

Affirmed and Opinion Filed January 8, 2018



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-01296-CV

**ONE 2007 LEXUS IS 250 AND MARISA ZAPIEN, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-13525**

MEMORANDUM OPINION

**Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill**

Appellant Zapien (Wife) appeals from a judgment forfeiting as contraband her 2007 Lexus that her husband (Husband) used to illegally transport five kilograms (more than eleven pounds) of methamphetamine. In a single issue, Wife argues that the evidence is legally insufficient to support the forfeiture because she established the innocent owner defense. We disagree, and affirm the trial court's judgment.

I. FACTUAL BACKGROUND

Husband was stopped while driving the vehicle, and the police found five kilograms of methamphetamine in the trunk. He pled guilty to a federal crime and was sentenced to ninety-seven months imprisonment.

The State seized the vehicle as contraband for forfeiture. Wife, the vehicle's registered owner, asserted the innocent owner defense.

The trial court entered an interlocutory default judgment against Husband forfeiting his interest in the vehicle. That default judgment merged into the trial court's final judgment discussed in the next paragraph. *See Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919, 924 (Tex. 2011). Husband is not a party to this appeal, and the forfeiture of his interest is not an issue before us.

After a bench trial, the court concluded that the vehicle was contraband subject to forfeiture because it was used in committing a drug felony. The court further rejected the innocent owner defense because: (i) Wife did not prove that she didn't know and reasonably shouldn't have known that Husband was using the vehicle in the commission of a drug felony and (ii) appellant's husband was an equitable owner of the vehicle.

II. ANALYSIS

Wife's sole issue does not contest whether the State provided sufficient evidence supporting the elements of its claim. Nor does she contend that whether Husband was an equitable owner is relevant. She instead argues only that she established her innocent owner defense as a matter of law.

A. Standard of Review and Applicable Law

A forfeiture proceeding under the code of criminal procedure is a civil proceeding. TEX. CODE CRIM. PROC. art. 59.05(a),(b); *see Five Hundred & Eighty Five Dollars in U.S. Currency v. State*, No. 03-09-00012-CV, 2009 WL 2837716, at *1 (Tex. App.—Austin Aug. 31, 2009, no pet.) (mem. op.). To prevail in a forfeiture proceeding, the state must prove by a preponderance of the evidence that the property is contraband and, thus, subject to forfeiture to the state. *Forty*

Three Thousand Seven Hundred & Seventy Four Dollars in U.S. Currency v. State, 266 S.W.3d 178, 182 (Tex. App.—Texarkana 2008, pet. denied).

“Contraband” is property of any nature used in the commission of certain felonies. *See* TEX. CODE CRIM. PROC. art. 59.01(2)(A)-(E). Article 59.01 also defines “owner” as “a person who claims an equitable or legal ownership interest in the property” and defines “interest holder” as “the bona fide holder of a perfected lien or perfected security interest in property.” *Id.* art. 59.01(4), (6).

After the State satisfies its burden of proof, there is available to the defendant a statutory provision known as the “innocent owner” defense. *Forty Three Thousand Seven Hundred & Seventy Four Dollars in U.S. Currency*, 266 S.W.3d at 182; *see* TEX. CODE CRIM. PROC. art. 59.02(c). This defense prevents forfeiture if the defendant demonstrates, by a preponderance of the evidence, that she acquired and perfected the interest prior to or during the act giving rise to the forfeiture, and did not know or should not reasonably have known of the act giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest. *Forty Three Thousand Seven Hundred and Seventy Four Dollars in U.S. Currency*, 266 S.W.3d at 182; *see* TEX. CODE CRIM. PROC. art. 59.02(c)(1).

Because a Chapter 59 forfeiture proceeding is a civil in rem proceeding subject to the rules applicable to civil trials and appeals generally, the appropriate standard of review depends on who had the burden of proof at trial. *One Ford Mustang v. State*, 231 S.W.3d 445, 449 (Tex. App.—Waco 2007, no pet.).

Evidence is legally insufficient when: (i) there is a complete absence of a vital fact; (ii) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (iii) the evidence offered to prove a vital fact is no more than a scintilla, and (iv) the evidence establishes conclusively the opposite of a vital fact. *One (1) 2002 JEEP, VIN #*

IJ4GK48K52W123230 v. State, No. 13-09-667-CV, 2010 WL 2697142, at *3 (Tex. App.—Corpus Christi July 8, 2010, no pet.) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005)).

B. Application of Law To Facts

Wife and Husband had been married for twenty-two years. Moreover, Husband had been out of work for an extended period at the time of his arrest, resulting in the couple's income having been cut roughly in half with three, non-working daughters living with them full time.

Husband and Wife went together to purchase the vehicle, and used the sale proceeds from two of their other vehicles and their income tax refund to pay for the Lexus. Although the vehicle was for Wife's use, Husband could use it anytime without her permission if he needed it. On one occasion during the intervening week, he took the car to a dealership for service.

A Dallas drug detective testified that Husband was the target of a joint Dallas Police Department-Federal drug task force surveillance as a drug trafficker. The detective further said that a person must work for a criminal organization for some time before he is entrusted with five kilograms of methamphetamine.

Wife relies on her testimony and the fact that she bought the car eight days before Husband was apprehended to demonstrate that she met her burden in the court below. She testified that she did not know if her husband was involved with drugs, and did not know Husband was going to transport methamphetamine. Had she known he was selling drugs, she would have left him. She also showed that the vehicle is registered in her name and purchase documents show her as the buyer. She added that Husband had only driven the vehicle a few times.

When Wife was asked whether Husband would come and go at different hours, she said "I mean he did sometimes. I mean during the day I don't know. I was always at work." When

she would ask him where he was going in the evening, he would tell her that he was going to do extermination work at a restaurant that was closed. On at least one time, she accompanied him to that restaurant.

Notwithstanding Wife's denials, there is more than a scintilla of evidence to support the trial court's finding that a novice drug trafficker would not be entrusted with 5,000 grams (more than eleven pounds) of methamphetamine and that Wife knew or reasonably should have known that her husband of twenty-two years was using the vehicle in the commission of a drug felony.

For example, Wife's testimony was equivocal, and the trial court was free to disbelieve her. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986) (fact finder may believe one witness and disbelieve others). And the detective testified that it was unlikely that Husband had been entrusted with that much methamphetamine for a first-time transport.

On the totality of this record, the trial court, weighing the evidence and judging witness credibility, could reasonably have found that a financially strained Wife knew or reasonably should have known that her out of work husband was using the Lexus's trunk (instead of his "little truck," which he customarily drove to spray for bugs at night) to transport the drugs that evening in order to make money for him, Wife, and their three daughters living with them. Accordingly, Wife did not conclusively prove her innocent owner affirmative defense. We thus resolve her sole issue against her and affirm the trial court's judgment.

/Bill Whitehill/

BILL WHITEHILL
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ONE 2007 LEXUS IS 250 AND MARISA
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Opinion delivered by Justice Whitehill.
Justices Lang and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered January 8, 2018.