No. 121636

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS ex rel. MATTHEW HARTRICH, State's Attorney of Crawford County, Illinois,	)	Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-15-0035
Plaintiff-Appellant,	)	There on Appeal from the Circuit Court of the Second Judicial Circuit,
v.	)	Crawford County, Illinois, No. 14-MR-20
2010 HARLEY-DAVIDSON,	)	
Defendant,	)	The Honorable Christopher L. Weber
(Petra Henderson, Claimant-Appellee).	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

During the early morning of April 26, 2014, claimant Petra Henderson allowed her intoxicated husband to drive her 2010 Harley Davidson motorcycle, knowing that he was impaired and that his driver's license had been revoked following a previous DUI conviction. Law enforcement in Crawford County seized the vehicle and initiated civil forfeiture proceedings. Following a trial, the circuit court found that claimant's motorcycle was subject to forfeiture. The Appellate Court reversed, holding that the forfeiture of the motorcycle, originally said to be valued at $35,000, was disproportionate to claimant's conduct and violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. The People now appeal.

No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the civil forfeiture of a luxury vehicle from an owner who knowingly consents to the vehicle's use by an intoxicated driver with a revoked license violates the Excessive Fines Clause of the Eighth Amendment.

2. In the alternative, should the case be remanded to the circuit court for a hearing on whether the forfeiture is constitutionally excessive.

JURISDICTION

Jurisdiction lies under Supreme Court Rule 315. On January 25, 2017, this Court allowed the People's petition for leave to appeal. *People ex rel. Hartrich v. 2010 Harley-Davidson*, No. 121636 (Ill. Jan. 25, 2017).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment, United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

§ 36-1. Seizure

> Any . . . vehicle . . . used with the knowledge and consent of the owner in the commission of, or in the attempt to commit as defined in Section 8-4 of this Code, an offense prohibited by . . .
>
> (f) (1) driving under the influence of alcohol or other drug or drugs, intoxicating compound or compounds or any combination thereof under Section 11-501 of the Illinois Vehicle Code during a period in which his or her driving privileges are revoked or suspended where the revocation or suspension was for driving under the influence of alcohol or other drug or drugs, intoxicating compound or compounds or any combination thereof . . . may be seized and delivered forthwith to the sheriff of the county of seizure.

720 ILCS 5/36-1 (2014).

STATEMENT OF FACTS[1]

After midnight on April 26, 2014, Officer Dan Strauch of the Robinson, Illinois Police arrested Mark Henderson, who was driving a 2010 Harley Davidson trike motorcycle while intoxicated and while his driver's license was revoked for a previous DUI. R55-59. Claimant Petra Henderson, Mark's wife and the owner of the motorcycle, rode in the passenger seat behind him. R58.

Strauch encountered the Hendersons while on patrol. R56. First, Strauch heard the sound of a motorcycle revving its engine, and then he observed the Hendersons' motorcycle making a wide turn, swerving, and nearly striking a telephone pole. *Id*. Strauch pursued the couple, switching on his lights and siren. R56-57. But Mark

[1] Citations to the Appendix to this brief appear as "A_." Citations to the common law record appear as "C_." Citations to the report of proceedings appear as "R_." Citations to the State's trial exhibit appear as "PX_."

continued driving for several blocks "weaving back and forth," then turned left "crossing into the oncoming traffic," and finally pulled into the driveway of the Hendersons' home. R57.

Mark was ordered to get off the motorcycle, which he did after "revv[ing] the engine a couple of times," and then Strauch placed Mark in custody. *Id*. Strauch noticed that Mark "had a strong odor of alcohol," "slurred speech," and "poor balance." R58. A subsequent breath test revealed that Mark had a blood alcohol concentration of .161, R59, twice the legal limit of .08, 625 ILCS 5/11-501(a)(1) (2014). Once Mark was handcuffed in the squad car, Strauch spoke with claimant, who told the officer that she knew Mark's license had been revoked and that he was intoxicated. R58-59.

The same day, police seized the motorcycle pursuant to Illinois law, 720 ILCS 5/36-1(f)(1) (2014).[2] C6. Section 36-1 permits law enforcement to seize a vehicle "used with the knowledge and consent of the owner in the commission of" certain serious criminal offenses, including an aggravated DUI — that is, a DUI committed while the driver's driving privileges have been revoked or suspended because of a previous DUI conviction. *Id*. As required by statute, 720 ILCS 5/36-1.5, the Crawford County State's Attorney promptly filed a request for preliminary review in the circuit court, C6-7, and, following a hearing, the court determined that probable cause existed to seize the motorcycle, C13.

In May 2014, the State filed a forfeiture complaint and, later, an amended complaint. C14-15, 28-30. Neither claimant's initial answer nor her answer to the

[2] Section 36-1 has been amended several times since claimant's vehicle was originally seized, and the relevant provision is codified today at 720 ILCS 5/36-1(a)(6)(A)(i). Despite these amendments, the substance of the provision at issue here has not changed. For reference, the People's Appendix includes the text of the statute as of the date of the seizure (April 2014), the date of trial (December 2014), and today. A21-22.

amended complaint challenged the constitutionality of the proposed forfeiture. C19-20, 31-32. Claimant filed a motion to dismiss, which also failed to raise any constitutional arguments. C25-27.

On December 3, 2014, the circuit court denied the motion to dismiss and held a bench trial. R53. The State presented the testimony of Officer Strauch, who described his encounters with the Hendersons, as discussed above. R54-61. The court took judicial notice of the facts that (1) Mark pleaded guilty to an aggravated DUI following his April 26, 2014 arrest, and (2) Mark's driver's license had been revoked in 2008 because of a previous DUI conviction. R62-63, 85; PX3.

For the claimant's case, Mark testified that on the afternoon before his arrest, he called claimant at work and "asked her if she wanted to go for a ride when she got off." R65. Mark pulled the motorcycle out of the garage, checked the tire pressure, and dusted off the bike.[3] R71. After claimant came home, around 6:00 P.M., they went out driving. R66. According to Mark, he held the key fob (which only needed to be within several feet of the vehicle in order for the engine to start), but claimant drove the motorcycle. R66-67, 71. The Hendersons made several stops that evening, and Mark testified that only claimant drove the motorcycle up until their final stop. R67-68.

The Hendersons ended their evening in the early morning of April 26 at the Corner Place, a bar in Robinson. R68. Mark testified that as they left the bar, he asked for the first time that evening to drive the motorcycle. *Id*. Claimant initially refused because she knew Mark was intoxicated and that he had no valid license. *Id*. Nonetheless, Mark "jumped on [the motorcycle] first and started it up." *Id*. Mark

[3] Mark testified that he is responsible for the "maintenance" and "care-taking" of the motorcycle. R72.

refused claimant's direction to move to the passenger seat and "told her [he] was taking it home; either get on or walk." R69. Because claimant did not want to walk home, she relented and got on the motorcycle. *Id*.[4]

Claimant also testified that she drove the motorcycle the entire evening until the Hendersons left the Corner Place. R77-78. Claimant had not been drinking that night, but she knew that Mark was intoxicated and that his license had been revoked. R78-79. According to claimant, she told Mark not to drive, but Mark jumped on the vehicle and refused to get off. R79-80. After a brief argument, claimant "knew there was no arguing anymore." R84. And although acknowledging that their home was only twelve blocks away,[5] claimant climbed into the passenger seat because she "just didn't want to walk home at that point." R80-81.

She testified that the original purchase price of the motorcycle was $35,000. R75. She had been making regular payments to Harley Davidson since purchasing it in May 2010, but claimant still owed money to the lender. R75-76, 83.

In closing, claimant argued that the motorcycle was not subject to forfeiture under § 36-1 because she did not consent to Mark driving, as required by the statute. R87-90. Once Mark insisted on driving the vehicle home, she claimed, there was nothing more she could do. *Id*. Claimant did not raise any constitutional argument. *Id*.

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[4] This version of events was never reconciled with Mark's earlier testimony that the passenger, not driver, generally must get on the motorcycle first. R66-67. "If the driver would get on first he would have to lean, she would have to lean way over for the passenger to get on." *Id*.

[5] According to Google Maps, the distance between the Corner Place and the Hendersons's Franklin Street residence is .7 miles. *People v. Stiff*, 391 Ill. App. 3d 494, 504 (5th Dist. 2009) (noting that reviewing court may take judicial notice of geographical distance using Google Maps).

The circuit court rendered a verdict for the State. It noted that the key issue in the case "is whether [claimant] gave consent to [Mark] to drive this motorcycle." R90. The court discredited the Hendersons' "self-serving testimony" that claimant protested Mark's driving home from the Corner Place. *Id*. The court concluded that claimant did indeed consent, despite knowing that Mark was intoxicated and that his license had been revoked following a previous DUI conviction. R90-91. If claimant had refused to ride as a passenger for the short distance to the Hendersons' home, "it would be a lot easier for [the court] to believe claimants' testimony." R90.

In her post-trial motion, claimant challenged the forfeiture for the first time as a violation of the Excessive Fines Clause of the Eighth Amendment. C39-40. The circuit court denied the post-trial motion. C3-4.

Claimant appealed, arguing that (1) the State failed to prove that she consented to Mark's use of the vehicle, and (2) the forfeiture violated the Excessive Fines Clause. A1 ¶ 1. The appellate court refused to second-guess the circuit court's finding that claimant knowingly consented to Mark driving the motorcycle. *Id.* ¶ 23. Nonetheless, the appellate court reversed, holding that the forfeiture was constitutionally excessive. *Id.* ¶ 41.

STANDARD OF REVIEW

This Court reviews *de novo* the legal question whether a forfeiture is grossly disproportionate. *People v. 1998 Lexus GS 300*, 402 Ill. App. 3d 462, 466 (1st Div. 2010); *cf. People v. One 1998 GMC*, 2011 IL 110236, ¶ 20 (constitutional question reviewed de novo). The trial court's factual findings are reviewed for clear error and will only be disregarded if against the manifest weight of the evidence. *People ex rel. Waller*

v. 1989 Ford F350 Truck, 162 Ill. 2d 78, 86 (1994); *People v. $5,970 U.S. Currency*, 279 Ill. App. 3d 583, 588 (2d Dist. 1996).

ARGUMENT

This Court should reverse the appellate court's judgment because the forfeiture was not grossly disproportionate to her conduct. To further public safety, the General Assembly reasonably provided for forfeiture of vehicles used to commit aggravated DUIs. The harshness of the forfeiture is balanced by the seriousness of claimant's conduct: she knowingly consented to the use of her property to commit a dangerous felony.

I. The Forfeiture of a Luxury Vehicle, Whose Owner Knowingly Consents to Its Use in the Commission of an Aggravated DUI, Is Not an Excessive Fine.

A. Legal Framework

The Eighth Amendment to the United States Constitution prohibits the imposition of "excessive fines."[6] In *Austin v. United States*, the United States Supreme Court held that a civil *in rem* forfeiture should be treated as a fine for purposes of the Eighth Amendment if the statute authorizing the forfeiture is designed, even in part, to serve as punishment. 509 U.S. 602, 609-10, 618 (1993). And a court can infer a punitive purpose where the statute focuses on the culpability of the property owner. *See id.* at 619 (federal forfeiture statutes containing "innocent-owner defenses" are punitive).

The Court declined in *Austin* to establish a test for determining when a forfeiture is constitutionally excessive, *id.* at 622, but, five years later in *United States v.*

[6] Although the United States Supreme Court has never decided whether the Excessive Fines Clause applies against the States, *see McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989), this case was tried on the assumption that it does, and this Court's cases have adopted the same assumption.

Bajakajian, the Court held that a forfeiture violates the Excessive Fines Clause only if it is "grossly disproportional" to the gravity of the owner's conduct, 524 U.S. 321, 336-37 (1998). In adopting this deferential standard, the Court recognized that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," and that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.* at 336. "Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense." *Id*.

Bajakajian involved a criminal *in personam* forfeiture of more than $350,000 in cash, assessed against the owner following his conviction for failing to report that he was transporting the money out of the country. *Id.* at 325. In deciding whether the forfeiture was grossly disproportionate, the Court focused on four circumstances specific to the facts of the case. First, the owner's crime "was solely a reporting offense" and not related to other criminal activity. *Id.* at 337-38. Second, the owner did "not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader." *Id.* at 338. Third, the maximum possible sentence under the federal sentencing guidelines was only six months' imprisonment and a $5,000 fine. *Id*. And fourth, the harm caused by Bajakajian's crime was minimal, affecting only the government's interest in obtaining information. *Id*. at 339.

Courts applying *Bajakajian*'s "grossly disproportional" standard have noted that the Supreme Court did not prescribe any "rigid test" for conducting the proportionality review. *United States v. Viloski*, 814 F.3d 104, 110 (2d Cir. 2016); *see also United States v. Wagoner Cnty. Real Estate*, 278 F.3d 1091, 1101 (10th Cir. 2002) ("a proportionality

analysis is 'factually intensive,' so that a catalog of factors is not 'necessarily exclusive'"); *Collins v. S.E.C.*, 736 F.3d 521, 527 (D.C. Cir. 2013) (factors discussed in *Bajakajian* "hardly establish a discrete analytic process"). Rather, courts should consider any facts and circumstances relevant to the particular case, an approach that is consistent with this Court's pre-*Bajakajian* observation in *People ex rel. Waller v. 1989 Ford F350 Truck* that the "case-by-case nature" of forfeiture actions "precludes simple cookbook application of any method of review." 162 Ill. 2d 78, 90 (1994).

Of particular importance in civil *in rem* proceedings is the relationship between the forfeited property and criminal activity. *Von Hofe v. United States*, 492 F.3d 175, 184-85 (2d Cir. 2007); *accord Wagoner*, 278 F.3d at 1101; *Howell v. Georgia*, 656 S.E.2d 511, 513 (Ga. 2008). The Second Circuit has adopted a framework for assessing excessiveness claims in *in rem* proceedings that weighs the factors discussed in *Bajakajian* as well as the nexus between the property and the crime. In *von Hofe*, the court looked to

> (1) the harshness, or gross disproportionality, of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other criminal activity, (b) whether the claimant falls within the class of persons for whom the statute was designed, (c) the punishments available, and (d) the harm caused by the claimant's conduct; (2) the nexus between the property and the criminal offenses, including the deliberate nature of the use and the temporal and spatial extent of the use; and (3) the culpability of each claimant.

492 F.3d at 186. This framework is similar to one adopted by this Court in *Waller*. 162 Ill. 2d at 89-90 (instructing Illinois courts to weigh "(i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use"). Courts applying

Bajakajian's deferential standard find a forfeiture excessive only in rare instances. 3 Fed. Prac. & Proc. Crim. § 571 (4th ed. 2017).

B. The Forfeiture of Claimant's Vehicle Is Not So Grossly Disproportionate that It Violates the Excessive Fines Clause.

The forfeiture of claimant's motorcycle comports with the Constitution because it is not grossly disproportionate. According due deference to the General Assembly's judgment, the forfeiture of a vehicle — even an expensive vehicle — is an appropriate penalty when the vehicle is used to commit an aggravated DUI. All of the considerations discussed in *Bajakajian*, *von Hofe*, *Waller*, and other cases applying the Excessive Fines Clause point in the same direction: the forfeiture here passes constitutional muster.

1. Claimant's motorcycle is subject to forfeiture as the instrumentality of the offense of aggravated DUI.

First, the connection between claimant's property and the crime is necessarily a close one — without the motorcycle, no crime would have been committed. Even claimant concedes that the motorcycle was "integral" to Mark's aggravated DUI, A15 ¶ 38, because "driv[ing] or be[ing] in actual physical control of any vehicle," 625 ILCS 5/11-501(a) & (d)(1)(G) (2014), is an element of the offense. And Mark used claimant's motorcycle to commit the offense for which he was convicted.

Moreover, the General Assembly's authority to order forfeiture is at its maximum where, as here, it has provided for the seizure of an instrumentality of a crime, i.e. "property actually used to commit an offense."[7] *Bajakajian*, 524 U.S. at 333 n.8.

[7] In contrast to § 36-1 which authorizes the forfeiture of vehicles "used . . . in the commission of" certain offenses, the statute at issue in *Bajakajian* authorized the forfeiture of property that was merely "involved in [an] offense, or any property traceable to such property." 524 U.S. at 325 (quoting 18 U.S.C. § 982(a)(1)). The cash that Bajakajian failed to report to customs was not an instrumentality because it did "not

"Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings." *Id.* at 333. And such proceedings "traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause." *Id.* at 331. In fact, nearly a century ago in *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926), the Supreme Court upheld the constitutionality of the forfeiture of a vehicle used to transport illegal goods absent any proof that the owner even had knowledge of the illicit use of his property. *See also Bennis v. Michigan*, 516 U.S. 442, 446 (1996) ("[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.").

Although some forfeitures — like the one in *Bajakajian* — serve only a punitive function, 524 U.S. at 332, instrumentality forfeitures serve remedial and deterrent purposes as well. Such forfeitures "prevent[ ] illegal uses 'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.'" *Bennis*, 516 U.S. at 452 (quoting *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974)). Illinois courts have recognized that the vehicle forfeiture statute furthers the General Assembly's remedial goals of deterring repeat drunk drivers and impairing their ability to access the roadways. *People v. 1998 Lexus GS 300*, 402 Ill. App. 3d 462, 466-67 (1st Dist. 2010); *People v. One 2000 GMC*, 357 Ill. App. 3d 873, 878 (2d Dist. 2005).

This remedial purpose provides additional reason to defer to the General Assembly's legislative judgment that a vehicle used to commit an aggravated DUI should

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facilitate the commission of that crime as, for example, an automobile facilitates the transportation of goods concealed to avoid taxes." *Id.* at 334 n.9.

be subject to forfeiture regardless of its value. The appellate court below was concerned that the forfeiture of claimant's motorcycle was "particularly harsh" compared to other cases because, according to claimant, it had been purchased (four years earlier) for $35,000. A14 ¶ 35. But if the Excessive Fines Clause prevents the State from seizing expensive vehicles used to commit repeat DUIs, then some owners and drivers will not be deterred. And because expensive cars tend to belong to wealthier owners, the appellate court's reasoning would have the perverse effect of permitting only the confiscation of property belonging to vehicle owners of more modest means. Fairness dictates that an instrumentality of a crime should generally be subject to seizure regardless of value.[8] *See Austin*, 509 U.S. at 627 (Scalia, J., concurring) ("Scales used to measure out unlawful drug sales . . . are confiscable whether made of the purest gold or the basest metal.").

2. The forfeiture is proportionate to claimant's dangerous conduct.

Second, the threat to public safety posed by repeat drunk driving provides ample justification for seizing vehicles used to commit such crimes. Section 36-1 balances the need to punish and deter those who facilitate aggravated DUIs against the harshness of a potential forfeiture. Illinois courts have long recognized that any DUI is a serious crime.

[8] The principle that an instrumentality should be subject to forfeiture regardless of value is subject to several important limitations, none of which applies in this case. First, property that is only incidentally related to a crime should not be considered a true instrumentality. *See Austin*, 509 U.S. at 627-28 (noting that the confiscation of "the building, for example, in which an isolated drug sale happens to occur" would be an excessive fine). Second, courts take additional care in assessing the excessiveness of forfeitures involving real property, rather than personal property. *One 2000 GMC*, 357 Ill. App. 3d at 876. Finally, a court may consider whether the forfeiture would "deprive the defendant of his livelihood, *i.e.*, his 'future ability to earn a living.'" *Viloski*, 814 F.3d at 111 (quoting *United States v. Levesque*, 546 F.3d 78, 85 (1st Cir. 2008)). Claimant here has never argued that the forfeiture would impose such a hardship.

"There can be no question that the presence of intoxicated motorists on Illinois roads is a serious threat to public safety." *One 2000 GMC*, 357 Ill. App. 3d at 877. Indeed, "it is difficult to imagine that forfeiture of an automobile for such a crime could ever be excessive." *Cnty. of Nassau v. Canavan*, 802 N.E.2d 616, 622 (N.Y. 2003); *see also* Brian L. Porto, Annotation, *Validity, Construction, and Application of Statute Permitting Forfeiture of Motor Vehicle for Operation of Vehicle While Intoxicated*, 89 A.L.R.5th 539 § 4 (collecting cases upholding vehicle forfeitures against Excessive Fines Clause challenge).

The crime takes on additional gravity where, as here, the driver should never have been behind the wheel because his license has been revoked following a previous DUI conviction. Reflecting the seriousness of the offense, the General Assembly has mandated harsh criminal penalties. A first conviction for aggravated DUI is a class 4 felony. 625 ILCS 5/11-501(d)(2)(A). A person convicted of such a felony will be sentenced to at least one year, and up to three years, in prison and may be required to pay a fine of up to $25,000. 730 ILCS 5/5-4.5-45(a) (2014); 730 ILCS 5/5-4.5-50(b) (2014).

Although claimant is fortunate that no one was killed or injured in this incident, drunk driving is a reckless act that poses a serious risk to the public. *United States v. Rutherford*, 54 F.3d 370, 376 (7th Cir. 1995), *abrogated on other grounds by Begay v. United States*, 553 U.S. 137 (2008). The National Highway Traffic Safety Administration (NHTSA) reported nearly 10,000 fatalities in 2014 involving alcohol-impaired drivers. NHTSA, *Traffic Safety Facts 2014 Data* (2015) (available at http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf) (last checked Apr. 18, 2017). And Illinois courts have recognized "the continuing carnage that drunk drivers cause on the

highways of this State." *People v. Winningham*, 391 Ill. App. 3d 476, 485 (4th Dist. 2009) (collecting cases).

To protect Illinois drivers, § 36-1 deters not only repeat drunk drivers but also those who enable such drivers by expressly providing for the seizure of vehicles belonging to anyone who entrusts his or her vehicle with "knowledge and consent." 720 ILCS 5/36-1(f)(1). Claimant falls squarely within the class of persons for whom § 36-1 was designed. The circuit court found that she knew Mark was intoxicated and that his license had been revoked and nonetheless permitted him to drive the motorcycle. R90-91. The circuit court's factual findings and credibility determinations are entitled to "great deference." *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). And as the appellate court recognized, A10 ¶ 25, the evidence supported the circuit court's conclusion that claimant knowingly consented to the use of her motorcycle. Both claimant and Mark testified that, when he got behind the wheel, she knew he was intoxicated and that his license had been revoked. R68, 79. Claimant's testimony that she did not consent to Mark driving was incredible in light of the fact that she voluntarily rode as a passenger on the motorcycle as he swerved dangerously along the short route to their home.

3. Claimant is culpable because she knowingly facilitated a dangerous felony.

Third, claimant's conduct is sufficiently culpable to warrant the forfeiture of the motorcycle. In holding the forfeiture here to be constitutionally excessive, the appellate court placed significant weight on its conclusion "that in nearly all cases [under § 36-1], the acquiescing [vehicle] owner will be less culpable than the actual offender [driver]." A13 ¶ 31. As an initial matter, the appellate court is incorrect as a matter of law. In

Illinois, "[a] person is legally accountable for the conduct of another when . . . either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (2014). A person who provides the instrumentality of a crime to another, knowing how the instrumentality will be used, is accountable as an aider and abettor. *See People v. Valladares,* 2013 IL App (1st) 112010, ¶ 120 (defendant who provided gun to shooter accountable for first degree murder); *People v. Rutherford*, 274 Ill. App. 3d 116, 127-28 (1st Dist. 1995) (defendant who knowingly "supplied the burial shovel" accountable for murder and concealment of homicidal death). Claimant knowingly provided the instrumentality for Mark's crime, so she is fully accountable for it under Illinois law.

But this Court need not conclude that claimant and her husband are equally culpable in order to reverse the judgment below. The appellate court may not substitute its views on relative culpability for those of the General Assembly. "[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336. As discussed above, the plain language of § 36-1 provides for forfeiture of any vehicle used to commit an aggravated DUI, as long as the owner knowingly consented to such use. 720 ILCS 5/36-1(f)(1). The General Assembly reasonably chose to treat all vehicle owners the same, regardless of whether the owner also drove the vehicle. Moreover, § 36-1 is narrowly drafted. The law does not permit forfeiture for every instance of drunk driving. Rather, the vehicle must be used by a repeat drunk driver, operating the car on a suspended or revoked license. *Id*. *See also One 2000 GMC*, 357 Ill. App. 3d at 877-78 ("'[W]hen implemented pursuant to a

carefully drafted statute, civil forfeiture of automobiles can be an extremely effective tool in the battle against drunk driving.'") (quoting *Canavan,* 1 N.Y.3d at 138). The General Assembly could have reasonably determined that additional deterrence was necessary to keep repeat DUI offenders from taking to the roads.

The cases cited by the appellate court, A13 ¶ 32, do not support the proposition that the claimant here bears significantly less culpability. In *von Hofe*, the court found constitutionally excessive the forfeiture of von Hofe's primary residence resulting from a marijuana business conducted on the property by her husband and son. 492 F.3d at 191. But in reaching that conclusion, the court relied on the facts that (1) the wife did not know the full extent of the drug business; and (2) the husband jointly owned the home, so he did not need his wife's permission to use the property. *Id.* at 188-89. Similarly in *United States v. Ferro*, 681 F.3d 1105, 1116-17 (9th Cir. 2012), the court affirmed in part the forfeiture of a $2.55 million firearm collection illegally possessed by Ferro and her husband, who had a felony record. The court in *Ferro* ordered the case remanded so the trial court could consider the extent of the wife's knowledge about the extent and location of the collection before concluding that the forfeiture was not excessive as to her. *Id*. Unlike *von Hofe* and *Ferro*, there is no question here that claimant had full knowledge of Mark's illegal conduct. And because Mark had no ownership interest in the motorcycle, claimant did more than simply "turn[ ] a blind eye" to her husband's conduct. *von Hofe*, 492 F.3d at 189. Her consent was necessary for Mark to use the motorcycle.

For all of these reasons, the forfeiture here was not grossly disproportionate to claimant's conduct. The Court should reverse the appellate court's judgment.

II. In the Alternative, the Court Can Remand for a Hearing on the Value of Claimant's Property.

Although this Court need not reach the issue, the appellate court also erred by finding the forfeiture to be constitutionally excessive in the absence of a proper record. To the extent the appellate court had concerns about the constitutionality of the forfeiture, it should have remanded to the circuit court for a hearing on that issue. Claimant bears the burden in the circuit court of establishing that the forfeiture is excessive. *Bajakajian,* 524 U.S. at 348 (Kennedy, J., dissenting); *United States v. Ahmad*, 213 F.3d 805, 816 (4th Cir. 2000). But the constitutional challenge was not raised until a post-trial motion. C39-40. And the circuit court denied the motion without holding an evidentiary hearing. C3-4. The appellate court then simply assumed that the value of the motorcycle was $35,000, A1, based only on claimant's testimony at trial that she purchased it for that amount in 2010, R75, 83. But there was no testimony about the value of the motorcycle at the time it was seized in April 2014. And the State had no notice before trial that the issue of excessiveness might arise because the constitutional challenge was not raised in claimant's answers. C19-20, 31-32. Thus, the circuit court never heard evidence on this point, or on any of the factors relevant to an excessiveness analysis. As explained above in Part I, this Court should reverse, even assuming that the value of the motorcycle is $35,000. But to the extent the Court disagrees, the case should be remanded to the circuit court for further proceedings.

CONCLUSION

For these reasons, this Court should reverse the judgment of the Appellate Court and affirm the trial court's judgment.

April 19, 2017

Respectfully submitted,

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People of the State of Illinois

RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is eighteen pages.

/s/ Jason F. Krigel
JASON F. KRIGEL
Assistant Attorney General

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

Under penalty of law as provided in 735 ILCS 5/1-109 (2014), the undersigned certifies that the statements set forth in this instrument are true and correct, including that the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and that it was served by placing a copy in envelopes with proper prepaid postage affixed and directed to each person named below at the address indicated, and by depositing each envelope in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, on April 19, 2017.

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail the original and twelve copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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2016 IL App (5th) 150035

NO. 5-15-0035

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE *ex rel.* MATTHEW HARTRICH, State's Attorney of Crawford County, Illinois,	)	Appeal from the Circuit Court of Crawford County.
Plaintiff-Appellee,	)	
v.	)	No. 14-MR-20
2010 HARLEY-DAVIDSON,	)	
Defendant	)	Honorable Christopher L. Weber,
(Petra Henderson, Claimant-Appellant).	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court, with opinion.
Justices Stewart and Cates concurred in the judgment and opinion.

OPINION

¶ 1 This appeal involves the application of the excessive fines clause of the eighth amendment in the context of our State's civil forfeiture provisions. The claimant, Petra Henderson, is the owner of a motorcycle valued at $35,000. Her husband, Mark Henderson, was arrested while driving the motorcycle and charged with aggravated driving while intoxicated and driving while his license was revoked. At the time of Mark's arrest, Petra was a passenger on the motorcycle. She appeals an order of the trial court finding the motorcycle subject to forfeiture. At issue is (1) whether the court

correctly determined that Petra consented to Mark's use of the motorcycle and (2) whether the forfeiture violated the excessive fines clause. We conclude that the evidence supports the court's finding that Mark used the motorcycle with Petra's consent. However, we find that the forfeiture violated the excessive fines clause, and we reverse on that basis.

¶ 2 Petra Henderson is the sole owner of a 2010 Harley-Davidson trike motorcycle. Her husband, Mark, does not have an ownership interest in the motorcycle. On the evening of April 25, 2014, Mark suggested to Petra that they go for a ride on the motorcycle. At the time, Mark's driver's license had been revoked due to a previous conviction for driving under the influence (DUI). Petra drove the motorcycle from the couple's home in Robinson, Illinois, to a tavern in Oblong, Illinois. She then drove to taverns in Lawrenceville and Palestine. Eventually, Petra drove to the Corner Place, which is located approximately 12 blocks from the Hendersons' home in Robinson. Petra did not drink any alcohol throughout the evening. Mark, however, had a lot to drink and was intoxicated by the time he and Petra left the Corner Place shortly after midnight.

¶ 3 Mark insisted on driving home from the Corner Place. According to both Mark and Petra, he jumped onto the motorcycle and told Petra that she could either ride home with him or walk home. She rode home with him. During the short drive home, Robinson police officer Dan Strauch activated his lights and siren to pull them over. Instead of stopping, Mark drove home and parked in the Hendersons' driveway. A breath test indicated that Mark's blood alcohol concentration (BAC) was 0.161. Officer Strauch placed Mark under arrest.

¶ 4 Mark was charged with aggravated DUI (625 ILCS 5/11-501(d) (West 2014)) and driving while his license was suspended or revoked (625 ILCS 5/6-303 (West 2014)). He subsequently pled guilty to the charge of aggravated DUI, and the State dismissed the charge of driving while license revoked.

¶ 5 The State subsequently filed a request for preliminary review to determine probable cause for forfeiture, a verified complaint for forfeiture, and an amended verified complaint for forfeiture. The State alleged that the motorcycle was used with the knowledge and consent of the owner in the offense of driving while license suspended or revoked and that it was subject to forfeiture because the revocation was due to a prior DUI conviction (625 ILCS 5/6-303(g) (West 2014)). In addition, the State alleged that the motorcycle was used with the knowledge and consent of the owner in the offense of aggravated DUI during a time in which the driver's license was revoked due to a prior DUI conviction (720 ILCS 5/36-1(a)(6)(A)(i) (West 2014)).

¶ 6 The matter came for a hearing on December 3, 2014. Officer Dan Strauch testified that he was on patrol in Robinson during the early morning hours of April 26, 2014. At approximately 12:30 a.m., he heard a motorcycle revving its engine in the parking lot of the Corner Place Tavern. He described the sound of the motorcycle as a "racing sound." He turned around and saw a black 2010 Harley-Davidson trike making a "very wide" right turn onto Cherry Street. Officer Strauch testified that the motorcycle then swerved, nearly hitting a telephone pole. At this point, he followed the motorcycle and activated his lights to initiate a stop. However, the motorcycle did not stop, so Officer Strauch also activated his siren. He testified that the motorcycle continued

driving, weaving back and forth, for approximately 12 blocks. It then turned left, drove one more block, and pulled into a driveway.

¶ 7 Officer Strauch testified that Mark Henderson was driving the motorcycle and his wife, Petra, was a passenger. The officer further testified that Mark "had a strong odor of alcohol," poor balance, and slurred speech. Officer Strauch arrested Mark for DUI and then spoke with Petra. Petra indicated that she was aware both that Mark was intoxicated and that his license had been revoked. She also told Officer Strauch that she told Mark to stop but he did not do so. Officer Strauch acknowledged that Petra did not specifically tell him that she gave Mark permission to drive the motorcycle.

¶ 8 After Officer Strauch testified, the State rested, and Petra moved for a directed verdict. She pointed to the officer's testimony that Petra told him "that she asked [Mark] to stop, [and] that he didn't do so." She argued that this testimony demonstrated that she did not consent to Mark's use of the motorcycle. The State argued in response that the testimony should be construed to mean that Petra told Mark to stop "in response to the police officer attempting to stop the vehicle." The court denied the motion.

¶ 9 Mark testified next. He first described the events leading up to his arrest. He testified that he called Petra at work to ask if she wanted to go for a ride on the motorcycle. Petra came home from work later than Mark, so Mark took the motorcycle out of the garage before she arrived home. He then put the key fob used to start the motorcycle in his pocket. He explained that the motorcycle did not require the use of a key to start; rather, it could be started if the key fob was within 8 to 10 feet of the motorcycle. Mark testified that he kept the fob in his pocket the entire evening. When

asked why, he explained, "You just don't think about it. You put it in your pocket and go."

¶ 10 Mark was asked to describe the configuration of the seats on the motorcycle. He responded, "It's a two-seater, front and back, and with a trike, the passenger gets on first for comfortability [*sic*] of the driver getting on. If the driver would get on first, he would have to lean, she would have to lean way over for the passenger to get on."

¶ 11 Mark further testified that he and Petra left their home in Robinson at around 6 in the evening. They first drove to Oblong, Illinois. They next drove to Lawrenceville, then Palestine, and finally, to the Corner Place in Robinson. Mark testified that Petra drove to all those places. However, when they left the Corner Place, he asked Petra to let him drive the motorcycle. He testified that she refused, telling him that he did not have a valid license and that he was "too drunk." However, Mark testified, he jumped onto the motorcycle and started the engine. He testified that Petra again told him he could not drive, but he continued to rev the engine, and he told Petra that he was going to drive the motorcycle home and she could either get on the back seat or walk home. At this point, Petra got on the back seat.

¶ 12 On cross-examination, Mark was asked what, if anything, Petra did to try to stop him from driving the motorcycle. He testified that there was nothing she could do to stop him because he was stronger than her and had the key fob in his pocket.

¶ 13 Petra's testimony concerning the sequence of events was the same as Mark's. In addition, she testified that she did not have anything to drink that night. She emphasized

that she never consented to Mark driving the motorcycle. She explained that the only reason she rode home with Mark was she "just didn't want to walk home at that point."

¶ 14 Petra further testified that she was the sole owner of the motorcycle. She testified that she purchased it for $35,000 and she was still making payments on it. She stated that she had to continue to make payments after the motorcycle was seized. Petra testified that although she owned the motorcycle, Mark performed maintenance on it as a hobby. She acknowledged that when he worked on the motorcycle, Mark backed it out of the garage onto the driveway. She explained that she believed this was permissible for him to do because it did not involve driving on any public roadways. Finally, asked to explain why she did not ask Mark to give her the key fob, Petra stated that she did not think to do so. She explained that as long as they were together, she could start the motorcycle if the fob remained in Mark's pocket.

¶ 15 The court announced its ruling from the bench. The court stated as follows:

> "The entire issue is whether Ms. Henderson gave consent to Mr. Henderson to drive this motorcycle, and it appears to me in this situation that actions speak louder than words. Had Ms. Henderson not got on and Mr. Henderson took off, it would be a lot easier for me to believe [their] testimony. However, as the State pointed out, it is self-serving testimony. She got on the motorcycle and they took off and the evidence is that they live about 12 blocks away so I don't think it would have been–it's not as if they were out on the interstate 50 miles from home where it would be impossible for her to find another way home, and so, therefore,

I doubt the testimony that has been presented by the claimants, and therefore I am going to find in favor of the State."

¶ 16 The court entered a written order for forfeiture later the same day. Petra subsequently filed a motion to reconsider, arguing both that the State failed to demonstrate that she consented to Mark's use of the motorcycle and that the forfeiture was excessive under the eighth amendment. The court denied the motion to reconsider. This appeal followed.

¶ 17 Petra first challenges the court's finding that she consented to Mark driving the motorcycle. In support of this claim, she argues that (1) the court erred in denying her motion for a directed verdict and (2) the court erred in finding that the act of getting on the back of the motorcycle constituted consent to Mark's driving. We reject both contentions.

¶ 18 Forfeiture is an *in rem* proceeding against an item used in the commission of certain enumerated offenses. The policy underlying our statutes allowing the forfeiture of vehicles is to prevent "certain types of crimes when such vehicles are used in their commission." *People v. 1998 Lexus GS 300*, 402 Ill. App. 3d 462, 465 (2010). A vehicle is subject to forfeiture if it is used with the knowledge and consent of the owner in the commission or attempted commission of certain offenses. 720 ILCS 5/36-1(a) (West 2014). Pertinent for our purposes, a vehicle is subject to forfeiture if it is used to commit the offense of DUI during a period of time in which the driver's license has been revoked or suspended due to a prior DUI. 720 ILCS 5/36-1(a)(6)(A)(i) (West 2014).

¶ 19 In this case, there was no dispute that the motorcycle was used in the commission of an offense that made it subject to forfeiture. There was also no dispute that Petra had knowledge of this use. The only factual question before the trial court was whether she consented to this use.

¶ 20 As with other factual determinations, it is the function of the trial court to assess the credibility of witnesses. *People v. $5,970 United States Currency*, 279 Ill. App. 3d 583, 588 (1996). In addition, the court may "draw reasonable inferences and reach conclusions to which the evidence lends itself." *People v. One 1990 Chevrolet Suburban*, 239 Ill. App. 3d 815, 817 (1992). We will reverse the trial court's factual findings only if they are against the manifest weight of the evidence. *1998 Lexus*, 402 Ill. App. 3d at 465.

¶ 21 As previously stated, Petra's first argument is that the court erred in denying her motion for a directed verdict. We disagree. We first note that by presenting evidence after the court denied her motion, Petra forfeited her right to seek a directed verdict. *Heastie v. Roberts*, 226 Ill. 2d 515, 544 (2007). Moreover, we believe the court's ruling was correct. A directed verdict is appropriate only if all of the evidence, viewed in the light most favorable to the nonmoving party, "so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Id*. (citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). That standard was not met in this case.

¶ 22 Petra contends that she was entitled to a directed verdict at the end of the State's case-in-chief because up to that point, the State did not meet "its burden of proof that the motorcycle was used with the knowledge and consent of the owner, Petra Henderson."

Contrary to this argument, however, the State is only required to demonstrate that the motorcycle was used in the commission of an offense that makes it subject to forfeiture. 720 ILCS 5/36-2(d) (West 2014); *People v. 1991 Chevrolet Camaro*, 251 Ill. App. 3d 382, 386 (1993). Once the State establishes this fact, it is up to the owner of the vehicle to demonstrate that it was used without her knowledge or consent. 720 ILCS 5/36-2(e) (West 2014). Here, as noted, there was no dispute that the motorcycle was used in the commission of a DUI. Thus, the State met its initial burden.

¶ 23 More importantly, the evidence presented did not so overwhelmingly favor Petra that a contrary verdict could not stand. The fact that Petra rode as a passenger gave rise to a reasonable inference that she did consent to Mark's driving, and there was nothing in Officer Strauch's testimony that indicated Petra told him whether she gave Mark permission to drive the motorcycle. We find that the court correctly determined that Petra was not entitled to a directed verdict.

¶ 24 Petra's next argument is that the court erred in finding that her act of riding on the motorcycle as a passenger constituted consent. This argument mischaracterizes the court's finding. The court did not find that the act of riding on the motorcycle constituted consent as a matter of law. Rather, the court found that Petra's testimony was not credible, primarily due to the fact that she chose to ride on the motorcycle under the circumstances presented. As stated previously, credibility determinations are a matter within the province of the trial court (*$5,970 United States Currency*, 279 Ill. App. 3d at 588), and we will only reverse the court's factual findings if they are against the manifest weight of the evidence (*1998 Lexus*, 402 Ill. App. 3d at 465). Petra argued to the trial

court that she felt she had no choice but to ride home with Mark because no woman would want to walk 12 blocks home in Robinson after midnight. While this may be a reasonable explanation, the court was not required to believe it. We will not substitute our judgment for that of the trial court unless the evidence does not support the court's determination. *1990 Chevrolet Suburban*, 239 Ill. App. 3d at 817.

¶ 25 It is also worth noting that the court's credibility determination is supported by additional evidence. Mark testified that due to the configuration of the motorcycle, the passenger had to get on first. This contradicts Mark and Petra's claims that Mark jumped on the motorcycle before Petra. In addition, Mark had control of the key fob at the time of his arrest. Although the Hendersons offered an innocent explanation for this, testifying that Mark pulled the motorcycle out of the garage and that Petra could start the motorcycle as long as the fob was within close proximity of the motorcycle, the court could have reasonably inferred that Mark was holding the fob because Petra permitted him to drive the motorcycle. We conclude that the court's finding that Petra consented to Mark's use of the motorcycle was supported by the evidence.

¶ 26 We turn our attention to Petra's eighth amendment arguments. She argues that the forfeiture of the $35,000 motorcycle was constitutionally excessive under all the circumstances of this case. We agree.

¶ 27 The eighth amendment to the United States Constitution prohibits the government from imposing excessive fines as a form of punishment. *Austin v. United States*, 509 U.S. 602, 609-10 (1993). This prohibition is applicable in criminal proceedings and also in civil proceedings that " 'advance punitive as well as remedial goals.' " *Id*. at 610

(quoting *United States v. Halper*, 490 U.S. 435, 447 (1989)). It is applicable in civil forfeiture proceedings because such proceedings "serve, at least in part, to punish the owner of the property subject to forfeiture." *People v. One 2000 GMC*, 357 Ill. App. 3d 873, 875 (2005) (citing *Austin*, 509 U.S. at 618).

¶ 28 A forfeiture violates the excessive fines clause if it is grossly disproportionate to the gravity of the offense. *Id.* (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). The Illinois Supreme Court has adopted a three-prong test to guide courts in determining whether a forfeiture is constitutionally excessive. Under this test, we consider:

> " '(i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use.' " *People ex rel. Waller v. 1989 Ford F350 Truck*, 162 Ill. 2d 78, 89-90 (1994) (quoting *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725, 732 (C.D. Cal. 1994)).

These factors are not exclusive, and the inquiry must be conducted on a case-by-case basis. *Id*. at 90; *2000 GMC*, 357 Ill. App. 3d at 876. We review *de novo* the trial court's application of this constitutional test to the facts before it. *2000 GMC*, 357 Ill. App. 3d at 875.

¶ 29 We first note that, as Petra points out, the trial court did not explicitly discuss any of these three factors in its docket entry denying her motion to reconsider. The court did, however, cite the Appellate Court, Second District, decision in *2000 GMC* in support of

its conclusion that the forfeiture of Petra's $35,000 motorcycle was not constitutionally excessive. There, the appellate court upheld the forfeiture of a $28,000 vehicle used by its owner to commit the offenses of DUI and driving while license suspended. *2000 GMC*, 357 Ill. App. 3d at 874. As we will discuss in more detail next, there is a significant distinction between that case and the case before us–here, the offense was committed by someone other than the owner of the motorcycle. Although this fact alone is not always dispositive, for the reasons that follow, we find that a different result is warranted here. We turn our attention to the three factors.

¶ 30 The first factor requires us to weigh the gravity of the offense against the harshness of the penalty. In assessing the gravity of the offense, we must consider the fact that Mark was driving erratically and posed a potential threat to the safety of anyone who encountered him on the road that night. These public safety concerns elevate the seriousness of the offense of DUI "and arguably set it apart from other nonviolent offenses." *Id.* at 877. In light of these same concerns, Illinois courts have long recognized that driving with a revoked license is "one of the most serious driving offenses one can commit absent bodily injury when the underlying revocation stems from a DUI conviction." *1998 Lexus*, 402 Ill. App. 3d at 465 (citing *Reynolds v. Edgar*, 188 Ill. App. 3d 71, 75 (1989)).

¶ 31 We must also consider, however, the fact that Petra was not the person who committed the offense. This does not relieve Petra of responsibility under our forfeiture statutes; as discussed previously, civil forfeiture statutes are applicable to vehicle owners who knowingly consent to the use of their vehicles in the commission of crimes by

others. See *Austin*, 509 U.S. at 615; 720 ILCS 5/36-1(a) (West 2014). Nevertheless, we believe that in considering whether the forfeiture was excessive, the difference in culpability between an offender and an acquiescing vehicle owner must be taken into account. We also believe that in nearly all cases, the acquiescing owner will be less culpable than the actual offender.

¶ 32 We find support for our holding in both federal and Illinois cases. The United States Supreme Court explained in *Austin* that civil forfeiture as punishment for the misconduct of others is premised "on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence." *Austin*, 509 U.S. at 615. Federal courts have held "that it is the individual culpability of a claimant–i.e., the person who is actually punished by the [forfeiture]–which must be considered in the excessiveness analysis." *United States v. Ferro*, 681 F.3d 1105, 1116 (9th Cir. 2012); see also *von Hofe v. United States*, 492 F.3d 175, 188-89 (2d Cir. 2007) (distinguishing between the interest in property subject to forfeiture of a husband who committed a drug offense and his wife, who "knowingly countenanced and allowed" the offense but did not participate). Similarly, Illinois courts have held that a relevant consideration in assessing the gravity of the offense is whether the claimant–in this case, Petra–"was convicted, acquitted, or never charged with a criminal offense." *2000 GMC*, 357 Ill. App. 3d at 876; *People ex rel. Waller v. 1996 Saturn*, 298 Ill. App. 3d 464, 471-72 (1998).

¶ 33 Here, Petra was not charged with DUI or driving while license revoked or any other criminal offense that would make the motorcycle subject to forfeiture. For the

reasons discussed above, we find that her conduct was significantly less culpable than that of Mark. With this in mind, we will now consider the harshness of the penalty.

¶ 34 Obviously, one key factor in assessing the harshness of the penalty is the value of the forfeited property. See *2000 GMC*, 357 Ill. App. 3d at 876. This includes both the monetary value of the property and its intangible value. In this regard, courts have recognized that the forfeiture of real estate is a harsher penalty than the forfeiture of personal property, including vehicles. *Id*. Courts have also considered the impact of the forfeiture on the claimant in light of the claimant's circumstances. See *id*. at 878 (upholding a vehicle forfeiture but noting that it constituted a "severe penalty," particularly in light of the fact that the claimant was "a person of limited means and assets").

¶ 35 This case involves personal property, a $35,000 motorcycle, and there is no evidence in the record concerning Petra's general financial situation. However, the monetary value of the motorcycle alone is sufficient to make the forfeiture a harsh penalty. In *2000 GMC*, the case relied upon by the trial court, the Appellate Court, Second District, recognized that the forfeiture of a vehicle worth $28,000 was "undeniably a severe penalty." *Id*. We agree with that assessment, and we note that the value of the motorcycle at issue here is 25% higher than the value of the vehicle at issue there. Thus, we find that the penalty involved in this case is particularly harsh.

¶ 36 In weighing this harsh penalty against the gravity of the offense, we must also consider the remedial purposes of our forfeiture provisions, which is to keep impaired drivers off the roads of this state. See *1998 Lexus*, 402 Ill. App. 3d at 466-67; *2000*

GMC, 357 Ill. App. 3d at 878. Even considering this remedial purpose, we find the harshness of the penalty far exceeds the gravity of Petra's offense.

¶ 37 Before concluding that the penalty is grossly disproportionate to the offense, however, we must consider the second factor–whether the property was integral to the commission of the offense–and the third factor–whether use of the property in the commission of the offense was extensive spatially and/or temporally. Both of these factors "embody an instrumentality or nexus test." *$5,970 United States Currency*, 279 Ill. App. 3d at 592. Therefore, the question is whether the property at issue has "a sufficiently close relationship to the illegal activity." *Id*.

¶ 38 Petra concedes that the motorcycle was integral to Mark's offense of driving under the influence, and we agree. Driving a vehicle is an element of Mark's offense. See 625 ILCS 5/11-501 (West 2014). This factor therefore weighs in favor of forfeiture.

¶ 39 The third factor–whether the criminal conduct involving the motorcycle was extensive in time and space–concerns more than simply how long and how far Mark drove the motorcycle. It also concerns the question of "whether the property played an extensive or pervasive role in the commission of the crime." *1996 Saturn*, 298 Ill. App. 3d at 473 (citing *Zumirez Drive*, 845 F. Supp. at 734). Here, the property obviously played an extensive and pervasive role in the offense because, as just discussed, driving a vehicle is an element of the offense of DUI. However, because this fact underpinned our conclusion that the second factor favors forfeiture, a similar finding with respect to the third factor would be duplicative. Thus, we do not find this aspect of the third factor to be relevant in this case.

¶ 40 We briefly address the more obvious aspect of the third factor–the time and distance involved in Mark's offense of DUI. As we discussed earlier, Mark drove the motorcycle 12 to 13 blocks from the Corner Place Tavern to the Hendersons' home. This likely took only a few minutes. Considering there is generally at least some movement involved in DUI, we do not believe this can be considered an extensive use of the vehicle in terms of time and/or spatial use. Although we do not consider this factor to be particularly significant under the facts of this case, we find that it weighs slightly against forfeiture.

¶ 41 When we consider the three factors together, we find that the forfeiture of Petra's motorcycle was grossly disproportionate to her conduct. As we discussed at length earlier, the harshness of the forfeiture significantly outweighed the gravity of Petra's conduct in acquiescing to Mark's use of the motorcycle. Our consideration of the second and third factors does not alter this imbalance. We therefore conclude that the penalty is constitutionally excessive under the eighth amendment. For this reason, we reverse the trial court's order finding the motorcycle subject to forfeiture.

¶ 42 Reversed.

STATE OF ILLINOIS
IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
CRAWFORD COUNTY

FILED
DEC 03 2014
Clerk of the Circuit Court
Second Judicial Circuit
Crawford Co., Illinois

IN THE MATTER OF THE PEOPLE OF THE STATE OF ILLINOIS, EX. REL., MATTHEW J. HARTRICH, STATE'S ATTORNEY OF CRAWFORD COUNTY, ILLINOIS, Plaintiff,	)	
vs.	)	No. 2014-MR-20
2010 HARLEY DAVIDSON VIN #1HD1MAM10AB854511,	)	Seizure No: 14040325
MARK A. HENDERSON, PETRA HENDERSON, Claimant.	)	

ORDER FOR FORFEITURE OF VEHICLE

This cause having come on for hearing upon the Amended Verified Complaint for Forfeiture heretofore filed herein, the parties being present, the Court finds that the allegations of the Amended Verified Complaint for Forfeiture were verified, and notice having been given, as required by law, and having heard evidence at a contested hearing the court finds that the vehicle is subject to forfeiture for the reasons outlined in the Amended Verified Complaint for Forfeiture and terminates any interest held by Mark A. Henderson and Petra Henderson.

IT IS THEREFORE ORDERED that the said property, a **2010 HARLEY DAVIDSON, VIN #1HD1MAM10AB854511,** be and hereby is forfeited to the Robinson Police Department subject to any lien, and the State's Attorney is hereby authorized to take such action as is necessary to implement the forfeiture ordered.

JUDGE

12/3/14

MATTHEW J. HARTRICH
Crawford County State's Attorney
105 Douglas St.
Robinson, IL 62454
Telephone: 618/546-1505

C 0033

A17

And, therefore, we would ask that the Verified Complaint for Forfeiture be dismissed and the motorcycle returned to Petra with the directions to give the motorcycle back and the key fob back to her because she is without criminality in this cause and she certainly didn't give her consent to the operation of that vehicle.

Thank you, Your Honor.

THE COURT: Okay. I think it's -- well, it is undisputed that the driver was driving on a revoked driver's license. Furthermore, there is no dispute that he had a previous DUI conviction. Furthermore, there is no dispute that he had indications of being intoxicated at the time that this event occurred. The entire issue is whether Miss Henderson gave consent to Mr. Henderson to drive this motorcycle and it appears to me in this situation that actions speak louder than words. Had Miss Henderson not got on and Mr. Henderson took off, it would be a lot easier for me to believe claimants' testimony. However, as the State pointed out it is self-serving testimony. She got on the motorcycle and they took off and the evidence is that they live about 12 blocks away so I don't think it would have been -- it's not as if they were out on the

interstate 50 miles from home where it would be impossible for her to find another way home and so, therefore, I doubt the testimony that has been presented by the claimants, and therefore I am going to find in favor of the State and grant the relief that is requested in the Amended Complaint for Forfeiture and I would ask that the State prepare a written order for the Court to enter in that regard.

And this is a final and appealable order. Thank you.

MR. HARTRICH: Thank you, Your Honor.

THE DEFENDANT: Can I ask a question?

THE COURT: No. There is no further proceedings. Thank you. You are free to go.

THE DEFENDANT: What about my personal property on that bike? Are they going to steal that, too?

MR. ANDERSON: Your Honor, they have personal property on that bike and prior to this order going --

MR. HARTRICH: Can we discuss this? This afternoon I can speak to you and then we can, I can send a letter to the police department to have personal property that's not part of the vehicle released.

ADDITIONAL RECORD SHEET

Case No. 2014-MR-20 No. Page 3

Nature of Case PEOPLE VS. 2010 HARLEY DAVIDSON, et al

Form AO 69-32A Byers Printing Company, Springfield, IL

DATE	JUDGE AND REPORTER		COSTS
12 11 14		Report of Proceedings filed.	
12 12 14		Motion To Reconsider Order and Petition To The Attorney General For Remission Of Forfeiture Filed.	
12 22 14	CLW TA	SA claimant Debra Henderson + Atty Anderson. Motion to Reconsider argued. Taken under advisement. Status by telecon. 1/28/15 at 9:00 AM. Notice Given. Note Atty Barry Schaeter appears for Atty General, Petition to the Attorney General For Remission of Forfeiture cont.	
1 5 15	CLW	Motion to Reconsider denied. Ct. cites People v. One 2000 GMC VIN 3GNFK16T2YG169852, 357 Ill. App. 3d 873, 829 N.E.2d 437, 293 Ill. Dec. 854 (2nd Dist. 2005) concerning Claimant's Eighth Amendment excessive fine claim. In that case, Appellate court held forfeiture of $28,000 vehicle for offense	

0003

A20

ADDITIONAL RECORD SHEET

Case No. 14-ML-20 No. Page #4

Nature of Case People VS. 2010 Harley Davidson, et al

Form AO 69-32A Byers Printing Company, Springfield, IL

DATE	JUDGE AND REPORTER		COSTS
1 5 15	clw	of driving on a suspended license (dse to DUI) was not an excessive time in violation of the Eighth Amendment. Further, ct. finds that based upon the evidence presented, the State met its burden of proof by a preponderance of evidence and that testimony of claimant & her husband that she did not consent to husband driving vehicle was self-serving and not credible. This is a final and appealable order. Clerk to mail copy to Atty. Anderson & to provide copy to SA.	
01 20 15		Notice of Appeal filed.	
1 28 15	clw	SA, Atty Anderson (by telecon), & Atty Schneider Telecon. Status conducted.	

1-5-15 Copy put in Matt's box & copy mailed to Jon

RELEVANT TEXT OF 720 ILCS 5/36-1

As of April 26, 2014:

> Any . . . vehicle . . . used with the knowledge and consent of the owner in the commission of, or in the attempt to commit as defined in Section 8-4 of this Code, an offense prohibited by . . .
>
> (f) (1) driving under the influence of alcohol or other drug or drugs, intoxicating compound or compounds or any combination thereof under Section 11-501 of the Illinois Vehicle Code during a period in which his or her driving privileges are revoked or suspended where the revocation or suspension was for driving under the influence of alcohol or other drug or drugs, intoxicating compound or compounds or any combination thereof, Section 11-501.1, paragraph (b) of Section 11-401, or for reckless homicide as defined in Section 9-3 of the Criminal Code of 1961 or the Criminal Code of 2012 . . . may be seized and delivered forthwith to the sheriff of the county of seizure.

As of December 3, 2014:

> (a) Any . . . vehicle . . . may be seized and impounded by the law enforcement agency if the . . . vehicle . . . is used with the knowledge and consent of the owner in the commission of, or in the attempt to commit as defined in Section 8-4 of this Code, an offense prohibited by . . .
>
> (6) Section 11-501 of the Illinois Vehicle Code (driving while under the influence of alcohol or other drug or drugs, intoxicating compound or compounds or any combination thereof) or a similar provision of a local ordinance, and:
>
> (A) during a period in which his or her driving privileges are revoked or suspended if the revocation or suspension was for:
>
> (i) Section 11-501 (driving under the influence of alcohol or other drug or drugs, intoxicating compound or compounds or any combination thereof)[.]

As of April 19, 2017:

> (a) Any . . . vehicle . . . may be seized and impounded by the law enforcement agency if the . . . vehicle . . . is used with the knowledge and consent of the owner in the commission of or in the attempt to commit as defined in Section 8-4 of this Code . . .
>
> (6) an offense prohibited by Section 11-501 of the Illinois Vehicle Code (driving while under the influence of alcohol or other drug or drugs, intoxicating compound or compounds or any combination thereof) or a similar provision of a local ordinance, and:

(A) during a period in which his or her driving privileges are revoked or suspended if the revocation or suspension was for:

(i) Section 11-501 (driving under the influence of alcohol or other drug or drugs, intoxicating compound or compounds or any combination thereof)[.]

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