IN THE SUPREME COURT OF TEXAS

NO. 16-1019

MARK KEN TAFEL, PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

~ consolidated with ~

NO. 16-1020

MARK KEN TAFEL, PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

Per Curiam

This appeal involves the forfeiture of two handguns pursuant to Texas Code of Criminal Procedure article 18.19. Two questions are presented. The first is whether the forfeiture proceedings are civil in nature so that this Court has jurisdiction. The second, which we may consider only if we answer the first "yes," is whether conviction for *possession* of a weapon authorizes a forfeiture order under article 18.19(e), which allows forfeiture based on conviction of an offense involving *use* of the weapon. The court of appeals determined that the forfeiture proceedings are civil in nature and answered the second question "yes." We agree that the proceedings are civil but conclude that the answer to the second is "no." Accordingly, we reverse.

Texas Penal Code section 46.035(c) makes it an offense to carry a handgun in the room where a governmental entity is meeting. Mark Tafel, who was a Hamilton County commissioner at the time and held a concealed handgun license, was arrested and convicted for the unlawful carrying of two handguns into a meeting of the commissioner's court. The guns were discovered when the sheriff observed a bulge that he believed was a weapon under Tafel's left arm. Following Tafel's conviction, the State moved for forfeiture of the guns. The State's motions were pursuant to Texas Code of Criminal Procedure article 18.19(e), which provides for forfeiture of a weapon following conviction for "an offense involving the use of the weapon." TEX. CODE CRIM. PROC. art. 18.19(e). The trial court granted the motions.

Tafel appealed, challenging both the convictions and the forfeiture orders. The court of appeals determined that the forfeiture proceedings were civil in nature. It severed the appeals of the forfeiture orders from the appeals of the convictions. In a 2–1 decision, it affirmed the forfeiture orders on the basis

that "use" of a weapon under article 18.19(e) includes simply possessing the weapon, and a separate and distinct offense is not required. 524 S.W.3d 642, 644 (Tex. App.—Waco 2016).

Tafel's appeal to this Court presents two arguments. First, he maintains that article 18.19(e) forfeiture proceedings are criminal law matters. That being so, he argues, the court of appeals erroneously classified and docketed the forfeiture proceedings as civil instead of criminal. Second, recognizing that we might not agree with his first argument, he argues that the trial court ordered forfeiture pursuant to article 18.19(e); he was only in possession of the guns and not using them in any manner; and under article 18.19(e), his mere possession of them does not constitute their "use."

In countering Tafel's jurisdiction argument, the State asserts that forfeiture under article 18.19(e) is a civil in rem proceeding. That is so because property, not a person, is what is subject to seizure. As to Tafel's second argument addressing the merits of the appeal, the State argues that the Court of Criminal Appeals has defined "use" to include simple possession when the possession facilitates an associated felony. *See Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989). Thus, according to the State, article 18.19(e) allows forfeiture following a possession conviction under Chapter 46.

We first address the jurisdiction issue. *See Hous. Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007) (holding that courts have jurisdiction to determine their own jurisdiction). We begin our analysis by noting that article 18.19's location within the Code of Criminal Procedure is not dispositive as to whether forfeitures under it are criminal matters. *See Smith v. Doe*, 538 U.S. 84, 94–95 (2003) (observing that codifying a sex offender registration provision in a criminal procedure code was not dispositive of the statute's nature); *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984)

(holding that a forfeiture provision for firearms was a civil sanction despite codification of its authorizing statute in a criminal code). In *Hardy v. State*, we concluded that "[a] civil forfeiture proceeding under chapter 18 of the Texas Code of Criminal Procedure is an *in rem* procedure" and therefore is a "proceeding against the property itself, not against the owner." *Hardy v. State*, 102 S.W.3d 123, 126–27 (Tex. 2003). Tafel correctly notes that we did not consider the entirety of article 18 in *Hardy* but instead only examined article 18.18, which addresses disposition of various specified categories of items, including prohibited weapons. *Id.* at 125. While article 18.18 specifically includes prohibited weapons and article 18.19 encompasses weapons that are not categorized as prohibited, the distinction is immaterial. Because forfeiture proceedings are against property, the proceedings are civil in rem matters. *State v. Rumfolo*, 545 S.W.2d 752, 754 (Tex. 1976); *see, e.g.*, *Fant v. State*, 931 S.W.2d 299, 307 (Tex. Crim. App. 1996); *State v. Meyers*, 328 S.W.2d 321, 325 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.); *McKee v. State*, 318 S.W.2d 113, 118 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.). We conclude that jurisdiction is proper in this Court.

We next consider whether the trial court's forfeiture orders made pursuant to article 18.19(e) are valid when they were based on Tafel's conviction under Chapter 46 of the Penal Code.

Article 18.19 addresses the disposition of seized weapons under two distinct circumstances: "Weapons seized in connection with an offense involving the use of a weapon or an offense under Penal Code Chapter 46." TEX. CODE CRIM. PROC. art. 18.19(a). Subsection (e) specifies the procedures and requirements regarding forfeiture for weapons seized in connection with the first basis for forfeiture—an offense involving the use of a weapon:

> (e) If the person found in possession of a weapon is convicted of an offense involving the use of the weapon, . . . the court entering judgment of conviction shall order . . . forfeiture to the state. . . .

TEX. CODE CRIM. PROC. art. 18.19(e). Subsection (d) specifies the procedures and requirements regarding forfeiture for weapons seized in connection with the second basis for forfeiture—an offense under Chapter 46:

> (d) A person either convicted or receiving deferred adjudication under Chapter 46, Penal Code, is entitled to the weapon seized upon request to the court in which the person was convicted or placed on deferred adjudication. However, the court entering the judgment shall order the weapon . . . forfeited to the state . . . if:
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> (1) the person does not request the weapon before the 61st day after the date of the judgment of conviction or the order placing the person on deferred adjudication;
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> (2) the person has been previously convicted under Chapter 46, Penal Code;
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> (3) the weapon is one defined as a prohibited weapon under Chapter 46, Penal Code;
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> (4) the offense for which the person is convicted or receives deferred adjudication was committed in or on the premises of a playground, school, video arcade facility, or youth center . . .; or
>
> (5) the court determines based on the prior criminal history of the defendant or based on the circumstances surrounding the commission of the offense that possession of the seized weapon would pose a threat to the community or one or more individuals.

TEX. CODE CRIM. PROC. art. 18.19(d).

Article 18.19(e) mandates forfeiture without exception when a person is convicted of an offense involving the "use" of a weapon. *Id.* art. 18.19(e). But article 18.19(d) provides that a person convicted or receiving deferred adjudication under Chapter 46 is entitled to the return of their weapon upon request, absent the application of one of five specified exceptions. *Id.* art. 18.19(d). Tafel was convicted under section 46.035(c), which makes it an offense to carry a weapon into a meeting of a governmental entity.

TEX. PEN. CODE § 46.035(c). However, the forfeiture orders Tafel challenges were rendered pursuant to article 18.19(e). For the reasons expressed below, we agree with Tafel and the dissenting justice in the court of appeals, *see* 524 S.W.3d at 686 (Gray, C.J., dissenting), that because Tafel's convictions were under Chapter 46 of the Penal Code, the applicable forfeiture provisions were those in article 18.19(d).

When interpreting a statute, we presume the Legislature intended the entire statute to be effective and none of its language to be surplusage. *Kallinen v. City of Hous.*, 462 S.W.3d 25, 28 (Tex. 2015) (citing *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987)). The Legislature provided two separate paths to forfeiture under article 18.19, each with its own procedures. And as noted above, where article 18.19(e) applies, then conviction mandates forfeiture, while under article 18.19(d) conviction alone is not sufficient for forfeiture. Reading the statute as permitting article 18.19(e) to serve as the basis for forfeiture following a Chapter 46 conviction renders article 18.19(d) meaningless because all forfeiture proceedings under article 18.19 would then fall within article 18.19(e).

The State argues that "use" has been interpreted by the Court of Criminal Appeals, albeit in regard to a different statute, to include simple possession *if* such possession facilitates the associated felony. *See Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989). Thus, the State's argument goes, article 18.19(e) supports forfeiture after convictions under Chapter 46 for possession. *See id.* at 940. But this argument fails to account for subsequent decisions regarding the definition of "use." *Narron v. State*, 835 S.W.2d 642, 643 (Tex. Crim. App. 1992) (per curiam) (holding that a finding of "use" is not permissible "when possession of the weapon is the gravamen of the [underlying] felony offense"); *Ex parte Petty*, 833 S.W.2d 145, 145 (Tex. Crim. App. 1992) (defining "use" to require that the weapon "be

utilized to achieve an intended result, namely, the commission of a felony offense separate and distinct from 'mere' possession"), *abrogated on other grounds by Ex parte Nelson*, 137 S.W.3d 666 (Tex. Crim. App. 2004). However, we need not determine when possession constitutes "use," if ever, because of article 18.19's bifurcated design and the principle of statutory interpretation by which all the words used by the Legislature are given meaning. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000). If the State wishes to pursue forfeiture based on a conviction for a possession offense under Chapter 46, article 18.19(d) is the mandatory path.

Finally, the State acknowledges that forfeiture in this case might better have been sought under article 18.19(d)(5) and urges that the forfeiture orders based on article 18.19(e) be affirmed under article 18.19(d)(5) on the basis of judicial notice and trial by consent. The State is correct that the Rules of Appellate Procedure allow it to assert an independent ground for affirmance of the court of appeals' judgment. TEX. R. APP. P. 53.3(c)(2). But as we explain, the State's position is unsupportable here.

Tafel's arrest for possession of the two handguns led to prosecution for two felony and two misdemeanor counts on the basis that the meeting into which he carried them was being held in the courtroom of a district court. *Tafel v. State*, Nos. 10-12-00216-CR, 10-12-00217-CR, 2013 WL 657790, at *1 (Tex. App.—Waco Feb. 21, 2013, no pet.); TEX. PEN. CODE § 46.03 (stating that carrying a handgun into the room where a meeting of a governmental entity is held is a misdemeanor offense); TEX. PEN. CODE § 46.035(c) (making carrying a handgun into a district courtroom a felony offense). In his first trial, Tafel was acquitted of the felony charges but convicted of the misdemeanor charges. He appealed the convictions and moved for the return of his handguns. The focus of the testimony at the hearing on the

motions to return his guns was on whether he came within the "community threat" exception in article 18.19(d), which barred the return of seized weapons following a Chapter 46 conviction. *See* TEX. CODE CRIM. PROC. art. 18.19(d)(5). However, the trial court did not rule on the community threat issue in light of Tafel's pending appeals. Then, the court of appeals reversed the misdemeanor convictions upon the determination that the sitting judge did not have jurisdiction over the misdemeanor charges and remanded to the trial court. *Tafel*, 2013 WL 657790, at *3. There, Tafel was once again convicted on the two misdemeanor charges.

Following his convictions in the second trial, the State moved for forfeiture of Tafel's guns based only on article 18.19(e). It asserted that the offenses of which Tafel was convicted involved "use" of the weapons. No evidence was presented; the motions were heard ex parte; and the trial judge signed orders forfeiting the guns on the basis that each gun "was used and possessed by the Defendant in the commission of [the] offense."

The State argues that the evidence presented in the hearing where Tafel sought the return of his guns after the first trial is sufficient for this Court to uphold the lower courts' rulings on the basis that Tafel's actions fall within the community threat exception of article 18.19(d)(5). The State buttresses that argument by referencing testimony from the second trial that could potentially support a community threat finding.

In response, Tafel says that testimony from his first trial and the first posttrial hearing cannot be considered because it was not properly authenticated and introduced into evidence at his second trial or at a hearing on the second posttrial forfeiture motions. He notes that the trial court issuing the forfeiture

order stated on the record that prior testimony was not considered and thus this Court should decline to take judicial notice of the prior testimony. We agree.

An appellate court is limited to the record that is before it on appeal and generally may take judicial notice only of (1) facts that could have been properly judicially noticed by the trial judge or (2) facts that are necessary to determine whether the appellate court has jurisdiction of the appeal. *See Harper v. Killion*, 348 S.W.2d 521, 523 (Tex. 1961); *Lemmon v. United Waste Sys., Inc.*, 958 S.W.2d 493, 499 (Tex. App.—Fort Worth 1997, pet. denied). Neither of those situations is present here. Because neither is and because the trial court did not take judicial notice of evidence from the first forfeiture hearing, the evidence cannot be considered in support of the trial court's forfeiture order. *See In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005) ("[A]n appellate court is naturally reluctant to take judicial notice of matters . . . when the trial court was not requested to do so." (quoting *Sparkman v. Maxwell*, 519 S.W.2d 852, 855 (Tex. 1975))); *SEI Bus. Sys., Inc. v. Bank One Tex., N.A.*, 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ) ("[A]ppellate courts are reluctant to take judicial notice of matters which go to the merits of a dispute."). Nor were the issues under article 18.19(d)(5) tried by consent because the State relied on article18.19(e) in the motions seeking forfeiture of the handguns.

In consideration of the foregoing, we grant the petition for review. Without hearing oral argument, we reverse the judgment of the court of appeals and render judgment that Tafel's guns are not subject to forfeiture under article 18.19(e). *See* TEX. R. APP. P. 59.1. We remand the case to the trial court for further proceedings consistent with this opinion.

OPINION DELIVERED: December 15, 2017