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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002601-MR

SANDRA HIBBENS AND JOHN HIBBENS — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIMBERLY CORNETT CHILDERS, JUDGE
ACTION NO. 05-CR-00054

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

ROSENBLUM, SENIOR JUDGE: Sandra Hibbens and her husband, John Hibbens, appeal from an order of the Magoffin Circuit Court ordering the forfeiture of $6,668.00 in currency discovered in the possession of Sandra at the time she was arrested on drug related charges. The appellants contend that the Commonwealth failed to establish a

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

nexus between the cash and a violation of KRS[2] Chapter 218A; that John Hibbens is an innocent owner of the cash; and that the amount of forfeiture ordered amounts to an excessive fine. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 23, 2005, the Salyersville Police Department received a call from the office of attorney Don McFarland regarding an intoxicated female upon the premises. The police responded to the call and discovered Sandra unconscious. Sandra was given field sobriety tests, which she failed. Sandra was subsequently arrested for public intoxication, and eventually pled guilty to the charge.

In a search incident to the public intoxication arrest, police discovered 29 Xanex (Alpralazom) pills, 3 Lorcet (Hydrocodone) pills, and 1 Tylox (Oxycodone) pill in Sandra's purse. Also discovered in the purse was $6,668.00[3] in currency and a check in the amount of $7,072.56 ($13,740.56 total). The cash and check were seized along with the pills.

On June 20, 2005, Sandra was indicted on one count of second degree trafficking in a controlled substance for unlawfully trafficking in Lorcets, a Schedule III narcotic, a Class D felony, KRS 218A.1413; one count of first degree trafficking in a controlled substance for unlawfully trafficking in Oxycodone, a Schedule II narcotic, a

[2] Kentucky Revised Statutes.

[3] The $6,668.00 in currency was what remained of an original cash withdrawal of $7,000.00 on May 20, 2005, three days prior to the arrest. On that date Sandra had essentially cleaned out her and her husband's joint savings account. At the time Sandra and John were beginning divorce proceedings.

Class C felony, KRS 218A.1412; and one count of third degree trafficking in a controlled substance for unlawfully trafficking in Xanax, a Schedule IV narcotic, a Class A misdemeanor, KRS 218A.1414.

Trial was held on August 28, 2006. At the conclusion of the evidence the jury rejected the Commonwealth's theory that Sandra was trafficking in the narcotics discovered in her possession, and instead returned verdicts on the lesser included offenses of possession. In summary, Sandra was convicted of one count of second degree possession of a controlled substance for possession of the Lorcets, a Class A misdemeanor, KRS 218A.1416; one count of first degree possession of a controlled substance for possession of the Oxycodone, a Class D felony, KRS 218A.1415; and one count of third degree possession of a controlled substance for possession of the Xanax, a Class A misdemeanor, KRS 218A.1414. Following the penalty phase, the jury recommended sentences upon the convictions of twelve months, five years, and twelve months, respectively. On September 26, 2006, the trial court entered final judgment in accordance with the jury's verdict and sentencing recommendation.

On September 26, 2006, Sandra filed a motion seeking the release of the money seized by the police in connection with her original arrest. In response, on October 12, 2006, the Commonwealth filed a motion seeking forfeiture of the $6,668.00 in currency seized at the time of Sandra's arrest (the motion did not seek forfeiture of the check). Also on October 12, 2006, John Hibbens, Sandra's husband, filed a motion seeking intervention in the forfeiture proceedings. The motion alleged that he had earned

the money at issue and had no knowledge of Sandra's use of the funds in connection with any violation of KRS Chapter 218A. He claimed that he was an innocent owner of the funds and, accordingly, the funds were not subject to forfeiture. John's motion was subsequently granted.

A hearing upon the forfeiture issue was held on October 26, 2006.[4] The parties filed post hearing memoranda in support of their positions. In its November 13, 2006, post hearing filing the Commonwealth requested to amend its forfeiture motion to include the $7,072.56 check found in Sandra's purse at the time of her arrest.

On November 21, 2006, the trial court entered an order determining that, pursuant to KRS 218A.410, the $6,668.00 in currency was subject to forfeiture because it was traceable to a violation of KRS Chapter 218A, but that the $7,062.56 check was not. Forfeiture was ordered consistent with that determination. On November 29, 2006, an amended order was entered clarifying the distribution of the forfeited proceeds. This appeal followed.[5]

SUFFICIENCY OF THE EVIDENCE

The appellants' first two assignments of error are to the effect that the Commonwealth failed to meet its burden of establishing a nexus between the cash and a violation of KRS Chapter 218A. More specifically, they contend that since Sandra was convicted of mere possession of - as opposed to trafficking in - the drugs, it has been

[4] The video tape of the hearing is not included in the record on appeal.

[5] The Commonwealth has not cross-appealed the trial court's denial of the forfeiture of the check.

established that the cash was not the product of drug profits. They also argue more generally that the Commonwealth failed to prove that the cash "had any relationship or was gained by any activity in drugs." As further discussed below, we believe that these arguments misconstrue the reach of the drug forfeiture statutes. Contrary to the premise of these arguments, it is not the case that to be subject to forfeiture that the currency or property have been derived directly from drug profits.

KRS 218A.410 provides, in relevant part, as follows:

> (1) The following are subject to forfeiture:
>
> (j) **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. (Emphasis added).

We first note that a trafficking conviction is not necessary as a prerequisite to forfeiture as appears to be suggested by the appellants. Contrary to the appellants'

argument, the Commonwealth need not show that the cash was derived from the profits of drug sales. By its plain language 218A.410(1)(j) provides for the forfeiture of currency which is "intended to be furnished [] in exchange for a controlled substance in violation of this chapter[.]" Indeed, the Commonwealth premised its forfeiture motion upon this provision. The Commonwealth's theory was that of the $7,000.00 in currency Sandra initially withdrew, she had spent at least $200.00 (the value of the drugs in her possession) to procure narcotics in violation of KRS Chapter 218A.

Further, nothing in the forfeiture statute even requires a criminal conviction at all of the person whose property is sought to be forfeited. *Osborne v. Commonwealth*, 839 S.W.2d 281, 283 (Ky. 1992). Rather, "[i]t is sufficient under KRS 218A.410(h) and (j) to show a nexus between the property sought to be forfeited and its use to facilitate violation of the Controlled Substances Act, KRS 218A." *Id.*, *citing Smith v. Commonwealth*, 707 S.W.2d 342 (Ky. 1986).

We next note that under KRS 218A.415, which governs the procedure for seizure of property, the Commonwealth has the initial burden of showing the existence of probable cause for the forfeiture of real property and the necessity of seizure; the burden then shifts to the respondent to show by a preponderance of the evidence that the property is not subject to forfeiture. *See* KRS 218.415(3)(a)(2); *Smith v. Commonwealth*, 205 S.W.3d 217, 222 (Ky.App. 2006).

However, KRS 218A.410(1)(j) has a special burden shifting procedure applicable to situations where, as here, currency is found in close proximity to controlled

substances. As is clear from the text of this provision, after the Commonwealth has made out a prima facie case for forfeiture, the statute then places the burden on the claimant to rebut by clear and convincing evidence the 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 ... forfeitable[.]" In *Osborne v. Commonwealth*, *supra*, the Supreme Court described the application of this burden shifting as follows:

> 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.

Id. at 284.

We further note that the issue of forfeiture was tried by the circuit court sitting without a jury. The issue is before this court upon the circuit court's findings of fact and conclusions of law and upon the record made before it. Accordingly, appellate review of the circuit court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. Ky. R. Civ. P. 52.01; *Largent v. Largent*, 643 S.W.2d 261, 263 (Ky. 1982). "A factual finding is not clearly erroneous if it is

supported by substantial evidence." *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Id.* The circuit court's application of law is, of course, reviewed de novo. *Monin v. Monin*, 156 S.W.3d 309, 315 (Ky.App. 2004).

In the case at bar it is uncontested that the currency was found in close proximity to the drugs Sandra was convicted of possessing in violation of KRS Chapter 218A. The pills and currency were found in the same purse. Moreover, the Commonwealth produced at least "slight evidence" of a nexus between the currency and a violation of the Act by producing evidence that the value of the drugs in her possession was approximately $200.00, thereby raising the circumstantial inference that Sandra had purchased the drugs from the dissipated $7,000.00 withdrawal. As such, the Commonwealth met its burden of establishing a prima facie case for forfeiture. Consistent with the foregoing, the trial court made the finding "[i]t is reasonable to infer based on the totality of the proof, and the Court so finds, that the Defendant used some of the $7,000.00 to purchase the Controlled Substances in her possession on 5/23/05 which constituted a violation of the Act." "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01; *Stincer v. Commonwealth*, 712 S.W.2d 939, 941 (Ky. 1986). Upon the available record, the trial court's conclusion that Sandra had spent some of the cash funds on drugs was not clearly erroneous.

The Commonwealth having met its burden of presenting a prima facie case for forfeiture, the burden then shifted to the appellants to demonstrate by clear and convincing evidence that the currency was not used in violation of KRS Chapter 218A. It appears that the appellants attempted to rebut the Commonwealth's case by trying to convince the trial court that Sandra had not procured the drugs by purchasing them out of the $7,000.00 in currency, but, rather the drugs had been given to her.[6] In its forfeiture order, following a discussion of the evidence presented by the appellants in their case in chief at the October 16, 2006, evidentiary hearing, the trial court made the following finding:

> [T]his Court finds that the Defendant's statements that she was 'given' approximately $200.00 worth of pills not credible, particularly in light of her admission to buying Controlled Substances in the past. The Defendant has not met her burden by clear and convincing evidence to rebut the presumption that a portion of the $7,000.00 was used to violate the Controlled Substances Act.

Unfortunately we are unable to review the strength of the appellants' rebuttal evidence because the video tape of the October 16, 2006, evidentiary hearing is not included in the record on appeal. It is an appellant's duty to see that the record is

[6] We note that under the facts at bar KRS 218A.410(1)(j) would require proof that Sandra **intended** to use the $6,668.00 to facilitate a violation of the statute (eg., to spend it all on additional drugs) to warrant forfeiture. We further note that the trial court did not make any findings regarding such intent. However, "[a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02." Moreover, it appears that the appellants did not raise the issue before the trial court, and hence the issue is unpreserved, *Caslin v. General Elec. Co.*, 608 S.W.2d 69, 70 (Ky.App. 1980) and if they did, they have not raised the issue before us, and hence the argument is deemed to be waived. *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

complete on appeal. *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky.1968). When the complete record is not before the appellate court, we are bound to assume that the omitted record supports the decision of the trial court. *Id.*; *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985); *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky.1968). As noted by the Court in the *Burberry* case, "[i]t is also reasonable to place upon appellant the duty to designate and file a record sufficient to enable the court to pass on the alleged errors." *Id.* at 585.

In summary, the trial court's finding that the Commonwealth had established a prima facie case for forfeiture was not clearly erroneous. Moreover, we are unable to review the appellants' evidence in rebuttal to the Commonwealth's prima facie case. It follows that we are unable to base a reversal of the trial court's forfeiture decision upon insufficiency of the evidence.

INNOCENT OWNER

KRS 218A.410(1)(j) provides an "innocent owner" defense by its provision "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."

In their third and fourth arguments the appellants contend that John is an innocent party in that he was the actual owner of the currency and that no drug transaction can be traced to him. They argue that even if Sandra did use proceeds from the original $7,000.00 cash withdrawal to purchase drugs, John had no knowledge of the

conduct and the conduct cannot be imputed to him. The appellants allege error in the trial court's rejection of this defense.[7]

Again, however, as the evidentiary hearing video is not included in the record on appeal, we are hampered in our review of this argument. We accordingly are constrained to affirm upon this argument. *Richardson*, *supra*; *Thompson*, *supra*; *Burberry, supra.*

EXCESSIVE FINE

In the alternative to the foregoing arguments the appellants contend that the ordered forfeiture constituted an excessive fine.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." United States Constitution, Amdt. 8; Kentucky Constitution, Section 17. Forfeitures which amount to a criminal penalty are subject to excessive fine scrutiny. *Commonwealth v. Fint*, 940 S.W.2d 896 (Ky. 1997). So are punitive civil in rem forfeitures. *U.S. v. Bajakajian,* 524 U.S. 321, 327, 118 S.Ct. 2028, 2033 (1998). The Commonwealth agrees with the appellants' position that the present forfeiture is subject to excessive fine scrutiny, so we accept without further review that it is.[8]

[7] The Commonwealth argues to the effect that this issue is not properly before us because John was not named as a party to the appeal. However, the body of the appellants' notice of appeal identified John as a party to the appeal.

[8] Further, as noted in footnote 6, *supra* at pg. 9, the appellants have waived any challenge as to Sandra's intent under KRS 218A.410(1)(j).

Citing *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), *Fint*, *supra*, set forth the following factors for consideration in determining whether a particular forfeiture violates the excessive fines clause: (1) the gravity of the offense and harshness of the penalty; (2) the sentences imposed upon other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 898. We believe factors one and two are dispositive under the facts at bar.

As previously noted, Sandra was ultimately convicted of one count of second degree possession of a controlled substance for possession of the Lorcets, a Class A misdemeanor, KRS 218A.1416; one count of first degree possession of a controlled substance for possession of the Oxycodone, a Class D felony, KRS 218A.1415; and one count of third degree possession of a controlled substance for possession of the Xanax, a Class A misdemeanor, KRS 218A.1414. Thus, Sandra was convicted of one Class D felony and two Class A misdemeanors.

Pursuant to Sandra's conviction for the Class D felony, she was subject to a maximum fine of $10,000.00. *See* KRS 534.030(1). She was further subject to fines of $500.00 for each Class A misdemeanor conviction. *See* KRS 534.040(2)(a). Thus she was subject to maximum fines totaling $11,000.00 for her three drug convictions.

In consideration that the total permissible fines for Sandra's drug convictions amounted to $11,000.00, we agree with the trial court's conclusion that the

forfeiture of $6,668.00 does not constitute an excessive fine. *Bajakajian*, *supra*; *Fint*, *supra*.

CONCLUSION

For the foregoing reasons the judgment of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

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