IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	**:**	
Plaintiff	**:**	
	:	**No. 99-00824**
vs.	**:**	
	:	
ONE MACK 1987 TRUCK,	**:**	
VIN 1M1N267X7HA002890,	**:**	
PA LICENSE NUMBER YW16226	**:**	

OPINION AND ORDER

This matter came before the Court on M.W. Farmer Company's Motion to Dismiss the Commonwealth's Forfeiture Petition. The relevant facts are as follows:

M.W. Farmer Company (hereinafter "the Company") owns a Mack 1987 truck with the vehicle identification number 1M1N267X7HA002890. Michael W. Farmer (hereinafter "Farmer") is the President and sole shareholder of the Company. In this capacity, he is involved in all the decisions regarding the Company's business activities. The Company is a petroleum contractor located at 13 Fleming Street in South Williamsport, Pennsylvania. It is in the business of installing and removing underground storage tanks from both commercial and industrial establishments.

The Company bids on tank removal jobs. If the Company receives the job, it sends a crew of its employees to the job site to remove the underground tanks. The crew excavates the ground surrounding the tank. An employee will then place a measuring stick with water paste on it into the tank to determine how full the tank is with petroleum material, water and sludge and where the water level begins.

The petroleum material may be gas, diesel fuel, kerosene, heating oil, or crank case oil, depending on the type of tank being removed. To some extent, the materials in the tank separate so that the sludge is at the bottom of the tank, then the water and the petroleum material is on the top. If there is usable material on top, it is usually pumped out first and either the client keeps it for its use or the material is taken back the to the Company property and put in the underground or aboveground storage tanks of like material for future use by the Company. For example, if the Company is removing gas tanks from a service station and there is any usable gas in the tank, the usable gas is pumped off the top and taken back to the Company property, placed in their gas storage tank and later used in the Company vehicles. It would not be placed in drums or the 10,000-gallon storage tank unless there was such a small amount of usable material that it was not cost effective to separate that material from the rest of the materials being removed.

The remaining, non-usable contents of the tanks would be pumped out of the tanks and into either 55-gallon drums or the Company's vacuum truck (hereinafter truck).[1] The drums were then transported to the Company property and stored. The truck would return to the Company property and its contents would be emptied into a 10,000-gallon aboveground storage tank.

Once as much of the contents were pumped out as possible, the underground tank was removed from the ground and taken to the Company property. There, any remaining liquid would be removed with a hand pump and put

[1] Before the Company purchased the truck, the contents were removed with a ha

into the 10,000- gallon tank. The sludge in the bottom of the tanks would be scraped out with a shovel or a squeegee and placed in 55-gallon drums. The cleaned tanks would be sold to a salvage yard or scrap metal dealer.

The Department of Environmental Resources, now the Department of Environmental Protection (hereinafter "the Department"), first came in contact with Farmer and the Company in the early 1980s. In or about 1982, employees of the Department met with Farmer to discuss interpretation of the Solid Waste Management Act (SWMA). In the late 1980s, the Department received complaints that Farmer and the Company were improperly handling and/or disposing wastes. The Department investigated these complaints and made recommendations to the Company regarding such things as the number of 55 gallon drums stored on the property and the length of their storage, Farmer's ideas about installing a 10,000-gallon aboveground storage tank and a concrete pad for tank cleaning activities, and building an appropriate containment area for the 10,000-gallon tank.

In 1992 and early 1993, the Department received complaints that the defendants were dumping contaminated soil along Route 15 near the racquetball club in Armstrong Township and at the Farmer property in the Linden area (Woodward Township), as well as a complaint regarding the business practices at the Company property. The complaint regarding Armstrong Township resulted in a referral of Farmer and the Company to the Attorney General's office.

On or about April 7, 1993, the Commonwealth, with the assistance of

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pump and placed into 55-gallon drums.

members of the Department, executed a search warrant at the Company property. The Commonwealth seized Company business records, searched the premises and took soil samples from noticeable spots on the ground and liquid samples from the 55-gallon drums on the property.

A few days after the search, the Department issued a compliance order in Farmer's name prohibiting the transportation of material off-site unless it was manifested as hazardous waste or authorized by the Department and prohibiting bringing waste materials onto the Company property. On or about June 22, 1993, a second compliance order was issued which replaced the first order. The only significant difference from the first order was that the second compliance order changed the name of the person subject to its terms to the Company instead of Farmer individually. The compliance order of June 22, 1993 still contained the same restrictions or prohibitions as the first order. See Commonwealth's Exhibit #23.

On or about July 13, 1993, the Department returned to the Company property and took samples from the 10,000-gallon aboveground storage tank. The sampling procedure was as follows: the truck was decontaminated and contents from the 10,000-gallon tank were removed and placed into the truck. Members of the Department then took two (2) identical samples from the truck. The Department kept one sample and gave the other sample to Farmer so he could conduct his own independent testing if he so desired.[2] The Department then sent a sample to their

[2]Farmer did not believe that the 10,000-gallon tank contained hazardous waste

lab. The results were that the materials from the 10,000-gallon tank ignited at 9.2? Celsius and contained 203 mg/l of lead and 1,700 mg/l of benzene.

Generally, Farmer and the Company disposed of the materials in the 10,000-gallon tank by sending these materials to processing facilities such as Lancaster Oil, International Petroleum Corporation (IPC) and Research Oil. These facilities would take the material, process it, then send it to another company who would process it further and send it to another entity for energy recovery through burning. Ellen Campbell, a former employee of the Company, was responsible for arranging the shipments from the 10,000-gallon tank from roughly 1993 until March 1998. She would usually notify Farmer that the 10,000-gallon tank was getting full and receive his authorization to transport the materials to a facility such as Lancaster Oil.

In the spring of 1994, Ms. Campbell contacted Lancaster Oil about sending materials from the 10,000-gallon tank to them. On April 19, 1994, a shipment was sent to Lancaster Oil in the Company truck. This load was rejected because it had a flash point of less than 65? Fahrenheit or approximately 18.3? Celsius. Another shipment was sent in the Company truck on May 20, 1994, which was rejected for a low flash point of 61? Fahrenheit or approximately 16 ? Celsius.

On or about July 25, 1995, the Commonwealth filed an Information charging the defendants with thirteen violations of the Solid Waste Management Act

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materials so he urged the Department to take samples from the tank and split the samp with him.

(SWMA).

A non-jury trial was held on the following dates: September 21-25, 1998; September 29 and 30, 1998; October 2, 1008; October 9, 1998; and October 12, 1998. On October 30, 1998, the Court found the defendants guilty of the following charges: Count 2 - owning or operating a residual waste transfer facility without a permit; Count 3 - owning or operating a hazardous waste storage facility or hazardous waste disposal facility without a permit; Count 4 - failing to label 55 gallon drums as hazardous waste; Count 7 - dumping or depositing solid waste into the environment (steam cleaning effluent); Count 10 - transporting hazardous waste to Lancaster Oil without a license on April 19, 1994; Count 11 - violating an order of the Department by transporting hazardous waste to Lancaster Oil on April 19, 1994; Count 12 - transporting hazardous waste to Lancaster Oil without a license on May 20, 1994; and Count 13 - violating an order of the Department by transporting hazardous waste to Lancaster Oil on May 20, 1994. On January 6, 1999, the Court sentenced Farmer and the Company to an aggregate sentence of five (5) years probation. In addition the Court imposed fifty (50) hours of community service and fines on Farmer totaling $18,000 and fines on the Company totaling $67,000. The Commonwealth submitted costs of $23,416.38; however, the Court imposed $5,916.68 in costs as many of the costs claimed were not recoverable.[3] The Court also ordered a site assessment of the company property at a cost in excess of $5,000 to determine if there was contamination in the steam cleaning area. On February 1, 1999, Farmer and the Company appealed their convictions.

Although the Commonwealth filed criminal charges against Farmer and the Company in 1995, it did not seek to seize the truck that was utilized to transport hazardous waste to Lancaster Oil in April and May of 1994 until April 26, 1999. The Commonwealth filed its Petition to Forfeit the truck on June 22, 1999. With the agreement of the parties, the forfeiture proceedings were held in abeyance pending the appeal of the criminal convictions.

On or about April 6, 2000, the Pennsylvania Commonwealth Court affirmed the criminal convictions. Farmer and the Company sought allowance of appeal from the Pennsylvania Supreme Court; however, this request was denied and the record was returned on or about November 3, 2000.

On September 21, 2001, the respondent filed a motion to dismiss the Commonwealth's forfeiture petition.

The respondent first asserts the forfeiture petition is barred by the two-year statute of limitations set forth in 42 Pa.C.S.A. §5524(5). Unfortunately, since the statute does not expressly state it applies to the Commonwealth, the limitations period found in section 5524(5) does not apply to this case. Pa. Dept. of Transp. v. J.W. Bishop & Co, 497 Pa. 58, 439 A.2d 101 (1981); Commonwealth v. Seymour, 120 Pa.Cmwlth. 423, 549 A.2d 246 (1988).

The respondent next claims the forfeiture petition is barred by the doctrine of laches. In order to prevail under this doctrine, the respondent must show prejudice. The Court does not believe the respondent has met this test. The respondent makes a bald assertion that some individuals no longer work for the

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3 See Order dated June 1, 1999.

Farmer Company. While it may make it more difficult to secure these individuals as witnesses, it does not necessarily make them unavailable.

The respondent asserts several other reasons why the Commonwealth's petition should be dismissed, including: (1) forfeiture of the vehicle would constitute a disproportionate penalty and/or violate double jeopardy; (2) there is a lack of a significant relationship between the vehicle and the crime or crimes; and (3) the equities favor the Court exercising its discretion and dismissing the petition. As these issues are all interwoven, the Court will address them together.

The Court begins its analysis with section 614 of the Solid Waste Management Act, which states:

> Any vehicle, equipment, or conveyance used for the transportation or disposal of hazardous waste in the commission of an offense under section 606 shall be deemed contraband and shall be seized and forfeited to the department. The provisions of law relating to seizure, summary and judicial forfeiture, and condemnation of intoxicating liquor shall apply to seizures and forfeitures under the provisions of this section.

35 P.S. §6018.614. Therefore, the law relating to forfeitures under the Liquor Code governs forfeitures under the Solid Waste Management Act. With respect to vehicles, the Liquor Code states: ". . . if it appears that said vehicle, boat, vessel, container, animal or aircraft was unlawfully possessed or used, the court may, in its discretion, adjudge the same forfeited and condemned as hereinafter provided." 47 P.S. §6-602(e)(emphasis added). Based on these statutes, the Court concludes that forfeiture under the Solid Waste Management Act is discretionary and not

mandatory.[4] Moreover, this discretion is not limited solely to occasions where there is an innocent owner defense. Commonwealth v. One 1959 Chevrolet Impala Coupe, 201 Pa.Super. 145, 191 A.2d 717 (1963).

The question for this Court is whether the facts and circumstances of this case are such that as a matter of law this truck should not be forfeited. Based on this Court's intimate knowledge of the case obtained from both this case and the 10-day non-jury criminal trial, the Court finds in favor of the respondents.

In rem forfeitures are limited by the excessive fines clause of the Eighth Amendment to the United States Constitution. Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801 (1993). In the criminal case, the Court imposed fines totaling $85,000 and costs of almost $6,000. The Court also ordered a site assessment, which resulted in an additional $5,000 expense to the respondents. The site assessment found no evidence of contamination. The truck is valued at approximately $12,500, but it would cost the company about $50,000 to replace the truck with a new one. Therefore, forfeiture would result in an additional 'fine' to the company of anywhere between $12,500 and $62,500.

The Commonwealth argues what is relevant is not the value of the property, but the relationship of the property to the crime. Since the crimes could not have been committed without the vehicle, the Commonwealth contends the

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4 On September 14, 2001, the Commonwealth filed a motion for summary judgment. In this motion, the Commonwealth asserted it was entitled to judgment as a matter of law, because the felony criminal convictions established that the vehicle was used to transport hazardous waste. Since the Court finds forfeiture is discretionary, it would deny this motion. The Court also notes the hazardous waste violations involved strict liability offenses. See 35 P.S. §6018.606(i); Baumgardner Oil Co. v. Commonwealth, 146 Pa.Cmwlth. 530, 606 A.2d 617, appeal denied 612 A.2d 986 (1992). Therefore, despite the convictions, the respondents may have an innocent owner defense, rendering summary

vehicle should be forfeited. The Commonwealth's argument, though, would allow forfeiture if the vehicle was used only once. This is not the law of Pennsylvania. Instead, the burden is on the party seeking forfeiture to establish a pattern of criminal conduct by clear and convincing evidence; a single incident is insufficient. In re King Properties, 535 Pa. 321, 331, 635 A.2d 128, 133 (1993); see also SAS, Inc. v. Commonwealth, et al, 162 Pa.Cmwlth. 263, 638 A.2d 455 (1994). The truck was transporting oily water to Lancaster Oil for recycling. The oily water came from underground oil or gas tanks that were removed from various sites by the company. The oily water was taken to the company property and placed in the 10,000-gallon tank. At various times, the oily water from the 10,000-gallon tank would be placed into the truck to be transported to Lancaster Oil or other similar facilities for recycling and/or disposal. On two occasions, the gas or oil component of the water mixture transported to Lancaster Oil was sufficient to render it hazardous based on flash point. Ellen Campbell testified for the Commonwealth at the criminal trial that the two shipments to Lancaster Oil in April and May of 1994 were out of thirty-two shipments off-site between 1993 and 1996. The testimony presented by the defense was two instances out of hundreds of trips. Depending on the facts and circumstances of the case, two instances may be sufficient to establish a pattern of conduct that would result in forfeiture. Given the facts and circumstances of this case, however, forfeiture is not appropriate.

It is important to note that this is not a case of illegal dumping. The respondents' convictions arise from their failure to have the appropriate paperwork.

If the respondents had a hazardous waste license and manifested the shipments on April 19 and May 20, 1994 as hazardous, there wouldn't be any convictions that would subject the vehicle to forfeiture. The Company began the process to obtain licenses prior to 1994, but never completed the process in part because of miscommunications with the department. For example, in a letter dated October 19, 1982, Leonard Tritt wrote to Farmer and explained that it was the obligation of retailers who owned the tanks being removed to determine whether the wastes were hazardous. In the concluding paragraph, Mr. Tritt stated: "In view of the uncertainty that you are, in fact, a hazardous waste transporter required to possess a hazardous waste transporter license, we will withdraw your current application effective this date." Defendant's Exhibit #1 from the criminal trial. Moreover, the department conducted an inspection in December 2000 and determined that the company is a conditionally **exempt** small quantity generator of hazardous waste. See Respondent's Answer to the Commonwealth's Motion for Summary Judgment, Exhibit B.

The Commonwealth also argues that the forfeiture provisions of the Solid Waste Management Act are remedial, because forfeiture deprives the respondents of the means to commit additional offenses. The Court, however, imposed substantial fines to deter such conduct in the future. If the Court had known the Commonwealth was intending to forfeit the truck as an additional deterrent, the Court would not have imposed such high fines.

Given the fines and costs already imposed, the delay in filing the

forfeiture petition, the confusion over whether the company needed a hazardous waste license, the necessity of this truck to the business, and the fact the truck transported hazardous waste to Lancaster Oil on only two occasions, forfeiture in this case is not warranted.

ORDER

AND NOW, this ___ day of July, 2002, the Court GRANTS the Motion to Dismiss filed by Respondents.

By The Court,

_____
Kenneth D. Brown

cc: Richard Tomsho, Esquire
Gregory Abeln, Esquire
Work file