

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

COMMONWEALTH OF PA,	:	
Plaintiff	:	
	:	
v.	:	CR 219-2006
	:	
TAURANCE JOHNSON,	:	
Defendant	:	

OPINION
Issued Pursuant to Pa. R.A.P. 1925(a)

The petitioner, Taurance Johnson, has appealed this court’s denial of his Motion for Return of Property. The items requested to be returned are \$1,397.42 in cash and two cell phones. These items were taken from the petitioner’s vehicle during a search and seizure this court found to be illegal.

At the time set for the hearing on the motion, petitioner declined to testify and failed to present any evidence whatsoever that he lawfully possessed the items. After this court denied his motion, the petitioner filed a Motion for Reconsideration and at the time of the hearing on that motion, petitioner again declined to testify or present any evidence that he lawfully possessed the items.

The case of Commonwealth v. Pomerantz, 573 A.2d 1149 (Pa. Super. 1989) is exactly on point. In Pomerantz, the petitioner filed a motion for return of property, alleging that the currency seized was not contraband, was not the fruit of any crime, was the exclusive property of the petitioner, and was obtained by legitimate business means. However, these averments were not offered as evidence, nor was any testimony offered by the defendant on any of the factual allegations of the motion. The Superior Court affirmed the trial court’s denial of the motion, stating that under Pa.R.Crim.P. Rule 588, the party moving for return of property “must first establish entitlement to lawful

possession . . . before any obligation is placed upon the Commonwealth to prove that the property at issue is contraband.” Pomerantz, 573 A.2d at 1150-51. The court

further stated that the moving party

must, at a minimum, allege that he is entitled to lawful possession of the involved property. In the case before us, no evidence was submitted to the trial court that [defendant] is entitled to lawful possession of the cash in dispute.

...

A review of the entire hearing transcript from the Return of Property Hearing, September 26, 1988, 39 pages reveals that the averments contained in the motion were not offered as evidence, nor was any testimony offered by Pomerantz on any of the factual allegations of the motion.

Pomerantz, 573 A.2d at 1150.

Similarly, Mr. Johnson presented no evidence at the initial hearing on his motion, or at the hearing on the Motion for Reconsideration, even though he knew the initial petition was denied for lack of evidence.

The defendant cites the case of Commonwealth v. Fontanez, 739 A.2d 152 (Pa. 1999), which states,

Although in some instances a petitioner may need to introduce evidence of ownership of an item to establish his “entitlement to lawful possession,” in cases such as this, where the property at issue is currency and the Commonwealth does not dispute that it was taken from the petitioner’s possession, the petitioner need only allege that the money belongs to him. See *Commonwealth v. Younge*, 446 Pa. Super. 541, 667 A.2d 739, 741 (Pa. Super. 1995) (stating that “in the few cases in which lawful possession or ownership of seized cash was at issue . . . the petitioner’s right to lawful possession or ownership was either presumed, or at best, cursorily discussed”).

This court does not believe the language stated above means all that is necessary to succeed on a Motion to Return property is for the petitioner to allege in the motion

that the money belongs to him.¹ The Younge case, cited by Fontanez in the above passage, does not stand for such a proposition. In fact, the petitioner in Younge testified at length during the hearing, which the Younge court contrasted with the petitioner in Pomerantz, who presented no evidence.

Clearly, Fontanez did not intend to overrule Pomerantz. Fontanez did not intend to eliminate a petitioner's initial burden of establishing a right to lawful possession through the presentation of evidence. Fontanez merely intended to clarify that in cases where a petitioner is requesting return of cash, that initial burden is much easier to meet. Likewise, the Commonwealth has a much more difficult task of showing, once the petitioner has presented any evidence regarding lawful possession, that the petitioner was not in lawful possession of the cash.

In the case before this court, the petitioner failed to introduce any evidence of lawful possession, despite being given two opportunities to do so. We note that even the allegations of lawful possession contained in his Motion for Return of Property were not signed by the petitioner. Therefore, there is absolutely no basis from which this court could find the petitioner was lawfully in possession of the cash or other items.

BY THE COURT,

Date: _____

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Richard A. Gray, J.
Paul Petcavage, Esq.
District Attorney
Gary Weber, Esq.

¹ Unfortunately, Fontanez does not disclose what evidence was offered by the petitioner.