

STATE OF LOUISIANA

NO. 23-KH-459

VERSUS

FIFTH CIRCUIT

BRETT ELISER

COURT OF APPEAL

STATE OF LOUISIANA

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Linda Wiseman
First Deputy, Clerk of Court

December 19, 2023

Linda Wiseman
First Deputy Clerk

IN RE BRETT ELISER

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT,
PARISH OF ST CHARLES, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE CONNIE M.
AUCOIN, DIVISION "C", NUMBER 23-94

Panel composed of Judges Jude G. Gravois,
Marc E. Johnson, and Scott U. Schlegel

WRIT GRANTED; RULING REVERSED; MATTER REMANDED

Relator, Brett Eliser, seeks this Court's supervisory review of the trial court's ruling that denied his Motion to Release Property pursuant to La. C.Cr.P. art. 167 and La. R.S. 15:41. For the following reasons, we grant the writ application, reverse the ruling of the trial court, and remand the matter for further proceedings consistent with this disposition.

On February 17, 2023, the police arrested relator and seized four firearms from him as evidence pursuant to a search warrant. On April 11, 2023, the State filed an amended bill of information charging relator with the following offenses: Count 1: simple arson, in violation of La. R.S. 14:52; Count 2: prohibited activities and sanctions, *i.e.*, insurance fraud, in violation of La. R.S. 22:1924(A)(1)(a); Count 3: illegal carrying of a firearm while in the possession of a controlled dangerous substance (methamphetamine), in violation of La. R.S. 14:94(E); and Count 4: possession of methamphetamine under twenty-eight grams, in violation of

La. R.S. 40:967(C). According to the May 30, 2023 minute entry, the State dismissed (“*Nolle prossed*”) all of the charges with the notation of “insufficient evidence.”

On August 1, 2023, relator, through counsel, filed a Motion to Release Property, requesting the return of his non-contraband items that were seized by the police, including his four firearms, pursuant to La. C.Cr.P. art. 167 (entitled “Custody of seized property; disposition”) and La. R.S. 15:41 (entitled “Disposition of property seized in connection with criminal proceedings”). The State and the St. Charles Parish Clerk of Court were served with the Motion, which proceeded to a hearing on September 5, 2023.¹

At the hearing, the State stipulated that Mr. Eliser was the owner of the seized items. However, the State objected to the firearms being returned, arguing that the firearms were “derivative contraband” as an immediate instrument of the crime of possession of a firearm in the presence of a CDS, even though all of the charges against relator had been dismissed. The State also alleged, without presenting any evidence, that Mr. Eliser is prohibited from possessing firearms by a North Carolina protective order and that there are outstanding felony warrants from North Carolina for Mr. Eliser, suggesting that if relator is convicted of the North Carolina charges, he would be prohibited from owning or possessing firearms. The only evidence the State introduced in support of these allegations was the court minutes in an extradition case that show the trial court transferred Mr. Eliser’s posted bond in this case to the extradition case. (Exhibit 5). The State further alleged that Mr. Eliser was a threat to society and to the alleged victim in

¹ La. R.S. 15:41(C) requires that a motion to return property be tried contradictorily with the Clerk of Court. At the outset of the hearing, the trial court admitted relator’s exhibits confirming that the trial court’s August 2, 2023 order setting the hearing date for September 5, 2023 was served on Lance Marino, the Clerk of Court for the Twenty-Ninth Judicial District Court, as required by La. R.S. 15:41(C). However, Mr. Marino was not present at the September 5, 2023 hearing. We find that the proof of service upon Mr. Marino is sufficient to meet the statutory requirement of La. R.S. 15:41(C).

North Carolina, suggesting that the firearms should not be returned for public policy reasons.

Next, at relator's request, the trial court took judicial notice of the fact that all of the charges were dismissed ("*Nolle prossed*") by the State, with the notation of "insufficient evidence." Relator also submitted into evidence the affidavit for the search and seizure warrant, along with the return for the search warrant, which listed the items seized from relator's home. Specifically, as relevant to the instant case, relator sought the return of the following firearms: a Sig Sauer P226 Legion pistol, a Ruger AR 5.56 rifle, a SXP shotgun, and a single shotgun. The State stipulated to relator's ownership of all of the seized items, but not to the classification of the seized firearms as non-contraband.

With respect to the return of the firearms, both sides and the trial court relied on this Court's recent disposition in *State v. Mayfield*, 23-382 (La. App. 5 Cir. 8/9/23), 2023 WL 5073076.² In *Mayfield*, this Court considered La. R.S. 15:41, which details the procedure for disposition of property seized in connection with criminal proceedings, specifically providing, in pertinent part:

- A. If there is a specific statute concerning the disposition of the seized property, the property shall be disposed of in accordance with the provisions thereof.
 - B. If there is no such specific statute, the following governs the disposition of property seized in connection with a criminal proceeding, which is not to be used as evidence or is no longer needed as evidence:
 - (1) The seized property shall be returned to the owner, unless a statute declares the property to be contraband, in which event the court shall order the property destroyed if the court determines that its destruction is in the public interest; otherwise, Paragraph (2) of this Section shall apply.
- * * *
- C. Where the release of seized property is sought by a person claiming to be the owner, it shall be released only upon motion contradictorily with the clerk of court. In all other cases the court may either render an ex parte order for the disposition of the

² Following this Court's disposition in *Mayfield*, the trial court again denied the release of the relator's firearms under La. R.S. 15:41. On September 19, 2023, Mr. Mayfield's counsel filed a second writ application, 23-KH-456, which is currently pending review with this Court.

property as herein provided on motion of any interested person, or on its own motion, or the court may require a motion contradictorily with the apparent owner or the person in possession of the property at the time of the seizure.

In *Mayfield*, this Court found that La. R.S. 15:41 “requires two findings by the trial court at a contradictory hearing with the Clerk of Court: ownership of an item by the claimant, and a determination of whether an item is, in fact, contraband.” *Mayfield*, 2023 WL 5073076, at *1. Additionally, this Court cited La. C.Cr.P. art. 167, which states, in pertinent part: “If seized property is not to be used as evidence or is no longer needed as evidence, it shall be disposed of according to law, under the direction of the judge.” In *Mayfield*, this Court found that “factual deficiencies” with regard to both the “relator’s ownership of the firearms he sought to have returned” and “whether the firearms in this matter are contraband” warranted its disposition vacating the trial court’s ruling and remanding the matter for further proceedings. *Id.* In doing so, this Court, on the issue of contraband, observed that in *State v. Manuel*, 426 So.2d 140, 144 (La. 1983), the Louisiana Supreme Court stated:

It is generally recognized that there are two kinds of property which may be classified as contraband. Things which intrinsically are illegal to possess and are therefore insusceptible of ownership are categorized as contraband per se. Such articles include illegal narcotics, unregistered stills, unlawful alcohol, and illicit gambling devices. *See One 1958 Plymouth Sedan v. Pennsylvania supra; Brown v. State, Etc.*, 392 So.2d 415 (La.1980). Things which may be forfeited because they are the immediate instruments of a crime, but which are not ordinarily illegal to possess, are classed as derivative contraband. *One 1958 Plymouth Sedan v. Pennsylvania, supra, U.S. v. One 1972 Chevrolet Corvette*, 625 F.2d 1026 (1 Cir.1980). Derivative contraband encompasses guns, automobiles, ships and other such property when used to effectuate a proscribed activity. *Id.*

At the instant hearing, the trial court inquired about the application of *Manuel* to relator’s request for the return of his firearms. Relator argued that derivative contraband, as a classification, only applied to civil forfeiture proceedings. Thus, in relator’s view, because there was no statute declaring the firearms as contraband, he was entitled to their return under La. R.S. 15:41.

Relator further pointed out that the seized items were no longer needed as evidence given that the State had dismissed all of the charges. However, the State, relying on *Manuel*, argued that the firearms constituted “derivative contraband” because all of the firearms were found in proximity to contraband, *i.e.*, methamphetamine.

The trial court subsequently denied relator’s motion with respect to the firearms, first stating:

The Fifth Circuit did not rule that derivative contraband only existed in a civil forfeiture matter. They referenced those cases and derivative contraband specifically in connection with a case under [La. R.S.] 15:41. Therefore, this Court can only assume that the Fifth Circuit intends to apply the derivative contraband case law and facts to cases under [La. R.S.]15:41.

Citing *Manuel, supra*, the trial court further found “that those items are derivative contraband as immediate instruments of the crime, possession of a firearm in the presence of a CDS, which Mr. Eliser was charged with at the outset in this matter.” The trial court further ordered the destruction of the firearms in accordance with La. R.S. 15:41. However, the trial court stayed its order regarding the destruction of the firearms pending a ruling on relator’s writ application.

Upon review, we respectfully disagree with the trial court that this Court in *Mayfield* intended to apply “the derivative contraband case law and facts to cases under [La. R.S.]15:41” as discussed by *Manuel*. In *Mayfield*, this Court first found that the fact alone that the Clerk of Court for the Twenty-ninth Judicial District Court was not represented at the contradictory hearing, as required by La. R.S. 15:41(C), was a “sufficient basis upon which to vacate the trial court’s ruling and remand the matter.” Thus, the Court’s later reference in *Mayfield* to the holding in *Manuel* is clearly *dicta*, and thus not binding herein.

Further, *Manuel* was handed down in 1983, when a since-repealed statutory scheme on civil forfeitures was in effect, La. R.S. 32:1550, *et seq.*, and which was repealed by Acts 1997, No. 1334, § 2. Case law interpreting the now-repealed La.

R.S. 32:1550, *et seq*, explained that it was quasi-criminal in nature. *State v. Manuel*, 426 So.2d at 143. Forfeiture proceedings pursuant to the Seizure and Controlled Dangerous Substances Property Forfeiture Act of 1989 (“the Act”), La. R.S. 40:2601, *et seq.*, which is in effect today, are *civil* proceedings, generally governed by the Louisiana Code of Civil Procedure. La. R.S. 40:2611(K). The Act establishes specific procedures that allow the State to seize and forfeit property that is related to, is a proceed from, facilitates, or is itself a violation of the Uniform Controlled Dangerous Substances Law, La. R.S. 40:961-995. La. R.S. 40:2601, *et seq.*; *State v. 2003 Infiniti G35*, 09-1193 (La. 1/20/10), 27 So.3d 824, 828. Courts are required to strictly follow each of the Act’s detailed requirements to the various stages in the process. *State v. Marino*, 15-723 (La. App. 5 Cir. 5/12/16), 193 So. 3d 371, 374-75. For purposes of civil forfeitures under the Seizure and Controlled Dangerous Substances Property Forfeiture Act, there is no prerequisite that a crime be proved before property is subject to seizure. La. R.S. 40:2603; *Lewis v. State*, 21-0437 (La. App. 1 Cir. 12/22/21), 340 So.3d 1230, *writ not considered*, 335 So.3d 839, 22-00225 (La. 4/12/22).

This proceeding, however, is not a civil forfeiture proceeding. The motion for release of property was filed in the criminal proceeding against relator. La. R.S. 40:2608 provides the specific procedures and time limits within which the State must initiate a civil forfeiture proceeding. The writ evidences that no civil forfeiture proceeding, timely or otherwise, appears to have been brought relative to this matter. Further, as a result of the dismissal (“*Nolle prossed*”) of the charges against relator for “insufficient evidence,” no criminal proceedings on the subject charges are pending against relator.³

³ While this Court recognizes that the dismissal of such a formal charge by the district attorney is not, subject to narrowly delineated exceptions, a bar to a subsequent prosecution (see La. C.Cr.P. art. 693) at this juncture, the charges against relator have been dismissed for lack of evidence.

In light of the above, we find that the trial court erred in finding that relator's guns were derivative contraband as "immediate instruments of the crime, possession of a firearm in the presence of CDS, which Mr. Eliser was charged with at the outset of this matter" or a danger to the public based on the unsubstantiated charges. Because the charges have been dismissed, for "insufficient evidence," there is no "crime." Moreover, there was insufficient evidence (some of which was hearsay evidence) presented that relator faced charges in another jurisdiction or was a threat to the public. Relator has shown that he is entitled to the return of his property under La. R.S. 15:41, as there is no specific statute concerning the disposition of the seized property, and the seized property is not to be used as evidence and is no longer needed as evidence.

This Court does not lightly consider cases such as this that involve firearms, but as relator's criminal charges have been dismissed on insufficient evidence, and no civil forfeiture proceeding has been initiated, relator's constitutional rights to his property, under La. Const. Art. 1, §§4 and 11, must be respected.

For the foregoing reasons, this writ application is hereby granted. The ruling of the trial court under review is reversed. The matter is remanded for further proceedings consistent with this disposition.

Gretna, Louisiana, this 19th day of December, 2023.

JGG
MEJ
SUS

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
JOHN J. MOLAISSON, JR.
SCOTT U. SCHLEGEL

JUDGES



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CURTIS B. PURSELL
CLERK OF COURT

23-KH-459

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29th Judicial District Court (Clerk)
Honorable Connie M. Aucoin (DISTRICT JUDGE)
Maria M. Chaisson (Relator)

MAILED

Louis G. Authement (Respondent)	Hon. Joel T. Chaisson, II (Respondent)
Attorney at Law	District Attorney
13919 River Road	Twenty-Ninth Judicial District Court
Suite 300	Post Office Box 680
Luling, LA 70070	Hahnville, LA 70057

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