In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-22-00016-CV

$100,210.00 IN US CURRENCY AND 2007 SILVER INFINITY G35 (VIN JNKBV61E87M711079), Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 78th District Court
Wichita County, Texas
Trial Court No. DC78-CV2021-1338

Before Kerr, Bassel, and Walker, JJ.
Memorandum Opinion by Justice Kerr
Concurring Memorandum Opinion by Justice Walker

MEMORANDUM OPINION

This is a civil-forfeiture case. We will affirm the trial court's judgment forfeiting money and a car to the State.

Background

After being pulled over for driving in the passing-only left lane of U.S. Highway 287 North in Wichita County, Luis Modesto Gonzalez and his passenger, Davis Secin, were discovered with an odor-blocking backpack containing a vacuum-sealed package of $100,210 in cash,[1] a Glock pistol, and a scale. The sheriff's deputies who pulled them over detected the odor of marijuana in the car. During the stop, Gonzalez said that both he and Secin, whom Gonzalez identified as his uncle, were unemployed; had been driving all night; and were traveling to meet up with cousins from New York in Fresno, California, for two weeks to "see what's up." Secin had a small amount of marijuana on him that was discovered after he tried to flee the traffic stop on foot.

Law enforcement seized the cash and other items, including the silver 2007 Infiniti G35 that Gonzalez was driving, and arrested both men.[2] The State later filed a notice of seizure and of intended civil forfeiture of the cash and the car as

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[1]The currency consisted of 100 $100 bills, 145 $50 bills, 4,055 $20 bills, 142 $10 bills, 87 $5 bills, and 5 $1 bills.

[2]As of the time they filed their appellate brief, neither Secin nor Gonzalez had been criminally charged.

contraband, served written discovery on Secin and Gonzalez, and then moved for summary judgment based on what the State characterized as deemed admissions.[3] The trial court denied Secin and Gonzalez's motion to abate the forfeiture proceedings pending the outcome of any parallel criminal trial and granted summary judgment in the State's favor.

Secin and Gonzalez appeal, raising four issues:

1. Whether the trial court abused its discretion by denying their plea in abatement;
2. Whether genuine fact issues or insufficient evidence precluded summary judgment;
3. Whether the trial court abused its discretion by ruling that the privilege against self-incrimination is unavailable when responding to admission requests in a

[3]The State's Rule 198 requests included ones that collectively asked Secin and Gonzalez to admit to all elements of the State's Chapter 59 forfeiture proceeding. *See* Tex. Code Crim. Proc. Ann. art. 59.02; Tex. R. Civ. P. 198. Rather than admit or deny the State's various requests, they responded to each by invoking their right to remain silent. Appellants did not later ask to withdraw or strike the putatively deemed admissions under Rule 198.3 after the State moved for summary judgment, unlike cases in which trial courts were held to have wrongly refused to allow parties to withdraw merits-preclusive deemed admissions. *See Marino v. King*, 355 S.W.3d 629, 634 (Tex. 2011) (noting that "[c]onstitutional imperatives favor the determination of cases on their merits rather than on harmless procedural defaults," and that using deemed admissions as summary-judgment evidence "does not avoid the requirement of flagrant bad faith or callous disregard, the showing necessary to support a merits-preclusive sanction"); *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (holding that trial court should have granted new trial and allowed deemed admissions to be withdrawn upon learning that summary judgment was solely because responses were two days late).

civil case and by not holding an evidentiary hearing to determine the merits of the privilege's use; and

4. Whether forfeiture of the Infiniti and cash violates the Excessive Fines Clause of the United States Constitution's Eighth Amendment.

We will affirm.

Standards of Review

We review Appellants' first and third issues for an abuse of discretion. A trial court abuses its discretion if it acts without reference to any guiding rules or principles—that is, if its act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). An appellate court cannot conclude that a trial court abused its discretion merely because the appellate court would have ruled differently in the same circumstances. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *see also Low*, 221 S.W.3d at 620.

We review Appellants' second issue—whether summary judgment was appropriate—de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). A plaintiff is entitled to summary judgment on a cause of action if it conclusively proves all essential elements of the claim. *See* Tex. R. Civ. P. 166a(a), (c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986).

Civil Forfeitures

Texas law allows the State to seize certain property and obtain it through a forfeiture proceeding if the property is "contraband." *See* Tex. Code Crim. Proc. Ann. arts. 59.02(a), 59.04. Such a proceeding is "distinctly civil in nature: 'parties must comply with the rules of pleading as required in civil suits,' *id.* art. 59.05(a), cases 'proceed to trial in the same manner as in other civil cases,' and '[t]he state has the burden of proving by a preponderance of the evidence that property is subject to forfeiture,' *id.* art. 59.05(b)." *State v. One (1) 2004 Lincoln Navigator*, 494 S.W.3d 690, 693 (Tex. 2016). Seized property is contraband if it was used (or was intended to be used) in the commission of certain offenses.[4] *See* Tex. Code Crim. Proc. Ann. art. 59.01(2). The requisite "substantial connection" between the "property to be forfeited and the criminal activity defined by the statute" may be proved by circumstantial evidence. *$27,877.00 Current Money of U.S. v. State*, 331 S.W.3d 110, 114, 119 (Tex. App.—Fort Worth 2010, pet. denied) (citing *State v. $11,014.00*, 820 S.W.2d 783, 784, 785 (Tex. 1991), and holding evidence factually sufficient to support forfeiture where claimant was unemployed, there was no evidence of a legitimate job or other legal source of income, and $23,020 was found in various denominations tied in hair bands inside a bag).

[4]In this case, the State pleaded that the cash and car were involved in the felony offense of money laundering in an amount between $30,000 and $150,000. *See* Tex. Penal Code Ann. § 34.02.

The purpose of forfeiting contraband to the government is to keep the property and its proceeds from being used for illegal purposes. *See Bennis v. Michigan*, 516 U.S. 442, 452, 116 S. Ct. 994, 1000 (1996) ("Forfeiture of property prevents illegal uses . . . by imposing an economic penalty, thereby rendering illegal behavior unprofitable."); *Fant v. State*, 931 S.W.2d 299, 308 (Tex. Crim. App. 1996) (same). The State need not prosecute or obtain a criminal conviction against the property's owner to pursue civil forfeiture of contraband. *See* Tex. Code Crim. Proc. Ann. art. 59.05(d) ("A final conviction for an underlying offense is not a requirement for forfeiture under this chapter.").

Refusal to Abate (Issue One)

Rather than attempt to counter the substance of the State's summary-judgment motion with controverting evidence, Appellants asked the trial court to abate the forfeiture proceeding until any related or parallel criminal case was disposed of and to continue the summary-judgment hearing. They argued, in the trial court and on appeal, that without an abatement or continuance, they faced a Hobson's choice: exercise their right against self-incrimination—which they did by invoking the Fifth Amendment in response to the State's admission requests—or exercise their due-process interests by actively defending against the forfeiture action. This dilemma purportedly "constrained [them] from making any statements concerning the facts relating to their stop [or] the assets seized due to the pending criminal prosecution,"

leaving them "unable to proffer any defense or put on any evidence to defeat the State's motion for summary judgment."

We are unaware of any Texas case[5] in which a failure to abate a civil-forfeiture proceeding at a claimant–defendant's request was held to be an abuse of discretion—although courts have held that discretion can be abused by *ordering* abatement at the State's request. *See In re Gore*, 251 S.W.3d 696, 699–700 (Tex. App.—San Antonio 2007, orig. proceeding) (holding that State was not entitled to abatement of civil-forfeiture proceeding while criminal case pending); *cf. In re Unauthorized Prac. of Law Comm.*, No. 13-08-00662-CV, 2008 WL 6654756, at *1 (Tex. App.—Corpus Christi–Edinburg Dec. 4, 2008, orig. proceeding) (per curiam) (mem. op.) ("As a general rule, the pendency of a criminal investigation, indictment, or other proceeding does not affect a contemporaneous civil proceeding based on the same facts or parties, and does not justify abating or staying all discovery in a civil case until resolution of the criminal matter."). Moreover, we have found no Texas case ordering a blanket or indefinite stay or abatement of a civil-forfeiture case where, as here, no criminal proceedings have been initiated and might never be.

[5]Unlike Chapter 59, comparable federal law explicitly provides that either the government or the claimant of seized property can obtain a stay of a civil-forfeiture proceeding under certain circumstances. *See* 18 U.S.C.A. § 981(g). To the extent that Appellants rely on federal caselaw in arguing that a stay was proper, those cases do not apply here. Appellants themselves acknowledge that "Texas [c]ourts have reviewed this issue on a more limited basis."

To that latter point, commentators have observed that "[i]f the civil witness/defendant has already been indicted, then the risk of criminal prosecution (and the need for the stay) is clear. If the civil witness/defendant has *not* been indicted, he will have to convince a sometimes skeptical judge that the risk is real and imminent." Gerald H. Goldstein et al., *The Criminalization of Civil Law*, 38 The Advoc. (Texas) 4, 7 (2007).

That observation tracks with numerous cases from other jurisdictions recognizing that whether a civil litigant has been indicted is one of the factors relevant to a stay—and, if not, the lack of indictment is reason alone to deny such a request:

> A stay is most appropriate when criminal charges have been filed against the moving party. Pre-indictment requests to stay parallel civil litigation are routinely denied because the defendant faces a reduced risk of self-incrimination. Further, the requested postponement is typically contingent upon a criminal investigation of indefinite duration. When a party seeking a stay has not yet been indicted, the court may deny the motion "on that ground alone."

Barker v. Kane, 149 F. Supp. 3d 521, 527 (M.D. Penn. 2016) (citations omitted); *see also Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995) (explaining how "[a] stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct"); *Heller Healthcare Fin., Inc. v. Boyes*, No. Civ.A. 300CV1335D, 2002 WL 1558337, at *3 (N.D. Tex. July 15, 2002) (same).

Because Appellants have not been indicted, and because stays and abatements are discretionary with the trial court in any event, we overrule Appellants' first issue.

Self-Incrimination and Deemed Admissions (Issue Three)[6]

Appellants' third issue asks whether the trial court abused its discretion by "rul[ing] that the Fifth Amendment privilege against self-incrimination is not available when responding to requests for admission in a civil case" and thus by not having an evidentiary hearing to determine the merits of the privilege's use.

The State's summary-judgment motion took the position that when Appellants improperly invoked the Fifth Amendment in response to each request for admission, the responses automatically became deemed admissions. Appellants' summary-judgment response seemed to accept that proposition: "[T]he only arguments made by the State relate to *certain deemed admissions* made when Respondents timely responded claiming fifth amendment protection to certain of the State's requests for admissions." [Emphasis added.]

Strictly speaking, the trial court did not "rule" that the privilege is not available, because it was not asked to so rule. Appellants now assert that the trial court had a "duty to consider evidence to determine if the privilege is meritorious," citing *Ex parte Butler*, 522 S.W.2d 196, 198 (Tex. 1975), and *In re Speer*, 965 S.W.2d 41, 45–46 (Tex.

[6]We address Appellants' issues out of order because if the trial court properly considered their (implicitly) deemed admissions as valid summary-judgment evidence, then the State established its entitlement to judgment against the seized property as a matter of law (Appellants' second issue). *Cf. Marino*, 355 S.W.3d at 633–34; *Wheeler*, 157 S.W.3d at 444.

App.—Fort Worth 1998, orig. proceeding). But Appellants did not raise this argument in the trial court. *See* Tex. R. App. P. 33.1(a).

And although their summary-judgment response stated that, once a Fifth Amendment privilege is asserted, the "trial court must study each question for which the privilege is claimed and forecast whether an answer could tend to incriminate the witness in a crime," they noted that "current Texas Appellate Court case law states that the Fifth Amendment privilege against self-incrimination does not apply when responding to Requests for Admission in civil cases." Appellants never asked the trial court to hold an evidentiary hearing or even to determine, on a request-by-request basis, whether invoking the privilege against self-incrimination was appropriate. In their summary-judgment response, they stated only that although some Texas appellate courts have held the privilege inapplicable in these circumstances, "it is important to note that the Texas Supreme Court has not ruled on this issue, so Defendants have a[n] argument to make in Court against being forced to answer[] incriminating Requests for Admission." They concluded their response by asking that summary judgment be denied; their response sought no other relief. Furthermore, although they argued in their response that some of the State's requests improperly sought admissions on pure questions of law or on mixed questions of law and fact, Appellants did not lodge these objections when responding to the admission requests.

In this issue, Appellants also discuss the interplay between Rule 198.3 and the Fifth Amendment and question the soundness of cases suggesting that, because Rule

198.3 explicitly limits the use of admissions to the pending action, the privilege cannot be used to avoid admitting (or denying) particular requests. *See Speer*, 965 S.W.2d at 46 (noting that "a civil defendant can be forced to choose between asserting his privilege against self-incrimination or losing his civil suit" and that "a party may not assert the privilege against self-incrimination as a reason for refusing to answer requests for admission"); *Katin v. City of Lubbock*, 655 S.W.2d 360, 363 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (affirming summary judgment, based in part on deemed admissions, that appellant was violating city ordinance and holding Fifth Amendment privilege unavailable as ground for ignoring admission requests); *cf.*, *e.g.*, *Gordon v. FDIC*, 427 F.2d 578, 581 (D.C. Cir. 1970) (discussing federal-rule counterpart to Rule 198 and observing that its "protective provision" does "not prevent the use of facts set forth in the admission by the criminal prosecutor as a confirmation that facilitates preparation of the criminal case, or perhaps as a lead to other evidence").

But in this case's procedural posture, we need not address which approach wins out. That is, by going along with the State's characterization of the requests as having already been deemed admitted through Appellant's (presumably) invalid interposition of the privilege against self-incrimination, Appellants gave the trial court no opportunity to review each request for propriety or to order Appellants to answer the

requests before deeming them admitted.[7] Rule 198 is self-executing in its deemed-admissions effect only if a party completely fails to timely respond to the requests. *See* Tex. R. Civ. P. 198.2(c) ("If a response is not timely served, the request is considered admitted without the necessity of a court order."). But when a party timely responds to admission requests with an objection or assertion of privilege, such a response—even if unfounded—is not the equivalent of a failure to timely answer, and the requesting party is supposed to follow the procedures of Rule 215.4 before admissions can be deemed. *See* Tex. R. Civ. P. 215.4.

That rule provides that the requesting party "may move to determine the sufficiency of the answer or objection" and that "[u]nless the court determines that an objection is justified, it shall order that an answer be served"; "[i]f the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served." *See* Tex. R. Civ. P. 215.4(a) (footnote omitted). This framework clearly contemplates that it was incumbent upon the State to seek a ruling that Appellants' objections were invalid, and for an order directing them to answer, rather than going straight for

[7]Appellants' seeming acquiescence in the admissions' having been deemed might also explain why they did not move to amend or withdraw those admissions under Rule 198.3 after the State moved for summary judgment. *See* Tex. R. Civ. P. 198.3 (creating mechanism for a party to ask the trial court to allow it to "withdraw or amend [an] admission" if the party shows good cause and "the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission").

summary judgment as though Appellants' privilege assertions resulted in automatically deemed admissions (something that, as noted, Appellants apparently believed too[8]). But Appellants did not point this out to the trial court or to us; in fact, neither side has cited to Rule 215.4.

In a civil case, we cannot consider an issue not raised in an appellant's brief even if we "may perceive that the ends of justice seem to require it." *Liles v. Contreras*, 547 S.W.3d 280, 296 (Tex. App.—San Antonio 2018, pets. denied). We have neither the duty nor the right to independently review the record and the applicable law to determine whether error occurred; in construing briefs, we cannot make parties' arguments for them and then adjudicate the case based on arguments we ourselves supplied. *See Craaybeek v. Craaybeek*, No. 02-20-00080-CV, 2021 WL 1803652, at *5 (Tex. App.—Fort Worth May 6, 2021, pet. denied) (mem. op.) (citing cases); *see also Wolf v. Ramirez*, 622 S.W.3d 126, 134 (Tex. App.—El Paso 2020, no pet.) (noting that error-preservation rules apply in summary-judgment proceedings as well as trials). At its core, then, Appellants' third issue fails as framed because they did not ask the trial court to do anything other than stay or abate the forfeiture proceeding, continue the summary-judgment hearing, or deny the State's motion. They cannot now be heard to complain that the trial court should have held a hearing to test the viability of their

[8]The parties seemed to be on the same page, even if that page was wrong.

Fifth Amendment assertions when they never asked it to do so.[9] *See* Tex. R. App. P. 33.1(a).

We overrule Appellants' third issue.

Propriety of Summary Judgment (Issue Two)

In their second issue, Appellants assert that genuine issues of material fact existed or that the State failed to meet its summary-judgment burden.

As for the first challenge, Appellants have not pointed us to anything in the record that ostensibly shows a genuine issue of fact. Indeed, they posit a sort of appellate Catch–22, arguing that "[d]ue to the criminal proceedings arising from the same set of facts, the Appellants were constrained from providing any evidence to defend themselves in the civil litigation. Therefore, the Appellants cannot, at this time, attack the merits of the State's motion for summary judgment." This statement does not suffice to raise a fact issue. *See* Tex. R. App. P. 38.1(i); *see also*, *e.g.*, *Avery Pharms., Inc. v. Haynes & Boone, L.L.P.*, No. 2-07-317-CV, 2009 WL 279334, at *13 (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (per curiam) (mem. op.) ("Appellants do not include a single record citation in their opening brief directing us to evidence that they claim raises a genuine issue of material fact to support their negligent misrepresentation claim.").

[9]We express no opinion about what the outcome of such a hearing might or should have been.

Appellants next argue that they should have been allowed to assert their Fifth Amendment rights instead of having the admissions deemed against them, contending that "[w]ithout those admissions, the only evidence that [the] State had was speculative and conclusory statements from various employees of the State."[10] The deputies' affidavits aside, deemed admissions can support summary judgment. *See* Tex. R. Civ. P. 166a(c) (providing that summary judgment can be rendered if (among other things) a nonmovant's admissions show no genuine issue of material fact), 198.3 (providing that matter admitted under Rule 198 "is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission"); *Carter v. Perry*, No. 02-14-00185-CV, 2015 WL 4297586, at *4 (Tex. App.—Fort Worth July 9, 2015, no pet.) (mem. op.) (holding that "admissions, once deemed admitted against a defendant, are judicial admissions that will fully support a summary judgment in favor of the plaintiff where the deemed admissions fully support and establish each element of a plaintiff's cause of action"); *Oliphant Fin., LLC v. Galaviz*, 299 S.W.3d 829, 838 (Tex. App.—Dallas 2009, no pet.) ("Deemed admissions may be employed as proof, and once admissions are deemed

[10]Appellants appear to be referring to the deputies' affidavits submitted in support of the State's notice of seizure and intended forfeiture, which affidavits—as being among "the live pleadings and exhibits to same filed in this cause"—were "incorporate[d] by reference" and attached as part of the State's summary-judgment evidence. The State did not, however, discuss any of those affidavits' contents in explaining its entitlement to summary judgment, instead relying entirely on deemed admissions.

admitted by operation of law and where the admissions fully support each element of a cause of action, including damages, they will fully support a judgment based thereon.").[11]

We overrule Appellant's second issue.

Excessive Fines Clause (Issue Four)

In their fourth and final issue, Appellants argue that forfeiture of over $100,000 in cash and an Infiniti automobile "lacks proportionality" and violates the Eighth Amendment's Excessive Fines Clause. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). They did not raise this issue at any point in the trial court, so our Rule 33.1(a) analysis of a similarly unpreserved issue in an earlier civil-forfeiture case applies:

> As a general rule, a constitutional claim must have been asserted in the trial court to be raised on appeal. *See* Tex. R. App. P. 33.1(a); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (citing *Wood v. Wood*, 320 S.W.2d 807, 813 (Tex. 1959)); *Walker v. Emps. Ret*[.] *Sys.*, 753 S.W.2d 796, 798 (Tex. App.—Austin 1988, writ denied) ("A constitutional challenge not raised properly in the trial court is waived on appeal."). This rule extends to the Excessive Fines Clause of the Eighth Amendment in civil proceedings. *See Romero v. State*, 927 S.W.2d 632, 634 n.2 (Tex. 1996) (refusing to consider whether a civil forfeiture

[11]Appellants do not contend that the deemed admissions fail to fully support each element of the State's forfeiture action. And again, because the parties all proceeded as though the admissions had been deemed under Rule 198 and the trial court was not asked to find them so under Rule 215.4's procedures, we take no position about whether the trial court could or should have ultimately deemed them admitted if the State had sought such a ruling under Rule 215.4.

> violated the Excessive Fines Clause because the issue was not preserved); *White Lion Holdings, L.L.C. v. State*, No. 01-14-00104-CV, 2015 WL 5626564, at *4 (Tex. App.—Houston [1st Dist.] Sept. 24, 2015, pet. [denied]) (mem. op. on reh'g) ("Both due-process and excessive-fines arguments can be waived. By failing to preserve these arguments, White Lion has waived them." (footnote omitted)); *see also Sample v. State*, 405 S.W.3d 295, 304 (Tex. App.—Fort Worth 2013, pet. ref'd) (holding that an appellant in a criminal appeal had failed to preserve an Eighth Amendment claim by not raising it in the trial court).
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> Youngblood raised the Excessive Fines issue for the first time in his appellate brief. By failing to raise an Eighth Amendment claim in the trial court, he failed to preserve error, thereby waiving the issue. We overrule Youngblood's second issue.

One 2006 Harley Davidson Motorcycle v. State, No. 02-16-00450-CV, 2017 WL 4819430, at *6 (Tex. App.—Fort Worth Oct. 26, 2017, no pet.) (mem. op.); *see* Tex. R. App. P. 33.1(a).

Because Appellants have waived their excessive-fines complaint, we do not reach its merits and overrule their fourth issue.

Conclusion

Having overruled each of Appellants' issues, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Delivered: December 22, 2022