**[Cite as *State v. Jelenic*, 2010-Ohio-6056.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF MEDINA | ) | |

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| STATE OF OHIO | C.A. No. 10CA0024-M |
| Appellant | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| NICHOLAS J. JELENIC IV | COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO |
| Appellee | CASE No. 09CA0500 |

DECISION AND JOURNAL ENTRY

Dated: December 13, 2010

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WHITMORE, Judge.

**{¶1}** Plaintiff-Appellant, the State of Ohio, appeals from the judgment of the Medina County Court of Common Pleas, concluding that Defendant-Appellee, Nicholas Jelenic IV's, 1999 Oldsmobile was not subject to forfeiture. This Court affirms.

I

**{¶2}** On two separate occasions, Jelenic met with and sold marijuana to a confidential informant, who was working for the Medina County Drug Task Force ("the Task Force"). Prior to each meeting, Jelenic and the informant exchanged text messages to arrange the time and location of their meetings. An undercover agent from the Task Force observed both meetings. One meeting took place at a park and the other took place at a Burger King. Jelenic drove his 1999 Oldsmobile to both meetings.

**{¶3}** On November 4, 2009, a grand jury indicted Jelenic on two counts of trafficking marijuana, in violation of R.C. 2925.03(A)(1)(C)(3)(a), and two attendant forfeiture

specifications. The forfeiture specifications related to the 1999 Oldsmobile that Jelenic drove to each drug transaction. Specifically, the State alleged that Jelenic's vehicle was an instrumentality that Jelenic used to commit his trafficking offenses. Jelenic pleaded no contest to the trafficking counts, but refused to plead to the specifications. The court held a forfeiture hearing on February 4, 2010. On February 9, 2010, the court determined that Jelenic's 1999 Oldsmobile was not subject to forfeiture. The court sentenced Jelenic to eight months in prison, suspended upon certain conditions.

**{¶4}** The State sought leave to appeal from the trial court's ruling with regard to Jelenic's forfeiture specifications. On June 14, 2010, this Court granted the State's motion for leave. The State's appeal is now before this Court and raises one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING THE STATE OF OHIO'S PETITION FOR FORFEITURE OF A 1999 TAN OLDSMOBILE PURSUANT TO OHIO REVISED CODE SECTIONS 2941.1417 AND 2981.04(A)(1) BY INCORRECTLY APPLYING THE FACTORS DESCRIBED IN OHIO REVISED CODE SECTION 2981.02(B) AS TO WHETHER AN INSTRUMENTALITY WAS 'USED IN OR WAS INTENDED TO BE USED IN THE COMMISSION OR FACILITATION OF AN OFFENSE.'"

**{¶5}** In its sole assignment of error, the State argues that the trial court erred by refusing to order the forfeiture of Jelenic's vehicle. Specifically, the State argues that the court misinterpreted and misapplied the statutory factors a trier of fact must consider in determining whether instrumentalities are subject to forfeiture.

**{¶6}** "This Court applies a de novo standard of review to an appeal from a trial court's interpretation and application of a statute." *State v. Massien*, 9th Dist. No. 24369, 2009-Ohio-

1521, at ¶5. "A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." *State v. Baumeister*, 9th Dist. No. 23805, 2008-Ohio-110, at ¶4.

**{¶7}** A court must enforce an unambiguous statute as written, "making neither additions to the statute nor subtractions therefrom." *State v. Knoble*, 9th Dist. No. 08CA009359, 2008-Ohio-5004, at ¶12, quoting *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14. "When a statute is subject to varying interpretations, [however,] it is ambiguous and [a court] must construe it in a manner that carries out the intent of the General Assembly." *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, at ¶29. "To determine this intent, [a court must] read words and phrases in context and construe them in accordance with the rules of grammar and common usage. Additionally, *** the legislative intent may be reflected in the objective sought by the legislature, the circumstances of the statute's enactment, or [its] legislative history." (Internal citations and quotations omitted.) *Massien* at ¶5.

**{¶8}** R.C. 2981.04 allows for the forfeiture of an offender's property by way of a properly-framed specification in the offender's indictment. R.C. 2981.04(A)(1). Compare R.C. 2981.05(A) (permitting a prosecutor to seek forfeiture through a civil complaint). Yet, only certain items of property are subject to forfeiture under R.C. 2981.04. R.C. 2981.02. One such item is "[a]n instrumentality that is used in or intended to be used in the commission or facilitation of [a felony] *** when the use or intended use *** is sufficient to warrant forfeiture under this chapter." R.C. 2981.02(A)(3)(a). "'Instrumentality' means property otherwise lawful to possess that is used in or intended to be used in an offense." R.C. 2981.01(B)(6).

> "In determining whether an alleged instrumentality was used in or was intended to be used in the commission or facilitation of 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:
>
> "(1) Whether the offense could not have been committed or attempted but for the presence of the instrumentality;
>
> "(2) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense; [and]
>
> "(3) The extent to which the instrumentality furthered the commission of, or attempt to commit, the offense." R.C. 2981.02(B)(1)-(3).

The State bears the burden of proving, by a preponderance of the evidence, that property is forfeitable under R.C. 2981.02. R.C. 2981.04(B).

**{¶9}** A vehicle constitutes a "mobile instrumentality," which is an "instrumentality" for purposes of R.C. 2981, et seq, so long as the vehicle was used or intended to be used to commit an offense. R.C. 2981.01(B)(6), (8). Accord *State v. King*, 12th Dist. No. CA2008-10-035, 2009-Ohio-2812, at ¶19-20 (holding that defendant's vehicle was an instrumentality for purposes of forfeiture). Because Jelenic drove his 1999 Oldsmobile to meet his contact and to complete two trafficking offenses, there is no doubt that he used his vehicle, a mobile instrumentality, to commit two offenses. Thus, the vehicle was an instrumentality for purposes of R.C. 2981, et seq. R.C. 2981.01(B)(6), (8). The remaining issue is whether the State proved that Jelenic used his vehicle, an instrumentality, "in a manner sufficient to warrant forfeiture." R.C. 2981.02(B).

**{¶10}** The first factor that one must apply to decide if an instrumentality should be forfeited is "[w]hether the offense could not have been committed or attempted but for the presence of the instrumentality." R.C. 2981.02(B)(1). The trial court interpreted this factor as requiring the State to prove that "the offense could only have been committed by the defendant using his car on the day of the drug trafficking offenses." Because there was no evidence that Jelenic's vehicle was his only means of transportation or that Jelenic had to travel anywhere at all to sell marijuana, the trial court concluded that the State did not meet its burden on this factor.

The State argues that the trial court erred by adding the language "on the day of" to R.C. 2981.02(B). The State contends that it would be unreasonably difficult to prove that Jelenic "had no other way during the entire day of the drug transaction to arrive at the location of the offense." Under that interpretation, the State avers, mere proof of access to a public bus route would suffice to defeat a petition for forfeiture under R.C. 2981.02(B)(1).

**{¶11}** Initially, we note that the General Assembly enacted R.C. 2981, et seq., in July 2007. Few appellate courts have been presented with challenges to forfeitures under R.C. 2981, et seq., as of the date of this opinion. Indeed, this Court was unable to find any cases in which an Ohio court interpreted the meaning of any of the factors contained in R.C. 2981.02(B). Nor did the parties provide this Court with any law or secondary sources that might aid in our interpretation. With that in mind, we turn to the State's arguments.

**{¶12}** R.C. 2981.02(B)(1) requires the trier of fact to apply a "but for" test to gauge the necessity of an instrumentality. Phrased positively, R.C. 2981.02(B)(1) asks whether an offender could have committed "the offense" without the instrumentality at issue. See R.C. 2981.02(B)(1) (questioning "[w]hether the offense could not have been committed or attempted but for the presence of the instrumentality"). Although R.C. 2981.01(B)(10) defines the term "offense" as "any act *** that could be charged as a criminal offense," that definition narrows in cases where the State seeks a forfeiture by way of criminal indictment. Specifically, R.C. 2981.04 only allows for the forfeiture of an instrumentality if: (1) there is an indictment "charging the offense"; (2) the indictment contains a specification; and (3) the specification sets forth, among other items, the "alleged use or intended use of the property in the commission or facilitation of the offense." R.C. 2981.04(A)(1)(c). Thus, in R.C. 2981.04 forfeiture cases, a trier of fact must look to the specific offense charged in an offender's indictment and the

circumstances outlined in that charge's attendant specification in order to define "the offense" for purposes of R.C. 2981.02(B). See R.C. 2981.02(B) (measuring the interplay between an instrumentality and "the offense"); R.C. 2981.04(A)(1) (requiring the State to specify the criminal offense at issue and any instrumentality used in the offense when seeking to forfeit an item through indictment). Jelenic was charged with two counts of trafficking marijuana, during the commission of which he allegedly used his vehicle "as transportation to the location of the transactions." The question for the trial court, therefore, was whether Jelenic could have trafficked marijuana in this particular manner ("the offense") without the aid of his vehicle. See R.C. 2981.02(B)(1).

**{¶13}** As previously noted, the trial court interpreted R.C. 2981.02(B)(1) as requiring the State to prove that "the offense could only have been committed by the defendant using his car on the day of the drug trafficking offenses." The plain language of R.C. 2981.02(B)(1) does not include the phrase "on the day of." To warrant the inclusion of that language, the trial court first would have had to find that R.C. 2981.02(B)(1) was ambiguous. See *Knoble* at ¶12, quoting *Hubbard* at ¶14 (providing that a court may not make additions to an unambiguous statute). The trial court, however, did not make such a finding. Moreover, R.C. 2981.02(B)(1) is not ambiguous. As noted, its plain language merely required the trial court to consider whether Jelenic could have trafficked marijuana in the particular manner that he did without the aid of his vehicle. To the extent that the trial court added language to R.C. 2981.02(B)(1), it erred by doing so. See id.

**{¶14}** The trial court also found, however, that forfeiture would not be warranted under R.C. 2981.02(B)(1) because "[t]here was no evidence that [Jelenic's vehicle] was the only way [he] had to get to the places where he was meeting the confidential informant, or, indeed, that he

actually had to go somewhere to meet the confidential informant." This finding is independent of the additional "on the day of" language that the court erroneously included and is consistent with R.C. 2981.02(B)(1)'s plain language. We do not agree with the State's assertion that the trial court actually required the State to prove that Jelenic "had no other way *during the entire day of* the drug transaction to arrive at the location of the offense." The trial court simply applied the "but for" test in R.C. 2981.02(B)(1) and determined that, based on the evidence presented, Jelenic could have committed his two trafficking offenses without his vehicle.

**{¶15}** Although the State argues that the trial court misapplied R.C. 2981.02(B)(1), the State's primary concern seems to be that R.C. 2981.02(B)(1)'s "but for" test is too difficult a test to meet. Yet, the "but for" test frequently presents a cumbersome burden in other contexts. See, e.g., *State v. Lollis*, 9th Dist. No. 24826, 2010-Ohio-4457, at ¶24 (concluding that an appellant failed to prove prosecutorial misconduct where he did not show that, but for the misconduct, the jury would not have convicted him); *State v. Bradley* (1989), 42 Ohio St.3d 136, 143 (holding that a successful ineffective assistance of counsel claim requires an appellant to prove that, but for counsel's errors, the result of his trial would have been different). Given that the law does not favor forfeiture, R.C. 2981.02(B)(1)'s use of a burdensome test is unsurprising. See *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534 ("Forfeitures are not favored by the law."). Further, the State's argument that the trial court's application of R.C. 2981.02(B)(1) would make it virtually impossible for the State to forfeit property is unpersuasive. R.C. 2981.02(B)(1) is only one of three factors a trier of fact must consider in determining whether to forfeit an instrumentality. R.C. 2981.02(B).

**{¶16}** While the trial court misinterpreted R.C. 2981.02(B)(1) by including additional language, the State has not pointed this Court to any evidence to show that the court's error

actually affected its application of that factor. See App.R. 16(A)(7). The State sought to forfeit Jelenic's vehicle solely because he drove it to the locations where he committed the offenses. As a matter of law, the mere usage of an instrumentality is an insufficient basis to warrant forfeiture. R.C. 2981.02(B) (setting forth factors to determine if an instrumentality was used "in a manner sufficient to warrant its forfeiture"). It is the manner of the instrumentality's usage that makes forfeiture a viable option. Id. The State has not cited to any evidence in the record with regard to whether Jelenic used his vehicle in a manner sufficient to warrant forfeiture. See App.R. 16(A)(7). As such, we conclude that the trial court did not err by finding that forfeiture was not warranted under R.C. 2981.02(B)(1).

**{¶17}** R.C. 2981.02(B)(2) asks if the defendant's "primary purpose in using the instrumentality was to commit or attempt to commit the offense[.]" The trial court found the phrase "primary purpose in using the instrumentality" to be ambiguous. Specifically, the court noted that the phrase could refer to the primary purpose of the vehicle in general, on the day of the offense, or during the commission of the crime itself. Because the law does not favor forfeiture, the trial court concluded that "either of the first two meanings should be adopted when construing R.C. 2981.02(B)[(2)]." The trial court's ultimate conclusion was that "[t]he State *** did not show that the primary purpose of the defendant using the car on the day of the transactions was to either commit or facilitate the transactions."

**{¶18}** We disagree with the trial court's finding that R.C. 2981.02(B)(2) is ambiguous. "A statute is ambiguous when the words used are susceptible [to] more than one reasonable interpretation." *State v. McConville*, 9th Dist. No. 08CA009444, 2009-Ohio-1713, at ¶6. Including its introductory portion, R.C. 2981.02(B)(2) provides as follows:

> "In determining whether an alleged instrumentality was used *** *in the commission or facilitation of an offense* *** in a manner sufficient to warrant its

> forfeiture, the trier of fact shall consider *** [w]hether the primary purpose in using the instrumentality was to commit or attempt to commit the offense[.]" (Emphasis added.)

Based on the plain language of the statute, the phrase "primary purpose in using the instrumentality" relates back to the phrase "in the commission or facilitation of [the] offense." R.C. 2981.02(B)(2). Thus, R.C. 2981.02(B)(2) directs the trier of fact to look to a defendant's primary purpose in using an instrumentality in the commission or facilitation of the specific offense at hand. While that timeframe may be larger or smaller depending upon the nature of the charged offense at issue, R.C. 2981.02(B)(2) does not direct a trier of fact to examine the use of an instrumentality in general or "on the day of" the offense. To the extent that the trial court found R.C. 2981.02(B)(2) to be ambiguous and interpreted it in such a manner, the court erred. See *Knoble* at ¶12, quoting *Hubbard* at ¶14 (prohibiting a court from making additions to an unambiguous statute).

**{¶19}** Much like the trial court's erroneous interpretation of R.C. 2981.02(B)(1), its error with regard to R.C. 2981.02(B)(2) need not necessitate a reversal so long as the court still reached the correct outcome. See, e.g., *State v. Scott*, 9th Dist. No. 08CA009446, 2009-Ohio-672, at ¶16 (affirming on other grounds where a judgment was legally correct for reasons other than those relied upon by the trial court). The record reflects that the Task Force only monitored Jelenic during the two drug transactions at issue, both of which were very brief encounters. The State's only witness did not know how far the drug transaction locations were from Jelenic's home or workplace, but testified that Jelenic arranged the transactions via text message while he was at work. Both meetings took place in the early evening, sometime after Jelenic left work. Jelenic testified that he drove his car to and from work everyday, which he estimated to be about

forty miles each way. The State's witness testified that Jelenic had his girlfriend in his car with him during both drug transactions as well as his girlfriend's child on one of the occasions.

**{¶20}** The trial court ultimately concluded that the State did not satisfy the test set forth in R.C. 2981.02(B)(2). While we agree with the State that it did not have to present evidence with regard to the primary purpose of Jelenic's vehicle in general or on the entire day of the offense, we reiterate that R.C. 2981,et seq., requires, not just use of an instrumentality, but use in a manner sufficient to warrant forfeiture. See R.C. 2981.02(A)-(B). The State has not pointed this Court to what evidence, if any, supports a finding, under the correct interpretation of R.C. 2981.02(B)(2), that Jelenic's primary purpose in using his vehicle was to commit his trafficking offenses. See App.R. 16(A)(7). As we have repeatedly held, "[i]f an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. Without evidence to the contrary, this Court will not upset the trial court's ultimate conclusion that the State did not show that forfeiture was warranted under R.C. 2981.02(B)(2).

**{¶21}** Finally, R.C. 2981.02(B)(3) asks a trier of fact to consider "[t]he extent to which the instrumentality furthered the commission of *** the offense." The plain language of the statute simply requires a trier of fact to consider how much or how little the instrumentality at issue aided the defendant when he committed the charged offense. See R.C. 2981.02(B)(3). Applying this factor, the trial court concluded that "[t]he State did not meet its burden of showing that [Jelenic] had to use that particular car in order to commit the offense." The State argues, without any analysis or support, that the trial court misinterpreted R.C. 2981.02(B)(3) because the statute does not require proof that a defendant had to use the particular instrumentality at issue to commit his offense.

**{¶22}** The trial court's conclusion is oddly phrased in that it would appear to fit more comfortably within the framework of R.C. 2981.02(B)(1) than R.C. 2981.02(B)(3). Compare R.C. 2981.02(B)(1) (asking the trier of fact to apply a "but for" test to the use of he instrumentality) with R.C. 2981.02(B)(3) (asking the trier of fact to consider the degree to which an instrumentality aided a defendant in the commission of the charged offense). Jelenic's vehicle clearly aided him to some extent in the commission of his offenses because he drove it to the location of the offenses. Nevertheless, the trial court's point appears to be that Jelenic's vehicle did not further the commission of his offenses to any large degree because he could have committed his offenses without the aid of his vehicle. Given the limited evidence that the State presented at the forfeiture hearing and its failure to point to any of that evidence as support on appeal, we cannot take issue with the trial court's conclusion that the State did not show that forfeiture was warranted under R.C. 2981.02(B)(2).

**{¶23}** As set forth above, the State failed to prove that Jelenic used his vehicle in a manner sufficient to warrant its forfeiture. See R.C. 2981.02(A)(3); R.C. 2981.02(B). While the trial court erred in its interpretation of certain items under R.C. 2981, et seq., its ultimate ruling against the forfeiture of Jelenic's vehicle was correct. The State's sole assignment of error is overruled.

III

**{¶24}** The State's sole assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

**{¶25}** I concur in the result reached by the majority. R.C. 2981.02(B), the statute at issue, is far from a model of clarity, and thus, interpretation of the statute is not a simple task. For example, according to the statute, in determining whether an instrumentality was used "in a manner sufficient to warrant its forfeiture, the trier of fact shall consider the [] factors the trier of fact determines are relevant[.]" R.C. 2981.02(B). The statute then lists three factors. Id. It is unclear from the statute what should happen if the trier of fact concludes that none of the factors listed are relevant. In addition, it is unclear how many factors the trier of fact must find to be

relevant and applicable in order to conclude that the instrumentality was used "in a manner sufficient to warrant [] forfeiture." Id. Thus, while I might have analyzed the statute differently, I concur in the judgment.

APPEARANCES:

DEAN HOLMAN, Prosecuting Attorney, and JOSEPH P. DANGELO, Assistant Prosecuting Attorney, for Appellant.

ROBERT B. CAMPBELL, Attorney at Law, for Appellee.