case at issue in this appeal,¹ appellant was charged with one count of violation of a temporary protection order pursuant to R.C. 2919.27, a misdemeanor of the first degree, for a violation which occurred on March 18, 2014. Appellant entered a plea of not guilty and the trial court appointed Attorney James M. Linehan to represent him.

{¶4} On June 10, 2014, a "Motion to Compel Sale of Seized Weapons" was journalized by the trial court and signed by counsel for appellant and appellee, and by appellant personally. The motion as converted to an order states pursuant to a negotiated plea agreement, the Fairfield County Sheriff's Department is ordered to "dispose of all firearms seized by law enforcement officers from the marital residence" as described in an attached exhibit by sale to a "third party licensed Ohio gun dealer." The Sheriff is further ordered to solicit not less than three bids within 90 days, to award

¹ The violation of T.P.O. offense was filed as Case Number 14CRB00740. Also pending against appellant were Case Numbers 14CRB00535 and 14CRB00807 which are not before us in the appeal but which were also resolved with appellant's change of plea in the instant case.

the sale to the highest bidder, and to deliver the sale proceeds to the trust accounts of either appellant's criminal defense attorney (Linehan) or the parties' respective domestic relations attorneys. We note the attached Exhibit A is a list of 18 separate firearms by description and serial number. Only the following numbered items on the list include additional information on cases, accessories, and ammunition:

* * * *

10) Smith & Wesson 380 handgun with laser Model: Bodyguard
Serial #EAX1747

* * * *

15) Savage .22 Long Rifle w/black case Model: Mark II Serial
#0779526

16) Remington 20ga. Shotgun Pump B/B w/soft case Model: 870
Serial # W1225864

* * * *

18) Charles Daly 5.56cal NATO w/4 clips and black case Model:
CDD15 Serial # 05625.

{¶5} On June 10, 2014, a "Pretrial Conference" memorandum was filed under all three case numbers, signed by the prosecutor, defense counsel and/or appellant personally [the signatures are illegible], and the complaining witness, J.S. The memorandum notes appellant will plead guilty to one count of violation of T.P.O. and the remaining charges will be dismissed with a recommended sentence of 180 days in jail with credit for time served and the balance suspended on certain conditions including but not limited to "Offer conditioned upon [appellant's] agreement/signature on agreed

entry directing F.C.S.O. to sell all seized firearms to [illegible] licensed gun dealer and deliver proceeds to D.R. attorney."

{¶6} The trial court's Journal Entry filed the same day indicates appellant changed his plea to guilty upon one count of violation of a temporary protection order and was sentenced in accord with the agreement supra. The Journal Entry of the trial court notes, e.g., "Seized weapons held by FCSO are ordered to be sold & proceeds distributed pursuant to court order;" "[appellant] must not own or purchase firearms while on probation;" and "[appellant] may use his bow for hunting purposes."

{¶7} The following statements were made by defense counsel at the change-of-plea hearing:

* * * *

As the State has indicated, there is a significant negotiation between the State and the defense in regards to the guns. I believe the entry that's been presented to the Court is a way of preserving the equity in this marital property or separate property as a domestic relations court may find, but also alleviate the Court's concern--the State's concern that there are 18 weapons available in the marital home.

So the anticipation is that these weapons will be sold. There will be three bids taken from the sheriff's department, the money will then be held in trust though the attorneys in the domestic relations court, pending an order from the domestic relations judge as to whether those are marital property or premarital property and how those

assets are going to be divided. We've put in the entry that the proceeds from the sale of the weapons can either be placed in the trust accounts of myself [or the parties' domestic relations attorneys].

So with that being said, Your Honor, we would ask that the Court adopt the joint recommendation of counsel. * * * *.

(T. June 10, 2014, 14-15.)

{¶8} On June 12, 2014, an "Agreed Entry (Amended)" was filed, signed by the trial court, defense counsel, and prosecutor, setting forth the terms of the disposition by sale of the firearms described again in an attached Exhibit A, the same list as above.

{¶9} On June 19, 2014, appellant filed a "Motion for Return of Seized Property-Gun Cases and Accessories/Request for Oral Evidentiary Hearing." This motion was filed by Attorney Jason A. Price. At the resulting hearing before the trial court on July 3, 2014, Attorney Price explained he did not represent appellant in the criminal matter but did represent him in domestic relations court and filed the motion because the disposition order for the firearms did not address a number of "gun cases and accessories (i.e. scopes, lasers, extra clips)." Appellant requested the return of these items, arguing they are outside the scope of the court's order. Appellee opposed the motion with a Memorandum in Opposition.

{¶10} At the hearing on July 3, 2014, appellant testified to a number of cases and accessories that were stored outside the gun safe in which his firearms were stored the last time he saw them, approximately two weeks before they were seized by law

enforcement. Appellant was the only witness called at the hearing and testified he does not know exactly what was seized.

{¶11} On the record at the hearing, the trial court ordered the return of anything not attached to the firearms, including accessories, cases, and unattached clips. Anything attached to the firearm, however, is considered a "firearm" pursuant to the court's original order and remains subject to seizure.

{¶12} The trial court directed appellee to prepare an entry memorializing the court's ruling.

{¶13} On July 8, 2014, appellant filed a Notice of Appeal from the Journal Entry of June 10, 2014, the "Motion to Compel Sale of Seized Weapons" as journalized by the trial court on June 10, 2014; and the "Agreed Entry (Amended)" of June 12, 2014.

{¶14} On July 21, 2014, the trial court filed an "Entry" granting appellant's motion for return of seized property in part and denying it in part. The court notes the terms of the parties' plea agreement and further states in pertinent part:

* * * *.

Upon further review, and taking into consideration the testimony offered by [appellant] and argument by the parties, the Court hereby finds that the term "firearm," as used in the Court's prior entries, includes any part, piece, instrument, or accessory which is attached to the weapon itself. For example, a strap attached to a firearm, a clip or case and any attached scopes, whether capable of removal or not, is considered part of the firearm and is to be sold pursuant to the terms outlined in the Agreed Entry

adopted by this Court. Any article of property which is not properly characterized as part of the firearm, as described above, is to be returned to the Defendant without undue delay.

* * * *

{¶15} The Entry further notes the disposition of the firearms is stayed pending appeal.

{¶16} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶17} "I. THE TRIAL COURT ERRED WHEN IT ORDERED THE FORFEITURE AND SALE OF APPELLANT'S FIREARMS SEIZED BY THE FCSO."

{¶18} "II. THE TRIAL COURT ERRED IN FAILING TO ORDER THE RETURN OF THE FIREARM ACCESSORIES."

ANALYSIS

I., II.

{¶19} Appellant's two assignments of error are related and will be considered together. In his first assignment of error, he asserts the trial court erred in ordering forfeiture of the weapons because he did not enter a knowing and voluntary plea. In his second assignment of error, appellant challenges the terms of the trial court's order of July 21, 2014 and its definition of "firearm." For the following reasons, we overrule both assignments of error.

{¶20} We first note the trial court's entry of July 21, 2014 was filed after initiation of this appeal and we must consider the issue of appellate jurisdiction. Appellant filed the notice of appeal prior to journalization of the trial court's judgment and the notice

was therefore premature. *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 527, 1999-Ohio-285, 709 N.E.2d 1148. When a notice of appeal is filed after a judgment is announced, but before the judgment is entered, that notice is treated as filed immediately after the judgment is entered. *Id.*, citing App.R. 4(C). In the case *sub judice*, appellant's notice of appeal is considered filed and effective on July 21, 2014, the date the court's judgment was filed and became final. *Id.* Accordingly, we have jurisdiction to hear the case. *Id.*, citing App.R. 4(A).

{¶21} Appellant first challenges the disposition order itself, arguing his change of plea was neither knowing or voluntary because he did not "know[] the full effect and consequences of forfeiture." We disagree.

{¶22} It is of great significance to us that disposition of firearms ordered in this case is not a "forfeiture" per se as described in Chapter 2981 of the Ohio Revised Code.² If this were a "forfeiture" pursuant to Chapter 2981, disposition of the proceeds would be controlled by R.C. 2981.12; to wit, appellant would receive none of the proceeds. Instead, this is an agreement ancillary to appellant's negotiated plea by which the trial court "preserved the equity" of the firearms for the benefit of appellant and the victim, maintaining the firearms' value subject to orders of the domestic relations court as marital property or otherwise.

{¶23} We are thus unconvinced by appellant's argument that disposition of the weapons is improper because appellee did not follow the statutory requirements of R.C. 2981.04. We disagree with appellant's characterization of the record stating the trial court's plea colloquy was insufficient pursuant to Crim.R. 11(D). The record is replete

² Appellant also references R.C. 2933.43 but that statute has been repealed and replaced with the comprehensive forfeiture scheme under Chapter 2981.

with appellant's signature upon, and verbal agreement to, disposition of the firearms in the manner repeatedly laid out by the parties and the trial court.

{¶24} Both parties cite *State v. Whitmore*, 162 Ohio App.3d 659, 2005-Ohio-4018, 834 N.E.2d 833 (6th Dist.) and we find this case instructive, even though it was decided pursuant to the former forfeiture scheme codified in R.C. 2933.43. In that case, the court noted:

A court may * * * properly declare as forfeited property surrendered pursuant to a valid plea agreement. “Where a defendant enters into a plea agreement, and clearly has notice of and agreed to forfeiture of his property, the procedural requirements under R.C. 2933.43 need not be followed in order to comport with due process. Because relinquishment of the ownership of property in such a case is effectuated by a plea agreement, and not under statutory provisions governing forfeiture, adherence to statutory forfeiture procedure is unnecessary.” (Citations omitted.) *State v. Hensley*, 9th Dist. No. 03–CA–008356, 2004-Ohio-2664, 2004 WL 1160167, at ¶ 7. When there is a plea agreement signed by the defendant, enumerating specifically what property the defendant is forfeiting and why, with an acknowledgment by the defendant that he understands the agreement, the statutory requirements may be abandoned. *State v. Fogel*, 9th Dist. No. 04–CA–008498, 2004-Ohio-6268, 2004 WL 2674591, at 7.

State v. Whitmore, 162 Ohio App.3d 659, 661-62, 2005-Ohio-4018,
834 N.E.2d 833, 835, ¶ 10 (6th Dist.)

{¶25} The court went on to find the forfeiture order in that case was improper because the trial court's entry contained no explanation of the circumstances, the record was devoid of any plea agreement signed by the defendant listing what property was to be forfeited; and there was no acknowledgment by appellant that he understood the agreement. *Id.* at ¶ 11. In the case sub judice, the record is replete with all of the above, including the parties' explanation of the surrounding circumstances; a pretrial conference memorandum signed by the parties acknowledging the agreement; defense counsel's acquiescence to and explanation of the agreement's terms; and appellant's acknowledgment twice on the record he voluntarily signed the agreements.

{¶26} We thus find the disposition of appellant's firearms was effectuated by the plea agreement and "adherence to forfeiture procedures laid out in the Ohio Revised Code * * * was unnecessary." *State v. Sammor*, 9th Dist. Summit No. 24094, 2008-Ohio-4847, ¶ 10, citing *State v. Fogel*, 9th Dist. Lorain No. 04CA008498, 2004-Ohio-6268 at ¶ 9. Appellant had notice of items included in the disposition, which we again note was to his benefit because the proceeds would be retained by the marital estate; therefore, "by entering the plea agreement he effectively 'waived application of the statutory provisions governing forfeiture procedure.'" *Id.*, citing *State v. Hensley*, 9th Dist. Lorain No. 03CA008356, 2004-Ohio-2664, at ¶ 8.

{¶27} We therefore find appellant's first assignment of error to be without merit because the trial court did not err in ordering disposition of the seized firearms.

Appellant's second contention is the trial court erred in defining "firearms" to include items attached to the firearms.

{¶28} Generally a "firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, including an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable. R.C. 2923.11(B)(1).

{¶29} We note Exhibit A, the list of firearms contained in every version of the plea agreement acknowledged by appellant, includes certain items that may be described as "accessories." Even if we assume, *arguendo*, that the trial court erred by including "attached accessories" in its disposition order, the invited error doctrine prohibits a party from taking advantage of an error that appellant induced the court to make and applies to errors arising from a negotiated plea agreement. *State v. Marcum*, 4th Dist. Hocking Nos. 12CA22, 12CA26, 2013-Ohio-2189, ¶¶ 10-11, citing *State v. Patterson*, 5th Dist. Muskingum No. CT2008–0054, 2009–Ohio–273, at ¶ 12 and *State v. Robinson*, 8th Dist. Cuyahoga No. 90411, 2008–Ohio–3972, at ¶ 7.

{¶30} Consequently, whatever error the trial court may have committed in its resolution of the accessories issue was invited by the terms of appellant's plea agreement "inviting the trial court to issue the order that he now asserts is improper." *Id.* "As such, we do not decide if the trial court erred, but rather that the invited error doctrine bars appellant from raising any such error at this time." *Id.*

{¶31} We therefore find appellant's second assignment of error to be without merit.

CONCLUSION

{¶32} Appellant's two assignments of error are overruled and the judgment of the Fairfield County Municipal Court is affirmed.

By: Delaney, J. and

Farmer, P.J.

Wise, J., concur.