

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No's. CR-1696-2011  
vs. :  
JOHN AIKEY, SR., : **Opinion and Order Re**  
: **Defendant's Motion for Return of Property**

**OPINION AND ORDER**

Before the Court is a Motion for Return of Property that was filed by the Defendant on August 17, 2012. On October 15, 2012, the Court held a conference with counsel regarding said Motion. During the conference, the parties resolved the Motion except for a handcrafted ivory pipe and its component parts.

A hearing to determine whether the handcrafted ivory pipe should be returned to Defendant was held on October 18, 2012.

The parties initially stipulated that the Defendant would testify that he purchased the pipe in the 1980's as a collector's item. Further, he never used it to smoke marijuana and did not intend to use it to smoke marijuana in the future.

Sergeant Deremer of the Tiadaghton Valley Regional Police Department testified on behalf of the Commonwealth. He testified that the ivory pipe was seized from Defendant's home. It was located on a stand in the master bedroom. He could not recall if the pipe was wrapped in anything.

There are three sections of the pipe: the bowl portion; a rather long, thin mouthpiece; and a portion or stem that connects the long, thin mouthpiece to the bowl. At the time the bowl was seized, Sergeant Deremer recalled the mouthpiece being separate but the stem being connected to the bowl.

The pipe and its component parts were introduced and admitted into evidence.

On the portion of the mouthpiece that connected to the stem there was a rip or tear. Sergeant Deremer admitted that if one attempted to inhale a substance from the bowl, it would escape through this rip or tear.

Sergeant Deremer testified that he took a paperclip and scraped the inside of the bowl to obtain residue. After scraping residue from the pipe, he field tested such. The field test indicated “positive” for marijuana. While there was no testimony as to what occurred in connection with this positive field test, Sergeant Deremer noted that it was his practice once an item tested positive to send that item to the lab in order that the identification of the substance could be confirmed.

While he received training on how to conduct the field test, he could not testify as to its reliability.

Sergeant Deremer also testified that the bowl smelled like the odor of burnt marijuana.

No additional testimony was presented by either the Commonwealth or Defendant.

Motions for Return of Property are governed by Pa. R.Crim. P. 588. On a Motion for Return of Property, “the moving party must establish by a preponderance of the evidence entitlement to lawful possession. Once the moving party provides sufficient proof, the burden shifts to the Commonwealth to resist the return of property by proving the property is contraband.” Commonwealth v. Johnson, 931 A.2d 781, 784 (Pa. Cmwlth. 2007),

citing Commonwealth v. Crespo, 884 A.2d 960 (Pa. Cmwlth. 2005).

The Commonwealth concedes that the Defendant has established by a preponderance of the evidence his entitlement to lawful possession. Nonetheless, the Commonwealth argues that the property should not be returned because it is contraband.

There are two types of contraband. The first is contraband per se, that is, property the mere possession of which is unlawful. Commonwealth v. Howard, 552 Pa. 27, 713 A.2d 89, 92 (1998). Derivative contraband is property innocent by itself, but used in the perpetration of an unlawful act. Id.

The Commonwealth does not argue that the pipe is contraband per se. Indeed, possession of pipes similar to the one in question is not illegal per se. Such pipes can obviously be used as a collector's item, ornamentation, to smoke tobacco or to smoke an illegal substance such as hashish or marijuana. Commonwealth v. Phillips, 310 A.2d 290, 291 (Pa. Super. 1973).

The Commonwealth argues the pipe is derivative contraband because it was used in the past to smoke marijuana as evidenced by the odor of burnt marijuana and the presence of marijuana residue as confirmed by a field test. The Court does not agree.

First, property is not derivative contraband merely because it is owned or used by someone who has in the past been engaged in criminal conduct. Howard, 713 A.2d at 92. The Commonwealth must establish a specific nexus between the property and the alleged criminal activity. Id.

The only evidence presented by the Commonwealth was that a pipe was

seized from Defendant's residence, the pipe smelled of an odor of burnt marijuana and a field test of the scraping from the bowl of the pipe indicated a positive result for marijuana.

Based on the record in this case, or the lack thereof, this evidence is insufficient to prove a preponderance of the evidence that the pipe was being or was intended to be used for criminal activity.

While the officer testified that he smelled the odor of burn marijuana, there was no testimony regarding whether he had any training with respect to identifying marijuana or had experience in his ten-year career identifying the odor of burnt marijuana.

With respect to the field test, the officer only knew how to conduct the test. There was no testimony regarding its accuracy or reliability. Indeed, under cross-examination, he could not testify as to whether the field test was a test of inclusion or exclusion. Moreover, it was clear that when the officer received a positive field test, he would submit the item to the lab for confirmatory testing. No evidence was presented as to any confirmatory testing in this case. Accordingly, the Court places little weight on the positive field test.

As well, when the pipe was seized, it was in a condition that it could not be used to smoke anything let alone an illegal substance. Through Sergeant Deremer's testimony and through viewing the pipe, it was clear that it could not be used to smoke anything. The mouthpiece portion was broken such that anyone attempting to inhale anything through it would have done so in vain.

Moreover, there was no testimony whatsoever regarding the presence of

illegal substances or paraphernalia utilized to store, package or smoke any illegal substance.<sup>1</sup>

Finally, the Court accepts as credible the stipulated testimony of Defendant that he had purchased the item in the 1980's as a collector's item and that he had never used it nor did he intend to use it to smoke marijuana.

Because the Commonwealth has failed to prove by a preponderance of the evidence that the pipe is derivative contraband, Defendant's Motion for Return of Property shall be granted.

**ORDER**

AND NOW, this \_\_\_\_ day of October 2012, following a hearing and argument, the Court **GRANTS** Defendant's Motion for Return of Property. The Commonwealth is directed to return to Defendant within thirty (30) days of the date of this Order the pipe at issue including all of its component parts.

By The Court,

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Marc F. Lovecchio, Judge

cc: Aaron Biichle, Esquire  
Ronald Travis, Esquire  
Work file

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<sup>1</sup> In Defendant's criminal case, the Court granted a motion to suppress the evidence seized from Defendant's residence as being the product of an illegal search and seizure. The exclusionary rule also applies to quasi-criminal proceedings such as motions for return of property and forfeiture proceedings. See Commonwealth v. Howard, 931 A.2d 129, 131 (Pa.Cmwlt. 2007)("Proceedings for return of property under the criminal rules are civil in form, but quasi-criminal in character."); Commonwealth v. \$17,182.00 United States Currency, 42 A.3d 1217, 1220 n.5 (Pa. Cmwlt. 2012), citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 85 S.Ct. 1246 (1965)(exclusionary rule applied to forfeiture proceedings due to their quasi-criminal nature).

Gary Weber, Lycoming Reporter