

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02-23-2010
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA ex rel. TERRY) 1 CA-CV 08-0616
GODDARD,) 1 CA-CV 09-0003
) (Consolidated)
Plaintiff/Appellant,)
)
v.) DEPARTMENT A
)
OSVALDO DOMINGUEZ and TERESA)
VICENTE aka TERESA DOMINGUEZ,) **MEMORANDUM DECISION**
) (Not for Publication -
Defendants/Appellees,) Rule 28, ARCAP)
)
and)
)
EL PAISANO'S AUTO SALES,)
)
Defendant in Rem/Appellee,)
)

STATE OF ARIZONA ex rel. TERRY)
GODDARD,)
)
Plaintiff/Appellee,)
)
v.)
)
OSVALDO DOMINGUEZ and TERESA)
VICENTE aka TERESA DOMINGUEZ,)
)
Defendants/Claimants/)
Appellants,)
)
and)
)
EL PAISANO'S AUTO SALES,)
)
Defendant in Rem/)
Claimant/Appellant.)

Appeal from the Superior Court in Maricopa County

Cause No. CV2004-021585

The Honorable Barry C. Schneider, Judge (Retired)
The Honorable Edward O. Burke, Judge

VACATED AND REMANDED

Terry Goddard, Attorney General Phoenix
By Stephen C. Lepley, Assistant Attorney General
Attorneys for Plaintiff/Appellee

Wolf & Associates, P.C. Phoenix
By David J. Wolf
and
Gabroy, Rollman & Bosse, P.C. Tucson
By Lyle D. Aldridge
Attorneys for Defendants/Claimants/Appellants

W I N T H R O P, Judge

¶1 These consolidated appeals arise out of the same set of facts. The State of Arizona ("State") appeals from the superior court's August 8, 2008 amended judgment denying the State's partial motion for summary judgment, dismissing with prejudice the State's complaint for forfeiture, and releasing the majority of El Paisano's Auto Sales, Osvaldo Dominguez, and Teresa Vicente's ("Defendants") seized assets.

¶2 Defendants appeal the superior court's minute entry order dated October 28, 2008, signed on November 21, 2008, and filed on December 3, 2008, concluding that Defendants are entitled to the proceeds of the sale of their seized personal

property and the collected proceeds of their seized accounts receivable, but not consequential or incidental damages.

¶3 For the following reasons, we vacate the trial court's order of dismissal and remand for further proceedings in accordance with this decision.

FACTS AND PROCEDURAL HISTORY¹

¶4 These consolidated appeals arise out of the State's seizure and subsequent sale of Defendants' assets, allegedly the proceeds of various racketeering offenses.² See *Dominguez*, 1 CA-CV 07-0330 A, at *2, ¶ 2. Before trial, both parties filed motions for summary judgment. Defendants argued that because they pled guilty to what were ultimately designated as misdemeanor offenses, their crimes did not, as a matter of law, qualify as "racketeering" offenses under Arizona Revised

¹ In a prior decision involving these same parties, we described some of the factual and procedural history of this case. *State ex. rel. Goddard v. Dominguez*, 1 CA-CV 07-0330 A (Ariz. App. Feb. 7, 2008) (mem. decision). Accordingly, we only reiterate here those facts and the updated procedural history necessary to consider the issues presented for review.

² In its May 27, 2005 civil complaint, the State alleged that Defendants provided "property and services to smugglers for profit, specifically including the sale of vehicles for use in transporting illegal immigrants and drugs[,] . . . selling such vehicles using false purchaser identifications, and creation of false liens to facilitate the recovery of the vehicles in the event seized during smuggling operations." The State also filed criminal charges against Defendants, ultimately resulting in plea agreements, as more fully discussed *infra*.

Statutes ("A.R.S.") section 13-2301(D)(4) (Supp. 2009),³ and therefore the State's seizure and sale of Defendants' assets was improper. See *id.*, at *3-4, ¶ 4. They requested immediate release of assets being held under the seizure order and damages.

¶5 In its motion, the State argued that there was no genuine issue of material fact regarding liability because Defendants, by their respective pleas and convictions, were "statutorily estopp[ed]" from denying the actions underlying their convictions. *Id.*, at *4, ¶ 5. After holding oral argument on the parties' motions for summary judgment, the superior court denied the State's motion and dismissed the State's complaint, ordering the return of all property seized for forfeiture. *Id.*, at *5, ¶ 7.

¶6 The State then moved for a new trial; however, the assigned trial judge retired before he could rule on the motion and the case was assigned to a different trial judge. *Id.*, at *6, ¶ 9. The newly assigned judge declined to rule on either the State's motion for new trial or Defendants' motion for summary judgment on the ground that they constituted a "horizontal appeal." The court did, however, grant the State's motion for stay pending appeal, and entered an order dismissing

³ We cite the current version of statutes in which no material changes have occurred.

the State's complaint without prejudice, and denying Defendants' motion for summary judgment. The State appealed and Defendants cross-appealed, resulting in this court's February 7, 2008 decision. See *Dominguez*, 1 CA-CV 07-0330 A.

¶7 On appeal, this court determined that, because the dismissal had been without prejudice, the State was not an aggrieved party, and therefore dismissed the State's appeal. *Id.*, at *7-8, ¶ 12. This court did, however, find that Defendants were aggrieved, and resolved the cross-appeal on the merits, holding that, as a matter of law, the dismissal should have been with prejudice. *Id.*, at *8-9, ¶¶ 13, 15. We remanded the matter to the superior court for entry of dismissal with prejudice. *Id.*, at *9-10, ¶ 15.

¶8 On remand, the superior court entered a new judgment dismissing the State's complaint with prejudice and further ordered the State to release Defendants' assets held under the seizure order. The State immediately filed a notice of appeal. Thereafter, the case proceeded to trial to the court on the issue of Defendants' damages from the seizure, with Defendants subsequently appealing the trial court's damages ruling.

¶9 This court consolidated the State's and Defendants' appeals, and we have jurisdiction over both pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), and 12-2101(B) and -(D) (2003).⁴

ANALYSIS

I. Summary Judgment Proceedings and the State's Appeal⁵

¶10 The State presents several issues for review, all arising out of the trial court's dismissal of the State's complaint after its denial of the State's motion for partial summary judgment. On summary judgment, the State argued that Defendants' criminal convictions "statutorily estop[ped] them, and the assets as named in this civil forfeiture proceeding, from avoiding the consequences of the criminal convictions."

⁴ On November 5, 2009, we granted Defendants' motion to accelerate these appeals pursuant to Arizona Rule of Civil Appellate Procedure 29. After oral argument, we determined these cases were no longer appropriate for accelerated disposition. See ARCAP 29(g).

⁵ The State's arguments on appeal from the entry of dismissal with prejudice are substantially identical to the arguments that the State raised on its first appeal. Defendants urge that because this court indirectly determined the merits of the State's case when it exercised jurisdiction over Defendants' cross-appeal, the "law of the case" bars the State from bringing this appeal. See *Dominguez*, 1 CA-CV 07-0330 A. The "law of the case" doctrine "denotes a principle that if an appellate court has ruled upon a legal question and remanded for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case." *Employers Mut. Liab. Ins. Co. v. Indus. Comm'n*, 115 Ariz. 439, 441, 565 P.2d 1300, 1302 (App. 1977). We are not convinced that this court reached the merits of the State's position in our previous decision such that the "law of the case" would apply.

Aside from summary judgment on liability, the State also requested entry of "a forfeiture judgment consisting of property identified and determined at subsequent evidentiary hearing, and separately, a non-forfeiture civil judgment for that property."

¶11 We review the denial of a motion for summary judgment for an abuse of discretion and view all facts and reasonable inferences in the light most favorable to the non-moving party. See *Sonoran Desert Investigations, Inc. v. Miller*, 213 Ariz. 274, 276, ¶ 5, 141 P.3d 754, 756 (App. 2006). Because they involve questions of law, we also review statutory interpretation issues *de novo*. *Jones v. Paniagua*, 221 Ariz. 441, 444, ¶ 7, 212 P.3d 133, 136 (App. 2009).

¶12 Under Arizona's forfeiture statutes, A.R.S. §§ 13-4301 to -4315 (2001 & Supp. 2009), "property is subject to forfeiture if some other statute provides for such a remedy." *In re 1986 Chevrolet Corvette*, 183 Ariz. 637, 639, 905 P.2d 1372, 1374 (1994). For a forfeiture application to succeed, the following are required: (1) the occurrence of an act of racketeering, see A.R.S. § 13-2301(D)(4), and (2) a link between the property to be forfeited and the alleged racketeering conduct, see A.R.S. § 13-2314(G). *In re \$24,000.00*, 217 Ariz. 199, 201-02, ¶ 7, 171 P.3d 1240, 1242-43 (App. 2007); see also *State v. Ott*, 167 Ariz. 420, 427, 808 P.2d 305, 312 (App. 1990) ("[t]o prevail in the civil forfeiture proceeding, the state must prove that [a

defendant] committed predicate criminal acts.”). In this case, the State’s forfeiture application is based on racketeering allegations,⁶ and therefore a predicate act of racketeering is required.

¶13 Defendants argue that the undesignated offenses that Defendants pled to, ultimately designated as misdemeanors, do not qualify as crimes “punishable by imprisonment for more than one year” under Arizona’s definition of “racketeering,” the predicate offense on which the State’s forfeiture action was based. A.R.S. § 13-2301(D)(4). This argument is ultimately unavailing.

¶14 First, with respect to the State’s motion for partial summary judgment, A.R.S. § 13-2314(H), which applies to civil racketeering actions, provides that “[a] defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding.” Further, “a conviction may result from a verdict or plea[.]” A.R.S. § 13-2314(H). See also A.R.S. § 13-4310(C) (same language applied to forfeiture actions); *Aetna Cas. & Sur. Co. v. Dini*, 169 Ariz. 555, 557-58, 821 P.2d 216, 218-19 (App. 1991) (finding that

⁶ In its complaint, the State seeks forfeiture of Defendants’ seized assets under various racketeering and forfeiture statutes, particularly A.R.S. §§ 13-4313(A) (2001), 13-2314(D)(7), and 13-2314(E).

federal convictions could provide the predicate for racketeering charges in civil case, and A.R.S. § 13-2314 "creates a statutory estoppel" conclusively establishing "that the [defendants] committed the predicate crimes necessary to impose liability under Arizona's RICO statutes."). Accordingly, Defendants are, in the State's words, "statutorily estop[ped] . . . from avoiding the consequences of the criminal convictions." The trial court's denial of the State's motion for partial summary judgment as far as liability for the acts underlying Defendants' convictions, fails to acknowledge this fact.

¶15 Further, because "[f]orfeiture exists only by virtue of statute, . . . [if] the statute does not expressly or impliedly provide for the prior conviction of the individual offender, a conviction is not a prerequisite of the forfeiture." 36 Am. Jur. 2d *Forfeitures & Penalties* § 19 (2009). Section 13-2301(D)(4) requires an act that "would be punishable by imprisonment for more than one year[,] . . . regardless of whether the act is charged or indicted." The statutory scheme, then, does not require an indictment, let alone a conviction, for predicate behavior to qualify under the definition of "racketeering." It follows that an acquittal or, as in this case, a misdemeanor designation, does not preclude predicate behavior from qualifying as "racketeering," so long as the defendants have admitted or the State has accumulated "ample

evidence" to support a predicate offense punishable by imprisonment for more than one year. *In re 1996 Nissan Sentra*, 201 Ariz. 114, 117, ¶ 9, 32 P.3d 39, 42 (App. 2001).

¶16 Moreover, the first trial judge incorrectly blurred an important distinction between criminal and civil actions. A civil action is separate from any underlying criminal action, and "courts have recognized the difference in the relative burdens of proof in criminal and civil forfeiture actions." *In re Ten Thousand Ninety-Eight Dollars (\$10,098.00) in U.S. Currency*, 175 Ariz. 237, 242-43, 854 P.2d 1223, 1228-29 (App. 1993) (explaining that "probable cause" burden for forfeiture is different from the higher "beyond a reasonable doubt" burden in criminal proceeding); see *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) ("The time has come to clarify that neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges"); *In re 1972 Chevrolet Monte Carlo*, 117 Ariz. 461, 463, 573 P.2d 535, 537 (App. 1977) (permitting forfeiture of car containing marijuana seeds and debris, but not useable amount, even though criminal offense could not be proved); see also A.R.S. § 13-2314(L) ("Civil remedies . . . are supplemental and not mutually exclusive."). Although Defendants pled to crimes that were ultimately designated misdemeanor offenses, neither party was sentenced to

jail or prison for the class six undesignated offenses.⁷ It is well-established that until designation, the court may treat an offense as a felony "for all purposes." *State v. Benson*, 176 Ariz. 281, 285, 860 P.2d 1334, 1338 (App. 1993) (referring to a former version of A.R.S. § 13-702(H)). If treated as a felony, the maximum sentence for a class six offense is a year and a half - obviously more than the one year minimum required. See A.R.S. § 13-702 (Supp. 2009). Defendants argue that the presumptive sentence of one year for a class six felony is determinative for purposes of the "punishable by" language of A.R.S. § 13-2301(D)(4). We disagree. If the legislature intended for the presumptive sentence to be determinative of whether a crime is punishable by more than one year, then it could have so specified. Further, when the court took Defendants' pleas, both Dominguez and Vicente acknowledged that their crimes carried possible sentences of up to two years, the aggravated term for a class six felony.

⁷ Osvaldo Dominguez pled guilty to attempted hindering prosecution in the first degree, a class six undesignated offense. A.R.S. § 13-2512 (Supp. 2009). At sentencing, the court designated the offense a misdemeanor, suspended the imposition of a sentence, and ordered probation. Teresa Vicente pled guilty to solicitation to commit forgery, also a class six undesignated offense. A.R.S. §§ 13-1002 (2001), 13-2002 (2001). The court suspended imposition of a sentence and ordered probation. At the conclusion of the probation period, the court designated her offense a misdemeanor.

¶17 At oral argument and in its ruling on the State's motion, the trial court stated that the effect of an order denying the motion for summary judgment "would be summary judgment in favor of Defendants." The court then denied the State's motion and dismissed the State's forfeiture complaint. The trial court, like Defendants on appeal, relied heavily on *Lafarga v. INS*, 170 F.3d 1213 (9th Cir. 1999). This reliance was misplaced.

¶18 *Lafarga* involved an attempt by the federal Immigration and Naturalization Service to deny voluntary departure⁸ to the defendant, Lafarga. *Id.* at 1215. Lafarga argued that the "petty offense" exception found in the federal statute allowed her to seek voluntary departure. The immigration judge held that Lafarga was not eligible for voluntary departure because she had previously pled guilty to the class six undesignated offense of theft under Arizona law. *Id.* Lafarga was sentenced to eighteen months probation, which she successfully completed, and the offense was designated a misdemeanor.⁹ *Id.* at 1214. The Ninth Circuit reversed the ruling, and held that because the

⁸ "Voluntary departure" permits an otherwise removable individual to depart the country at her own expense in order to avoid a removal order and its consequences. See 8 U.S.C. § 1229c (2006).

⁹ The same event progression applies to Defendant Vicente. Defendant Dominguez's crime was designated a misdemeanor at sentencing.

offense was ultimately designated a misdemeanor, the defendant qualified for the petty offense exception because the maximum possible sentence for a misdemeanor under state law was six months. *Id.* at 1216. We find *Lafarga* neither controlling nor relevant to our resolution of the issue. First, *Lafarga* is distinguishable in that it did not involve racketeering allegations or statutory forfeiture analysis. Second, the petty offense exception was expressly defined as existing when "the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was *not sentenced to a term of imprisonment in excess of 6 months.*" *Id.* at 1215 (citing 8 U.S.C. § 1182(a)(2)(A)(ii)(II)) (emphasis added). The applicability of the petty offense exception thus hinged on what *actually occurred* at sentencing, whereas the racketeering statutes at issue in this case only require that the underlying behavior be *punishable* by more than one year of imprisonment.

¶19 For the foregoing reasons, we find that the trial court in part improperly denied the State's motion for partial summary judgment and also erred in dismissing the State's complaint. We remand the case for a determination of whether there is a sufficient link or nexus between the racketeering conduct of which Defendants have been convicted and the property the State seeks to forfeit, and the allowable extent of such

forfeiture, as well as the amount of fees, expenses, and costs due at the trial level. See A.R.S. § 13-2314(D)(5).

II. Damages Trial and Defendants' Appeal

¶20 As our decision reinstates the State's complaint, the trial court's hearing on and calculation of damages was premature. Accordingly, we need not decide Defendants' appeal from the trial court's damages ruling.

CONCLUSION

¶21 For the foregoing reasons, we vacate the trial court's denial of the State's motion for partial summary judgment and dismissal of the State's complaint, and remand for further proceedings in accordance with this decision.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
ANN A. SCOTT TIMMER, Chief Judge