IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE REAL PROPERTY KNOWN AS 3567 E. ALVORD ROAD, LOCATED IN, TUCSON ARIZONA, PIMA COUNTY AND ADDITIONALLY KNOWN AS PIMA COUNTY ASSESSOR PARCEL NO: 140-30-017E (DESCRIBED AS LOS RANCHITOS NO 7 E55' W110' S135' LOT 291), INCLUDING ALL BUILDINGS, FIXTURES, STRUCTURES AND APPURTENANCES THERETO,

No. 2 CA-CV 2019-0181
Filed July 16, 2020

Appeal from the Superior Court in Pima County
No. C20172567
The Honorable D. Douglas Metcalf, Judge

AFFIRMED

COUNSEL

D. Jesse Smith, Tucson
Counsel for Appellant

Barbara LaWall, Pima County Attorney
By Ellen R. Brown, Deputy County Attorney, Tucson
Counsel for Appellee

OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Richard Shonk appeals from the trial court's entry of summary judgment forfeiting his interest in the real property known as

3567 East Alvord Road. He contends the court erred by granting the forfeiture because only the mobile home on the property should have been subject to forfeiture and the forfeiture amounted to an unconstitutional fine under the Eighth Amendment. We affirm.

Factual and Procedural Background

¶2 "We review a trial court's grant of summary judgment de novo, viewing the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13 (App. 2005). Although Shonk contends disputes of material fact remain, he has not identified any such disputes, and the following facts relevant to our disposition are not disputed on appeal. In 2017, the state commenced an in rem forfeiture action against the real property located at 3567 East Alvord Road (the property), alleging Shonk had used the property in racketeering offenses related to criminal drug sales. The state seized the property in April 2017. When the alleged offenses were committed and when the property was seized, it was owned in joint tenancy by Shonk and Natasha Decker.[1]

¶3 In May, the state initiated the forfeiture by filing the proper notices, which in June were served on both Shonk and Decker. Shonk timely filed a notice of claim; Decker did not. The state filed its formal complaint in July, and Shonk timely answered. In August, the trial court granted Shonk's motion to stay the proceedings until his criminal charges were resolved.

¶4 In January 2019, the stay was lifted after Shonk pled guilty to one count of sale of a dangerous drug and one count of possession of a dangerous drug for sale.[2] Shortly after, the state renewed its application for an order of forfeiture with respect to Decker's interest in the property. In March 2019, the trial court granted that application and entered a judgment forfeiting Decker's interest because she had failed to timely notice a claim. In May 2019, the state filed a motion for summary judgment in regard to Shonk's interest in the property. After Shonk filed a response and argued

[1]Shonk alleged that the real property had been purchased with funds provided by his parents. Decker claimed she was a co-owner of the real property but not the mobile home that was on the land.

[2]Decker was in jail for unrelated crimes when Shonk committed these offenses in 2017.

his claim at a hearing, the trial court granted the state's motion for summary judgment.

Jurisdiction

¶5 On appeal, Shonk challenges the grant of summary judgment as to his interest in the property, but the opening brief also includes an argument as to the forfeiture of Decker's interest in the property. The state argues we lack jurisdiction to address Decker's interest because she failed to timely file a notice of appeal. The timely filing of a notice of appeal is a prerequisite to appellate jurisdiction. *Edwards v. Young*, 107 Ariz. 283, 284 (1971). If an appeal is not timely filed "the appellate court acquires no jurisdiction other than to dismiss the attempted appeal." *Id.*

¶6 Here, the trial court's judgment forfeiting Decker's interest in the property was entered on March 5, 2019. The notice of appeal in this matter was not filed until September 27, 2019—well outside the thirty-day window for filing it. *See* Ariz. R. Civ. App. P. 9(a) (must file notice of appeal no later than thirty days after judgment). The notice also specified it was taken from the court's August 29 ruling. Because the notice of appeal was untimely as to the ruling on the forfeiture of Decker's interest, we lack jurisdiction to address the merits of the argument with respect to her interest in the property.[3] However, we have jurisdiction to consider Shonk's claims pursuant to A.R.S. § 12-2101(A)(1) because he timely filed a notice of appeal.

Motion for Summary Judgment

¶7 On appeal, Shonk suggests the trial court erroneously granted the state's motion for summary judgment because the land on which the mobile home was sitting was not subject to forfeiture and the forfeiture of

[3]Even if Decker had timely filed a notice of appeal, she would not have standing to appeal because she did not timely file a claim to contest the forfeiture of her interest in the property. *See* A.R.S. § 13-4311(D) (claim must be filed within thirty days after receiving notice of pending forfeiture), (F) ("No extension of time for the filing of a claim may be granted."); *State ex rel. Brnovich v. Culver*, 240 Ariz. 18, ¶ 6 (App. 2016) (person who does not file a timely claim has no standing to contest a forfeiture action). Individuals served in jail, like Decker, are still subject to the thirty-day requirement under § 13-4311(D). *Id.* ¶¶ 2, 6 (person served in jail had no standing to contest forfeiture because he did not timely file a notice of claim).

the land and the mobile home amounted to an excessive fine under the Eighth Amendment. We review de novo the grant of a motion for summary judgment. *Kopacz v. Banner Health*, 245 Ariz. 97, ¶ 8 (App. 2018). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a).

Forfeiture of the property

¶8 Under Arizona's forfeiture statutes, A.R.S. §§ 13-4301 to 13-4315, property is subject to forfeiture if another statute allows for such a remedy. *In re $24,000 U.S. Currency*, 217 Ariz. 199, ¶ 7 (App. 2007). The state may file an in rem action to seek forfeiture of "property used or intended to be used in any manner or part to facilitate the commission of [a racketeering] offense." A.R.S. § 13-2314(G). To seek forfeiture of property based on racketeering allegations, the state must show there is an act of racketeering, and a link between the property to be forfeited and the alleged racketeering conduct. *See $24,000 U.S. Currency*, 217 Ariz. 199, ¶ 7 (citing A.R.S. §§ 13-2301(D)(4) (defining "racketeering"), 13-2314(G)).

¶9 A claimant may assert ownership and request a hearing "to adjudicate the validity of his claimed interest in the property." A.R.S. § 13-4311(D). "At the hearing, the state has the burden of establishing by clear and convincing evidence that the property is subject to forfeiture under [A.R.S.] § 13-4304," and a claimant who establishes ownership "has the burden of establishing by a preponderance of the evidence that the claimant's interest in the property is exempt from forfeiture under § 13-4304."[4] § 13-4311(M).

¶10 Here, the state alleged Shonk had committed a racketeering offense because he was involved in the sale of a prohibited drug for

[4]Effective August 2017, the Arizona legislature amended § 13-4311 to increase the state's burden of proof from a preponderance of the evidence to clear and convincing evidence. *See* 2017 Ariz. Sess. Laws, ch. 149, § 7. The state argued below that the preponderance of the evidence should apply because the complaint in this case was filed before the burden of proof was raised. The court agreed and found the state had met the preponderance of the evidence standard. We need not decide whether the correct burden of proof was applied because the state would have met its burden under either standard and we will affirm a grant of summary judgment if correct for any reason. *S & S Paving & Constr., Inc. v. Berkley Reg'l Ins. Co.*, 239 Ariz. 512, ¶ 7 (App. 2016).

financial gain. *See* § 13-2301(D)(4)(b)(xi). The state sought forfeiture of the property based on the theory that Shonk had used it to facilitate the sale of methamphetamine. Shonk does not dispute that he sold methamphetamine for financial gain, nor could he. Shonk pled guilty to sale of a dangerous drug and concedes on appeal that he sold methamphetamine on the property; law enforcement also uncovered large quantities of methamphetamine and marijuana inside the property along with drug sale ledgers, scales, and drug paraphernalia. *See* § 13-2314(H) (A defendant convicted in criminal case as a result of a plea "shall be precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding."); *In re 1632 N. Santa Rita*, 166 Ariz. 197, 201 (App. 1990) (finding real property used to facilitate sale of drug for financial gain because, among other things, defendant pled guilty to possession of a drug, and there was a large quantity of that drug and scales consistent with illegal drug sales). The state met its burden of proving the property in this case was used to facilitate sale of a drug for financial gain because the property was used to help him sell drugs by concealing his drug sales. *See In re 1986 Chevrolet Corvette*, 183 Ariz. 637, 640 (1994) ("Property is 'used to facilitate' a crime if its use makes the commission of the crime less difficult." (quoting *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir. 1981))).

¶11 Furthermore, contrary to Shonk's suggestion, it is irrelevant that the real property was purchased with money from Shonk's parents because the state did not need to show it had been acquired from the proceeds of racketeering. The state alleged the property was used to *facilitate* the racketeering offense, not that the property was the proceeds of a racketeering offense. *See In re 4030 W. Avocado*, 184 Ariz. 219, 222 (App. 1995) (rejecting argument that state had to prove house was purchased with illegal proceeds when state's theory was house was used to commit drug transactions for financial gain). Therefore, irrespective of how the property was acquired, we conclude the state showed it was subject to forfeiture for being used to facilitate sale of a drug for financial gain. Because the state met its burden and Shonk did not argue that an exemption for forfeiture applied under A.R.S. § 13-4304, we conclude as a matter a law the property was subject to forfeiture.[5]

[5]Shonk suggests the mobile home is personal property and because the drugs were sold inside the mobile home and not grown in the real property or buried in the real property, the real property was not subject to forfeiture. We do not address this suggestion because Shonk has failed to fully develop this argument or meaningfully cite to relevant authority

Excessive Fine

¶12 Next, Shonk suggests that the forfeiture amounts to an excessive fine in violation of the Eighth Amendment. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). A punitive civil forfeiture violates the Eighth Amendment if it is "grossly disproportional to the gravity of a defendant's offense." *In re One Residence at 319 E. Fairgrounds Dr.*, 205 Ariz. 403, ¶¶ 18-20 (App. 2003) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)) (finding property subject to forfeiture under Arizona's racketeering statute is subject to Eighth Amendment analysis).

¶13 To assess the proportionality, we look to "the nature and extent of the defendant's crime, the surrounding circumstances and relationship to other illegal activities, the harm caused, and the maximum sentence and fine under the appropriate sentencing guidelines." *Id.* ¶ 21. We do not consider the sanction imposed in the criminal case involving the same conduct. *See id.* ¶ 6. Instead, we "consider the amount of injury to the state, which is broadly defined as the expenditure of public monies, the amount of money or value of other property that would 'foreseeably be exchanged' for prohibited drugs, and the acquisition or gain of proceeds from any racketeering offense included in § 13-2301(D)(4)." *Id.* (quoting A.R.S. § 13-2318). There is a strong presumption that the forfeiture is constitutional if the value of the property is within the range of fines set by the legislature. *Id.* ¶ 21. We review the proportionality of a punitive forfeiture de novo. *Id.* ¶ 20.

¶14 Shonk was convicted of sale of a dangerous drug and possession of a dangerous drug for sale. Months after Shonk was arrested for selling methamphetamine to an undercover detective, a separate law enforcement investigation uncovered large amounts of methamphetamine and marijuana, drug sale ledgers, scales, and drug paraphernalia on the

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showing how if this were true it would change the forfeiture analysis. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (opening brief must contain "[a]ppellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies"). Therefore, Shonk has waived this issue on appeal. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2 (App. 2007) (failure to develop and support argument waives issue on appeal).

property, and Shonk admitted to "a high volume" of drug sales at the property. Shonk conducted all of these activities across the street from a school and caused two separate law enforcement investigations. For these crimes, a first-time offender would face maximum prison terms of fifteen years and fines of up to $150,000. *See* A.R.S. §§ 13-701, 13-702, 13-3407(A)(2), (7), 13-801(A). The legislature thus considered these crimes very serious.

¶15 The state alleged that the total value of the property was approximately $27,000, and Shonk has not argued the property was worth more. After comparing $27,000 to Shonk's offenses de novo, we conclude that the forfeited amount is not grossly disproportional to the crimes committed. Shonk received hundreds of dollars for selling methamphetamine in early 2017 and he was expecting to make significantly more money based on the large amount of marijuana and methamphetamine found on his property in late 2017. Shonk's first arrest did not curtail his criminal activity, and the drug scales and ledgers found on the property suggested this was an ongoing enterprise that had already cost the state two separate law enforcement investigations. For these crimes, Shonk was subject to a maximum fine of $150,000; the total forfeiture amounts to less than a fifth of that amount. Thus, the forfeiture of Shonk's interest in the property did not amount to an unconstitutionally excessive fine.

¶16 In sum, the court did not err in granting the state's motion for summary judgment because the state met its burden of proving the property was subject to forfeiture and forfeiture did not constitute an excessive fine under the Eighth Amendment as a matter of law.

Disposition

¶17 We affirm the trial court's judgment.