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CLERK OF COURT, CLERMONT COUNTY, OHIO

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STATE OF OHIO, :
 :
 Plaintiff : **CASE NO. 2016 CR 00503**
 vs. :
 : **Judge McBride**
 ALAYNE L. SCHMOGROW, :
 : **DECISION/ENTRY**
 Defendant :

Thomas W. Scovanner, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Lauri Tekulve, counsel for the defendant Alayne L. Schmogrow, 202 E. Main Street, Batavia, Ohio 45103

This cause is before the court for consideration of the state's motion filed on March 20, 2017, seeking to forfeit and destroy a firearm seized in this case from the defendant. The court took this motion under advisement on April 26, 2017.

Upon consideration of the motion, the written arguments of counsel, the record of this case, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On August 25, 2016, the defendant Alayne L. Schmogrow was indicted on two charges: 1) illegal conveyance or possession of a deadly weapon or illegal possession of an object indistinguishable from a firearm in a school safety zone in violation of R.C. 2923.122(A), a felony of the fifth degree, and 2) having a weapon while under disability in violation of R.C. 2923.13(A)(5), a felony of the third degree.

After pleading not guilty by reason of insanity, the defendant waived her right to a jury trial in open court on November 15, 2016. The court held a bench trial on December 22, 2016. The state requested leave to dismiss the charge in count two of the indictment of having a firearm while under disability, which the court permitted. On December 27th, the court issued an entry finding the defendant not guilty of count one of the indictment by reason of insanity.

On January 6, 2017, the court held a hearing to determine whether the defendant was a mentally ill person subject to court order. On January 13th, the court issued an entry in which it found the defendant to be a mentally ill person. On January 24th, the court held a second hearing to determine the conditions to be imposed regarding the treatment, evaluation, counseling, or control of the defendant that the court considered to be necessary to protect the public safety and the welfare of the defendant. In its entry dated January 31st, the court ordered that the defendant be subject to conditional release. One of the conditions ordered was that the defendant not own, carry, purchase, possess, use or have at ready a firearm or dangerous ordnance.

Additionally, the defendant was ordered to not live in a residence where firearms are kept.

On March 20, 2017, the state filed a motion to forfeit and destroy the firearm seized from the defendant at the inception of this case. The defendant was in possession of the firearm on school grounds, which led to her arrest and the charges in this case. That firearm is a Ruger LCR 38 Special, Serial No. 541-60702. The state now seeks to have that firearm forfeited and destroyed.

The defendant filed a memorandum in opposition to the state's motion for forfeiture on March 29, 2017. The defendant argues that the state did not follow the requirements set forth for criminal forfeiture in R.C. 2981.04. In particular, the state did not include in the indictment a forfeiture specification. The defendant requests that the court find that the firearm not be forfeited, but rather, returned to an appropriate party who does not reside with the defendant. The defendant also requests that the state return an air rifle that was also seized in the case.

On April 3, 2017, the court held a hearing on the motion. The state argued that it wanted the firearm forfeited in order to protect the defendant from violating R.C. 2923.13(A)(5), as she has a weapons disability. The state indicated that it may be open to the weapon being sold in an arm's length transaction to a third party. The state also indicated that it will willingly release the air rifle to the defendant, as it is not a firearm.

The defendant's counsel reiterated that the defendant has no intention of owning a firearm while on disability and that, while her conditional release is in place, the firearm should be released to a third party.

When the court asked the state what authority it had to order the firearm forfeited when the state had not followed the procedure set forth in R.C. 2941.04, the state indicated that it would need to conduct additional research. The court gave the state one week to submit a memorandum in support. The state did not file any supporting memorandum. The court took this matter under advisement on April 26, 2017.

LEGAL ANALYSIS

R.C. 2923.13 restricts the ability of certain persons to have weapons. R.C. 2923.13 provides, in relevant part:

“(A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: * * *

(5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, ‘mentally ill person subject to court order’ and ‘patient’ have the same meanings as in section 5122.01 of the Revised Code.”¹

As discussed, this court has found the defendant to be mentally ill subject to court order and ordered her not to own, carry, purchase, possess, use or have at ready a firearm or dangerous ordnance and not to live in a residence where firearms are kept.

¹ R.C. 2923.13(A)(5). Of note, in the state’s motion, it identified the defendant as having a weapons disability under R.C. 2923.13(A)(2), which applies when “(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.” As the defendant was found not guilty by reason of insanity, this subsection is inapplicable to the defendant.

Accordingly, R.C. 2923.13(A)(5) prohibits the defendant from acquiring, having, carrying, or using a firearm.

As to forfeitures, it is a "well-recognized principle that forfeitures are not favored in law or equity, and that forfeiture statutes must be strictly construed against the state."² "Moreover, forfeitures implicate a defendant's constitutional right to be free from excessive fines, and therefore a trial court's failure to comply with the mandates of the forfeiture statute clearly affects a defendant's rights."³ Hence, "[w]henver possible, [forfeiture] statutes must be construed as to avoid a forfeiture of property."⁴

"R.C. 2981.01 through 2981.14 'define and establish the mandatory procedures for the forfeiture of property involved in or relating to certain offenses."⁵ The legislature enacted R.C. Chapter 2981 as a "way to unify and expand the former forfeiture statutes and 'to balance punitive and remedial policies with the imperative of limiting the state's exercise of police power in derogation of private property rights."⁶ As such, "the authority of the trial court to order forfeiture requires compliance with the procedural requirements of the processes established by the General Assembly."⁷ The state's

² *State v. King*, 12th Dist. Fayette No. CA2008-10-035, 2009-Ohio-2812, ¶ 12, quoting *City of Hamilton v. Callon*, 119 Ohio App.3d 759, 760, 696 N.E. 281 (12th Dist. 1997). See *State v. McMeen*, 25 N.E.3d 422, 2014-Ohio-5482, ¶ 13 (3d Dist.), citing *State v. Brownridge*, 3d Dist. Marion No. 9-09-24, 2010-Ohio-104, ¶ 22 ("Generally, forfeitures of property are not favored under Ohio law.").

³ *State v. Cave*, 4th Dist. Scioto No. 13CA3575, 2015-Ohio-2233, ¶ 40, quoting *State v. Luong*, 977 N.E.2d 1075, 2012-Ohio-4519, ¶ 44 (12th Dist.).

⁴ *McMeen*, 2014-Ohio-5482 at ¶ 13, quoting *State v. Clark*, 173 Ohio App.3d 719, 2007-Ohio-6235, 880 N.E.2d 723, ¶ 8 (3d Dist.).

⁵ *McMeen*, 2014-Ohio-5482 at ¶ 14, quoting *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, 960 N.E.2d 1042, ¶ 33 (6th Dist.). See *Erie Cty. Sheriff's Office v. Lacy*, 6th Dist. Erie Nos. E-14-023, E-14-022, 2015-Ohio-72, ¶ 20 ("* * * R.C. 2981.01 through 2981.14 established mandatory procedures for forfeiture proceedings for certain offenses.").

⁶ *State v. North*, 980 N.E.2d 566, 2012-Ohio-5200, ¶ 6 (1st Dist.), quoting *In re \$449 United States Currency*, 1st Dist. Hamilton No. C-110176, 2012-Ohio-1701, ¶ 18.

⁷ *Lacy*, 2015-Ohio-72 at ¶ 20.

strict compliance with these provisions is necessary to invoke the trial court's subject matter jurisdiction.⁸

R.C. 2981.02 sets forth three specific types of property that are subject to forfeiture to the state. These types of property include "contraband," "proceeds," and "instrumentalities" involved in the commission of a felony.⁹ A prosecuting attorney may choose to pursue forfeiture of seized property in a criminal proceeding under R.C. 2981.04 or through a civil proceeding under R.C. 2981.05, or via both.¹⁰

Under R.C. 2981.05, a prosecutor can pursue a civil action for forfeiture by filing a complaint requesting an order that forfeits the property to the state or a political subdivision.¹¹ With limited exceptions, "a civil-forfeiture complaint must be filed within 60 days of the property's seizure."¹²

Alternatively, a prosecutor may elect to pursue criminal forfeiture. R.C. 2981.04 governs criminal forfeiture proceedings and "provides that property can be forfeited if the indictment contains a specification as to the nature and extent of the defendant's interest in the property, a description of the property, and an indication as to whether the

⁸ See *State v. Little*, 12th Dist. Butler No. CA2014-01-020, 2014-Ohio-4756, ¶ 34, fn. 4; *Lacy*, 2015-Ohio-72 at ¶ 22.

⁹ R.C. 2981.02 provides: "(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: * * * (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: (a) A felony. * * *"

¹⁰ R.C. 2981.03(F). See *State v. Germany*, 1st Dist. Hamilton No. C-130777, 2014-Ohio-3202, ¶ 17 ("R.C. Chapter 2981 permits the state to seek forfeiture of an offender's property through either a criminal process under R.C. 2981.04 or a civil process under R.C. 2981.05.").

¹¹ R.C. 2981.05(A). See *Germany*, 2014-Ohio-3202 at ¶ 18, citing R.C. 2981.05(A) ("A civil forfeiture action is initiated by filing 'a complaint requesting an order that forfeits the property to the state or a political subdivision.'").

¹² *North*, 2012-Ohio-5200 at ¶ 8.

property was used in the commission or facilitation of the charged offense."¹³

Specifically, R.C. 2981.04 provides, in pertinent part:

"(A)(1) Property described in division (A) of section 2981.02 of the Revised Code may be forfeited under this section only if the defendant is convicted of, or enters intervention in lieu of conviction for, an offense or the juvenile is adjudicated a delinquent child for committing an act that would be an offense if committed by an adult and 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:

- (a) The nature and extent of the alleged offender's or delinquent child's interest in the property;
- (b) A description of the property;
- (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. * * *¹⁴

The forfeiture specification gives the defendant notice of the potential forfeiture penalty.¹⁵

¹³ *State v. Graham*, 29 N.E.3d 239, 2015-Ohio-576, ¶ 29 (12th Dist.).

¹⁴ R.C. 2981.04(A). In turn, R.C. 2941.1417(A) provides: "(A) Property is not subject to forfeiture in a criminal case unless the indictment, count in the indictment, or information charging the offense specifies, to the extent it is reasonably known at the time of filing, the nature and extent of the alleged offender's interest in the property, a description of the property, and, 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. The specification shall be stated at the end of the body of the indictment, count, or information and shall be in substantially the following form:

'SPECIFICATION (or SPECIFICATION TO THE FIRST COUNT). The grand jurors (or insert the person's or prosecuting attorney's name when appropriate) further find and specify that (set forth the alleged offender's interest in the property, a description of the property subject to forfeiture, and any alleged use or intended use of the property in the commission or facilitation of the offense).''

¹⁵ *Lacy*, 2015-Ohio-72 at ¶ 13, citing *Brimacombe*, 2011-Ohio-5032 at ¶ 65.

R.C. 2981.04(A)(2) further permits forfeiture if the property was not listed in the indictment so long as such property was "not reasonably foreseen to be subject to forfeiture at the time of filing the indictment" and "if the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice of this fact to the alleged offender * * * under Criminal Rule 7(E) * * *."¹⁶

Thus, the provisions in R.C. 2981.04(A)(2) only apply when "(1) the property subject to forfeiture is not reasonably foreseen to be subject to forfeiture at the time of the filing the charging instrument, and (2) the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice to the offender * * * under the applicable criminal * * * rule."¹⁷ As such, "in all other instances," the state must comply with R.C. 2981.04(A)(1), and include a forfeiture specification in the charging instrument.

When the state fails to follow the above forfeiture procedures, courts cannot order a defendant's property to be forfeited, and forfeiture will not be presumed.¹⁸ For example, in *State v. McMeen*, 25 N.E.3d 422, 2014-Ohio-5482, ¶ 13 (3d Dist.), the two complaints charging the defendant did not include the specification required in R.C. 2981.04 regarding the forfeiture of the defendants' handguns.¹⁹ As such, the appellate court found that the trial court had no authority to order the handguns forfeited.²⁰ As a result, the defendant's handguns were not property subject to forfeiture.²¹

A similar result occurred in *State v. Haymond*, 5th Dist. Stark No. 2009-CA-00078, 2009-Ohio-6817. In *Haymond* the state failed to include a forfeiture specification

¹⁶ R.C. 2981.04(A)(2).

¹⁷ *Little*, 2014-Ohio-4756 at ¶ 31.

¹⁸ *Brimacombe*, 2011-Ohio-5032 at ¶ 32.

¹⁹ *McMeen*, 2014-Ohio-5482 at ¶ 18.

²⁰ *Id.* at ¶ 19.

²¹ *Id.*

for the defendant's handgun in the complaint.²² Due to this "deficiency," the appellate court ruled that the trial court had "no authority to order the handgun forfeited."²³

Even when a defendant is prohibited from acquiring, owning, possessing, using or carrying firearms, forfeiture will not be presumed and the state must follow the appropriate procedures in R.C. Chapter 2981.²⁴ A defendant's firearm disability "is distinct from the consequence of forfeiture under R.C. 2981 et seq."²⁵

When the state holds a defendant's property, and that property is not subject to forfeiture, then it should be returned to the defendant.²⁶

In the case at bar, the state did not include a forfeiture specification in its charging document, which would be the indictment. Further, upon reviewing the record, the court finds that the state should have reasonably foreseen that the firearm the defendant used in the commission of her charged offense would be subject to forfeiture as instrumentality used in the commission of a felony. As discussed, pursuant to R.C. 2981.04(A), property that is reasonably foreseen to be subject to forfeiture may be forfeited only if the charging document contains the necessary forfeiture specification under R.C. 2941.1417. That did not occur in this case. Therefore, the defendant's firearm is not subject to forfeiture.

Moreover, even if the court were to find that it was not reasonably foreseeable that the firearm would be subject to forfeiture, the record is devoid of any evidence that

²² *Haymond*, 2009-Ohio-6817 at ¶ 35.

²³ *Id.*

²⁴ *Brimacombe*, 2011-Ohio-5032 at ¶ 68.

²⁵ *Id.*

²⁶ *See Graham*, 2015-Ohio-576 at ¶ 30 (finding that, where the state had not sought criminal forfeiture under R.C. 2981.04, the defendant's property was not subject to forfeiture and should be returned to the defendant); *Cave*, 2015-Ohio-2233 at ¶ 42 (finding that, in a case where the trial court errantly ordered forfeiture of the defendant's property, the property must be returned to the defendant or the defendant's "designated representative.").

the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice of this fact to the defendant under Crim.R. 7(E) as required by R.C. 2981.04(A)(2). Rather, based on the record, the state requested the forfeiture of the firearm only after this court issued its finding that the defendant was not guilty by reason of insanity. As the Twelfth District Court of Appeals acknowledged in a similar situation, in which the defendant was notified of forfeiture only after the trial court found the defendant guilty, “[t]his hardly constitutes giving ‘prompt notice’ to the offender that the property was subject to forfeiture.”²⁷

Additionally, the state has not pursued forfeiture by way of civil proceedings under R.C. 2981.05. There is no indication in the record that the prosecutor has ever filed a civil action for forfeiture by filing a complaint requesting an order that forfeits the defendant's firearm.

Accordingly, the court has no authority to order the defendant's firearm to be forfeited.²⁸ As discussed, the procedures set forth in R.C. Chapter 2981 must be followed in order to invoke this court's subject matter jurisdiction over forfeiture proceedings. As a result, the court cannot order forfeiture and the state must return the property.

The fact that the defendant is presently under a disability and may not possess a firearm is immaterial to the question of forfeiture. As explained, even in instances where a defendant is under a weapon's disability, forfeiture will not be presumed and

²⁷ *Little*, 2015-Ohio-4756 at ¶ 34.

²⁸ *See Little*, 2015-Ohio-4756 at ¶ 35.

will not be ordered unless the state follows the appropriate procedures in R.C. Chapter 2981.²⁹

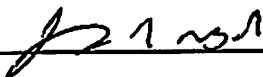
Because the defendant is under a disability and may not lawfully possess a firearm while on conditional release, the state should release the defendant's firearm to a third party representative of the defendant's choosing who does not reside with her. The defendant is cautioned and reminded that if she should acquire, have, carry, or use her firearm while under disability, she will have violated R.C. 2923.13 as well as the court order with respect to her conditional release.

CONCLUSION

For the foregoing reasons, the state's motion to forfeit and destroy weapon is not well-taken and is hereby denied. The state shall remit the defendant's firearm to a third party representative on the defendant's behalf.

IT IS SO ORDERED.

DATED: 8-20-17



Judge Jerry R. McBride

²⁹ *Brimacombe*, 2011-Ohio-5032 at ¶ 68.