

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket #2006-0680

State of New Hampshire,
Appellee,

v.

Chad Evans,
Claimant-Appellant

BRIEF FOR THE CLAIMANT-APPELLANT
On appeal from the Rochester District Court

Date: February 5, 2007

Chad Evans #32926
New Hampshire State Prison
P.O. Box 14
Concord, NH 03302-0014

QUESTIONS PRESENTED

- I. Did the District Court err by granting forfeiture of property to the State by disbelieving the Appellant's allegations and without giving the Appellant an opportunity to prove those allegations?

- II. Did the District Court err by granting forfeiture of property where it was asserted that the Appellant's former wife had a claim to the property as marital assets?

STATEMENT OF THE CASE

After years of trying to get the police to return his firearms and other weapons, the Appellant filed a motion to have them returned to his father. Shortly after that motion was granted, the State moved to reconsider and later filed a motion for the forfeiture and destruction of this property. At a non-evidentiary hearing, where both the Appellant and his former wife were present, counsel for the Appellant argued the legal issues and made representations to the Court about the ownership interests of the Appellant's former wife. The Court granted forfeiture and denied a timely motion for reconsideration. This appeal follows.

STATEMENT OF THE FACTS

On March 28, 1999, the Appellant's then wife, Tristan, filed a domestic violence complaint against the Appellant. No use of weapons was alleged but the police, as part of standard procedure, removed all firearms and other weapons from the house "for safekeeping." See Appendix p2, at ¶1, affidavit of Tristan Evans-Mellencamp, filed below with MOTION TO EXPAND THE RECORD (Appendix p1). Over the next few years, the Appellant became embroiled in other legal issues, all unrelated to weapons. During that time, he repeatedly requested the police return the weapons so that, at the very least, they could be liquidated to help Tristan with living and child-care expenses. *Id.* at ¶2.

In 2005, the Appellant retained attorney Robert E. Fisher to seek return of the weapons, so that they could be liquidated for the benefit of Tristan for use in child-care costs. See Appendix p3, ¶2, Appellant's affidavit, filed with MOTION TO EXPAND THE RECORD. Attorney Fisher, after making inquiries of the Rochester Police Department, received a response from Detective Gary Boudreau on April 11, 2005 suggesting a motion to the Court as the proper means of acquiring return of the weapons. *Id.* at ¶1. In light of the Appellant's legal problems and Tristan's concerns over having returned weapons in her home, counsel suggested the Appellant sign ownership of the weapons over to his father, Chet Evans, to "simplify" the legal issues. *Id.* at ¶2-3. Counsel generated a bill-of-sale and had the Appellant sign it on May 31, 2005. *Id.* at ¶3.

Counsel initiated *State v. Evans*, 05-CV-00177, in the Rochester District Court and moved for return of the weapons. At the October 12, 2005 hearing before Hon. Stephen H. Roberts, the State arrived late. The court accepted the bill-of-sale, noted that the State Police had cleared Chet Evans to receive the weapons, and issued an ORDER to have them released to him. *Id.* at ¶4.

The State immediately moved the court to reconsider, which it did, staying its release ORDER, and ordering another hearing. *See* Appendix p4-6 (fax of State's MOTION TO RECONSIDER with ORDER written on last page). Before a second hearing was scheduled a different judge, Hon. Daniel M. Cappiello, issued another ORDER on November 28, 2005 ruling that the transfer of weapons to Chet Evans was invalid and denying any release of them to him. The ORDER then *sua sponte* granted the State leave to file a motion for forfeiture. *See* Appendix p7-9 (Clerk's notice and ORDER ON MOTION TO RECONSIDER). The State filed a MOTION FOR FORFEITURE AND DESTRUCTION OF PROPERTY PURSUANT TO RSA 595-A:6 on March 24, 2006. *See* Appendix p10-12.

On March 31, 2006 counsel filed an OBJECTION TO MOTION FOR FORFEITURE asserting Tristan Evans-Mellencamp's marital property ownership rights. *See* Appendix p13-15. The Appellant and Tristan Evans-Mellencamp executed a document addressed to Attorney Fisher dated April 12, 2006 requesting that he represent BOTH of them to seek release of the weapons. Using this document as an attachment, on April 25, 2006 Attorney Fisher asserted Tristan's marital property rights in a letter to the State, requesting it waive forfeiture and allow her to receive the weapons. *See* Appendix p16-17. The request was declined.

On May 19, 2006 a hearing was held before Hon. Daniel M. Cappiello where both the Appellant and Tristan Evans-Mellencamp were present and counsel made an offer of proof to the Court that the weapons were marital property and should be returned to their then rightful owner, Tristan. *See* Appendix p18-19. The Court issued an ORDER on the matter on June 30, 2006 (clerk's Notice July 12, 2006), granting forfeiture. *See* Notice of Appeal at pp. NOA 4-6. On July 17, 2006 counsel filed a MOTION FOR RECONSIDERATION (Appendix p18-19), to which the State objected on July 21, 2006. *See* Appendix p20-21.

The MOTION TO RECONSIDER was denied by a third judge, Hon. Sharon N. DeVries, in an ORDER written on the last page of the MOTION dated August 3, 2006 (Clerk's notice August 17, 2006). *See* Appendix p19.

In the meantime, on August 1, 2006 the Appellant filed a *pro se* MOTION TO PRESERVE PROPERTY to prevent the destruction of the weapons. *See* Appendix p22-23. This was granted by a fourth judge, Hon. Peter G. Hurd, on August 14, 2006 (Clerk's notice August 17, 2006). On August 31, 2006 the Appellant filed a *pro se* MOTION TO EXPAND THE RECORD (Appendix p1) to which the State objected on September 29, 2006. No order was ever received on this MOTION.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING FORFEITURE OF PROPERTY TO THE STATE BY DISBELIEVING THE APPELLANT'S ALLEGATIONS AND WITHOUT GIVING THE APPELLANT AN OPPORTUNITY TO PROVE THOSE ALLEGATIONS.

It is black letter law that pretrial dismissals may not be granted against a claimant by disbelieving that party's factual assertions or credibility. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (Court must view all facts and all reasonable inferences in favor of nonmoving party); *Mountain Springs Water Co. v. Mountain Lakes Water District*, 126 N.H. 199, 200-201 (1985) (properly pled facts must be presumed true).

This is also the standard for pretrial summary judgments. See e.g. *Soper v. Purdy*, 144 N.H. 685, 687-88 (1996) (discussing standard); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (Court may only grant summary judgement if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.")

Here, Appellant's counsel made factual assertions and an offer of proof about the Appellant's former wife and her property interests in the weapons. Indeed, he confirmed to the Court that both she and the Appellant were present and prepared to testify. Nevertheless, the District Court ruled:

"There is, however, no credible evidence put before the Court that the weapons in fact were/are marital property. Ms. Mellencamp did not give any testimony, present any legal documentation of ownership, or any marital documents."

If the court took issue with counsel's offer of proof, Tristan Evans-Mellencamp was available to provide exactly the type of evidence the court found lacking.

II. THE DISTRICT COURT ERRED BY GRANTING FORFEITURE OF PROPERTY WHERE IT WAS ASSERTED THAT THE APPELLANT'S FORMER WIFE HAD A CLAIM TO THE PROPERTY AS MARITAL ASSETS.

A. The Gero Test Does not Apply

As an initial matter, the two-pronged test of *State v. Gero*, 152 N.H. 370, 386-387 (2005) does not apply to the instant case. The District Court relied on *Gero* in its November 28, 2005 ORDER ON (State's) MOTION TO RECONSIDER in granting the State an opportunity to move for forfeiture of the weapons.

However, no claim was ever made (nor could be made) that the weapons at issue were misused or involved in any way in a criminal act. This fact precludes the application of the first prong of the two-pronged *Gero* test. *Id.* at 386. A *Gero* forfeiture may only occur when prior unlawful use of the property (a) requires its destruction and (b) prevents its transfer. Therefore, application of *Gero* was erroneous.

This was effectively conceded by the State in its March 24, 2006 MOTION FOR FORFEITURE AND DESTRUCTION OF PROPERTY PURSUANT TO RSA 595-A:6 where it argued a *de facto* forfeiture had occurred and *Gero* did not apply. See Appendix p10, ¶¶6-8.

B. Marital Assets

Among the assertions made by Appellant's counsel to the State and the District Court below was the fact that the weapons at issue were marital assets jointly owned by the Appellant and his former wife, Tristan Evans-Mellencamp. Since the weapons were not improperly used, and *Gero* does NOT apply to bring about their destruction, Tristan Evans-Mellencamp's ownership interest cannot be overcome by arguing a *de facto* forfeiture by the Appellant who was, at best, no more than a co-owner. See e.g. *Holliday v. Holliday*, 139 N.H. 213, 215 (1994)

(only assets acquired after separation may be considered exclusive to one party or the other); *In re Preston*, 147 N.H. 48 (2001) (marital assets subject to equitable distribution); *Murano v. Murano*, 122 N.H. 223, 227-8 (1982) (“The trial court may order redistribution of any property falling within the joint marital estate, or within the individual estates of either spouse.”)

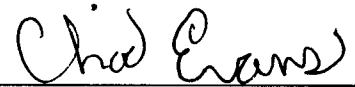
The State argued for forfeiture without addressing its argument to ALL relevant owners of the property. Given the Appellant’s legal position, his former wife had more of a claim to the weapons than he did, yet the State ignored counsel’s assertion of her claim and argued against the Appellant’s ownership interests. The State brought its MOTION FOR FORFEITURE AND DESTRUCTION OF PROPERTY against the wrong party.

As a logical and practical matter, the Appellant is serving a 40-year-to-life sentence, and Tristan Evans-Mellencamp is a single mother with three boys, struggling to make ends meet. The State advocated for her interests against the Appellant in earlier proceedings, but now seems bent on destroying a viable source of income that she could readily use to raise her children. In the interests of judicial economy, the weapons should be returned to her and this case should be summarily dismissed.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Honorable Court to find that the Court below erred and either remand for further proceedings or for return of the property to Tristan Evans-Mellencamp.

Respectfully submitted,



Date: February 5, 2007

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CERTIFICATION OF SERVICE

I hereby certify that two copies of this brief and the separate appendix were sent to the Office of the N.H. Attorney General, 33 Capitol Street, Concord, NH 03301 on this date.

Date: February 9th, 2007

Chad Evans
Chad Evans