

[Cite as *State v. Kohut*, 2002-Ohio-704.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 00-C.A.-127
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	<u>O P I N I O N</u>
	)	
JOHN KOHUT	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Campbell Municipal Court, Mahoning County, Ohio Case No. CRA00124, 125
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Brian J. Macala Law Director, City of Campbell 351 Tenney Avenue Campbell, Ohio 44405
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For Defendant-Appellant:	Atty. David J. Betras Betras, Maruca & Kopp, LLC 114 E. Front Street, Suite 100 Youngstown, Ohio 44503
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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: February 19, 2002

WAITE, J.

{¶1} This matter comes before us on appeal of the decision of the Campbell Municipal Court denying Appellant John Kohut's request to have a firearm returned to him. Based on the record herein and the law as it currently stands, we must affirm the trial court's decision.

{¶2} The record reflects that on April 21, 1999, Appellant was approached outside of his home by two men who asked for money. Appellant refused and told them to leave his property. As the men apparently refused to leave, Appellant went into the house, returned with a gun and began firing at the men. When officers arrived at the scene, they arrested Appellant, seized the gun and charged Appellant with two counts of felonious assault in violation of R.C. §2903.11(A)(1).

{¶3} The charges were later amended to two counts of negligent assault, a violation of Campbell City Code §131.04, on October 8, 1999. Appellant pleaded no contest to the charges as amended, was found guilty, fined \$250 and placed on probation. The trial court further ordered that the weapon used in the commission of the offense, which had been held as evidence, was to remain in the custody of the police pending further order of the court.

{¶4} Several months later, on May 21, 2000, Appellant filed what he styles as a Motion to Return Property. This motion

sought return of the gun. Appellant's motion was denied, and the court ordered that the weapon be confiscated and destroyed pursuant to law.

{¶5} Appellant filed a timely appeal of this order and raises a sole assignment of error:

{¶6} "The trial court committed reversible error by ordering the de facto forfeiture of a firearm seized from Appellant, John Kohut, in violation of his constitutional rights against Double Jeopardy and against excessive fines."

{¶7} Essentially, Appellant complains that the trial court erred in ordering the forfeiture of his gun when the prosecutor failed to formally institute a forfeiture action pursuant to R.C. §2933.43(C). However, because Appellant's requested property was a gun used in the commission of a crime, Appellant's arguments must fail.

{¶8} Appellant's gun was considered contraband pursuant to R.C. §2901.01(A)(13)(h). This is true because the gun was used in the commission of an offense for which Appellant pleaded guilty. This section authorized the seizure of Appellant's gun.

{¶9} As earlier stated, Appellant pleaded to and was found guilty of violating Campbell City Code §131.04, which states:

{¶10} "(A) No person shall negligently, by means of a deadly weapon or dangerous ordnance as defined in Section 2923.11 of the [Ohio] Revised Code, cause physical harm to another."

{¶11} This section, by its very terms, contains as an element the use of a weapon, in this case, a firearm.

{¶12} Turning to the error alleged by Appellant, it is undisputed that no formal forfeiture action pursuant to R.C. §2933.43(C) was instituted by the state in this matter. This is true because another section of the state statute, R.C. §2933.41(C), allows the state to dispose of so-called contraband property without the necessity of filing a formal forfeiture action.

{¶13} We have recently decided, in a case strikingly similar to the one before us, that a weapon used in the commission of an offense could be disposed of without further legal filings. As we stated in *State v. Singletary* (Dec. 9, 1999), Mahoning App. No. 98 CA 107, unreported:

{¶14} "Nothing in the record indicates that appellee sought the forfeiture of appellant's weapons or filed a petition to that effect. Rather, the trial court appears to have sua sponte ordered the forfeiture without a hearing on the matter and without presenting an opportunity for appellant to show why the weapons should not be forfeited.

{¶15} "The trial court noted that the offense appellant was convicted of was a crime of violence and that appellant had pistol whipped Hartman. R.C. 2933.41(C) provides as follows:

{¶16} "A person loses any right he may have to the possession and ownership of property, if any of the following applies:

{¶17} "(1) The property was the subject, or was used in a conspiracy or an attempt to commit, or in the commission of an offense other than a traffic offense, and such person is a conspirator, accomplice or offender with respect to the offense."

{¶18} "With respect to State's Exhibit 1, the .44 magnum, the evidence clearly established that the weapon was used in the commission of the offense. Thus, appellant lost any right to possess the weapon pursuant to R.C. 2933.41(C)(1), and was precluded from claiming it. *State v. Grundy* (Dec. 9, 1998), Summit App. No. 19016, unreported. Although no particular procedure is established for accomplishing the forfeiture of property pursuant to R.C. 2933.41(C)(1), that provision appears to permit a trial court, as part of a judgment of conviction, to order the forfeiture of property used in the commission of an offense. *State v. Hanauer* (May 3, 1995), Montgomery App. No. 14492, unreported."

{¶19} *Singletary* specifically involves the forfeiture of a gun used in the commission of the crime of aggravated menacing. In the matter before us, the gun was used in the commission of the crime of negligent assault. In all other respects, these cases are alike in matters pertinent to this issue. Therefore, under the law as found in R.C. §2933.41, forfeiture is automatic upon a finding of guilt and the present Appellant is not entitled to the return of his weapon, which may be disposed of by the state without need for further forfeiture actions.

{¶20} When we acknowledged in *Singletary* that the contraband forfeiture section provided no formal procedure for forfeiture, we also decided that no such procedure was necessary; that is,

forfeiture under R.C. §2933.41 is completely automatic once the property is identified as evidence and the accused is found guilty.

{¶21} In so holding, we maintain consistency and agreement with other districts. See *State v. Acoff* (1998), 131 Ohio App.3d 657, 659 (First Dist.), *State v. Richard* (Sept. 7, 2000), Cuyahoga App. No. 76797, unreported (Eighth Dist.), *State v. Grundy* (Dec. 9, 1998), Summit App. No. 19016, unreported (Ninth Dist.), and *State v. Hanauer* (May 3, 1995), Montgomery App. No. 14492, unreported (Second Dist.). All of these other districts also hold that forfeiture of property used in the commission of a crime is automatic.

{¶22} In addition, the trial court did not need further evidence presented in order to deny Appellant's motion. It is apparent from the record that Appellant was initially charged with felonious assault and the seized weapon was described. The fact that Appellant later pleaded guilty to a lesser offense does not make this weapon legitimate and does not make its seizure improper. In order to prevail, Appellant must show in the record that the weapon was not similarly identified at his plea hearing to the amended charges. The fact that we have no transcript of the plea hearing, as in all cases where no transcript is filed, inures to the detriment of Appellant, who had the duty of supplying a transcript. Also, it is apparent in

the record that Appellant ultimately pleaded to a charge of causing or attempting to cause harm to another by use of a deadly weapon. His plea was an admission of those facts. *State v. Perry* (1998), 83 Ohio St.3d 41, 43. Thus, a review of the entire record before this Court reveals that the trial court had before it an admission by Appellant that the contraband in question was used in the commission of the crime.

{¶23} Further, although I would find that Appellant's forfeiture here was automatic, it must be noted that Appellant waited seven months, from October of 1999 to May of 2000, to file his motion seeking return of the gun. After this long a period, the court could have ruled that the property had been abandoned and disposed of it under the unclaimed property provision of R.C. §2933.41(D)(2). Because Appellant did eventually seek its return, however, the trial court was well within its right to declare the forfeiture to be automatic and deny Appellant the relief he sought. Thus, the trial court decision is affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., dissents; see dissenting opinion.

DeGenaro, J., dissenting:

{¶24} I must respectfully dissent. I disagree with the majority's conclusion that the Revised Code provides no particular procedure for the forfeiture of property used in the commission of an offense. I would find R.C. 2933.43(C) provides just such a procedure. Because the procedural mandates of R.C. 2933.43(C) were not followed in this case, I would reverse the trial court's decision and remand this case for further proceedings.

{¶25} As noted by the majority, the firearm at issue in this case was contraband under R.C. 2901.01(A)(13)(h) as it apparently was used in the commission of the offense to which Kohut pled guilty. Pursuant to R.C. 2933.41(C)(1), a person loses the right to own or possess any property that person used in the commission of an offense, other than a traffic offense. The majority's opinion relies heavily upon this court's decision in *State v. Singletary* (Dec. 9, 1999), Mahoning App. No. 98 CA 107, unreported, wherein the panel noted R.C. 2933.41(C) provides no particular procedure for accomplishing the forfeiture of property. *Id.* at 4. However, *Singletary* ignores the fact that R.C. 2933.43(C) provides that procedure when the property in question is contraband. Because of R.C. 2933.43(C), forfeiture under R.C. 2933.41(C) cannot be automatic when the property in question is contraband. Therefore, in order for this seizure to properly be transformed into a forfeiture, the trial court must comply with the procedures in R.C. 2933.43(C).

{¶26} **"The prosecuting attorney, village solicitor, city director of law, or similar chief legal officer who has responsibility for the prosecution of the underlying criminal case * * * shall file a petition for the forfeiture,** to the seizing law enforcement agency of the contraband seized pursuant to division (A) of this section. The petition shall be filed in the court that has jurisdiction over the underlying criminal case * * *

involved in the forfeiture. * * *

{¶27} "If the property seized was determined by the seizing law enforcement officer to be contraband because of its relationship to an underlying criminal offense * * *, no forfeiture hearing shall be held under this section unless the person pleads guilty to or is convicted of the commission of * * * the offense or a different offense arising out of the same facts and circumstances * * *; **a forfeiture hearing shall be held in a case of that nature no later than forty-five days after the conviction** * * *, unless the time for the hearing is extended by the court for good cause shown. The owner of any property seized because of its relationship to an underlying criminal offense * * * may request the court to release the property to the owner. * * *

{¶28} "Where possible, a court holding a forfeiture hearing under this section shall follow the Rules of Civil Procedure. When a hearing is conducted under this section, property shall be forfeited upon a showing, by a preponderance of the evidence, by the petitioner that the person from which the property was seized was in violation of division (A) of section 2933.42 of the Revised Code. If that showing is made, the court shall issue an order of forfeiture. * * * Except as otherwise provided in this division, all rights, interest, and title to the forfeited contraband vests in the state, effective from the date of seizure." (Emphasis added) R.C. 2933.43(C).

{¶29} Ohio law does not favor forfeiture. *State v. Hill* (1994), 70 Ohio St.3d 25, 31, 635 N.E.2d 1248, 1253; *Singletary, supra*. Therefore, statutes imposing forfeiture should be strictly construed, and whenever possible, forfeiture should be avoided. *State v. Lilliock* (1982), 70 Ohio St.2d 23, 25-26, 24 O.O.3d 64, 65-66, 434 N.E.2d 723, 725. The procedure established in R.C. 2933.43(C) for forfeiture is vital to ensuring the State does not force an improper forfeiture. By not applying those procedures when forfeiture appears appropriate due to R.C. 2933.41(C)(1), the majority fails to

strictly construe this statutory framework against forfeiture. R.C. 2933.41(C)(1) is the state's justification for seeking forfeiture, not the vehicle to effect forfeiture.

{¶30} A demonstration of why this procedure is vital is appropriate. Let us assume a man, Smith, had a friend who left a firearm at Smith's home. Smith then becomes involved in a dispute with a third party, goes inside his home to retrieve his friend's firearm and fires it at the third party. Under the majority's rule, in all likelihood, Smith's friend's firearm would be forfeited because Smith's friend would not have the opportunity to request the return of his firearm. Likewise, if, in the present case, Kohut owned more than one firearm and, when he was arrested, the officers seized the wrong firearm, there is no procedural remedy available to Kohut to prove the firearm was not the one used in the commission of the offense.

{¶31} In the present case, the trial court failed to comply with the mandatory, statutory procedures found in R.C. 2933.43 and ordered a forfeiture. The record reveals not only that the prosecuting attorney failed to file a petition for forfeiture, the trial court failed to hold a forfeiture hearing within forty-five days after Kohut was convicted of Negligent Assault.

{¶32} I wish to make it clear I am not concluding that, had a proper forfeiture hearing been held, Kohut would have had the firearm returned to him. If the firearm in question was his firearm and was used in the commission of the offense of which he was convicted, then he lost any right to that firearm pursuant to R.C. 2933.41(C)(1). However, because the prosecution did not file a petition for forfeiture in accordance with R.C. 2933.43(C), the trial court had no basis upon which it could properly order the forfeiture of this firearm.

{¶33} In holding that a trial court must comply with the procedural mandates of R.C. 2933.43(C) before it may order the

forfeiture of any contraband, even that used in the commission of an offense, I would disagree with this court's decision in *Singletary* and the case it relies upon, *State v. Hanauer* (May 3, 1995), Montgomery App. No. 14492, unreported. However, I would still be "maintaining consistency and agreement" with other cases cited by the majority.

{¶34} For instance, in *State v. Acoff* (1998), 131 Ohio App.3d 657, the defendant pled no contest to a charge of improperly handling a firearm in a motor vehicle. At the sentencing hearing, the prosecutor asked that the state retain possession of the gun. However, the trial court released the gun to the defendant. The First District reversed that decision, noting that an individual loses any right to property used in the commission of a non-traffic offense, and remanded for implementation and execution of the amended judgment. However, the decision is silent as to how the trial court is to implement that amended judgment. It does not speak to the issue in this case, namely, what procedure must a trial court follow when ordering a forfeiture.

{¶35} The majority also concludes it is "maintaining consistency and agreement" with *State v. Richard* (Sept. 7, 2000), Cuyahoga App. No. 76797, unreported. In *Richard*, a jury found the defendant guilty of one count of preparation of drugs for sale, three counts of possession of drugs, two counts of trafficking in cocaine, and one count of possession of criminal tools. The trial court sentenced the defendant and ordered the forfeiture of the funds seized at the time of the defendant's arrest. When discussing whether that order was proper, the Eighth District correctly noted R.C. 2933.41(C)(1) provides a person loses any right to property used in the commission of a non-traffic offense. It then goes on to decide whether the funds in question were used in the commission of the offense. Once again, the opinion is silent as to what is the proper procedure a trial court must follow when ordering a forfeiture

of contraband. In other words, *Richard* would be consistent with both the majority's opinion and this dissent.

{¶36} In this case, Kohut pled guilty to two counts of Negligent Assault. Without the forfeiture hearing required by R.C. 2933.43(C), it is impossible to tell either whether the firearm in question was the one used in the commission of the offense or even whether the firearm was Kohut's to forfeit. For these reasons, I would find the trial court's erred when it ordered Kohut's firearm be forfeited and would reverse its decision.