IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE $70,070 IN U.S. CURRENCY

No. 2 CA-CV 2015-0229
Filed October 31, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
Nos. S1100CV201301076 and S1100CV201301129 (Consolidated)
The Honorable Jason R. Holmberg, Judge

REVERSED

COUNSEL

Law Office of Robert L. Murray, Tucson
By Robert L. Murray
Counsel for Appellant

M. Lando Voyles, Pinal County Attorney
By Craig Cameron, Deputy County Attorney, Florence
Counsel for Appellee

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 Fernando Peña appeals the trial court's judgment forfeiting to the state $70,070 in currency seized from his pickup truck. We reverse for the reasons that follow.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's ruling. *In re 4030 W. Avocado*, 184 Ariz. 219, 219, 908 P.2d 33, 33 (App. 1995). In April 2013, Peña was pulled over on Interstate 10 by an Arizona Department of Public Safety (DPS) officer for a window tint violation. DPS obtained Peña's consent to search the truck, and found several grocery bags containing cash totaling $70,070, wrapped in bundles bound by rubber bands, inside a box designed to hold a retractable truck bed cover. The box was not designed to store anything other than the bed cover.

¶3 Peña initially told officers he did not own the money, but later claimed it was proceeds of the sale of a ranch located in Mexico. Peña said he had met J.L. at a convenience store in Phoenix to exchange the property title for the cash, which Peña hid, fearing J.L. would follow him and try to steal it. He stated he gave the original title to J.L., but that his wife in Mexico might have a copy, although she was unaware the sale had occurred.[1] Peña claimed he initially denied ownership of the money because he was afraid he might be required to pay taxes on the proceeds, which also belonged

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[1]Peña was questioned by DPS in English, but testified with the assistance of an interpreter.

to several family members. The state seized the cash and filed an in rem forfeiture complaint, alleging the currency was connected to money laundering or another racketeering offense.[2]

¶4 In July 2015, the trial court held a bench trial.[3] The state called Peña as a witness, along with three DPS officers, who testified Peña's behavior and the packaging and concealment of the currency were consistent with trafficking in illegal drugs. The officers also confirmed DPS had not conducted any follow-up investigation of Peña or the currency following the seizure. The court determined the state had "met its burden" under the "probable cause" standard, and ordered the currency forfeited.

¶5 This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶6 Peña argues the state failed to meet its burden of proving the currency was subject to forfeiture.[4] That determination

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[2]The state also seized Peña's truck, but abandoned its claim for the truck on the day of trial, more than two years after the seizure.

[3]The trial followed an appeal in which we reversed the denial of Peña's motion to dismiss because the court had applied an improper standard. *In re $70,070 U.S. Currency*, 236 Ariz. 23, ¶¶ 17-18, 335 P.3d 545, 550-51 (App. 2014).

[4]We reject the state's contention that Peña's withdrawal of his motion to dismiss rendered his amended answer untimely, thereby waiving his right to contest the sufficiency of the evidence. Although Peña's original answer failed to comply with A.R.S. § 13-4311(G) because it was signed by his attorney, it was amended to include a verification signed by Peña. Neither case relied on by the state suggests Rule 15, Ariz. R. Civ. P., does not allow amendment of a timely filed but technically deficient answer. *See State ex rel. Horne v. Anthony*, 232 Ariz. 165, n.6, 303 P.3d 59, 66 n.6 (App. 2013) (recognizing discretion to allow amendment); *State ex rel. McDougall v. Superior Court*, 173 Ariz. 385, 387, 843 P.2d 1277, 1279 (App. 1992)

is a question of law we review de novo. *See In re $315,900 U.S. Currency*, 183 Ariz. 208, 211, 902 P.2d 351, 354 (App. 1995). But we uphold a trial court's factual findings unless clearly erroneous. *Id.*; *see also In re $26,980 U.S. Currency*, 199 Ariz. 291, ¶¶ 15-16, 18 P.3d 85, 90 (App. 2000) (distinguishing weighing evidence from "issues of statutory interpretation").

¶7 Property is subject to forfeiture as provided for by specific statute, unless it is subject to a statutory exemption. *See* A.R.S. § 13-4304; *In re 1986 Chevrolet Corvette*, 183 Ariz. 637, 639, 905 P.2d 1372, 1374 (1994). Forfeiture is available based on allegations of racketeering, including money laundering, the basis of the state's forfeiture claim here. A.R.S. §§ 13-2301(D)(4)(b)(xxvi), 13-2314(G). Forfeiture based on alleged racketeering requires "an act of racketeering and a link between the property to be forfeited and the alleged racketeering conduct." *In re $24,000 U.S. Currency*, 217 Ariz. 199, ¶ 7, 171 P.3d 1240, 1242 (App. 2007) (citation omitted). And, although the state may seize property for forfeiture based on "probable cause to believe that the property is subject to forfeiture,"[5] A.R.S. § 13-4305(A)(3)(c), at trial it must prove by a preponderance of evidence the property is subject to forfeiture.[6] A.R.S. § 13-4311(M).

(involving deficient notice of claim). And, when we remanded this matter, we expressly contemplated Peña being given additional time to answer. *See $70,070 U.S. Currency*, 236 Ariz. 23, ¶ 17, 335 P.3d at 550 ("In the event the [motion to dismiss] is again denied, the trial court shall provide Peña with additional time to answer the complaint . . . .").

[5]To establish probable cause, "the state must demonstrate reasonable grounds for its belief that the property is subject to forfeiture, supported by more than a mere suspicion, but less than prima facie proof." *1986 Chevrolet Corvette*, 183 Ariz. at 640, 905 P.2d at 1375.

[6]In *$315,900 U.S. Currency*, we reviewed a contested forfeiture order based on the probable cause standard applicable under former A.R.S. § 13-4311(K), which was in effect until 1994. 183 Ariz. at 211, 902 P.2d at 354; *see* 1994 Ariz. Sess. Laws, ch. 219, § 12.

¶8 A large amount of currency "packaged elaborately and deceptively" can be a relevant factor in determining the existence of "[r]easonable suspicion . . . [to] support a temporary detention of property for investigative purposes." *In re $26,980 U.S. Currency*, 193 Ariz. 427, ¶ 8, 973 P.2d 1184, 1187 (App. 1998). The relevance of elaborate and deceptive packaging in determining probable cause for forfeiture has been recognized, at least in the context of an uncontested forfeiture. *See $24,000 U.S. Currency*, 217 Ariz. 199, ¶¶ 24-25, 171 P.3d at 1246. On the other hand, the mere possession of "a large sum of cash" is not inherently unlawful. *See $315,900 U.S. Currency*, 183 Ariz. at 216, 902 P.2d at 359. Possessing a large amount of cash also does not by itself establish any enumerated example of money laundering found in A.R.S. § 13-2317. *See $315,900 U.S. Currency*, 183 Ariz. at 214, 902 P.2d at 357 (possession of large amount of cash in proximity to small quantity of illegal drugs insufficient by itself to support forfeiture under former probable cause standard).

¶9 The currency in this case, although concealed from view in a box not designed for general storage, and bound by rubber bands, was not hidden in a manner involving special modifications to the vehicle, and there was no evidence the money was packaged or otherwise treated in a manner calculated to evade canine detection. *See $24,000 U.S. Currency*, 217 Ariz. 199, ¶¶ 23-25, 171 P.3d at 1246 (discussing common attempts to mask "drug odors"). Further, DPS officers found no contraband in the vehicle or on Peña.[7] Moreover, three different officers testified they had conducted no investigation of Peña other than interviewing him immediately after seizure of the currency. One, a narcotics detective and sixteen-year veteran of DPS, testified she was unaware, as of the date of the seizure, of any means to conduct further investigation "other than running a criminal history." Peña testified he had no

[7]The record before us provides less support for forfeiture than there was in *$315,900 U.S. Currency*, 183 Ariz. at 214, 902 P.2d at 357, where we concluded the presence of a small quantity of marijuana with a large sum of cash did not establish probable cause of the commission of a crime giving rise to forfeiture.

previous involvement with law enforcement and there is nothing in the record to suggest otherwise.

¶10 Here, the state seeks forfeiture of the cash based on the officers' opinions that Peña's initial disclaimer of ownership and southerly direction of travel, as well as the manner the cash was packaged and concealed, were consistent with illegal activity. Even assuming these facts were sufficient to establish reasonable suspicion allowing "a temporary detention . . . for investigative purposes," *see $26,980 U.S. Currency*, 193 Ariz. 427, ¶ 8, 973 P.2d at 1187, without more, they do not constitute substantive evidence of illegal activity. *Cf. State v. Ketchner*, 236 Ariz. 262, ¶ 15, 339 P.3d 645, 647 (2014) (profile evidence not allowed as "substantive proof of guilt"). As a matter of law, the evidence in this case was insufficient to establish by a preponderance of evidence a connection between the property and conduct giving rise to forfeiture.[8]

Disposition

¶11 For the foregoing reasons, we reverse the trial court's order forfeiting the currency to the state.

[8]Peña also asserts the trial court engaged in "a pattern of continuous abuse of discretion," by ignoring procedural rules and allowing the state to behave "in an egregious and unethical manner," in order to ensure forfeiture of the currency to the state. Because we reverse, we need not address this contention in detail. However, we find nothing in the record supporting Peña's suggestion of judicial misconduct. *See* Ariz. R. Sup. Ct. 42, ER 8.2 (proscribing making "a statement . . . with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge").