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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

State of Wisconsin,
Plaintiff-Respondent,

v. **Appeal No. 2014AP002226**

One 2013, Toyota Corolla/s/le four-door,
LICENSE #437MXR,
VIN #2T1BU4EEXDC038839,
ITS TOOLS AND APPURTENANCES,
Defendant,
Steven T. Baumgard and Gladys A. Vogel,
Defendants-Appellants.

Appeal from the Order of the
Circuit Court for Walworth County
The Honorable Kristine E. Drettwan Presiding
Walworth County Case No. 13-CV-657

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ARGUMENT

The State's brief is completely silent on the main legal issues and in other places its argument focuses on irrelevant factual distinctions rather than on the law itself. Consequently, this court may accept the appellants' arguments as undisputed. Charolais Breeding Ranches v. FPC Securities, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

I. Mrs. Vogel is an innocent owner of the Corolla and is entitled to the return of her ownership share.

A. The State makes no effort to dispute that seized property may have more than one owner and that the innocent owner is entitled to the return of her share.

At pages 13-15 of their initial brief, the appellants cited opinions from the Second and Ninth Federal Circuits which hold that, even in the context of forfeiture law, the property interests of multiple owners must be considered separately for purposes of applying the "innocent owner" defense. See Van Hofe v. United States, 492 F.3d 175 (2nd Circuit 2007) and United States v. Ferro, 681 F.3d 1105 (9th Cir. 2012). The cases involved both the "innocent owner" defense and proportionality requirement under the Eighth Amendment Excessive Fines Clause.

Both cases involved married couples. The opinions leave little doubt that the wives would have been entitled to keep the whole of their respective ownership shares of the seized property if they had been completely innocent. While the courts found that the wives were not entirely innocent, they also found that the wives' culpability was much less than their husbands'. Consequently, the courts held that there must be separate analyses of the proportionality of the forfeitures with respect to the husbands' and the wives' respective ownership interests in the property. In both cases, some of the seized property was returned to the wives, while none was returned to the husbands.

B. The State does not even try to refute the elementary principle that property may have multiple owners and, accordingly, that the guilt or innocence of multiple owners must be addressed separately.

The State's brief does not even acknowledge the Van Hofe and Ferro cases much less make any attempt whatsoever to refute them. Nor does the State address the issue of multiple ownership more generally. Instead, it ignores the issue and hews to the circuit court's dichotomic approach. Under their analyses, there can be only one owner of the Corrolla—it is either Steven or Gladys but ownership by one is mutually exclusive of any ownership interest by the other.

The State asserts, incorrectly, that Mrs. Vogel testified at the forfeiture hearing "that she is the owner of the Toyota Corolla." (State's Brief at 11)(citing to record at R19, 17-18). Nowhere in this proceeding did Mrs. Vogel claim to be the exclusive owner of the car. This court will find that she was asked whether she was "the owner or an owner" to which answered yes. (R19, 17:24-18:1). Subsequent testimony from Mrs. Vogel established that the vehicle had been purchased with a combination of a $20,000 cash payment from her and a trade-in of Steven's 1998 Infiniti valued at $2,500. (R.19, 17-20). She also testified that the title was issued jointly in both their names.[1] (Id.). In closing argument, counsel argued that Mrs. Vogel was "an" innocent owner of the Corolla up to her respective financial share. (R.19, 39).

C. The State does not refute that a "nominal" owner under Kirch must be one who holds no ownership interest whatsoever other than bare title.

In their analyses of the innocent owner defense, the circuit court and the State rely on State v. Kirch, 222 Wis. 598, 587 N.W.2d 919 (Ct.

[1] The circuit court and the State brought out the fact that within days after the seizure, Steven's name was removed from the title. The appellants have never argued in this proceeding that the post-seizure transfer had any legal effect on ownership for purposes of this proceeding.

App. 1998) in concluding that Mrs. Vogel was a mere nominal owner of the Corolla. See (R.19, 52:19-25)(circuit court cites Kirch as "the benchmark" case to be applied to determine ownership). In their principal appellate brief, the appellants explored the Kirch decision in detail to determine what the court meant by "nominal owner." The court had looked to Black's Law Dictionary and to federal case law to distinguish between real and merely nominal owners. The court found that a nominal owner is one who holds legal title but has no stake in the property whether financially, by possession or through dominion and control. Id. at 606-07.

The court in Kirch found that the three federal cases it relied upon and the case before it shared the common fact that the purported owner had nothing but bare legal title and was therefore a nominal owner. In Kirch, Walter claimed that his mother owned a Chevrolet Suburban that had been seized. The court noted that possession and control were in her son's hands. Despite these facts, the court still went on to address whether the mother had a financial stake in the vehicle.

> "She has not claimed ownership of the truck. In fact, she twice stated that the truck 'belongs to' her son, and that ***she was only listed as owner because her son "was undergoing a bankruptcy" and did not want the truck in his name.***

Id. 607(emphasis added). This is the quintessential example of a nominal owner—a person who has nothing other than bare legal title and for a fraudulent purpose at that.

In United States v. One 1990 Chevrolet Corvette, 37 F.3d 421, 422 (8th Cir. 1994), the defendant told the police that they could not seize the car because "he had it in his aunt's name." The aunt, who held legal title claimed to have purchased it but the district court found that she did not have the financial means to purchase, and in fact had not purchased the car. Consequently, she was found to be a mere nominal owner.

In United States v. One 1981 Datsun, 563 F. Supp. 470 (E.D. Penn. 1983), the title was in the name of "Joseph Esposito" without a designation of either Jr. or Sr. The court found that the father was a mere nominal owner and noted that one of the "most telling factors" was that the father had not purchased the car; the only indicium of

ownership was the ambiguous name on the title. In United States v. One 1971 Porsche Coupe Auto, 364 F. Supp. 745 (E.D. Penn. 1973), the father had purchased the car as a gift for his son and no longer had any financial stake in the vehicle; therefore he was a mere nominal owner.

The State argues that Kirch and the other three cases support the circuit's judgment, but it misunderstands the point. Those courts found that the guilty party had possession and control of the vehicles, but that did not end their inquiry. They were not trying to assign ownership solely to one party or another. Rather, the question was whether the legal title holder had any other indicia of ownership and financial stake is a key one. The courts in those cases held that the claimants had no real ownership interest, exclusive or joint, because they did not any indicia of ownership beyond bare legal title.

D. Mrs. Vogel is an innocent joint owner of the Corolla with by far the larger financial interest.

The undisputed facts establish that Mrs. Vogel is an innocent joint owner of the Corolla. No one disputes that she is innocent. The circuit court said "[Mrs. Vogel] also testified that she did not know about his criminal activity and did not consent to that. And I have no

reason not to believe that. I don't think she knew anything about what he was doing with the car . . ." (R.19, 54:25-55:4). There is no dispute that she has a substantial financial stake in the car. The circuit court noted: "Now that's not to say that I don't recognize that the primary financial stake issue falls on Ms. Vogel. She's the one that wrote the $20,000 check for it . . ." (Id., 56:19-22).

The appellants have never disputed that Steven had possession and control of the car. Of course Mrs. Vogel intended that Steven use the car; she had her own. The purpose of buying the car was so that Steven would have reliable transportation between school, work and home, but that does not mean that Mrs. Vogel gave it to him as a gift. Along with joint title, having possession and control means that Steven had an ownership interest in the car. But his ownership was not exclusive. That is where the circuit court and the State tripped up. They viewed the issue as a zero sum game; in their eyes there had to be only one owner and it was either Steven or Gladys.

The State argues that the car was a gift, but the circuit court made no such finding and the undisputed facts show that Mrs. Vogel

expected her grandson to pay her back. Black's Law Dictionary defines "gift" as "a voluntary transfer of property to another *made gratuitously and without consideration."* Mrs. Vogel paid the $20,000 as a loan to Steven and retained joint title to secure her interest. The promise to repay the loan is the consideration that Steven gave in return for Mrs. Vogel's advance payment. There is no issue in this case about whether the loan was fabricated after the seizure. It is undisputed that Steven made his first payment before the car was seized. It not surprising that, once his transportation was taken away by the State, Steven was unable to make another payment until about five months later.

The State suggests that Deputy Winger's testimony supports the notion that Steven was the sole owner of the Corolla, but it does not. On direct, he testified that Steven told him that he owned the vehicle. (R.19, 8:12-16). He also testified that Steven told him that Gladys had paid for the car and that he had to pay her back. On cross examination, Deputy Winger clarified that Steven did not claim that he was the exclusive owner. (Id., 15:10-12). Once again, there is no

question that Steven was a joint owner of the Corolla; the important fact in this case is that so was Mrs. Vogel.

II. Forfeiture of the Corolla would constitute an excessive fine.

A. The State supports the circuit court's erroneous and formulaic version of a proportionality test.

Like the circuit court, the State acknowledges the constitutional imperative of applying a proportionality test on a case-specific basis when considering the forfeiture of assets. The State begins well enough by enumerating the factors to be addressed:

> (1) the nature of the offense,
> (2) the purpose for enacting the statute,
> (3) *the fine commonly imposed upon similarly situated offenders, and*
> (4) *the harm resulting from the defendant's conduct.*

State v. Boyd, 2000 WI App 208, ¶14, 238 Wis. 2d 693, 618 N.W.2d 251. It then proceeds to ignore any balancing test in favor of the circuit court's formulaic two-part test.

The State, like the circuit court, applies only two factors in assessing proportionality: the theoretical maximum penalties for the crimes initially charged multiplied by the number of counts

charged. They do not give any consideration to the fine *commonly imposed* on offenders in situations similar to Steven's nor to the lack of any harm actually resulting from Steven's conduct.

B. The State's attempt to distinguish other cases actually highlights the very flaws that render its analysis unconstitutional.

There are three other cases the appellants have cited to demonstrate the gross proportionality of the forfeiture: State v. Bergquist, 2002 WI App 39, 250 Wis. 2d 792, 641 N.W.2d 179; State v. Boyd, 2000 WI App 208, 238 Wis. 2d 693, 618 N.W.2d 251; and State v. Hammad, 212 Wis. 2d 343, 569 N.W.2d 68 (Ct. App. 1997).[2] They all look at the proportionality of the proposed forfeiture in relation to the offense for which the defendant was convicted and the actual harm, if any, that resulted from the particular offense, not the harm that could hypothetically arise from an offense under the same statute.

[2] The appellants apologize to the court for citing State v. Peloza, 2013 WI App 73, 348 Wis. 2d 264, 831 N.W.2d 825 (unpublished). Because it is an unpublished *per curiam* decision, it may not be cited for its persuasive value. Nevertheless, the State's attempt to distinguish it suffers from the same deficiencies as with the others: it compares the penalties for the charges in this case to the penalties for the conviction in Peloza.

1. The State compares the charges in this case to the convictions in other cases.

The bankruptcy of the State's analysis is laid bare by looking at the contradictions between its justifications of the forfeiture in this case and its attempts to distinguish other cases. In a nutshell, it supports the forfeiture in this case by pointing to the theoretical maximum penalties that could have been imposed for the type and number of counts charged. In distinguishing the other cases it looks to the actual or maximum penalty for the type and number of counts for which the person was convicted. The courts in those cases were consistent in comparing the value of the property to the actual convictions.

The circuit court and the State justify the seizure of the appellants' $22,500 car because Steven was charged with three counts of an offense that carries a maximum fine of $10,000 per count. They compare the $30,000 to the value of the car and declare the forfeiture proportionate.

In Berquist, the defendant was charged with two counts of felony endangerment, which carried potential penalties of $50,000 in fines and up to 20 years imprisonment, but was convicted of a single count of misdemeanor disorderly conduct, which carried a maximum penalty of $1,000 and 90 days' imprisonment. The court of appeals found that the forfeiture of two guns worth between $5,000 and $7,150 would be "grossly disproportionate" to the $1,000 maximum penalty for the misdemeanor; it did not compare it to the $50,000 for the two felony charges.

The offense in Boyd was shooting a handgun at the door of the Elkhart Lake police station. The defendant was convicted of felony endangerment by use of a dangerous weapon, which carried a maximum fine of $10,000. The court of appeals rejected the State's appeal when the circuit court ordered that only $10,000 of the $28,000 value of the defendant's truck be forfeited.

In Hammad, the defendant was convicted of a class E felony carrying a maximum fine of $10,000. In upholding the

forfeiture of a $4,300 car, the court of appeals compared the value of the car to the maximum fine for the crime of which the defendant was convicted and to the $2,005 value of the stolen goods involved.

In this case, Steven was not convicted of any offense; all charges were dismissed. He did not pay any fine. The value of the goods involved in the offenses was $175. Under these circumstances, the forfeiture of a $22,250 car is obviously grossly disproportionate.

The State also seems to forget that Boyd requires a court to consider "***the fine commonly imposed upon similarly situated offenders***." 2000 WI App 208 at ¶14. Neither the State nor the circuit court have ever suggested that misguided first-time offenders involved in a few sales of small quantities (3.5 grams in a statute covering up to 200 grams) of marijuana are ***ever*** punished with anything remotely like the maximum possible penalties.

Counsel has been unable to locate any public sources of information setting out average sentences for marijuana convictions, but a district attorney's office has years of experience and data to rely on. The State does not even make the claim that the maximum penalties are commonly imposed in a case like this much less offer any support for such a claim.

2. The circuit court and the State rely on a vast generalization of the potential harm of the entire drug trade rather than the lack of harm actually resulting from Steven's conduct.

The proportionality test requires that the court examine "t*he harm resulting from the defendant's conduct.*" Boyd, 2000 WI App 208 at ¶14. In Berquist, the court found that the harm was minimal. While the defendant had fired guns toward his neighbors' property, fortunately no one was hurt. In Boyd, the defendant fired a handgun at the police station door. Obviously such a shooting can place the general public and the police at great risk of serious injury and death. But, in applying the proportionality test, the court properly looked at whether harm had actually occurred. Since no one had been injured or killed,

the court found it disproportionate to allow a forfeiture of more than the $10,000 maximum fine for the offense for which the defendant was convicted.

The State waxes on about the huge threat to public safety posed by the drug trade in general. It suggests that these three sales placed the public at risk because of their times and locations, all of which were under the control of the police. It treats the case as if armed gang members were shooting it out in the parking lots over huge quantities of drugs and cash.

The facts of this particular case are that the sales took place inside a car (the Infinity on the first occasion). There was no confrontation inside the car. There was no interaction with the general public whatsoever. The buyer and seller did not even have any firearms in their possession much less were any shots fired. No one was physically hurt or killed.

CONCLUSION

The circuit court did not apply the correct law. Applying the law correctly to the facts of this case it is clear that: (a) Gladys Vogel is an innocent owner and is entitled to the return of

her share; and (b) the forfeiture is grossly disproportionate to the offense and should be vacated.

Dated this 30th day of March, 2015.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,994 words.

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