

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
Appellant	:	
	:	
v.	:	No. 1157 C.D. 2011
	:	SUBMITTED: September 23, 2011
\$17,400 US Currency	:	
(Noe Adolfo Padilla-Gomez)	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: November 1, 2011

Appellant, the Commonwealth of Pennsylvania, appeals from the order of the Court of Common Pleas of Lebanon County (trial court), which granted Appellee, Noe Adolfo Padilla-Gomez’s, petition for return of property. We affirm.

On August 11, 2010, Pennsylvania state trooper Justin Coda and Lebanon city police officer Frank Bettancourt¹ conducted a traffic stop of an Acura driven by Appellee on the 2000 block of North 9th Street, Lebanon, Pennsylvania. The officers stopped Appellee because they could not see through the tinted windows of his car, a vehicle code violation. Appellee was accompanied by two passengers. Appellee produced a Guatemalan driver’s license and a Texas

¹ Bettancourt is fluent in Spanish and acted as an interpreter throughout the traffic stop.

registration card, which reflected that the vehicle was registered to Vidyadhar Silivery. Appellee informed the officers that he was in the business of exporting vehicles and had taken a bus from Guatemala to the Texas border. After crossing the border he purchased the Acura and drove north to Philadelphia to purchase a truck for export. Appellee did not purchase the truck and left Philadelphia heading for Interstate 81 south. Appellee was given a warning regarding the tinted windows and told him he was free to go. However, Coda then asked Appellee if he could speak further with him and obtained permission to search the vehicle.

During the search, the officers discovered two bags each containing \$8000 in twenty dollar bills and \$1400 in the pockets of one of the passengers. Appellee informed the officers that he had converted the money to U.S. dollars in Guatemala and had not declared the money at the border crossing. Following discovery of the money, a K-9 search of the vehicle indicated that the dog detected the odor of narcotics but could not determine the source. The officers confiscated the money.

The Pennsylvania State Police and the Pennsylvania National Guard performed an ion scan of the money. The money was fanned out on a table and the ion scanner primarily scanned the edges of all the bills. The bills were not scanned individually. The first ion scan returned a reading of 989 digital units of cocaine. The second ion scan, which used a more sensitive channel, returned a reading of 1,296 digital units of cocaine. The readings were four times the casual contact level of money in general circulation in Pennsylvania. The Commonwealth confiscated the money pursuant to Section 6801(a)(6)(i) of the Forfeiture Act, 42 Pa. C.S. § 6801(a)(6)(i), but did not file any criminal charges against Appellee.

Appellee filed a petition for return of property with the trial court. After conducting a hearing and consideration of the parties' briefs, the trial court granted the petition for return of property. The trial court held that forfeiture was not warranted because the Commonwealth had failed to establish a nexus between the forfeited currency and unlawful criminal activity. The trial court relied upon *Commonwealth v. \$9,000 U.S. Currency (Robert Collins)*, 8 A.3d 379 (Pa. Cmwlth. 2010), which involved nearly identical facts. The trial court acknowledged that while Appellee's credibility was questionable, the Commonwealth failed to carry its burden because the positive ion scan did not rule out that a few individual bills could be the source of the positive reading, and that the Commonwealth failed to submit evidence regarding the casual contact level of money circulating in Guatemala. This appeal followed.

The Commonwealth asserts that it established the requisite nexus through the positive ion scan results, Appellee's behavior during the traffic stop and the inconsistencies in Appellee's story. However, we must agree with the trial court that *\$9,000 U.S. Currency (Robert Collins)* is factually indistinguishable from the case at hand, and therefore must control the disposition of this case. Accordingly, this Court finds that the issue raised in this appeal is accurately and thoroughly addressed in the opinion of the Honorable Charles T. Jones, Jr. of the Court of Common Pleas of Lebanon County, filed May 12, 2011, in *Commonwealth v. \$17,400 US Currency (Noe Gomez)*, No. CP-38-MD-317-2010, and this Court affirms on the basis of that opinion.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
Appellant	:	
	:	
v.	:	No. 1157 C.D. 2011
	:	
\$17,400 US Currency	:	
(Noe Adolfo Padilla-Gomez)	:	

ORDER

AND NOW, this 1st day of November, 2011, the order of the Court of Common Pleas of Lebanon County is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF
PENNSYLVANIA

v.

\$17,400 US CURRENCY,
(NOE GOMEZ)

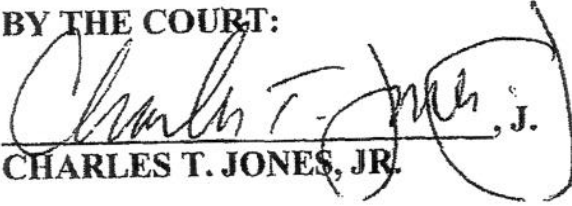
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CP-38-MD-317-2010

ORDER

AND NOW, this 12th day of May, 2011, upon careful consideration of the Petitioner's Petition for Return of Property and Supporting Brief, the Commonwealth's Brief in Opposition to Petitioner's Petition for Return of Property, and the testimony and exhibits submitted at the hearing held on March 1, 2011, Petitioner's Petition for Return of Property is **HEREBY GRANTED**.

BY THE COURT:


CHARLES T. JONES, JR.

Cc: Melissa Montgomery, Esquire

Robert Stewart, III, Esquire

**IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA**

CRIMINAL DIVISION

**COMMONWEALTH OF
PENNSYLVANIA**

v.

**\$17,400 US CURRENCY,
(NOE GOMEZ)**

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CP-38-MD-317-2010

APPEARANCES:

**Robert Stewart, III, Esquire
Office of Attorney General**

For the Commonwealth

**Melissa Montgomery, Esquire
Montgomery & Zimmerer**

For Petitioner

OPINION BY JONES, JR., J.:

I. PROCEDURAL HISTORY

On August 11, 2010, Petitioner, Noe Adolfo Padilla Gomez (“Gomez”) was stopped by the State Police in Lebanon County and \$17,400.00 was seized from the vehicle he was driving. Gomez has not been charged with any criminal or civil violations in connection with August 11, 2010 incident.

On December 2, 2010, Gomez filed a Petition for Return of Property. The Commonwealth filed an Answer to Gomez’s Petition on December 9, 2010. A forfeiture hearing was held on March 1, 2011, before this Court wherein both parties presented

testimony. Gomez presented testimony via videoconference from Guatemala. Following the hearing, the parties were instructed to file briefs regarding this matter no later than 4:30 p.m. on April 29, 2011. Both parties have filed briefs in support of their positions, and the matter is now ripe for disposition.

II. FACTUAL HISTORY

The facts, as presented at the forfeiture hearing, are as follows. On August 11, 2010, Trooper Justin Coda and Officer Betancourt were on a trigger lock detail in Lebanon City when they stopped Gomez's vehicle¹ for having tinted windows (N.T. 5-6). Trooper Coda explained at the hearing that a trigger lock detail is when several officers "saturate a particular area for traffic stops and other crimes that might be happening" (N.T. 6). One of Trooper Coda's specific responsibilities while working on a lock detail included looking for people who might be involved in drug trafficking or currency trafficking (N.T. 6).

Upon stopping the vehicle, Gomez, the driver of the vehicle, produced a Guatemalan driver's license (N.T. 7). Officer Betancourt acted as an interpreter because Gomez does not speak English (N.T. 8). There were two passengers in the vehicle, Padilla and Moran, Gomez's cousins (N.T. 8). When asked what he was doing, Gomez explained that he had crossed the Mexican border, bought the vehicle he was driving in Texas and had traveled to Philadelphia to buy a truck (N.T. 8). However, upon arriving in Philadelphia, they decided they were not interested in buying the truck (N.T. 8). When asked for his destination, Gomez stated "Interstate 81," but had no specific destination (N.T. 8).

The vehicle had several religious articles in it and several auto parts in the trunk of the vehicle; Trooper Coda testified that the vehicle appeared to have a "lived in" look (N.T. 9). Trooper Coda also testified that there were multiple cell phones that rang

¹ The vehicle was registered to a third party and Gomez was the driver of this vehicle on the date in question.

several times during the stop and all parties in the vehicle appeared very nervous (N.T. 9). Gomez's hands were shaking when he handed his documents to Trooper Coda and the two passengers refused to make eye contact, which he found suspicious (N.T. 9). Gomez was given a warning for the tinted windows and was released (N.T. 9).

Trooper Coda informed Gomez that "he was free to go" and was given his paperwork back (N.T. 9-10). Trooper Coda then asked Gomez if he could speak with him to which Gomez agreed (N.T. 10). Gomez was asked a second time where he was going (N.T. 10). Again, Gomez related that he had driven from Guatemala to Philadelphia to buy a truck but did not end up buying it, and he was now headed to Interstate 81 (N.T. 10). Trooper Coda asked if he could search the vehicle and Gomez consented (N.T. 10). During the search, Trooper Coda located a black leather bag in the backseat with approximately \$8,000, another bag with \$8,000 and \$1,400 in one of the passenger's pockets (N.T. 11). The cell phones continued to ring as the search was being conducted (N.T. 11). All of the money found was in 20 dollar bills (N.T. 12).

When confronted about the money found, Gomez indicated that it was Guatemalan money that he had turned over to U.S. currency in Guatemala (N.T. 12). Gomez also admitted that he had crossed the border without claiming it (N.T. 12). At first, Gomez had no explanation for why he neglected to claim the money but later stated that he did not think it was necessary to claim the money since there were three people in the vehicle and each person claimed an amount under \$10,000 (N.T. 12). Gomez also stated to Trooper Coda that he was in the business of buying and selling cars (N.T. 16). He provided a notebook that contained a handwritten log of dates and cities he visited to purchase vehicles (N.T. 16).

A K-9 was then brought to the scene and showed particular interest in the two bags of money found and in the trunk of the vehicle (N.T. 12). Officer Fisher testified that a change in the K-9's behavior indicates the presence of the odor of a controlled substance (N.T. 22). The K-9 at the scene is certified in the odor of cocaine, heroin, marijuana, and

methamphetamine (N.T. 23). Despite the K-9's change in behavior, no contraband or controlled substances were found in the vehicle.

The currency was taken to the State Police Asset Forfeiture Financial Investigation Unit in Jonestown. Trooper Teresa Cloman testified that an ionscan was performed on the \$17,400 currency (N.T. 31-33). She explained that "the money is fanned out across a table with paper on it so that the maximum amount of currency can be scanned at once" (N.T. 33). Trooper Cloman testified that primarily the edges of the bills, rather than the entire backs of the bills, are scanned so that they can fit as many bills in as possible for the reading (N.T. 33). The first cocaine reading of the currency was 989 digital units, and a second reading yielded 1,296 digital units (N.T. 35). Both readings indicated that the currency had four times the amount of cocaine than the casual contact level in Pennsylvania² (N.T. 35). Trooper Cloman opined that based on her conversations with Trooper Coda, the reports and the indication of the ionscan, it was her belief that the money was drug proceeds (N.T. 36).

III. STANDARD OF REVIEW

The Controlled Substances Forfeiture Act ("Act") provides that money "furnished or intended to be furnished by any person in exchange for a controlled substance in violation of the [Act], and all proceeds traceable to such an exchange" shall be subject to forfeiture to the Commonwealth and no property right shall exist in them. 42 Pa.C.S.A. §6801(a)(6)(i)(A). The Commonwealth bears the initial burden of proving, by a preponderance of the evidence, that the forfeiture was appropriate under either subsection (A) or (B). *Commonwealth v. Marshall*, 698 A.2d 576, 578 (Pa. 1997). To meet its burden, the Commonwealth must establish that a "nexus exists between the money and a violation of the [Act]." *Commonwealth v. \$6,425.00 Seized from Richard Esquilin*, 880

² There was testimony that the casual contact level in 2010 for Pennsylvania was 269.05 digital units and the Lebanon County casual contact level was 356.38 (N.T. 47).

A.2d 523, 529 (Pa. 2005). A preponderance of the evidence is tantamount to a “more likely than not” standard. *Esquilin*, 880 A.2d at 529.

Money found in close proximity to controlled substances possessed in violation of the Act is “rebuttably presumed to be proceeds derived from the selling of a controlled substance in violation of the . . . Act.” 42 Pa.C.S.A. § 6801(a)(6)(ii). The Commonwealth is not, however, required to produce evidence directly linking seized property to illegal activity to show a nexus between the property and unlawful activity. *Commonwealth v. McJett*, 811 A.2d 104, 110 (Pa.Cmwltth.2002). “Although illegal drugs are often present at the time of seizure, there is no requirement that such drugs be present; instead, circumstantial evidence may suffice to establish a party’s involvement in drug activity.” *Esquilin*, 880 A.2d at 530. Neither a criminal prosecution nor a conviction is required for property to be deemed forfeitable. *Esquilin*, 880 A.2d at 530.

Once the Commonwealth sustains its burden, the burden shifts to the claimant to rebut the presumption that the money is forfeitable. 42 Pa.C.S.A. § 6802(j). A claimant must establish that: “(1) he owned the money; (2) he lawfully acquired it; and (3) it was not unlawfully used or possessed by him.” *Marshall*, 698 A.2d at 578.

IV. DISCUSSION

We hold that a forfeiture is not warranted in this case because the Commonwealth failed to establish a nexus between the currency forfeited and the unlawful criminal activity. As previously mentioned, the Commonwealth is not required to directly link the property in question to illegal activity, but it must be able show a nexus between the currency and some type of drug activity by more than a suspicion. *Marshall*, 698 A.2d at 579. The fact that a drug-sniffing dog alerts to cash bundled in a manner consistent with drug dealing is not enough to establish a nexus—even coupled with the fact that a driver provides inconsistent stories. *Marshall*, 698 A.2d at 579. Although not dispositive, the fact that a person is never charged with a crime in relation to the seized money is

nexus with the forfeited money could be made since the driver of the vehicle was not charged with a crime in relation to the seized money).

Our Commonwealth Court recently ruled on a case nearly identical to the one at hand in *Commonwealth v. \$9,000 U.S. Currency*, 8 A.3d 379 (Pa.Cmwlt.2010). In that case, a driver was stopped on Interstate 81 for excessively tinted windows. The vehicle was owned in a third party's name and the driver's background revealed that he had been convicted for possession of marijuana and was driving with a suspended license. After the driver consented to a vehicle search, \$9,000 was found in the vehicle in a manner consistent with drug dealing practices. A drug dog alerted at the glove box, indicating that he detected the odor of a controlled substance, but no narcotics were found in the vehicle or on the driver's person. Despite the fact that the driver gave inconsistent stories about where he got the money from and the levels found on the currency were more than three times higher than the casual contact level, no criminal charges were filed. The \$9,000 was seized by the police and the Commonwealth filed a forfeiture petition.

The trial court granted the forfeiture petition and found that the evidence supporting the nexus between the cash and violation of the Act consisted of the following: (1) the method of bundling the money; (2) the drug dog's alert; and (3) the ionscan results. *\$9,000 U.S. Currency*, 8 A.3d at 383. The Commonwealth Court reversed the trial court's decision, finding that the Commonwealth failed to meet its burden of proving the nexus between the cash and drug trafficking. The Commonwealth Court focused on the fact that the ionscan, which scanned all of the currency in one reading, was not reliable:

Proving the presence of cocaine on cash, by itself, is insufficient to show a nexus between that cash and illegal drug trafficking. An ionscan must show the amount of controlled substance found on the money, and it must be done in a way that eliminates the possibility that only a small number of bills are

responsible for the ionscan reading. If it does not, the ionscan is no more probative than a drug dog alert.

\$9,000 U.S. Currency, 8 A.3d at 387.

The court also noted that the Commonwealth failed to identify the casual contact levels from New York or West Virginia (where the driver and passenger were from), rather than Pennsylvania, because there was no evidence that the cash seized ever circulated in Pennsylvania. Thus, the casual contact level from Pennsylvania was deemed irrelevant. *\$9,000 U.S. Currency*, 8 A.3d at 388. The remaining evidence (i.e. the dog's alert, the method of bundling the money, inconsistent statements about the origin of the money) was insufficient to support forfeiture. *\$9,000 U.S. Currency*, 8 A.3d at 387.

Our case is similar to *\$9,000 U.S. Currency* because the ionscan performed does not eliminate the possibility that only a small number of bills are responsible for the ionscan reading. Trooper Cloman testified that the currency was fanned out, like the reading in *\$9,000 U.S. Currency*, to allow the scan to test all of the currency at once. Similar to *\$9,000 U.S. Currency*, the casual contact level from Pennsylvania is irrelevant if Gomez brought the money from Guatemala because no evidence was presented that the currency was circulated in Pennsylvania. There was no testimony regarding the casual contact level from Guatemala or Texas. Furthermore, the other factors allegedly indicating drug activity are just as weak as the facts presented in *\$9,000 U.S. Currency*. In this case, no drugs or contraband were found in the vehicle or on any of the passengers. No drug-related charges were filed against any of the passengers in the vehicle. None of the bills looked like they had been rolled up to snort cocaine. It is clear that the money had been in recent contact with a controlled substance, but it is less than certain where the contact occurred. While it is true that Gomez's credibility is certainly questionable, the Commonwealth has failed to sustain its burden and this Court cannot rely on an ionscan that does not eliminate the possibility that only a small number of bills are responsible for the reading results and that utilized the improper casual contact level.

As a result, the forfeiture was improper. An Order will be entered consistent with the foregoing.