

[Cite as *State v. Pollard*, 2010-Ohio-908.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93002

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY POLLARD

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-495195

BEFORE: Dyke, P.J., Celebrezze, J., and Jones, J.
RELEASED: March 11, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, P.J.:

{¶ 1} Defendant Anthony Pollard appeals from the trial court's denial of his motion for the return of seized property. For the reasons set forth below, we affirm.

{¶ 2} On April 18, 2007, defendant and co-defendant Brook Lewis were indicted pursuant to a 17 count indictment in connection with alleged offenses, which occurred on November 22, 2006. Defendant was charged with three counts of drug trafficking, three counts of drug possession, four counts of drug trafficking with schoolyard specifications, three counts of possession of criminal tools, one count of drug possession with a firearm specification, one count of drug trafficking with a firearm and juvenile specification, a misdemeanor charge of endangering children, and one count of having a weapon while under disability.

{¶ 3} Defendant subsequently entered a guilty plea to one count of drug trafficking, one count of drug trafficking which was amended to delete the juvenile specification, one count of possession of criminal tools, the charge of endangering children, and the count of having a weapon while under disability. The trial court's journal entry of the plea agreement further indicates that the remaining charges were dismissed, and that defendant is "to forfeit \$9,317.26 guns and ammo and cell phones."

{¶ 4} On March 17, 2008, the trial court journalized an order of forfeiture, which indicated in pertinent part as follows:

{¶ 5} "[P]ursuant to the voluntary forfeiture of said contraband by one Anthony Brian Pollard, the person from whom the contraband was seized. Said

contraband being One Thousand Nine Hundred thirty four Dollars (\$1,934) in U.S. currency, Herstal 5.7 x 28 Belgin [sic] Handgun with Ammunition, Two Boxes of 7.62 mm Ammunition Rounds, Three Cellular telephones (one (1) Nextel and Two (2) Motorolas), Official Charter One Bank Check * * * in the amount of Seven Thousand Three Hundred and Eighty Three Dollars and Twenty Six Cents (\$7,383.26) * * *.”

{¶ 6} On February 9, 2009, defendant filed a motion for the return of seized property, asserting that the seizure was unlawful because his indictment did not set forth a forfeiture specification, the plea agreement did not contain any reference to “the unlawfully seized money[,]” and “there is no indication in the record that the currency at issue was connected to defendant’s possession of oxycontin or any other criminal activity.” Defendant additionally complained that he was not provided with a hearing on the issue of forfeiture.

{¶ 7} The trial court denied the motion, noting that both the docket and transcript of the plea proceedings provided for the seizure of the funds at issue. Defendant now appeals, assigning three errors for our review.

{¶ 8} In his first assignment of error, defendant complains that the trial court erred in ordering forfeiture because the indictment did not set forth a forfeiture specification.

{¶ 9} New provisions regarding forfeiture were enacted on July 1, 2007 and codified in R.C. Chapter 2981. See 2006 Sub.H.B. No. 241. *State v. Harris*, Butler App. No. CA2007-04-089, 2008-Ohio-3380.

{¶ 10} R.C. 2981.04 provides for specifications concerning forfeiture petitions, and provides, in relevant part, as follows:

{¶ 11} “(A)(2) If any property is not reasonably foreseen to be subject to forfeiture at the time of filing the indictment, information, or complaint, the trier of fact still may return a verdict of forfeiture concerning that property in the hearing described in division (B) of this section if the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice of this fact to the alleged offender or delinquent child under Criminal Rule 7(E) or Juvenile Rule 10(B).”

{¶ 12} See, also, *State v. Haymond*, Stark App. No. 2009-CA-00078, 2009-Ohio-6445.

{¶ 13} Thus, in accordance with R.C. 2981.04(A), a forfeiture specification is not a prerequisite to a forfeiture order where the prosecuting attorney gave the defendant prompt notice that the property was subject to forfeiture. Moreover, we remain mindful that it is the appellant’s duty to demonstrate error by reference to matters in the record. *State v. Williams*, Summit App. No. 23560, 2008-Ohio-1048. Because we have not been provided with a transcript in this matter, we must presume regularity in the trial court’s proceedings. *State v. Tillman* (1997), 119 Ohio App.3d 449, 695 N.E.2d 792. Therefore we must presume that prompt notice as provided for pursuant to R.C. 2981.04(A)(2) was given in this instance. We must therefore reject this assignment of error.

{¶ 14} For this second assignment of error, defendant complains that there is no signed plea agreement referencing the forfeiture.

{¶ 15} R.C. 2981.02 describes property that is subject to forfeiture as follows:

{¶ 16} “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:

{¶ 17} “(1) Contraband involved in an offense;

{¶ 18} “(2) Proceeds derived from or acquired through the commission of an offense;

{¶ 19} “(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:

{¶ 20} “(a) A felony[.]”

{¶ 21} R.C. 2981.04 provides for a forfeiture specification in an indictment but the specification may be excused under subpart (A)(2). The defendant must receive notice, R.C. 2981.03, and the state must then prove by a preponderance of the evidence that the property is in whole or part subject to forfeiture under section 2981.02. R.C. 2981.04.

{¶ 22} We read no provision in R.C. Chapter 2981 as requiring a signed plea agreement authorizing the forfeiture. To the contrary, pursuant to R.C. 2981.03(F), “[a] civil action to obtain civil forfeiture may be commenced as

described in section 2981.05 of the Revised Code regardless of whether the offender or delinquent child has pleaded guilty to, been convicted of, or been adjudicated a delinquent child for the act that is the basis of the order.” Accordingly, we reject this assignment of error.

{¶ 23} For his third assignment of error, defendant asserts that the forfeiture was unlawful because the state failed to prove by a preponderance of the evidence that the seized property was contraband or proceeds from criminal activity.

{¶ 24} “The State must prove by a preponderance of the evidence that the seized property is subject to forfeiture under R.C. 2981.02, R.C. 2981.04(B). There is a rebuttable presumption that the property is subject to forfeiture if the State proves, by a preponderance of the evidence, that 1) the defendant acquired the property during the commission of an offense or within a reasonable time afterwards, and 2) that there is no likely source of that property other than as proceeds from the offense.” *State v. Watkins*, Belmont App. No. 07 JE 54, 2008-Ohio-6634; R.C. 2981.03 (A)(5)(a).

{¶ 25} Again, because we have not been provided with a transcript, we must presume regularity. We are therefore compelled to presume that the state proved that the subject property was subject to forfeiture or the defendant waived this requirement in the plea proceedings.

{¶ 26} The third assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR