

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Nos. 00-2832
00-2833
00-2834

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER A. MOSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Peter Moss appeals his conviction for possessing fireworks with the intent to unlawfully sell, contrary to WIS. STAT. § 167.10(2).¹ He also challenges the trial court's judgment forfeiting his stock of fireworks. Moss contends that the record lacks sufficient evidence for conviction. He also argues that the court erroneously issued a search warrant of Trego Fireworks and a storage locker facility and that law enforcement improperly seized his stock at both locations. We disagree and affirm the conviction and forfeiture order.

BACKGROUND

¶2 Moss operates Trego Fireworks in Trego, Wisconsin. At trial, he testified that he also operates a store in Alvin, Texas. In June 1999, Moss obtained a license, issued under WIS. STAT. § 167.10(3)(c)(6), to purchase and use fireworks in the Town of Trego.²

¶3 On May 24, 2000, deputy sheriff David Bos entered the Trego Fireworks Store and purchased statutorily regulated fireworks. The store was marked from the outside with a billboard-size sign reading "Trego Fireworks For Sale." Moss personally assisted Bos in selecting and purchasing the fireworks. Bos told Moss that he wanted fireworks that would occupy some kids who were visiting him. Moss offered, "I got tons of stuff. Everything you see here is going to be top of the line." He indicated that everything in the store was for sale. Moss offered Bos an eighteen-inch-tall, four-inch-diameter device that would shoot 130 feet in the air as appropriate for Bos's needs. Although Bos was not authorized to

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

² It is not necessary for us to resolve whether this permit was properly issued to Trego Fireworks or whether it allowed Moss to sell fireworks to groups possessing a purchase and use permit. We resolve this case on other grounds.

purchase these fireworks without a permit, Moss did not inquire whether Bos had a permit. Bos testified that Moss told him "to come back any time I want, bring friends and he'll hook me up, and handed me his business card" that offered a 15% discount on future purchases.

¶4 Later that same day, deputy Angelina Savina also purchased statutorily regulated fireworks without a permit from Moss. She also testified about the billboard sign advertising fireworks for sale. Like Bos, Savina stated that she did not see signs explaining that certain fireworks required a permit for lawful purchase and possession. She told the court that Moss did not ask her whether she was taking the fireworks out of state. As with Bos, Moss did not request to see any type of permit that would make her possession or use of the fireworks legal. He gave Savina a business card suggesting that she should "stop back and present the card to whoever is working [to] receive a 15 percent discount on any purchase ... made in the store."

¶5 On May 30, 2000, officers, pursuant to a search warrant, entered the Trego Fireworks store and seized the fireworks that required a permit for purchase or possession. Deputy Austin Parenteau acknowledged that he located three signs in the store indicating that purchasers must have a permit to lawfully possess fireworks. Although Parenteau agreed that Moss possessed a permit in 1999, no one presented officers with proof of a current permit allowing Moss to possess the statutorily regulated fireworks. The fireworks that did not require a permit for possession or use were not seized.

¶6 During the search, officers recovered documents indicating that a storage unit was rented in a nearby storage facility. An investigator went to the storage unit and, by looking through a hole in the door, was able to see fireworks.

Officers obtained a second search warrant for the storage unit and, when it was opened, discovered that it was full of fireworks. Parenteau testified that the materials from the storage unit were the same types of fireworks that the undercover officers purchased or were confiscated from the Trego store. All materials in the storage unit were seized.

¶7 Moss was issued three forfeiture citations. One alleged illegal possession of fireworks with the intent to sell. Two others alleged unlawful sale of fireworks. Moss pled not guilty to each citation and a bench trial was held.

¶8 Before trial, Moss moved for return of the evidence seized. He alleged that law enforcement lacked probable cause and that WIS. STAT. § 968.13 did not authorize search warrants in civil forfeiture cases. The trial court denied his motion, reasoning that the sheriff was authorized to seize the materials and that the motion for return was premature.

¶9 At trial, in addition to the officers, thirteen-year-old Bradley Ingalls testified that Moss sold him statutorily regulated fireworks on two occasions, without requesting a permit or proof of his age. He stated that Moss also gave him free merchandise and invited him to come back.

¶10 Moss testified that he sold nonexplosive, ground-based fireworks that did not require a permit, as well as fireworks that required a permit. He explained that his permit authorizes him to possess and sell fireworks to other licensed persons and to nonresidents who take the goods out of state. Moss claimed that most of his statutorily regulated fireworks were sold in quantities for large displays. He asserted that he typically asks to see a permit and keeps a copy if it is offered. Moss introduced copies of permits and testified that these were

presented to him before sale. Moss presented receipts for \$1,400 in sales to the Cable Area Chamber of Commerce. He testified that Famous Dave's restaurant purchased \$4,500 in fireworks with a permit that he submitted to the court. Moss also testified that Blakey's Displays purchased \$600 in fireworks with two permits that he submitted to the court. Although Moss testified that his sales were \$27,000 in 1999 and \$17,000 in 2000, he could account for permitted sales of only \$6,500. Moss may have sold some fireworks lawfully, but he could not account for over \$10,000 in 2000 sales. Further, only one of the permit holders or issuers was present at trial to testify to the documents' authenticity.

¶11 Moss stated that he did not recall the sales to the officers or the minor child. Moss conceded that the same types of goods sold in the store were in the storage unit, but stated that boxes of fireworks were put in the storage unit in anticipation of shipment to Texas to set up distribution there. None were to be sold in Wisconsin.

¶12 Finally, one of his customers who had a permit testified on Moss's behalf. He testified that he belongs to a club called Northern Lighters that possesses a permit and presents fireworks shows. However, the permit introduced into evidence did not name Northern Lighters as the permit holder. This customer stated that he only purchased fireworks from Moss for personal use.

¶13 The trial court found Moss guilty on all three citations. The court imposed a \$3,000 forfeiture and ordered the inventory seized. Moss does not challenge the sales to the officers without a permit. He appeals the judgment convicting him of possessing fireworks with the intent to unlawfully sell and the court's judgment forfeiting the confiscated inventory.

DISCUSSION

¶14 Moss raises three arguments on appeal. First, he contends that the evidence is insufficient to show that he possessed fireworks with the intent to unlawfully sell. Second, he claims that the trial court erroneously ordered the forfeiture of the seized inventory. Finally, he argues that the court erroneously issued a search warrant of Trego Fireworks and the storage unit. We disagree with each of his arguments.

I. SUFFICIENCY OF THE EVIDENCE

¶15 Moss contends that the evidence against him consists of two purchases by officers and two purchases by Bradley that totaled about \$100. He argues that his evidence of legitimate sales of regulated fireworks and the uncalculated sales of unregulated goods demonstrate that he had no intent to illegally sell the remaining inventory.

¶16 A violation of WIS. STAT. § 167.10 for which the penalty is a forfeiture must be proven by clear, satisfactory and convincing evidence. *City of Madison v. Geier*, 27 Wis. 2d 687, 693 n.1, 135 N.W.2d 761 (1965). We will not reverse a trial court's factual findings in a forfeiture action unless the findings are against the great weight and clear preponderance of the evidence. *Id.* at 690. The question of intent is an issue of fact. *Bruner v. Heritage Cos.*, 225 Wis. 2d 728, 739, 593 N.W.2d 814 (Ct. App. 1999).

[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Noll v. Dimiceli's, Inc., 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). We do not reverse the trial court's factual findings unless they are clearly erroneous. WIS. STAT. §§ 805.17(2) and 778.01 (applying the rules of civil procedure to forfeitures).

¶17 The evidence shows that Moss sold regulated fireworks to a thirteen-year-old who had no permit. Moss could not have confused the teenager with a permit holder because permits may not be issued to minors under WIS. STAT. § 167.10(3)(h). He also sold regulated fireworks to two undercover officers without asking to see permits. Further, Moss told Bos that an eighteen-inch-by-four-inch device that shot 130 feet in the air was appropriate for "kids" to keep them busy and "out of [Bos'] hair." Moss does not dispute that aerial fireworks are regulated. The statute prohibits children from using regulated fireworks. WIS. STAT. § 167.10(3)(a) and (h). By his actions, Moss demonstrated his intent to sell fireworks to anyone willing to buy, regardless of restrictions. This evidence is sufficient to sustain Moss's conviction.

¶18 Moss introduced evidence of lawful sales and permits presented to him. However, the only witness to provide authenticity to the lawful permits and sales admitted that he purchased the controlled fireworks for his personal use. His group, Northern Lighters, was not named on the permit that he testified was issued to them. However, the permit could not have been issued to an individual. WIS. STAT. § 167.10(3)(c). We conclude, as the trial court implicitly did, that he purchased the fireworks with the group's permit. Fireworks permits issued to groups do not authorize sales of fireworks to group members for their individual use. *City of Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 20-21, 539

N.W.2d 916 (Ct. App. 1995). Therefore, we conclude as the trial court did that the witness was not authorized to purchase the controlled fireworks.

¶19 The permitted sales do not neutralize or mitigate the evidence of illegal sales. We conclude that clear and convincing evidence demonstrates Moss's intent to sell fireworks illegally.

II. FORFEITURE OF ALL THE SEIZED INVENTORY

¶20 Next, Moss argues that the court erroneously ordered the seizure of his inventory. He notes that law enforcement seized fireworks at two separate locations, but that the evidence only demonstrated sales in his store.

¶21 A forfeiture order is a discretionary act that may be reversed if the trial court erroneously exercises its discretion. *State v. Spielvogel & Sons Excavating*, 193 Wis. 2d 464, 478, 535 N.W.2d 28 (Ct. App. 1995). A trial court properly exercises its discretion if it examines the relevant facts, applies a proper view of the law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. *State v. Schmitt*, 145 Wis. 2d 724, 729, 429 N.W.2d 518 (Ct. App. 1988). We review interpretations of statutes de novo. *Id.*

¶22 In this case, the court's authority to order the forfeiture and destruction of fireworks is derived from WIS. STAT. § 167.10(8)(b), which provides:

Fireworks stored, handled, sold, possessed or used by a person who violates this section, an ordinance adopted under sub. (5) or a court order under par. (a) may be seized and held as evidence of the violation. Except as provided in s. 968.20 (4), *only the fireworks that are the subject of a violation of this section, an ordinance adopted under sub. (5) or a court order under par. (a) may be destroyed after conviction for a violation.* Except as provided in s. 968.20

(4), fireworks that are seized as evidence of a violation for which no conviction results shall be returned to the owner in the same condition as they were when seized to the extent practicable. (Emphasis added.)

¶23 Because we have already determined that sufficient evidence supported Moss's conviction for possessing fireworks with the intent to unlawfully sell, we conclude that the statute authorizes the court to order Moss to forfeit the fireworks he possessed with the intent to unlawfully sell. The trial court was able to observe the witnesses and judge credibility. We defer to the trial court on credibility determinations. *See* WIS. STAT. §§ 805.17(2) and 778.01. The court found Moss to be less credible than the state's witnesses, discounting Moss's statements as self-serving, uncorroborated and inconsistent. The court noted that Moss had previously been admonished and warned that he would be closely watched.³ The record contains evidence that he was again not only selling to adults lacking permits, but also to children. We agree that the trial court appropriately addressed these aggravated circumstances with the maximum penalty.

¶24 Moss disputes that the stock in the storage unit was related to the violation, and therefore he claims that it was wrongfully forfeited. We disagree. Moss operated a large retail store, filled with fireworks (nine- and ten-foot shelves full of product). Billboard-sized signs advertised sales. Moss offered 15% discounts on repeat business. The goods seized at the storage unit were the same brands and models being marketed at the Trego store. Cumulatively, these facts support the trial court's inference that Moss stored the fireworks nearby to resupply the store. There is no credible evidence to rebut this inference. The trial

³ Moss was convicted the previous year for illegally selling fireworks.

court did not believe Moss's explanation that the stock in the storage unit was earmarked for a Texas store. He provided no proof other than his word that an out-of-state business existed.

¶25 We defer to the trial court's credibility determination. *See* WIS. STAT. §§ 805.17(2) and 778.01. We conclude that the trial court's findings in this case were not clearly erroneous. Regardless of the location of stock, Moss possessed fireworks with the intent to sell illegally. The fireworks were subject to forfeiture under WIS. STAT. § 167.10(8)(b). We conclude that the trial court properly exercised its discretion when it ordered the stock seized at both the Trego retail store and the storage unit to be forfeited.

III. SEARCH WARRANT

¶26 Moss claims that the trial court did not have the authority to issue a search warrant to seize his fireworks. Under WIS. STAT. § 167.10(8)(b), fireworks possessed by a person who violates the statute may be seized. Possession with the intent to sell fireworks to unauthorized parties violates the statute. *See* WIS. STAT. § 167.10(2). Moss does not point to illegally seized evidence that was admitted as evidence at trial. Finally, even if the court erroneously issued a search warrant, once Moss was convicted the statute permits the court to order that his fireworks be seized and destroyed. *See id.*

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

