

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000919-MR
AND
NO. 2009-CA-001157-MR

ROSE JOHNSON

APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NOS. 07-CR-00057, 07-CR-00061, 07-CR-00062,
07-CR-00063, 07-CR-00064, 07-CR-00065, 07-CR-00066,
07-CR-00067, 07-CR-00068, 07-CR-00069, AND
07-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

KELLER, JUDGE: Rose Johnson (Johnson), who was convicted of trafficking in a controlled substance, appeals from the trial court's orders granting the Commonwealth's forfeiture motion. On appeal, Johnson argues that

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

the trial court lacked jurisdiction to enter the orders. Furthermore, Johnson argues that she did not receive due process before the orders were entered because her counsel did not receive notice of the forfeiture hearings. The Commonwealth argues to the contrary. For the following reasons, we affirm.

FACTS

An understanding of the ownership interests in the real property subject to the trial court's forfeiture order is necessary to understand the issues on appeal. Johnson and her siblings inherited interests in real property located in Louisa, Kentucky (the Louisa property). Johnson owns a one-fifth interest and her siblings own the remaining four-fifths interest. One of Johnson's brothers, Richard Quesenberry (Quesenberry), who owns a two-fifths interest in the property, was also convicted of trafficking in a controlled substance. The court's order of forfeiture includes both Johnson's and Quesenberry's interests in the property, but only the forfeiture of Johnson's interest is at issue on appeal.

In August 2007, a Lawrence County grand jury indicted Johnson on multiple charges involving the trafficking of controlled substances. Each indictment contained a different case number, as set forth in the caption to this Opinion, and the trial court refused to consolidate the cases. Attorney Brent Flowers (Flowers) represented Johnson in all of these cases through conviction/judgment.

The Commonwealth tried Johnson in March 2008 in case number 07-CR-00067 and a jury convicted her. Johnson appealed that conviction in May

2008 and attorney Jamesa J. Drake (Drake) represented Johnson on appeal. We note that Johnson dismissed that appeal in August 2009 after the events that are pertinent to the current appeal took place.

A jury convicted Johnson in June 2008 in case numbers 07-CR-00061 and 07-CR-00062. Johnson did not appeal those convictions.

In July 2008, Johnson entered guilty pleas in the remaining eight cases. She has not appealed any of the judgments related to those guilty pleas.

On January 6, 2009, the Commonwealth filed a motion for forfeiture, seeking an order forfeiting Johnson's and Quesenberry's interests in the Louisa property. The motion contained all of the case numbers related to Johnson's multiple cases, including 07-CR-00067, which was still pending on appeal. The Commonwealth served that motion on Flowers, Johnson's trial attorney, but did not serve it on Drake, Johnson's appellate attorney. Johnson did not file any objection to the motion.

On January 7, 2009, the court entered an order to seize the property and served that order on "Commonwealth Attorney" and "Defendant." Pursuant to the notice filed by the Commonwealth, the court held a forfeiture hearing on March 27, 2009. The Commonwealth certified that the notice had been mailed to "the Defendants or their attorneys and property owners and their spouses and to all persons having a security interest in" the Louisa property. The Commonwealth did not send notice to Drake and none of the other property owners or other persons having a security interest in the property were joined as parties.

At the March 27, 2009, hearing, Donna Hardin (Hardin) testified regarding the ownership interests in the Louisa property and that the property was encumbered by tax and judgment liens. Roger Salyers, a confidential informant, testified that he had made a number of illegal drug purchases at the Louisa property from various people, including Johnson. Lawrence County Deputy Sheriff Roberts testified that he and other officers had been called to the Louisa property on a number of occasions because of reports of drug-related activity.

Johnson testified that she had lived on the Louisa property for four years before her arrest and that she had no other real property. She admitted that she had sold drugs on the Louisa property to support her own drug habit. However, Johnson asked the court not to forfeit her interest in the property because she had been through rehabilitation in prison and, when released, would have no place to live.

Following testimony, Johnson's counsel argued that the Commonwealth's motion to forfeit the property was inappropriate because Johnson only owned a one-fifth interest in the property and the Commonwealth had offered no evidence that the Louisa property was used to commit or facilitate the commission of Johnson's crimes. Following that argument, the court expressed some concern regarding what would happen to the two-fifths of the Louisa property that neither Johnson nor Quesenberry owned. The court asked the Commonwealth to file a memorandum of law setting forth what authority would

permit the court to order the owners of the remaining interests to forfeit those interests. That memorandum, if filed, is not in the record before us.

On April 13, 2009, the court entered an order (the first forfeiture order) finding that the liens were valid; that the Commonwealth was entitled to Johnson's one-fifth interest and Quesenberry's two-fifths interest; and that the court could not make any finding with regard to the remaining two-fifths interest because the interest holders were not before the court. The court then ordered the property sold by the master commissioner; however, the court stated that said sale should be delayed until it could determine what to do with the remaining two-fifths interest. On May 4, 2009, the owners of those interests filed affidavits stating that they had no objection to the sale as long as they received credit for their proportionate share of the proceeds.

On May 11, 2009, the Commonwealth filed a motion to withdraw its forfeiture motion as it applied to case number 07-CR-00067. In its motion, the Commonwealth noted that case number 07-CR-00067 was pending on appeal and the case number had been inadvertently included on the forfeiture motion. That same day, Johnson filed a notice of appeal, appealing the court's first forfeiture order.

On May 27, 2009, the court entered a second forfeiture order (the second forfeiture order). In addition to deleting case number 07-CR-00067, the court reiterated that Johnson's and Quesenberry's interests in the Louisa property were forfeited to the Commonwealth. Furthermore, the court ordered the Louisa

property sold with the proceeds to be divided among the lien holders, the United Drug Task Force, the Commonwealth Attorney's office, and the owners of the other two-fifths interest. Johnson appealed from this second forfeiture order and this Court consolidated that appeal with Johnson's appeal from the first forfeiture order.

STANDARD OF REVIEW

Whether Johnson received due process and whether the court had jurisdiction to preside over the forfeiture proceedings are questions of law, which we review *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

ANALYSIS

With the above standard in mind, we first examine Johnson's due process argument. "The fundamental requirement of procedural due process is simply that all affected parties be given 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (internal citation and quotation omitted). Johnson argues that she did not receive due process because the Commonwealth did not notify Drake of the forfeiture hearing. In support of her argument, Johnson cites *Harbin v. Commonwealth*, 121 S.W.3d 191 (Ky. 2003).

In *Harbin*, a jury found Harbin guilty of a number of drug-related charges and the court sentenced him to twenty-years' imprisonment. Following

imposition of the sentence, Harbin filed an appeal and was provided with different counsel for representation during the appeal. The Commonwealth moved to forfeit Harbin's vehicle, providing notice of the motion and hearing to Harbin's trial counsel, but not to his appellate counsel. The court proceeded with the scheduled hearing even though neither Harbin nor any counsel representing Harbin was present. Following the hearing, the court ordered forfeiture of Harbin's vehicle. Harbin appealed, arguing that he had not received notice of the hearing.

The Supreme Court of Kentucky agreed with Harbin and reversed and remanded the forfeiture. In doing so, the Court noted that trial counsel's representation "did not demonstrate a currency and continuity of litigation and representation . . . from which the Commonwealth could reasonably conclude that [Harbin] was still represented by trial counsel." *Id.* at 196 (internal citations and quotations omitted.) Because of that lack of continuity, the Court determined that the Commonwealth had an obligation to serve appellate counsel with notice of the hearing. The Commonwealth's failure to do so, deprived Harbin of the ability to defend himself in the forfeiture proceeding.

Because of the obviously different facts, Johnson's reliance on *Harbin* is misplaced. Unlike Harbin, Johnson was the defendant in eleven separate cases. Johnson's trial counsel, Flowers, represented Johnson at the trial level in all eleven cases, only one of which was appealed. Because Drake only represented Johnson in that one case, it was reasonable for the Commonwealth to conclude that Flowers continued to represent Johnson in the other ten cases. Furthermore, and

more importantly, unlike Harbin, Johnson and Flowers appeared at and participated in the forfeiture hearing. Thus Johnson had the opportunity to be heard and to present a defense to the forfeiture, and she received all of the process she was due.

Next, we analyze Johnson's jurisdiction argument. As we understand it, this argument has two components. The first is that the trial court lacked jurisdiction to decide any matters regarding case number 07-CR-00067 once an appeal in that matter was filed. We agree with this first argument.

“As a general rule, except with respect to issues of custody and child support in a domestic relations case, the filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the appeal is pending.” *Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000). Because the forfeiture proceedings took place while Johnson's appeal in case number 07-CR-00067 was pending, the trial court lacked jurisdiction to enter any orders relative to that case. Therefore, the court's first forfeiture order as it relates to case number 07-CR-00067 is a nullity. However, because none of the other ten cases had been appealed, the court retained jurisdiction over those cases and its first forfeiture order related to those ten case numbers is valid. The fact that said order contained reference to 07-CR-00067 does not negate its validity to the remaining cases.

Johnson's second jurisdictional argument is that, when she appealed the first forfeiture order as to all case numbers, the court lost jurisdiction over all of the cases and its second forfeiture order then became a nullity. The

Commonwealth argues, in part, that Johnson's appeal from the court's first forfeiture order was premature because that order was not final and appealable and the premature appeal did not strip the court of jurisdiction. We agree with the Commonwealth on this argument.

An order

which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CR 54.02(1). In its first forfeiture order, the court stated that Johnson and Quesenberry had forfeited their interests in the Louisa property to the Commonwealth. The court then referred the matter to the master commissioner for sale. However, the court ordered the master commissioner to refrain from advertising or selling the property until it could obtain additional information regarding the interests of the other owners of the Louisa property.

The Commonwealth argues that the first forfeiture order was not final because it did not dispose of the interests of those other owners. Johnson argues that, because the other owners were never made parties to the action, the court's failure to dispose of their interests is irrelevant to the finality of the order. We agree with Johnson that, because the other property owners were not parties to the action, the court's request for additional information regarding their status had no

impact on the finality of the order as to Johnson. However, the court's request did have an impact on the finality of the order as to the Commonwealth.

Pursuant to KRS 218A.420(3), following forfeiture, the Commonwealth is entitled to retain property for official use or to sell it. The court determined that the property should be sold and the proceeds distributed to the other owners, the lien holders, and the Commonwealth. However, the court did not order the sale of the property, putting that on hold pending the receipt of additional information regarding the interests of the other property owners. After being notified that the other property owners were not opposed to the sale of the property, the court revised the order, permitting the sale to proceed. However, if the other property owners had objected to the sale, the court could have, and likely would have, revised its first forfeiture order. Any such revision could have altered the rights of the Commonwealth by withdrawing the referral to the master commissioner, further delaying the sale, or in any number of other ways which we need not delineate. It was not until the court ordered the master commissioner to sell the property that the Commonwealth's rights were fixed and fully adjudicated. Because the first forfeiture order did not do that, it was not final and appealable and Johnson's premature appeal of that order did not deprive the court of jurisdiction to issue the second forfeiture order.

We note that Johnson has not set forth what, if any, evidence she would present that might convince the trial court to deny the Commonwealth's request for forfeiture. Therefore, her only remedy on appeal would be a remand to

the circuit court for entry of a third forfeiture order, which would be a hollow victory at best.

Finally, we note that the Commonwealth has invited us to declare that a trial court retains jurisdiction to enter forfeiture orders after an appeal on the merits has been filed and is pending. Because we have disposed of this appeal on other grounds, we decline the Commonwealth's invitation.

CONCLUSION

Based on the foregoing, we hold that Johnson, who was present and represented by counsel at the forfeiture hearing, was not deprived of due process. Furthermore, we hold that the first forfeiture order, which did not adjudicate all of the Commonwealth's rights was not final. Finally, we hold that Johnson's premature appeal of that non-final order did not deprive the court of jurisdiction. Therefore, the trial court is affirmed.

SHAKE, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I believe the court did not have jurisdiction. Jurisdiction is generally only a question of law. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). The final judgments against Rose Johnson were entered on April 28, July 15 and July 18, 2008. Generally, the circuit court loses jurisdiction of a judgment ten days after entry of the final judgment. *Silverburg v. Commonwealth*, 587 S.W.2d 241,

244 (Ky. 1979). The Commonwealth did not file the motion for forfeiture of her real estate interest until January 6, 2009. The trial court did not enter an order of forfeiture until April 13, 2009, and May 27, 2009.

I can find no statute which extends the jurisdiction of the trial court to order the forfeiture at such a late date. We have previously ruled that the trial court had no jurisdiction to enter restitution orders unless such jurisdiction is renewed or extended by statute or rule. In *Rollins v. Commonwealth*, 294 S.W.3d 463 (Ky.App. 2009), and in *Brown v. Commonwealth*, _____ S.W.3d _____ (Ky.App. 2010) (WL 4137422) rendered October 22, 2010, we have ruled that the only statute which extends jurisdiction for the execution of an order of restitution is KRS 431.200.

The Supreme Court of Kentucky has further ruled that the trial court has no jurisdiction to enter an order of shock probation after its statutory jurisdiction has ended. *Jones v. Commonwealth*, 319 S.W.3d 295, 298 (Ky. 2010).

Based upon those rulings alone, I conclude that the trial court had no jurisdiction to enter this forfeiture order some nine months after the final judgments against Rose Johnson.

In addition, I do not believe the trial court had jurisdiction over the interests of Robert Quesenberry and Bernadine Harmon. There was no service of process upon them and the letter served by regular mail by attorney Kimberly Compton on January 9, 2009, was stamped “returned to sender” and “unable to forward and attempted not known.” Nor can I find that Exhibit 8, which is the

affidavit of publication by The Big Sandy News certifying the notice of an ancillary hearing of the Commonwealth, constitutes adequate service of process; nor can I believe that the unnotarized affidavit of Robert Quesenberry agreeing to the sale of property engenders jurisdiction of this criminal court over these civil defendants.

The criminal forfeiture was only authorized in this criminal action against Rose Johnson as to her one-fifth interest in this real estate. If the Commonwealth had secured a timely order of forfeiture of her one-fifth interest to this real property, then it should have filed a partition action pursuant to KRS 389A.030 and, after searching the public records of the Lawrence County Court Clerk's Office, proceeded to secure by summons all parties of interest to the real property, including but not limited to Quesenberry, Harmon, creditors, lien holders, mortgage holders, taxing authorities or any others who held an interest in the real estate. Thereafter, the court could order the sale of the property pursuant to its civil jurisdiction authorized in the partition action and award to the Commonwealth its interest.

I am aware that a judgment lien holder, John Zellers, did appear at the hearing and testified as to his lien upon the property. However, I have no knowledge from this record as to whether any other lien holders were notified of the hearing. Regardless, I am certain that they were not served by summons.

Once again, I believe there was no jurisdiction by this trial court over these civil parties and that a partition action was the proper manner to secure the sale of this property if a timely forfeiture order had been entered by the court.

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