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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0948
)
Appellee,) DEPARTMENT A
)
v.) MEMORANDUM DECISION
)
ADRIAN O'NEIL BARNES,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR-0020080440

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

Abigail Jensen, P.C. Prescott
By Abigail Jensen
Attorney for Appellant

D O W N I E, Judge

¶1 Adrian O'Neil Barnes appeals the forfeiture of certain property after his conviction for aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Barnes was indicted on, *inter alia*, one count of aggravated assault, a class 3 dangerous felony, for intentionally placing victim A.V. in reasonable apprehension of imminent physical injury by use of "a deadly weapon or dangerous instrument, to-wit: .22 rifle." Police seized the rifle with attached scope and magazine, as well as a box of .22 caliber ammunition, from the trunk of Barnes's vehicle following his arrest. A jury convicted Barnes after hearing evidence that he opened the trunk during a heated argument in the early morning hours, took out the rifle, and pointed it at the victim.

¶3 Five days before sentencing, the State noted in its presentence memorandum that, as a result of Barnes's conviction, "pursuant to A.R.S. Sec. 13-3105, the rifle and ammunition should be forfeited." At sentencing, the court imposed a mitigated prison term of five years and ordered the rifle, magazine, scope, and ammunition forfeited. The court stated it would order the property returned to the Prescott Valley police, to be retained pending any appeal or post-conviction relief proceeding. The court asked if there was any objection to this process, and defense counsel responded, "No, sir." At no time

did Barnes object to the forfeiture, complain of lack of notice, or request a further opportunity to be heard.

¶4 Barnes timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033 (Supp. 2008).

DISCUSSION

¶5 Barnes argues the trial court violated his right to meaningful notice and an opportunity to be heard regarding the forfeiture. He further contends the ammunition was not subject to forfeiture because it was in the trunk during the incident. Finally, Barnes argues that, although he did not object to the forfeiture, the court fundamentally erred by imposing an "illegal sentence."

¶6 We review issues of statutory and constitutional interpretation *de novo*. *State v. Aragon*, 221 Ariz. 88, 90, ¶ 4, 210 P.3d 1259, 1261 (App. 2009) (citation omitted); *State v. Moore*, 218 Ariz. 534, 535, ¶ 5, 189 P.3d 1107, 1108 (App. 2008) (citations omitted). Because Barnes did not object below to the forfeiture, we review only for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Barnes bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶17 The State's power to forfeit property based on a criminal conviction is subject to constitutional and statutory limits. Article 2, Section 16 of the Arizona Constitution provides that "[n]o conviction shall work corruption of blood, or forfeiture of estate." This provision is designed "to prohibit the application in Arizona of the early English penal requirement whereby a person convicted of a crime forfeited his land and personal property to the king." *Morrisey v. Ferguson*, 156 Ariz. 536, 538, 753 P.2d 1192, 1194 (App. 1988). The limitation on conviction-based forfeiture is also codified in A.R.S. § 13-904(D) (Supp. 2009), which provides: "The conviction of a person for any offense shall not work forfeiture of any property, except if a forfeiture is expressly imposed by law. All forfeitures to the state, unless expressly imposed by law, are abolished."¹

¶18 Forfeiture of the rifle was expressly authorized, as Barnes concedes, by A.R.S. § 13-3105(A) (2001), which provides:

Upon the conviction of any person for the violation of any felony in this state in which a deadly weapon, dangerous instrument or explosive was used, displayed or unlawfully possessed by such person, the court shall order the article forfeited and sold, destroyed or otherwise properly disposed.

¹ We cite to the current version of the applicable statute because no revisions material to his decision have occurred.

The trial evidence established that Barnes displayed the rifle with attached scope and magazine in committing aggravated assault. Thus, forfeiture of those items was mandatory under A.R.S. § 13-3105(A).

¶19 Section 13-3105(A) does not require the State to allege in the indictment that a deadly weapon is subject to forfeiture. *Id.* The statutes Barnes cites for the proposition that notice of forfeiture is required in the indictment--A.R.S. §§ 13-4306(C), -4308(B), and 4312(B), (G)--are located in Chapter 39 of Title 13. In 1993, the legislature expressly deleted from A.R.S. § 13-3105 prior references to Chapter 39 procedures. See 1993 Ariz. Sess. Laws, ch. 233, § 1 (1st Reg. Sess.). We cannot reinsert in the statute language that has been specifically eliminated. See, e.g., *State v. Weinstein*, 182 Ariz. 564, 567, 898 P.2d 513, 516 (App. 1995) ("[W]e cannot read into this statute language that the legislature intentionally and specifically excluded."); *Ariz. Bd. of Regents v. State ex rel. State of Ariz. Pub. Safety Ret. Fund Manager Adm'r*, 160 Ariz. 150, 157, 771 P.2d 880, 887 (App. 1989) (holding that where the legislature has specifically used a term or provision in certain places within a statute and excluded it in another place, the courts will not read that term into the section from which it has been excluded). Because the legislature expressly eliminated the requirement that a

forfeiture under A.R.S. § 13-3105 follow the procedures dictated by Chapter 39, and A.R.S. § 13-3105 does not itself include any notice requirements, the trial court did not err by ordering forfeiture without express notice in the indictment.

¶10 Barnes's contention that the court erred in ordering forfeiture of the scope, magazine, and ammunition also fails. Because the scope and magazine were attached to the rifle, they are encompassed within the term "deadly weapon." As for the ammunition in the trunk, the record reflects Barnes opened his trunk, pulled out the rifle, and pointed it at the victim. As the State notes, the threat to shoot the victim "was never limited to the ammunition physically in the rifle itself." Given these facts, the court did not err in ordering the ammunition forfeited.

¶11 Barnes has failed to establish fundamental error based on constitutional due process concerns. Due process entitles a party to "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). As outlined above, the governing statute provides for mandatory forfeiture of a deadly weapon used in committing a criminal offense. See A.R.S. § 13-3105(A). The indictment charged Barnes with using the rifle, a deadly weapon, to commit the crime. The indictment, when read in conjunction with the forfeiture statute, provided notice that

the weapon was subject to forfeiture upon conviction. See *Merrill v. Gordon*, 15 Ariz. 521, 532, 140 P. 496, 500 (1914) ("The administration of justice, the law itself as a practical system of the regulation of human conduct, requires that some fundamental assumptions should be made as postulates. The most important of all these is the assumption that all persons of sound and mature mind are presumed to know the law.").

¶12 Finally, Barnes received actual notice of the forfeiture request before sentencing. At sentencing, the court asked whether he had any objection to the forfeiture procedure, and defense counsel responded in the negative. Moreover, Barnes has failed to demonstrate that additional notice would have altered his strategy to avoid forfeiture and thus cannot demonstrate the requisite prejudice.

CONCLUSION

¶13 For the foregoing reasons, we affirm the superior court's forfeiture order.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge