

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2009-L-115
SHURMALE LAMAR GARNER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 06 CR 000174.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Shurmale Lamar Garner, pro se, PID# 522-147, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Shurmale Lamar Garner, appeals the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court denied Garner's Motion of Defendant of (sic) Return of Property. For the following reasons, we affirm the decision of the trial court.

{¶2} On June 16, 2006, the Lake County Grand Jury returned a three count indictment against Garner. Count One charged him with Trafficking in Cocaine, in an amount exceeding 1,000 grams (3,024.20 grams), a first degree felony, in violation of R.C. 2925.03(A)(2), with a Major Drug Offender Specification, pursuant to R.C. 2929.01(X), and a Forfeiture Specification, pursuant to former R.C. 2925.42, relating to Garner's vehicle. Count Two charged Garner with Possession of Cocaine, in the amount of 3,024.20 grams, a felony of the first degree, in violation of R.C. 2925.11. Count Two contained the same Major Drug Offender and Forfeiture Specifications as Count One.

{¶3} Count Three charged Garner with Possessing Criminal Tools, to wit, a 2002 Infiniti vehicle and five cellular phones, a felony of the fifth degree, in violation of R.C. 2923.24.

{¶4} The matter proceeded to trial before a jury on December 14, 2006. Following a two day trial, the jury returned a verdict of Guilty on Counts One and Two, and a verdict of Not Guilty on Count Three.

{¶5} Garner was sentenced to ten years imprisonment on Count One, and ten years on Count Two, to be served concurrently, and was ordered to serve an additional term of three years on each Major Drug Offender specification concurrent with each other, but consecutive with, and prior to, the ten year prison terms for the underlying offenses, for a total term of thirteen years. In addition, a mandatory fine of \$10,000 was imposed for each of Counts One and Two; however, this fine was waived upon the filing of Garner's Affidavit of Indigency.

{¶6} Pursuant to former R.C. 2925.42, all of Garner's rights, title and interest in his 2002 Infiniti, were forfeited to the Willoughby Hills Police Department.

{¶7} Garner pursued a direct appeal raising four assignments of error which this court deemed to be without merit¹. Garner subsequently filed a pro se motion with the trial court for the return of the property forfeited. The trial court found Garner was "not entitled to the return of the [property] as it was forfeited as part of his sentence."

{¶8} Garner timely appealed and raises the following assignments of error:

{¶9} "[1.] The trial court erred in failing to carry out into execution the jury verdict which found appellant not guilty of possessing criminal tools and forfeiture specification contained in the indictment in violation of the Fourteenth Amendment to the U.S. Constitution.

{¶10} "[2.] The trial court erred in forfeiting appellant's property where it lacked jurisdiction in the matter when the state failed to comply with the mandatory statutory and constitutional provisions under Ohio Revised Code R.C. 2933.42, R.C. 2933.43, and the Fourteenth Amendment to the U.S. Constitution and trial counsel rendered ineffective assistance for failing to file a motion for return of property seized without a warrant."

{¶11} As Garner's assignments of error are interrelated, they will be discussed together. While we note that Garner is proceeding pro se, "pro se litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors." *Curtis v. Cline*, 11th Dist. No. 2009-A-0020, 2009-Ohio-6034, at ¶13 (citations omitted).

1. For additional facts, see *State v. Garner*, 11th Dist. No. 2007-L-041, 2007-Ohio-5914.

{¶12} Garner first argues that he has been deprived of his property without due process. We disagree. This court has held that “R.C. 2925.42 provides procedures affording due process but which are not unduly restrictive on the state.” *State v. Corrado*, 11th Dist. No. 92-L-079, 1993 Ohio App. LEXIS 1219, at *8.

{¶13} Garner’s indictment explicitly stated that “[u]pon conviction, defendant’s right, title, or interest in the said 2002 Infiniti is subject to forfeiture pursuant to Ohio Revised Code, Section 2925.42.” Moreover, the jury found that “during the commission of this offense the 2002 Infiniti, silver in color ***, was in the defendant’s possession and was used or intended to be used in any manner to commit, or facilitate the commission of the felony drug abuse offense of Trafficking in Cocaine, as charged in Count One of the indictment.” Further, the jury found that the Infiniti was used to commit or facilitate “the commission of the felony drug abuse offense of Possession of Cocaine, as charged in Count Two of the indictment.”

{¶14} Garner’s car was forfeited under former R.C. 2925.42. The statute, as in effect at the time of Garner’s sentencing, provides that “a person who is convicted of or pleads guilty to a felony drug abuse offense *** loses any right to the possession of property and forfeits to the state any right, title, and interest the person may have in that property if either of the following applies:

{¶15} “(a) The property constitutes, or is derived directly or indirectly from, any proceeds that the person obtained directly or indirectly from the commission of the felony drug abuse offense or act.

{¶16} “(b) The property was used or intended to be used in any manner to commit, or to facilitate the commission of, the felony drug abuse offense or act.” Former R.C. 2925.42 (A)(1)(a) and (b).

{¶17} Garner was convicted of two felony drug abuse offenses and the jury found that the Infiniti was used to facilitate and/or commit said felony drug abuse offenses. Accordingly, his property was properly forfeited under former R.C. 2925.42.

{¶18} Garner further contends that the state did not comply with the requirements of R.C. 2933.43, which sets forth the procedure for forfeiture. However, R.C. 2933.43, as in effect at the time of Garner’s sentencing, was not applicable. Former R.C. 2933.43 states that the specified procedure is applicable “[e]xcept as provided in this division or in section 2913.34 or sections 2923.44 to 2923.47 or 2925.41 to 2925.45 of the Revised Code ***.” Consequently, as Garner’s car was forfeited pursuant to R.C. 2925.42, the provisions set forth under R.C. 2933.43 did not apply. The cases cited by Garner are inapposite, as they consider items forfeited under R.C. 2933.43 and 2933.42². *State v. Casalicchio* (1991), 58 Ohio St.3d 178 (“the state petitioned the trial court for forfeiture of Casalicchio’s automobile pursuant to R.C. 2933.43”); *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 1992-Ohio-17 (the trial court “found that the department had shown by a preponderance of the evidence that the draw poker machines and money were contraband and were in the possession of the lodge in violation of R.C. 2933.42”). Furthermore, there is no requirement in the statute for a separate hearing for forfeiture under R.C. 2925.42 as

2. Former R.C. 2933.42 states that “[n]o person shall possess *** contraband,” and said contraband is “subject to seizure and forfeiture pursuant to section 2933.43.” *Id.* at (A) and (B).

Garner suggests; “[t]he defendant bears the burden *** to request a hearing” regarding the forfeiture. *State v. Ziepfel* (1995), 107 Ohio App.3d 646, 653.

{¶19} Additionally, since Garner’s property was properly forfeited under R.C. 2925.42, trial counsel was not ineffective for failing to file a motion for return of property.

{¶20} Garner’s assignments of error are without merit.

{¶21} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, denying Garner’s motion for return of property, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.