COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2176 Cir. Ct. No. 2013CV535

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONE 2010, NISSAN ALTIMA, FOUR-DOOR, ILLINOIS LICENSE #L508796, VIN #1N4AL2AP2AC189484, ITS TOOLS AND APPURTENANCES,

DEFENDANT,

JOHN H. BICKLEY AND MELANIE K. BICKLEY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 GUNDRUM, J. John and Melanie Bickley, father and daughter,[1] appeal from an order of forfeiture of the captioned 2010 Nissan Altima. They argue the circuit court erred in ordering that the Altima, which Melanie utilized in the sale of illegal drugs, be forfeited. They contend the Altima should not be subject to forfeiture because John is the "innocent owner" of the vehicle. The circuit court ultimately found that while John did not know about or consent to the drug transactions, he was not the owner of the vehicle for purposes of the forfeiture statute and thus the "innocent owner" exception did not apply. Because we conclude that the circuit court did not clearly err, we affirm.

BACKGROUND

¶2 The State initiated a forfeiture action against the Altima and Appellants based upon Melanie's use of the Altima in the sale of illegal drugs. An evidentiary hearing followed, at which the following relevant testimony was provided.

¶3 A city of Whitewater police detective and a confidential informant (CI) each testified that Melanie sold illegal drugs to the CI on three occasions in 2013—April 12 and 26 and May 7—with Melanie driving the Altima to the locations of the transactions and the transactions taking place inside the Altima. The detective further testified that following the third transaction he made contact with Melanie and spoke with her about the drug deals. At the time, Melanie was nineteen years old and a student at the University of Wisconsin-Whitewater living on campus approximately an hour away from John's home. The detective testified

[1] For simplicity, we will hereinafter refer to John and Melanie Bickley individually by their first name and collectively as Appellants.

that, among other statements, Melanie told him that her father had given her a vehicle as a gift when she received her driver's license at age sixteen, and that after the vehicle was "totaled" in an accident, her father purchased the Altima for her with money received from the other driver. On cross-examination, the detective testified that while Melanie did use the word "gift" with regard to the first vehicle, she did not specifically use that word when referring to the Altima.

¶4 The detective testified that the Altima was registered in John's name and Melanie informed him it was also insured in John's name for the purpose of lower insurance rates. Melanie told the detective she took care of oil changes for the Altima, had taken it in for new tires, and usually paid for the gas, though John sometimes paid for that. The detective further testified that Melanie also told him that while at school, she parked the vehicle in a specified university parking lot.

¶5 The detective testified that he seized the Altima on May 9, 2013, and inventoried items in the vehicle. Utilizing photograph exhibits, the detective identified at the forfeiture hearing an assortment of personal, financial, and health-related items found in the Altima, as well as pay stubs from Melanie's employment, a previous law enforcement citation, three "gem-sized bags containing marijuana," a marijuana pipe with burnt marijuana residue and prerecorded "buy" money used in the drug transactions (located in the center console), and a rolled up piece of paper which the detective testified was a type of item "commonly used ... to snort" drugs like those Melanie had sold to the CI. He testified that Melanie told him everything in the vehicle belonged to her. The detective also found registration paperwork and an insurance card which appeared to belong to John. Melanie advised the detective that she was the main driver of the Altima and, as the detective stated it, Melanie told him that "[e]very now and then family members might use her vehicle."

¶6 John also testified at the hearing, first noting his lack of tolerance for drug use. He then stated that he purchased the Altima new for approximately $26,000 and still had about $1000 to pay on a $13,000 bank loan related to the purchase; the title is in his name alone and he has the insurance on the vehicle which covered all family members; he pays monthly on the loan and insurance; and he pays for the maintenance on the vehicle, including paying for the credit card charges related to Melanie's purchase of the new tires and oil changes. He further testified that the Altima is "my car," he never gifted it to Melanie, and she has "[never] been asked to reimburse me for anything pertaining to that car." John testified that Melanie came home from college with the Altima nearly every weekend and that she was allowed to use it on the condition that she received good grades and would drive her mother to appointments. He stated he had told Melanie there was to be no drinking or drugs in the car, and testified that if he had known Melanie was involved in selling drugs, "[t]he car would be pulled."

¶7 John further testified that his twenty-five-year-old son and twenty-three-year-old daughter both have cars "that I purchased," but that the title to his son's car was in his son's name only and the title to this daughter's car was in both John's name and her name. John stated that "from time to time" he would drive the Altima, other family members had driven it as well, and his son and Melanie had "swapped" vehicles on "numerous occasions." He testified that both he and his wife also have individual vehicles and that he planned to use the Altima to replace his wife's leased vehicle when the lease expired. On cross-examination, John acknowledged that none of the personal items in the Altima were his (other than a blanket he recognized from the photo exhibits) and that he last drove the Altima in February or March to transport a large box which he could not fit in his car.

¶8 The circuit court found that "dominion and control" of the Altima had been "entrusted" to Melanie, the Altima "was clearly ... under [Melanie's] possession and control," and Melanie was "the one who's going to really suffer from the forfeiture" because she would no longer have use of the vehicle. The court stated that Melanie's dominion and control of the vehicle was "also evidenced by the type of things in the vehicle.... The citations for this and that, parking violations, something in East Troy.... For the most part, it was all of her possessions in the vehicle and had been using [sic] the vehicle for a number of years." The court also noted that the vehicle "was parked by permit in the [university] parking" and had been "used three times in drug deals." The court ordered the vehicle forfeited. John and Melanie appeal. Additional facts will be included as necessary.

DISCUSSION

¶9 WISCONSIN STAT. § 961.55(1)(d) (2011-12)[2] provides that a vehicle is subject to forfeiture if it has been used to transport illegal drugs for the purpose of selling the drugs. Section 961.55(1)(d)2., however, provides an "innocent owner" exception, stating that "[n]o vehicle is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent." On appeal, the parties do not dispute that the Altima was used to transport illegal drugs or that John was unaware of Melanie's drug-dealing activities. John and

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Melanie do dispute, however, the circuit court's finding that Melanie, not John, was the actual owner of the Altima for purposes of the forfeiture statute.

¶10 In ***State v. Kirch***, 222 Wis. 2d 598, 587 N.W.2d 919 (Ct. App. 1998), we adopted a fact-intensive inquiry for determining whether a person is the "owner" of a vehicle for purposes of the vehicle forfeiture "innocent owner" exception.[3] We held that the relevant factors a court is to consider are "possession, title, control and financial stake." ***Id.*** at 606-07. Where, as here, the facts regarding ownership are disputed in a forfeiture proceeding, the ownership question is a factual one, and we will defer to the circuit court's finding unless we conclude that the court clearly erred. *See* ***Tri-Tech Corp. of Am. v. Americomp Servs., Inc.***, 2001 WI App 191, ¶13, 247 Wis. 2d 317, 633 N.W.2d 683 (where facts are disputed, question of ownership is a factual issue), *rev'd on other grounds*, 2002 WI 88, 254 Wis. 2d 418, 646 N.W.2d 822; ***State v. Wegmiller***, 623 N.E.2d 131, 133-34 (Ohio Ct. App. 1993) (treating the "ownership" question as a factual one in the vehicle forfeiture context); ***In the Matter of One 1985 Mercedes Benz Auto.***, 644 A.2d 423, 430 (Del. Super. Ct. 1992) (the question of ownership of a vehicle for forfeiture purposes is a factual one "that looks beyond the formal title to determine whether the record owner is the 'actual' owner"); *see also* ***Gerth v. Gerth***, 159 Wis. 2d 678, 682, 465 N.W.2d 507 (Ct. App. 1990) (we will

[3] While in ***State v. Kirch***, 222 Wis. 2d 598, 587 N.W.2d 919 (Ct. App. 1998), we addressed WIS. STAT. § 973.075(1)(b)2. (1995-96), we specifically drew upon WIS. STAT. § 961.55(1)(d)2. (1995-96). We concluded that because both statutes "include the same 'innocent owner' defense language, which precludes forfeiture if the crime was committed without the property owner's knowledge or consent," "the legislature intended 'owner' to have the same meaning in both provisions." ***Kirch***, 222 Wis. 2d at 604-05. The text of the 1995-96 and 2011-12 versions of § 961.55(1)(d)2. are identical in all respects relevant to this case.

overturn the circuit court's factual findings "only if they are clearly erroneous and unsupported by the record").

¶11 Here, there was no dispute at the forfeiture hearing (and there is no dispute on appeal) that the title for the Altima is in John's name. Related to the "financial stake" consideration, the circuit court appeared to find that John "paid for the whole thing and would be out the money."[4] The court, nonetheless, found Melanie, not John, to be the actual owner of the Altima for forfeiture purposes based upon the strength of the other two factors—possession and control. We conclude that the court did not clearly err in finding that Melanie had primary possession and control of the Altima at and around the time of the drug transactions and seizure and ultimately that John was not the owner of it for forfeiture purposes.

¶12 While John testified that he had his own set of keys to the Altima, would drive it "from time to time," and he and anyone else in the family could use it, he did not dispute that Melanie was the main driver of the vehicle and when she was at school—an hour away from John's home—it would be kept in a specified university parking lot. He also acknowledged that he had not driven the Altima in well over a month prior to its seizure. And while John may have had a rule that

[4] We say the circuit court "*appeared to find* that John 'paid for the whole thing and would be out the money'" because of how the transcript reads on this point. The transcript states: "Well, this was a little bit different from other cases I've heard, but *there's any question* that *this person* paid for the whole thing and would be out the money." (Emphasis added.) At the point the court made this statement, it was in the midst of going back and forth between talking about various considerations and actions of John and Melanie related to the Altima. The evidence from the hearing could not support a finding that *Melanie* "paid for the whole thing and would be out the money," thus the court could only have been referring to John. Further, while the transcript reads as it does, in light of the evidence at the hearing, the court's comment only makes sense if read as "there *isn't* any question that this person [John] paid for the whole thing and would be out the money." (Emphasis added.)

Melanie was not to have drugs in the Altima, he had limited contact with the vehicle, as the court found, such that between the last time he drove the Altima and its seizure on May 9, Melanie was able to freely use it to sell illegal drugs on at least three occasions. The testimony of both the detective and John, as well as the exhibits, support the court's finding that nearly everything in the vehicle—personal, financial, and health-related items, as well as pay stubs, a law enforcement citation, and illegal drugs and drug-related items (some in the center console)—belonged to Melanie. Further, the undisputed testimony was that each member of the family had their own individual car to use.

¶13 Related to financial stake as well as possession and control, the circuit court further concluded that Melanie would be the one who would ultimately suffer from the forfeiture of the vehicle. It noted that while John would be "out the money" related to the Altima, Melanie would no longer have the vehicle to utilize for her transportation needs. While we adhere to the four factors referenced in ***Kirch***, within the context of those factors who would ultimately suffer from the forfeiture is an appropriate consideration, and we cannot say that the court clearly erred in finding that Melanie would be the one who ultimately suffers from the forfeiture of the Altima. *See, e.g.*, ***United States v. One 1981 Datsun 280ZX***, 563 F. Supp. 470, 475 (E.D. Pa. 1983) (stating that looking to "who would actually suffer from the loss of the vehicle ... provides an excellent focus for determining ownership in the forfeiture context"); ***United States v. One 1971 Porsche Coupe***, 364 F. Supp. 745, 748 (E.D. Pa. 1973) (even though father challenging vehicle forfeiture had purchased the vehicle and retained legal title to it (but had given it to his son), "it is the claimant's son who will suffer the loss occasioned by forfeiture, and he was by no means innocent with respect to the prohibited activity"); *see also* ***Commonwealth v. One 1986 Volkswagen GTI***

Auto., 630 N.E.2d 270, 273-74 (Mass. 1994) (concluding that financial stake alone does not determine who suffers the loss from forfeiture of a vehicle).

¶14 Based on the foregoing, the circuit court's ultimate finding that Melanie, not John, was the actual owner of the vehicle for purposes of the vehicle forfeiture statute is not clearly erroneous.[5] Further, with forfeiture, Melanie will no longer have the Altima to provide her the means for continuing to sell illegal

[5] John suggests that if he does not qualify as an "innocent owner," then no person could. We disagree. An example of a circumstance where the "innocent owner" exception could appropriately apply was provided by the circuit court itself:

> I followed [***Kirch***] in other cases and three out of four I have found the same way as this case. The other one was simply a case where somebody who owned the car gave it to a person for a very short period of time and it was not giving the dominion and control I found of the car to that person. And I found in favor of that person as an innocent owner as defined [in ***Kirch***].

The circumstance described by the circuit court does not present itself in this case.

Without fully developing an argument on the point, John further asserts that he is an "innocent person" under WIS. STAT. § 961.55(3) and that he was not afforded "due provision" for his rights. Section 961.55(3) states in relevant part that "[a]ll dispositions and forfeitures under this section and [WIS. STAT. §§] 961.555 and 961.56 shall be made with due provision for the rights of innocent persons *under [§ 961.55](1)(d)1., 2. and 4.*" (Emphasis added.) Section 961.55(3) does not define "innocent persons" except, as relevant to this case, by referring back to § 961.55(1)(d)2., which essentially explains that an innocent person is "the owner" of a vehicle who had no knowledge of and gave no consent to the act or omission which would otherwise subject the vehicle to forfeiture.

This plain reading is also consistent with the legislative history related to this provision. In ***State v. Fouse***, 120 Wis. 2d 471, 355 N.W.2d 366 (Ct. App. 1984), we interpreted WIS. STAT. § 161.55(3), the predecessor to WIS. STAT. § 961.55(3), so as to "reject" the State's argument in ***Fouse*** "that the 'innocent persons' referred to in subsection (3) would mean only those parties specifically enumerated under subsection (1)(d)1-4." ***Fouse***, 120 Wis. 2d at 472-73. The relevant language in § 161.55(3) was identical to that in § 961.55(3) above *except* that it did not include the words "under sub. (1)(d)1., 2. and 4." ***Fouse***, 120 Wis. 2d at 473 n.2. The legislative history shows that 1985 Wis. Act 245 was enacted in direct response to the ***Fouse*** decision, and, according to the Legislative Reference Bureau analysis accompanying the related senate bill, the enactment added "under sub. (1)(d)1., 2. and 4." for the express purpose of "limit[ing] the rights of innocent persons to the 3 specified exceptions" in "sub. (1)(d)1., 2. and 4." *See* Drafting File for 1985 Wis. Act 245, Analysis by the Legislative Reference Bureau of 1985 S.B. 419.

drugs, which is the purpose of the forfeiture statute. *See* ***Jones v. State***, 226 Wis. 2d 565, 577, 594 N.W.2d 738 (1999) ("The purpose of the forfeiture provisions of the [Uniform Controlled Substance Act] is to deter drug trafficking by permitting confiscation and forfeiture of the means and mobility used to commit activities proscribed in the act.").[6]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[6] In their reply brief, Appellants, for the first time on appeal, challenge evidence presented by the State through the detective's testimony. We will not consider arguments raised for the first time on appeal in a reply brief. *See* ***State v. Chu***, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878. Further, while John makes brief reference to the Fifth and Eighth Amendments to the United States Constitution, he develops no arguments related to those amendments. Because "we will not abandon our neutrality to develop arguments" for a party, ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82, we do not address these references further.