



SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

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January 8, 2019

RE: STATE ex rel BRNOVICH v WILLIAM EARL MILLER SR
Arizona Supreme Court No. CV-18-0141-PR
Court of Appeals, Division One No. 1 CA-CV 17-0304
Maricopa County Superior Court No. CV2015-006886

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 8, 2019, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Vice Chief Justice Brutinel did not participate in the determination of this matter.

Janet Johnson, Clerk

TO:

Mark Brnovich
Eric S Rothblum
Kenneth R Hughes
William E Miller Sr., ADOC 210645, Arizona State Prison, Phoenix
- Aspen/SPU Unit
Amy M Wood

jd

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, ex rel. MARK BRNOVICH, Attorney General,
Plaintiffs/Appellees,

v.

WILLIAM EARL MILLER, SR., *Defendant/Appellant.*

No. 1 CA-CV 17-0304
FILED 8-16-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-006886
The Honorable Christopher T. Whitten, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eric S. Rothblum, Kenneth R. Hughes
Counsel for Plaintiffs/Appellees

William Earl Miller, Sr., Phoenix
Defendant/Appellant

OPINION

Presiding Judge Lawrence F. Winthrop delivered the opinion of the Court,
in which Judge Jennifer B. Campbell and Judge Paul J. McMurdie joined.

WINTHROP, Presiding Judge:

¶1 William Earl Miller, Sr., appeals the *in personam* judgment entered against him for \$482,400 and the forfeiture of \$40,218.33 in seized property to the State of Arizona. In this opinion, we hold that, unlike a search warrant, which must be executed within five days pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3918(A), a seizure warrant is not subject to the same statutory five-day requirement. Accordingly, and because Miller's other challenges to the judgment are unavailing, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On April 17, 2015, the State obtained a seizure warrant authorizing *in rem* and *in personam* seizure of property from Miller. The seizure warrant was based on a judicial finding of probable cause that Miller engaged in racketeering activity. Under the authority of the seizure warrant, the State seized \$28,000 from a safe deposit box leased to Miller, as well as \$12,218.33 from Miller's bank and prison inmate trust accounts.

¶3 The State initiated forfeiture proceedings, and the case proceeded to a bench trial. The trial court found by a preponderance of the evidence that Miller "possessed, solicited to possess, attempted to possess, conspired to possess, conspired and participated in the transfer and sale of, and conspired and participated in the transaction of proceeds of the sale of prohibited drugs" in violation of A.R.S. §§ 13-2312, -3408, and -2317 for financial gain. Thus, the court forfeited the seized money to the State, and also entered an *in personam* racketeering judgment against Miller in the amount of \$482,400.

¶4 Miller timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

ANALYSIS

¶5 Although his argument is unclear, Miller appears to argue in his opening brief that the judgment does not contain a probable cause determination pursuant to A.R.S. § 13-4305(E). In violation of Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(d), Miller failed to refer to the record where he raised this argument for the trial court's consideration.¹

¹ Miller does not argue that he raised the issue at trial, and he has failed to provide the trial transcript. To the extent the argument was raised at trial, "[a] party is responsible for making certain the record on appeal

STATE v. MILLER
Opinion of the Court

Our independent review of the record confirms the issue was not raised below. "Matters not presented to the trial court cannot for the first time be raised on appeal." *Brown Wholesale Elec. Co. v. Safeco Ins. Co. of Am.*, 135 Ariz. 154, 158 (App. 1982). Thus, the argument that the trial court needed to make a probable cause determination in the judgment is waived. *See Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 171, ¶ 52 (App. 2007) (holding the appellate court will not consider a question not raised in the lower court (citing *J.H. Mulrein Plumbing Supply Co. v. Walsh*, 26 Ariz. 152, 161 (1924); *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, 442, ¶ 7 (App. 2007))). Moreover, even assuming Miller made the probable cause argument and thus preserved the issue for appeal, he fails to recognize that a judicial determination of probable cause was made before issuance of the seizure warrant.²

¶6 Miller next contends seizures of funds from his inmate trust account on July 22, 2016, and January 30, 2017—both of which occurred more than five days after issuance of the seizure warrant—violated A.R.S. § 13-3918, which, he argues, rendered the seizure warrant expired and

contains all transcripts or other documents necessary for us to consider the issues raised on appeal." *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995) (citing ARCAP 11). When an appellant fails to include all transcripts or other documents, we assume the missing portions of the record support the trial court's findings and ruling. *Id.*; *accord Kohler v. Kohler*, 211 Ariz. 106, 108 n.1, ¶ 8 (App. 2005).

² Further, Miller appears to be conflating *in rem* and *in personam* seizure. The judgment against him is *in personam*. In an *in rem* forfeiture action, only property that is derived from or has facilitated a crime is forfeitable. *See A.R.S. § 13-2314(G)*. In an *in personam* action, however, any property belonging to the racketeer, *i.e.* Miller, is subject to forfeiture to the extent of his monetary liability for the racketeering conduct, even if the property has no nexus to the underlying crime. *See A.R.S. § 13-2314(D)(6)(d)*. In this case, the seizure warrant was based on probable cause to believe that up to \$160,800 was subject to *in personam* forfeiture. After the bench trial, the court determined that Miller "is personally (*in personam*) liable to the State for Racketeering in the amount of \$160,800." The court then trebled the damages pursuant to A.R.S. § 13-2314(D)(4), and awarded the final judgment amount of \$482,400 in favor of the State and against Miller *in personam*.

STATE v. MILLER
Opinion of the Court

void.³ "We apply a *de novo* standard of review to issues of statutory interpretation and application." *Obregon v. Indus. Comm'n*, 217 Ariz. 612, 614, ¶ 9 (App. 2008) (citing *Naslund v. Indus. Comm'n*, 210 Ariz. 262, 264, ¶ 8 (App. 2005); *O'Connor v. Hyatt*, 207 Ariz. 409, 411, ¶ 4 (App. 2004)).

¶7 Section 13-3918(A) states that "[a] *search* warrant shall be executed within five calendar days from its issuance Upon expiration of the five[-]day period, the warrant is void unless the time is extended by a magistrate." (Emphasis added.) Section 13-3918 specifically refers to search warrants. In this case, the warrant at issue is a *seizure* warrant, making the five-day time limit under A.R.S. § 13-3918 inapplicable. Miller did not cite, and we have not found, any statute or other authority that requires a seizure warrant to be executed within five days of its issuance. Cf. A.R.S. §§ 13-2314(C), -4310(A), -4305(A), -4312(C). The State's seizures of Miller's property more than five days after issuance of the seizure warrant did not violate A.R.S. § 13-3918.

¶8 Finally, Miller argues that failure to serve him with police reports used at trial violated the due process clause of the Fourteenth Amendment. The trial court's exclusion or admission of evidence will not be disturbed on appeal absent an abuse of discretion and resulting prejudice. *See Selby v. Savard*, 134 Ariz. 222, 227 (1982); *Lay v. Mesa*, 168 Ariz. 552, 554 (App. 1991).

¶9 The State filed a motion *in limine* seeking to admit (1) the police reports describing Miller's arrest and associated police investigation and (2) the crime lab report confirming that four grams of crack cocaine were found at Miller's residence during his arrest. The trial court issued an advisory ruling granting the motion, pending any objections raised by Miller at trial. At trial, discussion was held regarding the State's motion, and the police reports were ultimately admitted. As noted above, Miller failed to provide the trial transcript on appeal. "When a party fails to include necessary items, we assume they would support the court's

³ The State argues that because Miller did not argue the seizure warrant was "void" in the lower court, he has waived the issue. Miller argued in his motion for summary judgment that the warrant was invalid pursuant to A.R.S. § 13-3918. We address only Miller's argument related to whether the seizure warrant failed to comply with § 13-3918. To the extent Miller is arguing on appeal the seizure warrant is void for any other reason, Miller has waived that argument because it was not raised before his appeal. *See Regal Homes, Inc.*, 217 Ariz. at 171, ¶ 52.

STATE v. MILLER
Opinion of the Court

findings and conclusions." *Baker*, 183 Ariz. at 73 (citing *In re Mustonen's Estate*, 130 Ariz. 283 (App. 1981)). Given that assumption, we cannot say the court abused its discretion.

CONCLUSION

¶10 For the foregoing reasons, we affirm. We award costs to the State upon compliance with ARCAP 21.

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 8/16/18
AMY M. WOOD,
CLERK
BY: RB

STATE OF ARIZONA, ex rel. MARK BRNOVICH, Attorney General, Plaintiffs/Appellees, v. WILLIAM EARL MILLER, SR, Defendant/Appellant.) Court of Appeals
Division One
No. 1 CA-CV 17-0304
Maricopa County
Superior Court
No. CV2015-006886

ORDER DENYING MOTION FOR RECONSIDERATION

The Court, Presiding Judge Lawrence F. Winthrop, Judge Jennifer B. Campbell, and Judge Paul J. McMurdie participating, has reviewed Appellant's motion for reconsideration filed May 22, 2018. After consideration,

IT IS ORDERED denying Appellant's motion.

A copy of the foregoing
was sent to:

William E Miller Sr. ADOC 210645 (mailed)
Eric S Rothblum
Kenneth R Hughes

Granted as Submitted

See eSignature page

Document Number: 5860731

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8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

9 IN AND FOR THE COUNTY OF MARICOPA

10
11 STATE OF ARIZONA, *ex rel.* MARK
12 BRNOVICH, Attorney General,
13 Plaintiff,

No. CV2015-006886

(Cross Reference Seizure Warrant
SW2015-010038)

14 v.

JUDGMENT

15 WILLIAM E. MILLER, SR., an unmarried man,
16 DIEGO FLORES AND JANE DOE FLORES,
17 DAVID A. MOSLEY AND JANE DOE
18 MOSLEY, JIMMY LEE MONTGOMERY AND
19 JANE DOE MONTGOMERY, CAMERON
20 TOLLIVER AND JANE DOE TOLLIVER,
21 MARCOS CONTRERAS AND JANE DOE
22 CONTRERAS; OWNERS/INTEREST
23 HOLDERS OF RECORD, *IN PERSONAM*,

(Assigned to Hon. Christopher Whitten)

24 AND

25 THE PROPERTY DESCRIBED IN APPENDIX
26 ONE ATTACHED HERETO, *IN REM*,

27 Defendants.

28 Based on the Court's review of the entire record in this matter, and the evidence
presented at Trial on March 30, 2017, the Court makes the following Findings of Fact and
Conclusions of Law and enters the following Judgment forfeiting to the State of Arizona

1 ("State") Items 2.8, 3.1, 3.2, 3.3 and 3.4 of the Appendix One to the Complaint, as
2 supplemented/amended.¹ The forfeited Items are referred to collectively as the "Property" as
3 provided in the Appendix One hereto. The Court further enters Judgment against William E.
4 Miller, Sr. ("Defendant") in favor of the State of Arizona ("State").

5 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

6 1. This action is brought pursuant to the Arizona Racketeering Act, A.R.S. § 13-2301, *et seq.*, and the Arizona Forfeiture Reform Act, A.R.S. § 13-4301, *et seq.*, to remedy,
7 restrain and prevent racketeering acts.

8 2. Under the Arizona Racketeering and Forfeiture Reform Acts the Attorney General
9 is empowered to bring a civil action to enforce their provisions to prevent, restrain or remedy
10 racketeering as defined by A.R.S. § 13-2301(D)(4) and Arizona law, or a violation of A.R.S. §
11 13-2312, including remedying racketeering as defined by A.R.S. § 13-2301(D)(6), and to do so
12 by seeking civil forfeitures.

13 3. The Superior Court in and for Maricopa County has jurisdiction to enter
14 appropriate orders both prior to and following a determination of liability pursuant to A.R.S. §
15 13-2314, including forfeiture orders, pursuant to A.R.S. §§ 13-2314 and 13-4301, *et seq.*, and
16 particularly 13-4302.

17 4. Venue is proper pursuant to A.R.S. § 12-401(17) ("Actions on behalf of the state
18 shall be brought in the county in which the seat of government is located."). Venue is also
19 proper pursuant to A.R.S. §§ 13-2314 and 13-4303 because this action is brought on behalf of
20 the State of Arizona in the county in which subject property was seized, and one or more owners
21 or interest holders in the property, or organization members, can be complained of civilly or
22 criminally in this county for the conduct giving rise to forfeiture. The conduct complained of
23 occurred within, from and/or into Arizona and caused injury to the State as defined in A.R.S. §
24 13-2318.

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28 ¹The State's claims against all other property/*in personam* defendants named in this litigation
have been resolved by prior Judgment, release and/or abatement.

1 5. The Property is within the jurisdiction of the Superior Court, having been seized in
2 this State pursuant to Seizure Warrant SW2015-010038 ("SW"), issued by the Hon. Daniel
3 Kiley, Judge of the Maricopa County Superior Court.

4 6. The SW authorized seizure *in rem* and *in personam* and was issued based on a
5 finding of probable cause that Defendant, individually and as part of an illegal enterprise,
6 violated one or more of the following statutes and that Defendant would have profited not less
7 than \$160,800 from his Racketeering conduct ("Proceeds"):

- 8 A. A.R.S. § 13-3408 [Possession, Use, Administration, Acquisition, Sale,
9 Manufacture or Transportation of Narcotic Drugs];
- 10 B. A.R.S. § 13-2312 [Illegally Conducting an Enterprise];
- 11 C. A.R.S. § 13-2308 [Participating in a Criminal Syndicate];
- 12 D. A.R.S. § 13-2317 [Money Laundering];
- 13 E. A.R.S. §13-1001 [Attempt to Commit the Above Offenses];
- 14 F. A.R.S. §13-1002 [Solicitation to Commit the Above Offenses];
- 15 G. A.R.S. §13-1003 [Conspiracy to Commit the Above Offenses]; and
- 16 H. A.R.S. §13-1004 [Facilitation of the Above Offenses];

17 7. The State seeks forfeiture of the Property *in rem* pursuant to A.R.S. § 13-4311
18 alleging that it is substantially constituted by Proceeds derived from Defendant's Racketeering.

19 8. The State also asserts that Defendant is personally liable to the State for his
20 Racketeering (*in personam* liability) and that because Defendant's *in personam* liability
21 pursuant to A.R.S. § 13-4312 and related statutes is greater than the value of the Property, the
22 Property is subject to forfeiture in partial satisfaction of an *in personam* Judgment.

23 9. The Defendant is the only Claimant to the Property.

24 10. The matter proceeded to Trial on March 30, 2017.

25 11. The Court having considered the evidence presented at Trial, and being fully
26 advised in the premises, has made the following findings by a preponderance of the evidence
27 (*see* A.R.S. § 13-2314):

1 A. On, about or between May, 2011 and September, 2011, Defendant on multiple
2 occasions possessed, solicited to possess, attempted to possess, conspired to
3 possess, conspired and participated in the transfer and sale of, and conspired
4 and participated in the transaction of proceeds of the sale of prohibited drugs in
5 violation of A.R.S. §§ 13-2312, 13-3408 and 13-2317 for financial gain.

6 B. Pursuant to A.R.S. § 13-2318 (defining "Injury to the state"):

- 7 a. The amount of money or the value of other property that Defendant
8 exchanged or that would foreseeably have been exchanged for prohibited
9 drugs was not less than \$160,800. *See A.R.S. § 13-2318(2).*
- 10 b. Defendant's acquisition or gain of proceeds as defined in A.R.S. § 13-2314
11 of any offense included in the definition of racketeering as defined in
12 A.R.S. § 13-2301(D)(4) (particularly, 13-2301(D)(4)((b)(xi) (prohibited
13 drugs)) was not less than \$160,800. *See A.R.S. § 13-2318(3).*

14 12. Based on the evidence presented at Trial, the Court does not find that the State has
15 proven that the Property is subject to forfeiture *in rem*.

16 13. However, the Court finds that A.R.S. §§ 13-2314 and 13-4312(G) compel
17 forfeiture of the Property because of the amount of Defendant's *in personam* liability to the
18 State as determined by this Judgment.

19 **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:**

20 1. Pursuant to A.R.S. §§ 13-2314 and 13-4312(A), the State has established by a
21 preponderance of the evidence that Defendant is personally (*in personam*) liable to the State for
22 Racketeering in the amount of \$160,800. The Court concludes that the State is the prevailing
23 party.

24 2. Pursuant to A.R.S. §§ 13-2314(D)(4), the State is entitled to treble damages, or
25 three times the amount of the Defendant's *in personam* liability for Injury to the State. *See*
26 *Sullivan v. Metro Productions, Inc.*, 150 Ariz. 573, 577-78, 724 P.2d 1242, 1246-47 (1986);
27 *Daggett v. Jackie Fine Arts, Inc.*; 152 Ariz. 559, 569, 733 P.2d 1142, 1152 (App. 1986)
28 (interpreting the language of A.R.S. § 12-2314 authorizing suit "for the recovery of treble

1 damages and the costs of the suit, including reasonable attorney fees" as making treble damages
2 mandatory).

3 3. The State of Arizona is awarded judgment against William E. Miller, Sr., in the
4 amount of \$482,400.00 (\$160,800 x 3), with interest to accrue thereon at the legal rate. The
5 Judgment amount against Mr. Miller is to be reduced by the amount of the funds forfeited by
6 this Judgment.

7 4. Pursuant to A.R.S. §§ 13-2314 and 13-4312(G), Judgment is entered to Plaintiff,
8 State of Arizona, forfeiting to the State Items 2.8, 3.1, 3.2, 3.3 and 3.4 of the Appendix One to
9 this Judgment, including all right, title and interest in the currency and all actual interest accrued
10 thereon.

11 5. Pursuant to A.R.S. § 13-4314(B), the State has clear title to the forfeited property
12 and title to said property and its proceeds vested in the State on the commission of the act or
13 omission giving rise to forfeiture.

14 6. Pursuant to A.R.S. § 13-4314(D), the Attorney for the State may transfer good and
15 sufficient title to any subsequent purchaser or transferee, and the title shall be recognized by all
16 courts, by this State and by all departments and agencies of this State and any political
17 subdivision. Title shall pass free of any and all liens or encumbrances, including racketeering
18 liens filed pursuant to A.R.S. § 13-2314.02.

19 7. The funds shall be allocated in conformance with A.R.S. §§ 13-2314.01 and 13-
20 4315.

21 8. Pursuant to A.R.S. § 13-4314(F), Defendant William E. Miller, Sr., is further
22 ordered to pay to the State all costs, investigative expenses, and reasonable attorneys' fees
23 incurred in the prosecution of this matter, the amount of which shall be determined by the Court
24 upon the filing of an Application for Attorneys' Fees, Costs and Expenses, along with a
25 supporting affidavit.

26 V/V

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1 The Court finds that there is no just reason for delay and the Judgment is entered under
2 Rule 54(b), Ariz.R.Civ.P.

3
4 DONE IN OPEN COURT this _____ day of _____, 2017.

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6 Hon. Christopher Whitten
7 Judge of the Superior Court
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