

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001095-MR

STEPHEN P. RICE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES SHAKE, JUDGE  
ACTION NO. 97-CR-01307

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, GUIDUGLI AND EMBERTON, JUDGES.

GUIDUGLI, JUDGE. Stephen P. Rice (Rice) appeals an order entered by the Jefferson Circuit Court granting the Commonwealth of Kentucky's motion for forfeiture of \$13,745 seized at the time of Rice's arrest for trafficking in a controlled substance (cocaine). We affirm.

On March 4, 1997, Rice was observed in his vehicle selling cocaine. When the police detectives approached the vehicle they found a small amount of cocaine under the driver and passenger seats and a larger bag of cocaine hidden in the dashboard. Rice was arrested for trafficking in a controlled substance. Rice subsequently consented to a search of his

residence. The search revealed approximately 58.6 grams of cocaine, \$13,745 in cash, a .38 caliber revolver and assorted drug paraphernalia. On June 4, 1997, the Jefferson County Grand Jury returned a six (6) count indictment against Rice.

Thereafter, on November 20, 1997, Rice entered into a negotiated plea in which he agreed to plead guilty to two (2) counts of trafficking in a controlled substance and serve (6) years with the remaining charges being dismissed. Included in the plea recommendations was the statement that the Commonwealth would move to forfeit the \$13,745 seized on the date of the arrest. After the trial court accepted the guilty plea and sentenced Rice to the agreed upon six years<sup>1</sup> a hearing was scheduled on the forfeiture issue.

At the forfeiture hearing held on January 30, 1998, Robert Gear and Bruce Hicks testified on behalf of Rice. Mr. Gear indicated that he had traveled to Las Vegas in January of 1997, with Rice and was told that Rice had won "a lot of money" at the craps table. On cross-examination, Gear admitted that he had no idea how much money Rice had in March, 1997 (the time of the arrest). Mr. Hicks testified that he also traveled to Las Vegas with Rice in January 1997 and personally saw him win over \$11,000 at the craps table. On cross-examination, Hicks admitted that Rice worked at his night club earning approximately \$6.00 per hour and he did not know anything about Rice's financial situation or how much money he possessed in February or March of

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<sup>1</sup>Rice actually received a sentence of seven (7) years in that he was on probation at the time of this offense and the court revoked the one-year sentence previously imposed.

1997. Rice also testified at the hearing and claimed that he came back from Las Vegas in January of 1997, with \$12,750. Of the \$13,475 seized at the time of his arrest, Rice stated that \$12,750 (the amount he brought back from Las Vegas) was found in a fire proof box at his home and \$700 was taken from his person. Rice also admitted to using and selling cocaine since July 1996, and that he had no physical proof that he had won a large sum of money in Las Vegas. Under cross-examination, Rice agreed that some cocaine was found in the fire proof box and additional cocaine was found in close proximity to the box. Finally, he stated that he earned approximately \$200 to \$300 every two weeks during January, February, and March of 1997. Applying these facts and the forfeiture statute, KRS 218A.410(j), the trial court held that Rice had failed to adequately trace the money seized to his alleged gambling winnings in January. As such, the court determined that Rice had failed to meet his burden of proof by clear and convincing evidence and thus the motion for forfeiture must be granted. This appeal followed.

KRS 218A.410 deals with property subject to forfeiture in drug cases. KRS 218A.410(1)(j) reads as follows:

Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him to have been committed or omitted without his knowledge or consent. It shall be a rebuttable

presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph.

Pursuant to the statute, currency is subject to forfeiture.

Also, the statute creates a rebuttable presumption that "all moneys, coin, and currency found in close proximity to controlled substances, ...are presumed to be forfeitable under this paragraph." KRS 218A.410(1)(j). In this case the money in question was found in a fire proof box together with cocaine and in the same room in close proximity to more cocaine. There was a "close proximity" between the money and the controlled substances. Therefore, the money is presumed to be forfeitable. The burden of proof then shifts to Rice to rebut the presumption by clear and convincing evidence. In Osborne v. Commonwealth, Ky., 839 S.W.2d 281 (1992), Kentucky's Supreme Court set forth the proper standards for compliance by the Commonwealth in forfeiture cases:

The Commonwealth may meet its initial burden by producing slight evidence of traceability. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a

drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a prima facie case.

Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.

Osborne, 839 S.W.2d at 283.

In the case sub judice, the money seized was found on Rice during an observed drug transaction and in his residence, after a consensual search, in a box with cocaine and in a room with more cocaine (a total of 58.6 grams of cocaine). Rice alleges that he won the money on a gambling expedition several months earlier but has no documents or other physical proof to verify his claims. To believe his version of the events, one must believe that he won almost \$13,000 and then locked it in a box at his home and never touched or used it again. At the same time he earned only \$200 to \$300 every two weeks and bought and sold large volumes of cocaine. The trial court permitted Rice a full opportunity to present his case but found that Rice had failed to rebut the presumption that the seized money was not subject to forfeiture under KRS 218A.410. A thorough review of this matter convinces this Court that the trial judge's order is not clearly erroneous.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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