

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-626-2007
vs. :
 : CRIMINAL DIVISION
 :
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 :
 THOMAS COBBS, :
 Appellant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Order entered October 6, 2011, which forfeited \$1235 to the Commonwealth.

Appellant was convicted of the charges of person not to possess a firearm and possession of a controlled substance arising out of his possession of a .380 caliber Davis semi-automatic handgun and 88.3 grams of marijuana. Appellant was sentenced to 54 months to 10 years incarceration in a state correctional institution on the firearm conviction and a consecutive 4 months to 1 year on the drug offense. Appellant's conviction and sentence were affirmed by the Pennsylvania Superior Court in a memorandum decision filed on June 26, 2009.

On June 29, 2010, Appellant filed a pro se motion for return of property, in which he sought the return of a safe, various papers from the safe, jewelry, CDs, videotapes and DVDs, a variety of computer equipment, a camcorder, a digital camera, some ammunition and cash totaling \$1235.

On October 12, 2010 and March 14, 2011, the Court held hearings on

Defendant's petition for return of property. In an Opinion and Order docketed April 11, 2011, the Court granted the motion for return of property with respect to the various items of personal property. The Court, however, denied the request for return of the \$1235 in U.S. currency, finding that the Commonwealth had shown by a preponderance of the evidence that these funds were derivative contraband.

On October 3, 2011, the Court issued a supplemental order forfeiting the money to the Commonwealth.¹ This Order was docketed October 6, 2011

On or about November 7, 2011, Appellant filed an appeal from the Order entered on October 6, 2011.² Appellant asserts five issues on appeal: (1) the court and prosecution violated Appellant's state and federal constitutional rights of due process by not informing him of notice that a forfeiture hearing was to be held at the same time as the motion for return of property; (2) the court erred and/or abused its discretion by modifying and supplementing a final order 6 months later; (3) the court erred or abused its discretion by issuing a court order 6 months later on a waived issue (forfeiture); (4) the court erred and/or abused its discretion by relying on forfeiture documents that were not admitted into evidence to support forfeiture; and (5) the court erred and/or abused its discretion by relying on hearsay evidence of forfeiture.

Appellant first contends his constitutional rights of due process were violated because he was not given notice that a forfeiture hearing was going to be held at the same

¹ On August 27, 2010, the Commonwealth filed a petition for forfeiture of \$1235 in U.S. currency at civil docket number 10-01795. Appellant filed an answer to the Commonwealth's forfeiture petition on October 8, 2010.

² Although Appellant's appeal was docketed on November 7, 2011, it would be considered timely for two reasons: (1) the thirtieth day fell on a Sunday, November 6, 2011; therefore, an appeal filed on Monday, November 7, 2011 would still be considered timely, see 1 Pa.C.S.A. §1908; and (2) Appellant is an inmate

time as the motion for return of property. The Court cannot agree.

Although the notice for the hearing on October 12, 2010 did not state that it was for forfeiture as well as return of property, it was the Commonwealth's position that Appellant was not entitled to return of the cash because there was a nexus between the illegal activity and the cash such that the cash was subject to forfeiture. See N.T., October 12, 2010, at p. 11. The Commonwealth conceded that Appellant was the owner of the property; therefore, the sole issue was whether the money was derivative contraband. The Commonwealth presented its witnesses, but the hearing was continued because Appellant wanted to try to obtain some documents he wished to use to further cross-examination of the Commonwealth's witnesses and more time was needed to take testimony from Appellant and any other witness Appellant wished to call. A second hearing was held on March 14, 2011. Therefore, Appellant had adequate notice prior to the March hearing and a full and fair opportunity to present any evidence he wished to refute the Commonwealth's evidence that the money was derivative contraband and subject to forfeiture. Commonwealth v. Wright, 599 Pa. 270, 961 A.2d 119, 132 (2008)(basic elements of procedural due process are adequate notice, an opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal).

Appellant next asserts that the Court erred by modifying and supplementing its Order six months later. The Court acknowledges that it entered the supplemental order more than 30 days after it issued its Opinion and Order denying Appellant's motion for return of property with respect to the \$1235 in cash, which was contrary to 42 Pa.C.S.A. §5505. In

entitling him to the benefit of the "prisoner mailbox rule," see Commonwealth v. Jones, 549 Pa. 58, 700 A.2d 423 (Pa. 1997).

hindsight, if the Court had things to do over, instead of simply issuing a supplemental order the Court would have made the Commonwealth file a motion for summary judgment based on collateral estoppel in the civil forfeiture action. If that had been done, however, the end result would be the same and there would not have been another evidentiary hearing or trial.

Collateral estoppel applies if (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person in privity to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

Collateral estoppel is also referred to as issue preclusion. It is a broader concept than res judicata and operates to prevent a question of law or an issue of fact which has once been litigated and fully determined in a court of competent jurisdiction from being re-litigated in a subsequent suit.

Catroppa v. Carlton, 998 A.2d 643, 646 (Pa. Super. 2011), quoting Incollingo v. Maurer, 394 Pa. Super. 352, 575 A.2d 939, 940 (Pa. Super. 1990)(citation and quotation marks omitted); see also Columbia Medical Group, Inc. v. Herring & Roll, P.C., 829 A.2d 1184, 1190 (Pa. Super. 2003).

All these elements are met. The issue that the Court decided in its April 11th Opinion and Order was whether there was a nexus between the money and Appellant's criminal activity such that the money would be considered derivative contraband and subject to forfeiture. The Court found that it was. The issue for the civil forfeiture proceedings would be identical.

The Court's finding was final and no appeal was taken by Appellant from that finding.

Appellant was a party in both the return of property proceeding and the

forfeiture proceeding.

As previously discussed, Appellant had a full and fair opportunity to litigate this issue. He had the opportunity to present evidence and call witnesses to refute the Commonwealth's evidence.

The determination that the money was derivative contraband was essential to the Court's decision; in fact, that finding was the sole reason why the money was not returned to Appellant.

Therefore, collateral estoppel applies and the Court would not have held another evidentiary hearing on this issue.

Appellant also claims the Court erred or abused its discretion by issuing a court order on a waived issue. Not only did the Commonwealth file a petition for forfeiture before the Court held any evidentiary hearings on Appellant's petition for return of property, the Commonwealth described the issue with respect to the cash at the return of property as follows: "And with regard to the cash, does the Commonwealth have a nexus between illegal activity and the cash so that the cash is subject to forfeiture." N.T., October 12, 2010, at p. 11. Therefore, the issue of forfeiture was not waived.

Appellant next alleges the Court erred or abused its discretion by relying on forfeiture documents that were not admitted into evidence to support forfeiture. The Court did not rely on any forfeiture documents per se. Although the Court was aware of the fact that the Commonwealth filed a petition for forfeiture when it entered its supplemental order, the Court did not rely on the content of the petition to make its decision that the money was derivative contraband; that decision was made on the evidence adduced at the hearings held on October 12, 2010 and March 14, 2011.

Finally, Appellant contends the Court erred or abused its discretion by relying on hearsay evidence of forfeiture. The Commonwealth presented some evidence from its witnesses about information provided to them by a confidential informant that Appellant sold marijuana to him or her; however, Appellant did not make any hearsay objection to this evidence. Therefore, this issue is waived. See Commonwealth v. Baumhammers, 599 Pa. 1, 960 A.2d 59, 94-95 (2008).

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
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Work file
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