

COMMONWEALTH OF
PENNSYLVANIA,

Petitioner

vs.

\$3,770.00 & \$1,600.00 U.S. CURRENCY
and SONY PLAY STATION with 19
GAMES & DVD's
(reputed owner – James Mabry),

Defendant

: IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA

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: NO. 04-00,605

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: CIVIL ACTION-LAW

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: 1925(a) OPINION

Date: December 4, 2007

**REVISED OPINION IN SUPPORT OF THE ORDER OF JUNE 12, 2007 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

This opinion is issued to revise the opinion entered on November 16, 2007 to correct a word usage error on page 2.

James Mabry, reputed owner of property forfeited to the Commonwealth of Pennsylvania, is appealing this court's order of June 12, 2007 which denied in part his Petition to Open Judgment of an order of forfeiture entered September 30, 2004. Mabry's petition alleged that the Commonwealth wrongfully instigated forfeiture proceedings in regards to property seized at the time of his arrest on March 19, 2004 and had failed to give him proper notice of the forfeiture proceedings. Mabry requested the return of U.S. currency in the amounts of \$3,700.00 and \$1,600.00 as well as the Sony Play Station, 19 games and DVD's, and personal effects such as a shaving kit, wallet and keys.

At the hearing held June 12, 2007, this court agreed with Mabry that he received insufficient notice of the forfeiture proceedings and granted the return of his Sony Play Station, 19 games and DVD's, shaving kit, wallet and keys. This court did not grant, however, the return

of the \$3,770.00 and \$1,600.00 in U.S. currency which were also seized along with the other items at the time of his arrest. This court found that Mabry could not assert the existence of any evidence to support a meritorious defense to the Commonwealth's claim that the currency was lawfully forfeited under the Controlled Substance Drug, Device and Cosmetic Act of Pennsylvania 35 P.S. Section 780-101 et. seq and the Controlled Substances Forfeiture Act, 42 Pa. C.S. § 6801(a)(4)(6)(I)(a)(b)(a)(7). As Mabry failed to rebut this presumption or present evidence supporting a meritorious defense to the seizure, his Petition to Open Judgment as to the currency must be denied.

I. Background

On March 19, 2004, Mabry was arrested on charges of possession with intent to sell crack cocaine. Notes of Testimony (6/12/2007), 8. The currency, Sony Play Station, games, DVD's and personal effects at issue were seized at the time of Mabry's arrest. N.T., 8-9. On April 15, 2004, the Commonwealth, through District Attorney Michael Dinges, filed a Petition for Order of Forfeiture upon James Mabry in reference to the above listed items pursuant to the Controlled Substance Drug, Device and Cosmetic Act of Pennsylvania 35 P.S. Section 780-101 et. seq. and the Substance Forfeiture Act 42 Pa.C.S.A. Section 6801(a)(4)(a)(6)(I)(a)(b)(a)(7). The Petition was served at Mabry's last known address of 1015 Penn Street, Reading, PA. Mabry lived at this address until his date of arrest on March 19, 2004 and subsequent incarceration at Lycoming County Prison. N.T., 5.

On September 28, 2004, the Commonwealth filed a Motion for Order of Forfeiture upon Mabry's failure to file an answer to the Commonwealth's Petition. This court granted the Commonwealth's motion in an Order of Forfeiture filed September 30, 2004 thereby terminating

any claim of right, title or interest of James Mabry in the U.S. currency, Sony Play Station, and 19 games and DVD's.

On March 7, 2007, Mabry filed a "Motion to Return Claimant Property." In that motion Mabry requested the return of all property seized at the time of his arrest on March 19, 2004. Mabry argued that the Commonwealth did not have jurisdiction over his case as he had been transferred to Federal custody on March 25, 2004. Mabry also claimed that he was not given proper notice of the forfeiture proceedings because the Commonwealth sent the Petition to his last known home address knowing he was incarcerated at the Lycoming County Prison and unable to receive the notice. Lastly Mabry claimed that his property was wrongfully seized during his arrest. The court denied this motion by order of March 19, 2007 because of the judgment filed on September 24, 2004.

On April 13, 2007, Mabry filed a "Motion to File a Civil Lawsuit Against the Court of Common Pleas of Lycoming County, Pennsylvania." In that motion, Mabry again requested property seized at the time of his arrest be returned. He raised the same claims of lack of jurisdiction by the Commonwealth, insufficient notice of Petition for Order of Forfeiture, and wrongful seizure. Additionally, Mabry claimed that because the Commonwealth did not use the property seized to prosecute him, he is entitled to its return plus interest.

On May 9, 2007 this court filed an Order in response to Mabry's Motion to File a Civil Lawsuit Against the Court of Common Pleas of Lycoming County. In that order, this court regarded Mabry's motion as a Petition to Open Judgment which was entered on the Commonwealth's Petition for Forfeiture of September 28, 2004. The order also scheduled an evidentiary hearing for June 12, 2007.

At the conclusion of the June 12 evidentiary hearing, this court entered an Order denying Mabry's Petition to Reopen Judgment as to the currency but granting the request for certain items consisting of the Sony Play Station, the 19 games and DVD's, shaving kit, keys and wallet. The court gave the Commonwealth a period of 60 days to make a diligent inquiry as to the disposition and/or current status as to the particular items to be returned to Mabry and to file a report with the court in order to determine what further proceedings would be required to effect their return to Mabry.

On June 18, 2007 the Commonwealth filed an answer to the June 22, 2007 order stating that due to the previous forfeiture order of September 28, 2004, the items subject to be returned had either been sold or destroyed. The Commonwealth then made a request that Mabry furnish Assistant District Attorney, Kenneth Osokow, with a list of the property and the value of each item so that a fair market value could be deduced for replacement purposes.

On June 25, 2007, Mabry filed a Motion Request for an Appeal against the findings and subsequent order from the June 12, 2007 evidentiary hearing. In his appeal, Mabry alleges that all items seized pursuant to his March 19, 2004 arrest should be returned because: (1) the Commonwealth failed to prove that said items were instrumentalities of a crime prior to conviction or thereafter; and (2) the Commonwealth did not have jurisdiction over the items on the forfeiture date of September 28, 2004 because the Commonwealth had previously dropped all charges against Mabry on March 22, 2004.

On July 11, 2007 this court filed an Order recognizing Mabry's Motion filed June 25, 2007 as an appropriate motion to appeal the June 12, 2007 evidentiary hearing findings and order. This court also filed on July 11, 2007 a 1925(b) Order pursuant to the provisions of Pennsylvania Rules of Appellate Procedure directing Defendant to file a concise statement of

matters complained of on appeal with this court within 21 days from the date of this order's entry on the docket.

In response to the Court's 1925(b) Order, Mabry filed on July 31, 2007 a document entitled "Plaintiff's Appeal Arguments Against Commonwealth of Pennsylvania." Mabry set forth the following arguments supporting a return of all property seized pursuant to his March 19, 2004 arrest: (1) the Commonwealth's forfeiture proceedings violated Mabry's right to due process by giving him insufficient notice of the proceedings; (2) the Commonwealth wrongfully seized and forfeited the property because it failed to prove the property constituted instrumentalities of a crime; and (3) notice and undertaking of the forfeiture proceedings in September of 2004 was inappropriately executed by the Commonwealth as the Commonwealth had dropped Mabry's case on March 22, 2004 and the federal government had adopted it on March 25, 2004.

II. Discussion

This court regarded the documents filed by Mabry on March 7, 2007 a petition to grant relief from judgment of default. The court in reviewing Pa.R.C.P. 237.3 could not grant the automatic relief because the petition was filed more than 10 days after the default judgment was entered. The court, however, found that insufficient notice was asserted by Mabry in the filing and determined at the June 12, 2007 hearing that the Commonwealth had not given Mabry appropriate notice of the institution of the forfeiture proceedings. Accordingly, this court believed that Mabry was entitled to relief because the notice of the institution of proceedings furnished by the Commonwealth was insufficient to satisfy the requirements of procedural due process. Notes of testimony, 6/12/07, 18.

This court then proceeded to apply the standards pursuant to case law relating to when relief from the entry of a default judgment should be entered. See, Comment to Pa.R.C.P. 237.3. Citing *Shultz v. Erie Insurance Exchange*, 477 A.2d 471 (1984). A petition to open judgment is addressed to the equitable powers of the court and is a matter of judicial discretion. Under that case law, in order to grant relief, the Defendant who had suffered a default judgment being entered against him is required to promptly file a petition to reopen judgment and assert a meritorious defense.

This court made a factual determination that Mabry had acted timely. See, Notes of Testimony, 19. The issue then was to determine whether or not Mabry could assert a meritorious defense to the forfeiture.

Recognizing that the Commonwealth could not and at the June 12, 2007 hearing did not assert that the items subject to forfeiture, except for the currency, were related to the drug dealing activities of the Defendant, the court ordered the return of the Sony Play Station, the 19 games and DVD's, and other personal items such as the shaving kit, wallet, and keys within its June 22, 2007 Order following the evidentiary hearing. Therefore the only property subject to Mabry's appeal and request for return is the U.S. currency in the amounts of \$3,770.00 and \$1,600.00. This court concluded that Mabry could not assert or point to any evidence that existed which would defeat or contradict the Commonwealth's claims that they were entitled to forfeiture of the currency.

Mabry then argues the Commonwealth failed to prove by a preponderance of the evidence that the property seized and forfeited constituted instrumentalities of a crime. This court agreed with Mabry as to the Sony Play Station, games and personal effects, but found that the U.S. currency was properly forfeited as an instrumentality of a crime. The Controlled

Substances Forfeiture Act, 42 Pa. C.S.A. § 6801, permits the forfeiture of money exchanged for drugs or used or intended to be used to facilitate any violation of the Controlled Substances Act, by providing as follows:

Forfeiture generally.—The following shall be subject to forfeiture to the Commonwealth and no property right shall exist in them:

(6)(i) All of the following:

(A) Money, negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act, and shall proceed traceable to such an exchange.

(B) Money...used or intended to be used to facilitate any violation of [the Controlled Substance Act]

42 Pa. C.S.A. § 6801 (a)(6)(i). The statute further provides that: “Such money and negotiable instruments found in close proximity to controlled substances possessed in violation of the [Controlled Substances Act] shall be rebuttably presumed to be proceeds derived from the selling of controlled substances in violation of the [Controlled Substances Act.]” *Id.* § 6801(a)(6)(ii). See *Commonwealth v. \$ 9,847.00 U.S. Currency*, 550 Pa. 192, 704 A.2d 612, 616 n. 7 (Pa. 1997).

Therefore in forfeiture cases involving money, the Commonwealth bears the initial burden of proving that forfeiture was appropriate under either subsection (A) or (B).

Commonwealth v. Marshall, 548 Pa. 495, 698 A.2d 576, 578 (Pa. 1997). To meet its burden, the Commonwealth must prove, by a preponderance of the evidence, that a nexus exists between the money and a violation of the Controlled Substance Act. *Id.*

Once the Commonwealth sustains its initial burden of proving a drug nexus by a preponderance of the evidence, the Forfeiture Act directs that the burden shifts to the claimant to rebut the presumption that the money is forfeitable:

(j) Owner's burden of proof.—At the time of the hearing, if the Commonwealth produces evidence that the property in question was unlawfully used, possessed or otherwise subject to forfeiture under *Section 6081(a)*, the burden shall be upon the claimant to show:

- (1) That the claimant is the owner of the property or the holder of the chattel mortgage or contract of conditional sale thereon.
- (2) That the claimant lawfully acquired the property.
- (3) That it was not unlawfully used or possessed by him. ***

42 Pa. C.S.A. § 6802(j). By allowing the Commonwealth to seize and retain a person's property under a civil standard, and subject to a lower civil standard of proof, the General Assembly has knowingly increased the cost of engaging in the drug trade. *Commonwealth v. \$6, 4235.00 Seized*, 583 Pa. 445, 880 A.2d 523, 530 (2005).

In this case, the Commonwealth proved at the hearing it was more likely than not that the U.S. currency seized at Mabry's arrest was used or intended to be used to facilitate a violation of the Controlled Substances Act. The Commonwealth produced evidence that the money seized was found on Mabry's person and in his hotel room. N.T., 14. Mabry testified that he pled guilty to federal drug charges involving possession of 6.8 grams of crack cocaine with intent to deliver. N.T. 10-12. These charges arose out of Mabry's conduct and arrest on March 19, 2007 when his property was seized. N.T. 10-11. The crack cocaine was also seized on Mabry's person and in his hotel room on March 19, 2007 incident to his arrest. N.T. 12. By presenting evidence that drugs were found on Mabry's person and in his hotel room on the date of his arrest, combined with Mabry's guilty plea to federal charges of possession with intent to deliver crack

cocaine, it is more likely than not the U.S. currency seized from Mabry's person and hotel room was used or intended to be used to violate the Controlled Substances Act.

Mabry has failed to present evidence sufficient to rebut the presumption that the money found in close proximity to the crack cocaine was used to facilitate a drug deal. Mabry did testify he was the owner of the currency, but he did not produce further evidence to prove the forfeited currency was acquired lawfully or that he was unlawfully deprived thereof. Mabry argues that the currency was never used as part of the drug transaction and that because he has a history of stable work and a 401K, therefore, the currency found at the time of his arrest cannot be successfully linked to the drug transaction. N.T., 12-13. Mabry, however, fails to take into account in this argument the presumption that he must overcome. Mabry did not proffer that he had any evidence from which it could be found that this currency was money saved from his work or that it came from his 401K. There is no evidence as to when he work asserted nor as to what his pay would have been nor how it would have been that from his pay he would have accumulated these funds. Having asserted no such evidence he has not asserted any evidence which could be utilized to overcome the presumption against him. Furthermore, it is clear from *Commonwealth v. \$6,425.00 Seized* does not require a direct nexus between drugs and currency be shown by the Commonwealth in order to permit forfeiture. In that case the court stated “[a]lthough the nexus in this case may not have been sufficient to connect all of the cash directly to the drug trade (as proceeds or as facilitation beyond a reasonable doubt), we believe it clearly sufficient under the Forfeiture Act’s preponderance standard. The two ineluctable elements involved in the retail distribution of illicit drugs are drugs and cash.” 583 A.2d at 531. The court also stated, “[T]here is no need for the Commonwealth to produce evidence directly linking

seized property to illegal activity and circumstantial evidence can be used in order to establish the requisite nexus.” *Id.* at 533.

In this case, Mabry’s claim that he has work history and therefore could have substantial amount of cash on his person, is insufficient under the circumstances to rebut the presumption that the currency was used for a drug deal. Firstly, Mabry pled guilty to federal drug charges of possession with intent to deliver crack cocaine. N.T, 10-12. This proves that a drug deal was intended or being facilitated by Mabry. There was a substantial amount of drugs found on Mabry’s person and in his hotel room when the currency was seized. N.T. 11. Additionally, the amount of cash found was also substantial which courts have found to be strong evidence that an illegal drug transaction is involved. See *Id.* at 531. Under the circumstances surrounding the arrest, Mabry’s claim that he has a work history does not rebut the presumption that the currency was part of an illegal drug transaction.

This court correctly ruled the U.S. currency, although forfeited with insufficient notice, was forfeited lawfully as an instrumentality of a crime under Federal and Pennsylvania drug laws. Mabry argues that the money was not lawfully forfeited by the Commonwealth because the Commonwealth did not ultimately prosecute Mabry. Pursuant to Pennsylvania Supreme Court decision in *Commonwealth v. \$6,425.00 Seized*, “for property to be deemed forfeitable, neither a criminal prosecution nor a conviction is required.” *Id.* at 530. Even though it was the federal government and not the Commonwealth that ultimately prosecuted and convicted Mabry regarding the incident on March 19, 2004, the currency is still deemed appropriate for forfeiture. It is not required that the Commonwealth prosecute or convict Mabry in order for a forfeiture proceeding to be appropriate.

Therefore Mabry's appeal should be denied and the Order of June 22, 2007 should be affirmed.

BY THE COURT,

William S. Kieser, Judge

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