

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

---

In re the Matter of:

1998 MERCEDES VIN: WDBJF65F3WA601892

STATE OF ARIZONA, *Appellee*,

*v.*

CARY VANDERMEULEN, *Claimant/Appellant*.

No. 1 CA-CV 15-0247  
FILED 10-17-2017

---

Appeal from the Superior Court in Maricopa County  
No. CV2012-056514  
The Honorable Thomas L. LeClaire, Judge (retired)

**AFFIRMED**

---

COUNSEL

Phoenix City Prosecutors Office, Phoenix  
By Gary L. Shupe  
*Counsel for Appellee*

Cary VanDerMeulen, Phoenix  
*Claimant/Appellant*

STATE v. VANDERMEULEN  
Decision of the Court

---

**MEMORANDUM DECISION**

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Peter B. Swann and Judge Patricia A. Orozco<sup>1</sup> joined.

---

**M c M U R D I E**, Judge:

¶1 Cary VanDerMeulen appeals from the superior court’s civil *in rem* order of forfeiture following a contested evidentiary hearing. Under the order, VanDerMeulen forfeited to the State his vehicle, \$372 in cash, 12 firearms, a cell phone, and equipment used for growing marijuana plants indoors. For the following reasons, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 In October 2012, Phoenix Police Officer Michael Walter was investigating illegal marijuana sales on Craigslist<sup>2</sup> when he saw an advertisement warning potential buyers about “a white male in . . . a black Mercedes” that was carrying a firearm and became “aggressive” when the person didn’t want to buy marijuana. The warning advertisement also listed the phone number the person selling marijuana was using. Walter searched Craigslist using that phone number and found numerous advertisements regarding marijuana for sale. Walter called the number using a nondescript police phone and arranged to buy an ounce of marijuana from a man who identified himself as “Cary.”

¶3 Officers in both marked and unmarked police vehicles arrived at the location of the buy and witnessed a black Mercedes registered to VanDerMeulen leaving the location. In a marked police cruiser, Officers Dennis Tucker and Rachel Granzow pulled the Mercedes over for speeding, and the driver identified himself as VanDerMeulen. The officers found a firearm in his pocket, another one in the center console, and a third one in the trunk of his vehicle, along with an ounce of marijuana in the car. When

---

<sup>1</sup> The Honorable Patricia A. Orozco, retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

<sup>2</sup> Craigslist is a classified advertisements website where users can post items for sale.

STATE v. VANDERMEULEN  
Decision of the Court

Tucker asked VanDerMeulen if he was on his way to sell marijuana to someone, VanDerMeulen admitted he was going to receive a “donation” in exchange for marijuana. VanDerMeulen showed the officers his medical-marijuana card, which allowed him to cultivate a limited number of marijuana plants, but did not authorize him to sell marijuana. Walter then called the number he used to set up the sale, and Tucker confirmed that VanDerMeulen’s phone rang while displaying Walter’s police phone number.

¶4 VanDerMeulen was arrested and a search warrant was executed on his residence. Officers found a marijuana growing operation inside VanDerMeulen’s home that consisted of roughly 70 plants being grown with an automated watering system and “grow” lights. A safe inside the house also contained several firearms and \$300 in cash. Between the traffic stop and the search of VanDerMeulen’s home, officers seized his Mercedes vehicle, \$372 in cash, a cell phone, 12 firearms, and the equipment being used to grow the marijuana plants.

¶5 VanDerMeulen was charged with six counts of felony drug possession and misconduct involving weapons offenses, but later pled guilty to one count of solicitation to commit possession of marijuana, a Class 6 felony. The City of Phoenix then instituted *in rem* forfeiture proceedings with respect to the seized property in January 2013 and a hearing was held in February 2015. VanDerMeulen represented himself at the hearing, after which the property was declared forfeited by the superior court. VanDerMeulen appealed to this court and we have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(1) and -2101(A)(1).

**DISCUSSION**

¶6 VanDerMeulen raises several arguments on appeal, including: (1) the superior court’s failure to rule on his Motion to Continue left him unable to adequately prepare his case; (2) the seizure of his assets subject to this proceeding left him unable to afford counsel and forced him

STATE v. VANDERMEULEN  
Decision of the Court

to represent himself;<sup>3</sup> (3) the superior court should have dismissed the charges based on the State's destruction of his cell phone; (4) the "lack of action" from the judge during the hearing resulted in an unfair hearing; and (5) the superior court's findings were unsupported by the evidence presented at the hearing.

**A. VanDerMeulen Failed to Appropriately File a Motion to Continue.**

¶7 VanDerMeulen first argues he was unable to effectively present his case because the superior court did not consider or rule on his motion to continue. However, the superior court record is devoid of any such motion from VanDerMeulen. While the State filed a response to his motion, it appears VanDerMeulen failed to appropriately file the motion with the superior court. Accordingly, the superior court was unable to rule on the motion.

¶8 The superior court continued the hearing multiple times from November 2014 until it was finally held in February 2015. This gave VanDerMeulen over a year to prepare, even without the superior court specifically ruling on the purported motion. VanDerMeulen also did not ask the court to continue the case at the February 2015 hearing. Therefore, there is no error concerning any motion to continue the hearing.

**B. The Superior Court Did Not Abuse Its Discretion by Denying VanDerMeulen's Motion to Dismiss.**

¶9 VanDerMeulen claims the superior court should have granted his Motion to Dismiss based on the State's destruction of his cell phone. In January 2015, a month before the evidentiary hearing, the State filed a "Notice of Destroyed Property" advising the court VanDerMeulen's cell phone had been inadvertently destroyed by Phoenix Police despite the pending forfeiture matter. In response, VanDerMeulen moved to dismiss, arguing his case was irreparably harmed by the destruction of his cell phone because it contained the contact information of several key witnesses he had intended to call at the hearing. At the hearing, the superior court

---

<sup>3</sup> VanDerMeulen did not raise this issue in the superior court, therefore we do not consider it. *See Pima County v. Testin*, 173 Ariz. 117, 119 (App. 1992) ("We will not consider on appeal a theory that was not presented to the trial court."); *see also* ARCAP 13(a)(7)(B) (Appellate briefs must contain "references to the record on appeal where the particular issue was raised and ruled on").

STATE v. VANDERMEULEN  
Decision of the Court

heard argument on the issue and allowed VanDerMeulen to make an offer of proof regarding what the testimony from these witnesses would have been. After hearing the argument, the superior court took the motion under advisement and eventually denied it.

¶10 The sanction of dismissal for destruction of evidence in a civil case, while within the discretion of the superior court, is “harsh and not to be invoked except under extreme circumstances.” *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 249 (App. 1997) (quotation omitted). The superior court considered VanDerMeulen’s testimony regarding the evidence he would have presented had the phone not been destroyed, as well as the State’s testimony that the evidence was inadvertently destroyed, and ruled against dismissing the case.

¶11 VanDerMeulen’s testimony during the hearing revealed he would have called: (1) a man who would testify that VanDerMeulen refused to sell him marijuana after learning he did not have a medical-marijuana card; (2) a young couple who would testify that they had difficulty obtaining medical marijuana after it became legal; (3) an older woman who would have attested to his character; (4) the widow of a man whom VanDerMeulen had provided medical marijuana to previously; and (5) a young man who would have testified that VanDerMeulen was “personally interested in the well-being of people.” None of these witnesses would have provided any evidence relevant to the civil forfeiture proceeding, which concerned whether VanDerMeulen had used or intended to use the property subject to the proceeding to facilitate the commission of a drug offense. *See* A.R.S. § 13-3413. Accordingly, the superior court did not err by denying VanDerMeulen’s Motion to Dismiss.

**C. The Evidentiary Hearing Was Fair and Impartial.**

¶12 VanDerMeulen contends that a “lack of action on the part of the judge in the conduct of the hearing concerning testimony” did not provide for a fair and impartial hearing. Specifically, he asserts the judge “took no action to see that the questions were appropriately responded to.” However, VanDerMeulen made no objections regarding any testimony during the evidentiary hearing. *See State v. Thomas*, 130 Ariz. 432, 435 (1981) (failure to object to testimony waives the issue on appeal). VanDerMeulen was free to object to any answers he thought unresponsive and impeach any witness he thought was not credible. The presentation of his case, including asking the questions necessary to produce his desired answers, was in his sole discretion. *See In re Marriage of Williams*, 219 Ariz. 546, 549, ¶ 13 (App. 2008) (a self-represented party is held to the same standard as

STATE v. VANDERMEULEN  
Decision of the Court

an attorney “with respect to ‘familiarity with required procedures and . . . notice of statutes and local rules’”) (quoting *Smith v. Rabb*, 95 Ariz. 49, 53 (1963)). This court presumes the trial court to be fair and impartial, and VanDerMeulen offers no evidence on appeal to show otherwise. See *State v. Henry*, 189 Ariz. 542, 546 (1997).

**D. Sufficient Evidence Supported the Superior Court’s Order.**

¶13 Finally, VanDerMeulen challenges whether the sufficiency of the evidence supported the superior court’s finding of probable cause for forfeiture under A.R.S. § 13-3413(A) and (B). On appeal, we review the sufficiency of the evidence “to determine whether substantial evidence exists in the record to support the trial court’s judgment,” and “we view the evidence in the light most favorable to sustaining the trial court’s judgment.” *A.R. Teeters & Assoc., Inc. v. Eastman Kodak Co.*, 172 Ariz. 324, 328 (App. 1992). The superior court reviews the evidence to determine if probable cause existed, at the time of the hearing, that the property was used in connection with a drug transaction. *In re Twenty-Four Thousand Dollars (\$24,000) in U.S. Currency*, 217 Ariz. 199, 202, ¶¶ 9-10 (App. 2007). We review the superior court’s determination of probable cause *de novo*. *In re U.S. Currency in the Amount of \$315,900.00*, 183 Ariz. 208, 211 (App. 1995).

¶14 The State presented evidence that VanDerMeulen was authorized to cultivate a small amount of marijuana plants, but not to provide marijuana to others.<sup>4</sup> VanDerMeulen used his cell phone to set up the drug transaction with Walter. When the officers stopped VanDerMeulen, he admitted to being on the way to provide marijuana to someone in exchange for a “donation.”<sup>5</sup> VanDerMeulen was driving his Mercedes to the location of the arranged sale, and was carrying firearms both on his person and in the vehicle during the attempt. Furthermore, the lawful search of his home revealed a large quantity of marijuana plants, as well as cash and other firearms inside a safe. We find substantial evidence supports the superior court’s findings.

---

<sup>4</sup> There was no evidence that VanDerMeulen even attempted to ascertain whether Walter was a registered medical-marijuana card holder.

<sup>5</sup> VanDerMeulen spent much of the hearing presenting a theory that he was not guilty of the underlying offense, however, under A.R.S. § 13-4310(C), VanDerMeulen was precluded from denying the allegations of the underlying criminal offense because he pled guilty.

STATE v. VANDERMEULEN  
Decision of the Court

**CONCLUSION**

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



AMY M. WOOD • Clerk of the Court  
FILED: AA