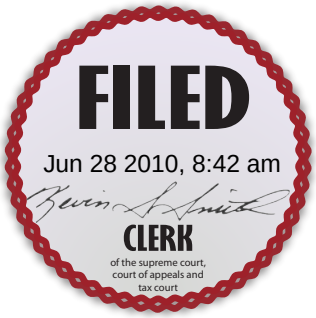

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IN THE
COURT OF APPEALS OF INDIANA

MARTIN SERRANO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0908-CV-362
	)	
STATE OF INDIANA and the CITY OF FORT WAYNE,	)	
	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable David Avery, Judge
Cause No. 02D01-0808-PL-422

June 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Martin Serrano appeals the trial court's judgment in favor of the State of Indiana and the City of Fort Wayne (collectively "the State") ordering the forfeiture of his truck, which was seized following a traffic stop. Serrano presents several issues for review, of which we find the following dispositive: whether sufficient evidence was presented to support the civil forfeiture of his truck.

We reverse.

FACTS AND PROCEDURAL HISTORY

Serrano and his wife, Maria, worked at the El Paraiso grocery store in Fort Wayne, Indiana. Serrano was the purchasing manager. The Fort Wayne Police Department received an anonymous tip that El Paraiso was receiving shipments of drugs from Chicago and therefore placed the store under surveillance. On the evening of July 10, 2008, Fort Wayne Police Department Detective Craig Wise observed Serrano's 2004 GMC silver pick-up truck parked in front of El Paraiso next to a box truck with Illinois license plates. Both trucks eventually drove to the back of the store, where they remained for approximately forty-five minutes. When the box truck drove away, the surveillance team followed and stopped the vehicle. While the box truck was stopped, Serrano drove by and "started speeding off." *Tr.* at 79. This aroused the suspicion of the surveillance team, and they decided to follow Serrano. They ran a check of his license plate and learned that the registered owner of the truck was named Martin Serrano, and that there was an outstanding warrant on a Martin Serrano. As police followed, Serrano weaved in and out of traffic and exceeded the speed limit. Eventually, Serrano was pulled over for speeding by an Indiana State Police Excise

Unit and Officer Jason Fuhrman of the Fort Wayne Police Department. During the stop of Serrano's vehicle, a canine unit arrived, and Canine Officer Bach conducted a sniff test of Serrano's truck. Bach alerted, indicating the presence of narcotics.

Serrano was placed under arrest and transported to the police station because of the outstanding warrant. His truck was towed to the police station. It was determined after several hours that the subject of the outstanding warrant was a different Martin Serrano. Thereafter, Serrano was released, but his truck was not. The next day, after obtaining a search warrant, the police searched Serrano's truck and found a box of quarters worth approximately $500.00, as well as $51.00 in cash elsewhere in the truck. The box of quarters was covered in a residue that was later determined to be cocaine. The same kind of residue was found elsewhere in Serrano's truck.

Approximately one month later, Detective Wise interviewed Serrano. Serrano stated he was the only person who drives the 2004 GMC truck and that the quarters found in the truck with cocaine residue were his. When asked about the residue, Serrano claimed he sometimes "makes" drugs, which Serrano clarified as meaning that he used drugs. *Tr*. at 116.

On August 20, 2008, because of the presence of cocaine in the 2004 GMC truck, the State filed a complaint for forfeiture. The complaint sought forfeiture of Serrano's truck as well as $551.00 in U.S. currency. After a bench trial, the trial court entered judgment in favor of the State with respect to the truck and in favor of Serrano with respect to the currency. The trial court entered findings of fact and conclusions of law in support of its decision. Among other things, the court concluded that Serrano used his truck to transport or

to facilitate the transportation of a controlled substance for the purpose of committing a drug-related offense, specifically, possession of cocaine or a narcotic drug in violation of Indiana Code section 35-48-4-6. Serrano now appeals.

DISCUSSION AND DECISION

"Because forfeiture cases are civil in nature, we use the standard of review employed in other civil cases where an appellant questions the sufficiency of the evidence to support a verdict." *$100 and A Black Cadillac v. State*, 822 N.E.2d 1001, 1006 (Ind. Ct. App. 2005). We consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn therefrom. *Id*. We neither reweigh the evidence nor reassess the credibility of the witnesses. *Id*. Additionally, here, the trial court issued findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. *Cantrell v. Putnam County Sheriff's Dep't*, 894 N.E.2d 1081, 1083 (Ind. Ct. App. 2008).

Serrano argues that the trial court erred in finding that his truck was subject to forfeiture because insufficient evidence was presented to satisfy the forfeiture statute. He specifically contends that the State failed to prove that the presence of the cocaine residue in his truck was not more than incidental or fortuitous. Because no nexus between the truck and his possession of the cocaine residue was shown, Serrano claims that his truck should not have been subject to forfeiture.

Forfeitures are not favored, and should be enforced "only when within both the letter and spirit of the law." *United States v. One 1976 Ford Pick-up VIN F14YUB03797*, 769 F.2d

525, 527 (8th Cir. 1985). Indiana's forfeiture statute states in relevant part:

> (a) The following may be seized:
>
> (1) All . . . vehicles if they are used or intended for use by the person . . . to transport, or in any manner to facilitate the transportation of the following:
>
> (A) A controlled substance for the purpose of committing, attempting to commit, or conspiring to commit any of the following:
>
> (vi) Possession of cocaine . . . .

Ind. Code § 34-24-1-1. The State must demonstrate by a preponderance of the evidence that the property was subject to seizure. Ind. Code § 34-24-1-4(a).

In *Katner v. State*, 655 N.E.2d 345 (Ind. 1995), our Supreme Court concluded that the forfeiture statute "requires more than an incidental or fortuitous connection between the property and the underlying offense." *Id*. at 348-49. The Court further indicated that to establish an adequate nexus between the property sought in forfeiture and the underlying offense, the State must demonstrate by a preponderance of the evidence "that the property sought in forfeiture was used 'for the purpose of committing, attempting to commit, or conspiring to commit' an enumerated offense" under Indiana Code section 34-24-1-1. *Id.* at 349. The Court further held:

> The Indiana forfeiture statute requires more than a mere demonstration that the vehicle's operator possessed cocaine. Rather, under the portion of our statute which we examine today, the State must show that the operator used (1) the vehicle to transport an illicit substance or item listed in the statute, (2) for the purpose of committing possession, attempting to commit possession, or conspiring to possess the substance or item. The second limitation, requiring the State to show transportation for a specific purpose, serves an important

> function, i.e. avoiding forfeiture where the operator of a vehicle coincidentally possesses drug residue, but is not transporting the residue, or using the vehicle in any other way to further possession or conspiracy to possess.

Id.

The underlying facts in *Katner* were that after a traffic stop and a violent altercation with the police, Katner was placed under arrest. When searching Katner's person incident to the arrest, police found a vial in his pocket containing a trace amount of cocaine, weighing less than .06 grams. The State sought forfeiture of the truck that Katner was driving at the time based upon the presence of that cocaine. The trial court entered judgment for the State and ordered the truck forfeited. This court reversed, and our Supreme Court affirmed our determination. Serrano contends that the facts of this case are sufficiently similar to those in *Katner* so as to justify the same result here. We agree.

In *Katner*, it was held that Katner's possession and transportation of cocaine residue was not sufficient to establish the required nexus between the truck and possession of the drug. In the instant case, only a "fine, misty residue" of cocaine was found in Serrano's truck. *Tr*. at 83. In fact, the amount of residue was so small that the chemist from the Indiana State Police Laboratory was not able to weigh it and had to rinse the baggie with a methanol rinse in order to obtain a sample portion for testing. *Id*. at 29-31. In *Katner*, the cocaine was in a vial; here, it was dispersed throughout the truck. We believe that this distinction was immaterial. Serrano was an admitted user of cocaine. Cocaine residue may have been on Serrano's clothing and dispersed in the truck when he entered it; there are a number of other ways in which cocaine residue may have been transferred to the interior of

his truck that do not involve the transportation of cocaine. We, therefore, conclude that the State failed to demonstrate a nexus between Serrano's possession of cocaine residue and the use of his truck. The trial court erred in finding that Serrano's truck was subject to forfeiture.

Reversed.

ROBB, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

MARTIN SERRANO	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0908-CV-362
	)	
STATE OF INDIANA	)	
	)	
Appellee-Plaintiff.	)	
	)	

FRIEDLANDER, Judge, dissenting

Upon my conclusion that the evidence was sufficient to support civil forfeiture of Martin Serrano's truck, I respectfully dissent.

Serrano presents three issues upon appeal. Two of those issues – whether Serrano's truck was subject to forfeiture and the sufficiency of the evidence supporting forfeiture – are, sequentially and logically, the second and third arguments that must be addressed in deciding Serrano's appeal. Because the majority deems the former to be dispositive, however, I will address it first.

Serrano contends, and the majority agrees, that the trial court erred in determining his truck was subject to civil forfeiture pursuant to I.C. § 34-24-1-1(a)(1), which provides that vehicles may be seized "if they are used or are intended for use by … to transport or in any

manner to facilitate the transportation of … [a] controlled substance for the purpose of committing, attempting to commit, or conspiring to commit … [p]ossession of cocaine or a narcotic drug[.]" Citing *Cantrell v Putnam County Sheriff's Dep't,* 894 N.E.2d 1081 (Ind. Ct. App. 2008), Serrano contends the State failed to establish the requisite nexus between the vehicle and the drug possessed.

Our Supreme Court first determined that such a nexus was required in *Katner v. State,* 655 N.E.2d 345 (Ind. 1995). In that case, the Court further indicated that to establish an adequate nexus in this context, the State must demonstrate by a preponderance of the evidence "that the property sought in forfeiture was used 'for the purpose of committing, attempting to commit, or conspiring to commit' an enumerated offense'" under I.C. § 34-24-1-1. *Id.* at 349 (quoting I.C. § 34-24-1-1(a)(1)(A)). With respect to the parameters of the requisite nexus, the Court expressly adopted and incorporated by reference this court's opinion in *Katner*, i.e., *Katner v. State,* 640 N.E.2d 388 (Ind. Ct. App. 1994), which contained a detailed discussion of the factors that led this court to conclude that the State had failed to establish a nexus in Katner's case. I reproduce that discussion here:

> In the case before us, the State made absolutely no showing that Katner used his vehicle in any way to "transport" cocaine "for the purpose of" committing the offense of possession. While the presence of the cocaine residue in the glass tube was sufficient to support Katner's possession conviction, his possession of the substance in his automobile did not constitute "transportation" of cocaine for the purpose of possessing the drug. See IC 34-4-30.1-1.
>
> The State based the forfeiture action solely upon the quantity of cocaine that was discovered in the automobile. No evidence was offered that may have demonstrated more than an incidental connection between Katner's possession of the drug and the fact that he happened to be in his car when the drug was seized from his pocket. There was no showing that the use of the vehicle was

> an integral part of Katner's cocaine possession. The residual amount of cocaine could not be used or exchanged, and the State presented no evidence showing that the automobile was in any way associated with Katner's act of possessing the drug. The record is devoid of evidence that Katner's vehicle was used to facilitate any drug-related offense, and the mere incidental connection between the automobile and the cocaine should not support a forfeiture. *See e.g. Douglas, supra* (forfeiture is appropriate when the property is used or intended to be used, in any manner or part, to commit or to facilitate the commission of a drug offense).

Id. at 390-91.

The majority examines the underlying facts in *Katner* and deems them sufficiently similar to those in the instant case so as to settle the question of whether a nexus exists between the cocaine residue and Serrano's truck. In so doing, I believe the majority incorrectly focuses on the similarity between the quantity of drugs present in *Katner* and the instant case. Although I agree that the cases are similar to the extent that each involves a small quantity, I believe that fact is not dispositive. Instead, I would focus on the connection between the trace amount of drugs present and the vehicle in question.

In *Katner*, the defendant had, in one of his pockets, a vial with a trace amount of cocaine in it. The amount of cocaine was too small for Katner's personal use and not enough to sell or exchange. This court concluded, in effect, that the only connection between the cocaine and Katner's vehicle was the fact that the cocaine was in Katner's pocket and he happened to be sitting in his truck when he was stopped. I do not interpret the relevant discussion in *Katner* to indicate that the small amount of cocaine involved, standing alone, was determinative on the question whether a sufficient nexus existed. Rather, the small amount was relevant to the court's analysis in that it indicated that Katner was not going to

use the cocaine while in the truck or take it somewhere to do so, or to sell it. Put plainly, it appears that Katner just happened to have it in his pocket when he was stopped while driving his vehicle.

In the instant case, on the other hand, although there was only a "fine, misty residue" of cocaine found in Serrano's truck, *Appellant's Appendix* at 109, it was found "in the front carpet", "in the back carpet", "[o]n top of [the box of quarters]" – in short, it was "all over" the interior of the vehicle. *Id.* The wide-spread presence of the cocaine residue located throughout the truck's interior permits a reasonable inference that the truck was closely associated with Serrano's possession of cocaine.

Accordingly, I believe the State demonstrated by a preponderance of the evidence that the truck was used "for the purpose of committing, attempting to commit, or conspiring to commit" possession of cocaine and thereby established an adequate nexus for purposes of forfeiture under I.C. § 34-24-1-1. I would hold that the trial court correctly determined that Serrano's truck was subject to civil forfeiture. Having concluded that the truck was subject to forfeiture under I.C. § 34-24-1-1, I now address the remaining arguments.

Serrano presents as a threshold issue the contention that the search of his truck the day after his arrest and after he had been released violated his Fourth Amendment rights. A law enforcement officer may stop a vehicle when the officer observes a traffic violation. *Lark v. State*, 755 N.E.2d 1153 (Ind. Ct. App. 2001), *clarified on reh'g on other grounds*, 759 N.E.2d 275. Serrano does not challenge the legality of the traffic stop, which was initiated because officers observed him speeding and weaving in and out of traffic. After executing

the valid traffic stop, officers immediately performed a canine sweep around the exterior of Serrano's vehicle, utilizing a canine unit on the scene. Except for certain cases involving entry onto private property, *see, e.g.*, *Hoop v. State*, 909 N.E.2d 463 (Ind. Ct. App. 2009), *trans. denied*, the United States Constitution does not require reasonable suspicion for a canine drug sniff. *See State v. Gibson*, 886 N.E.2d 639 (Ind. Ct. App. 2008). Moreover, this court has observed that a "dog sniff alone [is] sufficient to establish probable cause" for a search of the vehicle. *Hoop v. State*, 909 N.E.2d at 468.

After the canine officer alerted to the presence of drugs outside Serrano's truck, officers had sufficient probable cause to search the inside of the vehicle. *See id*. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *United States v. Ross*, 456 U.S. 798, 825 (1982). Recall, however, that officers at the scene believed Serrano had an outstanding arrest warrant. Thus, he was placed under arrest on that basis and his vehicle was impounded. While police were ascertaining that Serrano was not, in fact, the same Martin Serrano who was the subject of the warrant, they initiated efforts to obtain a search warrant to search his truck. A warrant was issued and the search occurred the next day. Serrano complains that the fact that they retained his vehicle in impound after he was released and did not search his truck until the next day constitutes a search and seizure that is incompatible with the Fourth Amendment.

The police could have conducted a warrantless search of the vehicle at the scene of the traffic stop based upon the alerting reaction of the canine officer. *See Hoop v. State*, 909

N.E.2d 463. Moreover, if a search is promptly carried out after removal of a vehicle from the public highway to a more convenient location, the probable cause factor and exigent circumstances existing at the original point of seizure remain in force and a warrantless search at the removal area is constitutionally permissible. *See Chambers v. Maroney*, 399 U.S. 42 (1970). Thus, the search without a warrant could have been done shortly after the truck was towed to the impound lot. As noted, however, Serrano contends the procurement of the search warrant on the day following his arrest and the impoundment of his truck while the warrant was being procured fatally tainted the search, notwithstanding that it was conducted under a search warrant. The United States Supreme Court has rejected this interpretation of the Fourth Amendment:

> [f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> ... [T]here is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.

Id. at 50.

Where a search of Serrano's truck without a warrant could have been conducted promptly after its seizure without invading his Fourth Amendment rights, a search pursuant to a warrant conducted the day after the warrantless impoundment of Serrano's truck was not unreasonable. Under Ind. Code Ann. § 35-33-5-7(b) (West, Westlaw through 2009 1st Special Sess.), search warrants must be executed and returned within ten days of the date of

issue. It is not incumbent upon law enforcement authorities to obtain a search warrant as soon as probable cause arises. Even assuming for the sake of argument that the officers here could have obtained a warrant earlier, the fact that they did not do so does not negate its constitutional availability under the circumstances of this case. Absent a prompt warrantless search, and there being no reasonable likelihood that Serrano's truck could be removed from impound or meddled with by Serrano or others, the procurement of a search warrant under these circumstances showed proper official sensitivity to constitutional Fourth Amendment rights. *See Cardwell v. Lewis*, 417 U.S. 583 (1974). The seizure of Serrano's truck until such time as a warrant could be obtained and executed did not offend the Fourth Amendment.

As a final matter on this issue, I note that Serrano mentions article 1 § 11 of the Indiana Constitution in conjunction with the legality of the search. He has failed, however, to present an argument that the analysis under the Indiana Constitution differs from the analysis under the Fourth Amendment. Therefore, Serrano waived the issue because it requires a separate and distinct analysis under the Indiana provision. *See Carroll v. State,* 822 N.E.2d 1083 (Ind. Ct. App. 2005).

Serrano presents as a separate issue the sufficiency of the evidence justifying civil forfeiture of his truck. Specifically, he contends, "[c]onsidering the small amount of residue collected by Det. Wise, it is not reasonable to infer that Serrano 'intended' or 'knowingly' possessed that residue." *Appellant's Brief* at 10. "Knowing" or "intentional" possession are elements of the offense of possession of cocaine. *See* Ind. Code Ann. § 35-48-4-6 (West,

Westlaw through 2009 1st Special Sess.). In order to prevail in this forfeiture action, the State was required to prove, among other things, that the vehicle was used by Serrano while he committed, attempted to commit, or conspired to commit possession of cocaine.

The trial court entered findings of fact and conclusions of law in support of its judgment. Our appellate courts will set aside the findings or judgment only if they are clearly erroneous. *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206 (Ind. 2000). Courts first consider whether the evidence supports the factual findings and then whether the findings support the judgment. *Id*. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206.

The evidence revealed that there was cocaine residue "all over" the interior of Serrano's truck. *Appellant's Appendix* at 109. This included the box of quarters found in the truck. Serrano admitted the box of quarters was his. In fact, Serrano told police that he was the only person who drives the truck. When asked about the cocaine residue, Serrano responded that he sometimes uses drugs. This was sufficient to prove that Serrano knowingly or intentionally possessed the cocaine residue found in his truck. *See Beeler v. State*, 807 N.E.2d 789 (Ind. Ct. App. 2004) (evidence was sufficient to support finding that defendant knowingly or intentionally possessed cocaine residue found on an electronic scale, where an officer found the scale in defendant's pants pocket, cocaine residue was present on the scale, and the defendant admitted he obtained the scale for the purpose of buying

cocaine), *trans. denied*; *Moore v. State*, 637 N.E.2d 816 (Ind. Ct. App. 1994), *trans. denied, cert. denied* 513 U.S. 1165 (evidence was sufficient to prove that defendant knowingly and intentionally possessed cocaine based on its presence in an automobile in which he was passenger and over which he had custody and control).

I would affirm the judgment of the trial court.