

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

HAMPSHIRE COUNTY

NO. 2020-P-1179

COMMONWEALTH

v.

EDWARD B. FLEURY

BRIEF FOR THE DEFENDANT-APPELLANT
EDWARD FLEURY

On Direct Appeal
from a post-conviction order, entered by the
Honorable John A. Agostini of
the Hampshire Superior Court,
Docket No.s 14 80 CR 00193

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April 7, 2021

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ISSUES PRESENTED

- I. Whether the Legislature intended the firearms forfeiture and destruction provisions of G. L. c. 276, § 3 (b) to apply to violations of the Improper Storage Statute, G. L. c. 140, § 131L.

STATEMENT OF THE CASE

This is the defendant's direct appeal of a post-conviction order of the Trial Court.

COURSE OF THE PROCEEDINGS

In Hampshire Superior Court Indictment 14 80 CR 00193 Edward Fleury was charged with one count of Assault by Means of a Dangerous Weapon, Firearm, in violation of G. L. c. 265, § 15B (b), and twenty-two counts of Improper

Storage of a Large Capacity Firearm in violation of G. L. c. 140, § 131L. (R. 38-60). In another related indictment, Hampshire Superior Court 15 80 CR 00115, he was charged with five more counts of Improper Storage. (R. 61-65). He was acquitted following jury trial on October 28, 2016 of the Assault charge, as well as five of the Improper Storage charges. (R. 35). At a subsequent trial on September 22, 2017, a jury acquitted Mr. Fleury of ten counts of Improper Storage of a Large Capacity Firearm, and convicted on the remaining twelve counts. (R. 20). Mr. Fleury appealed his convictions and on June 11, 2020, the Appeals Court affirmed his conviction in an unpublished opinion, 2018-P-303. (R. 22).

On November 28, 2016, Edward Fleury sought return of property seized in his cases, an extensive firearm collection. (R. 66). The Commonwealth opposed the motion. (R. 76). The Court determined that the motion was premature in light of the Commonwealth's assertion that the firearms remained potential evidence in the pending related case for Improper Storage. (R. 16).

On November 20, 2017, Mr. Fleury again petitioned the Superior Court for return of his seized firearms. The Commonwealth again opposed the return of the firearms. (R. 83). The Trial Court ordered that the firearms not be

disposed of until Mr. Fleury's pending appeal was fully addressed and decided. (R. 78-79).

On September 1, 2020, Mr. Fleury renewed his request for return of the seized firearms pursuant to Mass. R. Sup. Ct. 61. (R. 85). The Commonwealth likewise renewed their opposition. (R. 89). In their opposition the Commonwealth agreed to return the bulk of the collection to an appropriate designee, but opposed the motion with respect to the twelve firearms that were the subject of the convictions citing G. L. c. 276, § 3 (b). (R. 89-90). On September 17, 2020, the Honorable John Agostini entered an order granting the return of the seized firearms with exception of the twelve identified by the Commonwealth as the subject of Mr. Fleury's convictions. (R. 92). Mr. Fleury filed an Emergency Motion for Stay of Destruction of Property and Request for Reconsideration on September 23, 2020. (R. 93). On October 2, 2020, Judge Agostini entered an order denying the motion for reconsideration. (R. 98-100). Mr. Fleury filed a Notice of Appeal on October 7, 2020. (R. 101).

STATEMENT OF FACTS

On the morning of September 11, 2014, members of the State Police and various local police departments executed a search warrant for the residence of Edward Fleury located

at 10 King Street in Pelham, Massachusetts. The police were investigating an allegation that Mr. Fleury assaulted another person with a firearm. Mr. Fleury was an avid gun collector. At the time of the search he owned over two hundred firearms. The police determined that many of the firearms were improperly stored and charged him with twenty-two counts of Improper Storage of a Large Capacity Firearm in violation of G. L. c. 140, § 131L.

Following his conviction upon twelve counts of improper storage, Mr. Fleury requested return of the firearms seized by the police in 2014. The Court ordered return of the seized firearms with the exception of the twelve firearms that were the subject of his convictions. The Court reasoned that G. L. c. 276, § 3 (b) required that firearms found to be kept unlawfully shall be forfeited to the Commonwealth. (R. 99-100).

ARGUMENT

- I. The forfeiture and destruction provisions of G. L. c. 276, § 3 (b) should not apply to violations of the Improper Storage Statute, G. L. c. 140, § 131L, because improper storage is not explicitly listed in G. L. c. 276, § 3 (b) as conduct giving rise to forfeiture of firearms.

The Trial Court erred in denying a request pursuant to Superior Court Rule 61 for return of property seized by the police during execution of a search warrant. The Trial Court ignored the strong presumption that Mr. Fleury is entitled to the return of his seized property, and erroneously concluded that the forfeiture provision of G. L. c. 276, § 3 (b) applied in circumstances where, as in the present case, the defendant is convicted of improper storage. See Commonwealth v. Salmons, 96 Mass. App. Ct. 61, 67 (2019).

This case presents an issue of statutory interpretation. The construction of statutes poses a question of law that the Appeals Court reviews *de novo*. See Commonwealth v. B & M Fitzgerald Builders, Inc., 71 Mass. App. Ct. 486, 491 (2008) (citing GPT-Acton, LLC v. Department of Env'tl. Protection, 64 Mass. App. Ct. 103, 106 (2005)).

A "statute must be interpreted according to the intent of the legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of

its framers may be effectuated.” Commonwealth v. Figueroa, 464 Mass. 365, 368 (2013).

The court should first look to the plain language of the provision at issue to ascertain the intent of the Legislature, consider other sections of the statute, and examine the pertinent language in the context of the entire statute. Chin v. Merriot, 470 Mass. 527, 532 (2015). The Court should “ascertain the intent of a statute from all of its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective and consonant with sound reason and common sense.” Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006).

Rifles, shotguns, pistols, knives or other dangerous weapons which have been found to have been kept, concealed or used unlawfully or for an unlawful purpose shall be forfeited to the commonwealth and delivered forthwith to the colonel of the state police for destruction or preservation in the discretion of the colonel of the state police. G. L. c. 276, § 3 (b)

At issue in this case is whether the Legislature intended this statute to encompass violations of the Improper Storage statute. There are three identified classes of weapons to be forfeited: kept, concealed, or used unlawfully. Neither concealed, nor used unlawfully would apply in the present case. There is no suggestion

that Mr. Fleury was trying to hide his firearms, and he was acquitted of the fire-armed assault charge. The only class of forfeited weapons that would arguably apply in this case is firearms "unlawfully... kept."

Merriam-Webster defines 'kept' as "to retain in one's possession or power." This definition and the common use of the word suggest that the Legislature intended to subject firearms that were illegally possessed to forfeiture. As a general rule of statutory interpretation, the express inclusion of one thing is an implied exclusion of things not mentioned, unless the purpose of the statute would be frustrated. See Trust Ins. Co. v. Bruce at Park Chiropractic Clinic, 430 Mass. 607, 609 (2000) (citing Brady v. Brady, 380 Mass. 480, 484 (1980)).

The Legislature could have included language indicating that improper storage of a firearm would subject seized firearms to forfeiture and destruction. Stored firearms were not included. Similarly, G. L. c. 140, § 131L does not reference G. L. c. 276, Section 3 or otherwise indicate that forfeiture is a penalty or consequence of Improper Storage. Both statutes are silent with respect to improperly stored firearms and the Courts should not read into the statutes language which is not there.

Indeed G. L. c. 276, Section 3 dates back to 1934, then c. 340, Section 15. It was last amended in 1996. By contrast the Improper Storage Statute, G. L. c. 140, § 131L is relatively new. It was added in 1998 well after the last amendment of G. L. c. 276, Section 3. The words at issue in G. L. c. 276, § 3 (b), "kept... unlawfully" were enacted before improper storage was a crime. Therefore Legislature could not have intended to include improper storage of firearm in the forfeiture and destruction provision of the statute. Based on this statutory history, the Court should conclude that the Legislature did not intend to include illegally stored firearms in the forfeiture provision of Section 3 (b), and reverse the order of the Trial Court prohibiting the return of twelve firearms to Mr. Fleury's designee.

The Trial Court found this interpretation of the word "kept" to be "strained," but it erred in not applying general principle of narrow construction of criminal statutes, and the rule of lenity. See Commonwealth v. Cola, 18 Mass. App. Ct. 598 (1984). The rule of lenity ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. United States v. Lanier, 520 U.S. 259, 266 (1997) (quoted in Commonwealth v. Hourican, 85 Mass. App.

Ct. 408, 416 (2014). In this instance Mr. Fleury and defendants like him who have been convicted of Improper Storage have not been fairly warned by the General Laws that in addition to the imposition of fines and incarceration the Court may also forfeit and dispose of their property. Because the Trial Court's interpretation of G. L. c. 276, § 3 (b) was not sufficiently narrow to comply with the rule of lenity, it should be reversed as a matter of law.

CONCLUSION

On the grounds that the Trial Court erred in applying the forfeiture provision of G. L. c. 276, § 3 (b) to violations of the Improper Storage Statute, G. L. c. 140, § 131L, without express language granting authority to do so, this Court should reverse the order of forfeiture and order the return of Mr. Fleury's property, twelve firearms.

Respectfully Submitted,

/s/ Thomas E. Robinson

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April 7, 2021.

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STATUTES

G. L. c. 276, § 3 provides:

If an officer in the execution of a search warrant finds property or articles therein described, he shall seize and safely keep them, under the direction of the court or justice, so long as necessary to permit them to be produced or used as evidence in any trial. As soon as may be, thereafter, all property seized under clause First of section one shall be restored to the owners thereof; and all other property seized in execution of a search warrant shall be disposed of as the court or justice orders and may be forfeited and either sold or destroyed, as the public interest requires, in the discretion of the court or justice, except:

(a) Diseased animals or carcasses thereof, or any tainted, diseased, corrupt, decayed or unwholesome meat, fish, vegetables, produce, fruit or provisions of any kind, or the meat of any calf killed when less than two weeks old, or any product thereof kept or concealed with intent to kill, sell or offer the same for sale for food, shall be destroyed or disposed of in accordance with section one hundred and forty-six of chapter ninety-four by the board of health or by an officer designated by the court or justice; and diseased animals found to have been kept or concealed in a particular building, place or enclosure shall be destroyed or disposed of by the division of animal health and department of food and agriculture without compensation to the owners thereof.

(b) Rifles, shotguns, pistols, knives or other dangerous weapons which have been found to have been kept, concealed or used unlawfully or for an unlawful purpose shall be forfeited to the commonwealth and delivered forthwith to the colonel of the state police for destruction or preservation in the discretion of the colonel of the state police.

(c) Money seized under clause Third of section one shall be forfeited and paid over to the state treasurer.

(d) Any property, including money seized under section one, the forfeiture and disposition of which is specified in any general or special law shall be disposed of in accordance therewith.

G. L. c. 140, § 131L provides:

(a) It shall be unlawful to store or keep any firearm, rifle or shotgun including, but not limited to, large capacity weapons, or machine gun in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. It shall be unlawful to store or keep any stun gun in any place unless such weapon is secured in a locked container accessible only to the owner or other lawfully authorized user. For purposes of this section, such weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user.

(b) A violation of this section shall be punished, in the case of a firearm, rifle or shotgun that is not a large capacity weapon, by a fine of not less than \$1000 nor more than \$7,500 or by imprisonment for not more than 1 1/2 years or by both such fine and imprisonment and, in the case of a large capacity weapon or machine gun, by a fine of not less than \$2,000 nor more than \$15,000 or by imprisonment for not less than 1 1/2 years nor more than 12 years or by both such fine and imprisonment.

(c) A violation of this section shall be punished, in the case of a rifle or shotgun that is not a large capacity weapon and the weapon was stored or kept in a place where a person younger than 18 years of age who does not possess a valid firearm identification card issued under section 129B may have access without committing an unforeseeable trespass, by a fine of not less than \$2,500 nor more than \$15,000 or by imprisonment for not less than 1 1/2 years nor more than 12 years or by both such fine and imprisonment.

(d) A violation of this section shall be punished, in the case of a rifle or shotgun that is a large capacity weapon, firearm or machine gun that was stored or kept in a place where a person younger than 18 years of age may have access without committing an unforeseeable trespass, by a fine of not less than \$10,000 nor more than \$20,000 or by imprisonment for not less than 4 years nor more than 15 years or by both such fine and imprisonment.

(e) A violation of the provisions of this section shall be evidence of wanton or reckless conduct in any criminal or civil proceeding if a person under the age of 18 who was not a trespasser or was a foreseeable trespasser acquired access to a weapon, unless such person possessed a valid firearm identification card issued under section 129B and was permitted by law to possess such weapon, and such access results in the personal injury to or the death of any person.

(f) This section shall not apply to the storage or keeping of any firearm, rifle or shotgun with matchlock, flintlock, percussion cap or similar type of ignition system manufactured in or prior to the year 1899, or to any replica of any such firearm, rifle or shotgun if such replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition.

RULES

Mass. R. Sup. Ct. 61 provides:

Motions for the return of property and motions to suppress evidence shall be in writing, shall specifically set forth the facts upon which the motions are based, shall be verified by affidavit, and shall otherwise comply with the requirements of [Mass. R. Crim. P. 13](#).

Such motions shall be filed within seven days after the date set for the filing of the pre-trial conference report pursuant to [Mass. R. Crim. P. 11\(a\)\(2\)](#), or at such other time as the court may allow.

ORDER APPEALED

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COMMONWEALTH OF MASSACHUSETTS
HAMPSHIRE, ss **SUPERIOR COURT**
CR. NO. 14-0193;
15-0115

COMMONWEALTH OF MASSACHUSETTS

v.

EDWARD FLEURY

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

By way of background, this criminal litigation relates to a series of charges emanating from an investigation and search of the defendant's property in September 2014. The search of the defendant's home revealed numerous firearms (hundreds) that were deemed to be illegally stored leading to two sets of indictments. The defendant was also charged with Assault with a Dangerous Weapon.

In a jury trial in October 2016, the defendant was found guilty of 12 charges for illegal storage of firearms and not guilty of the remaining indictments. He was sentenced to a period of probation. Appeals were taken by the defendant that were unsuccessful and he has exhausted all avenues of appellate review.

The defendant filed identical motions in the two cases seeking the return of property subject to the criminal confiscation. Based on the response of the Commonwealth, I ordered that for the charges that the defendant was found not guilty, those weapon must be returned to a properly licensed designee of the defendant. See G.L. c. 140, sec. 129D. The weapons for which the defendant was found guilty of improper storage (12 weapons) shall be destroyed pursuant to G. L. c. 276, sec. 3(b).

Section 3(b) states,

"If an officer in the execution of a search warrant finds property or articles therein described, he shall seize and safely keep them, under the direction of the court or justice, so long as necessary to permit them to be produced or used as evidence in any trial. As soon as may be, thereafter, all property seized under clause First of section one shall be restored to the owners thereof; and all other property seized in execution of a search warrant shall be disposed of as the court or justice orders and may be forfeited and either sold or destroyed, as the public interest requires, in the discretion of the court or justice, except: ...

(b) Rifles, shotguns, pistols, knives or other dangerous weapons which have been found to have been kept, concealed or used unlawfully or for an unlawful purpose shall be forfeited to the commonwealth and delivered forthwith to the colonel of the state police for destruction or preservation in the discretion of the colonel of the state police.”

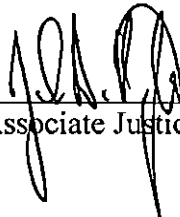
A plain reading of the statute clearly states that firearms and long guns which have been found to have been kept unlawfully shall be forfeited to the Commonwealth. This was precisely the situation faced by the defendant. The defendant interpretation of the word “kept” is a rather strained reading of the statute and contrary to its clear language.

Accordingly, the defendant’s motion for reconsideration is DENIED.

SO ORDERED

10/2/20

Date



Associate Justice, Superior Court

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of the Court that pertain to filing of briefs, including but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 16(m) (impounded material); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Thomas E. Robinson

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April 7, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2021, I served an electronic copy of the foregoing "Brief," as well as a copy of the Record Appendix (as a separate document) through the Massachusetts Court "efile" System to ADA Thomas H. Townsend of the Northwestern District Attorney's Office.

/s/ Thomas E. Robinson

Thomas E. Robinson