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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 8-576 / 97-2330
Filed March 31, 1999

IN THE MATTER OF THE PROPERTY SEIZED FROM RICHARD BILLINGTON AND PATRICIA BILLINGTON,

PATRICIA BILLINGTON,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Walter W. Rothschild, Judge.

Patricia Billington appeals the district court order forfeiting several guns. **AFFIRMED.**

John W. Ackerman of Ackerman Law Office, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Anthony H. Janney, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Patricia Billington appeals the district court order forfeiting several guns she claimed she owns, arguing she did not have knowledge her husband was a convicted felon and the forfeiture violated her second and eighth amendment rights. We affirm.

Background: A law enforcement officer arrested Richard Billington for driving while suspended. Billington had a gun in a case on the front seat of the vehicle he was driving. Billington possessed a hunting license. The officer later learned Billington was a convicted felon and should not have been in possession of the shotgun. He executed a search warrant of Billington's residence. The officers seized approximately twenty firearms from various rooms in the home, including the children's bedroom. During the search, Billington said the guns were his. When Mrs. Patricia Billington arrived home, she told the officers at least one gun was a family heirloom passed down to the children. She also expressed concern "about keeping any firearms in the house at all with her husband being a convicted felon."

Forfeiture proceedings: The State filed an in rem forfeiture complaint, seeking to forfeit all of the seized weapons. Patricia Billington filed an answer claiming she owned all the guns. At the forfeiture hearing, Patricia testified she was a hunter, owned many of the guns, or was holding them for her sons. She also stated she inherited some of the guns. She testified her husband did not own any of them. She did not present any receipts or written evidence that she owned the guns or

received them through inheritance. Patricia claimed she did not know her husband was a convicted felon and was precluded by law from possessing firearms.

The court found, although Patricia claimed to be a hunter, she had not been issued a hunting license since at least 1991. The court explicitly found her testimony she owned all the guns was not credible. The court also found all the guns seized were subject to forfeiture because they were "available to and within the dominion and control" of a convicted felon. One conclusion of the court was "the issue of the right to forfeit the interest of an innocent owner is not implicated under the facts of this case." The court ordered all the guns forfeited.

Scope of review: We review forfeiture proceedings under Iowa Code chapter 809 for correction of errors at law. *In re Property Seized from DeCamp*, 511 N.W.2d 616, 619 (Iowa 1994). We examine the evidence in the light most favorable to the district court judgment and construe the district court's findings liberally to support its decision. *In re Property Seized from Chiodo*, 555 N.W.2d 412, 424 (Iowa 1996). Those findings are binding on us if supported by substantial evidence. *In re Property Seized from Rush*, 448 N.W.2d 472, 477 (Iowa 1989). In case of doubt or ambiguity we construe the court's findings of fact to uphold rather than defeat, the judgment. *Id.* In addition, the review standard prohibits us from weighing the evidence or the credibility of witnesses. *Papenheim v. Lovell*, 530 N.W.2d 668, 671 (Iowa 1995). "An order of forfeiture will not be reversed unless the evidence is utterly wanting to

support the conclusion of the trial court." *State v. 1984 Monte Carlo SS*, 521 N.W.2d 723, 724 (Iowa 1994).

Claims: Patricia claims the district court erred in forfeiting her guns. She argues she owns the guns and she did not know her husband was a convicted felon. She also claims forfeiture violates her second amendment right to bear arms and constitutes an excessive fine and punishment, in violation of the eighth amendment.

The State first responds Patricia did not preserve error on either argument. We agree Patricia did not preserve error on her constitutional claims because they were not raised below. *Hagarty v. Dysart-Geneseo Community Sch. Dist.*, 282 N.W.2d 92, 96 (Iowa 1979).

Concerning the claim Patricia owns all the guns and she did not know her husband was a convicted felon, the State argues our standard of review makes the court's findings and assessment of witness credibility binding on appeal unless the evidence is utterly wanting. *See State v. Dykes*, 471 N.W.2d 846, 847 (Iowa 1991).

Patricia testified she did not know Richard was a convicted felon. Although she does not use the term "innocent owner" in her testimony, the district court did in its ruling. The court understood she was making such a claim. The State's argument as to error preservation on this issue must fail.

The district court made an explicit finding Patricia's claim of ownership was not credible. The court's findings are binding on us unless unsupported by substantial evidence. *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844,

846 (Iowa 1989). Determining the credibility is particularly the province of the trial court and we do not weigh credibility on appeal. *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). In any event, the court correctly found the gravamen of the charges is possession, dominion, or control by the felon, not ownership. *See* Iowa Code §§ 724.26 and 809A.4.[1] Richard's possession, dominion, and control made the weapons forfeitable. The district court did not err.

AFFIRMED.

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[1] These sections read, in pertinent part:

724.26: A person who is convicted of a felony . . . and who knowingly has under the person's dominion and control . . . a firearm or offensive weapon is guilty of a class "D" felony.

809A.4: The following are subject to forfeiture:
4. All weapons possessed, used, or available for use in any manner to facilitate conduct giving rise to forfeiture.