

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :
 :
 v. : No. 1338 C.D. 2010
 : Submitted: October 29, 2010
Property Listed on Commonwealth's :
Exhibit No. 1 (Marvin Fulton) :
 :
Appeal of: Marvin Fulton :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: March 8, 2011

Marvin Fulton appeals an order of the Court of Common Pleas of York County (trial court) granting the Commonwealth's petition for forfeiture of property under the act commonly known as the Controlled Substances Forfeitures Act (Forfeiture Act), 42 Pa. C.S. §§6801-6802. At issue are cash and various items of personal property seized from Fulton's residence that were forfeited as derivative contraband. We affirm.

On August 9, 2008, undercover members of the York County Drug Task Force arranged for an informant to make a controlled buy of cocaine from Michael Knaub, a suspected drug dealer. The Task Force supplied the informant

with \$4,000 in “buy money,”¹ which he gave to Knaub. Knaub proceeded to 36 East Princess Street in York, where he purchased a total of 17 ounces of cocaine for \$17,000. Knaub then gave the informant four one-ounce bags of cocaine, the amount purchased with the “buy money,” and kept the rest of the cocaine, which he purchased with his own funds, for himself. Knaub was subsequently arrested for possession of 13 ounces of cocaine.

Task Force officers immediately obtained a search warrant for 36 East Princess Street, which is owned by Fulton. Fulton operates a barber shop on the first floor and uses the second and third floors as his private residence. In a second floor bedroom the officers seized \$50,140 in cash; a bottle of Inositol, a substance used to cut cocaine; and a digital scale. The officers also found a two-pound block of cocaine and three one-ounce bags of cocaine on the floor under the headboard of the bed. When they inventoried the cash, police found \$3,690 of the Task Force’s “buy money;” the remainder of the buy money was not found. The officers seized the deed to the property, Fulton’s tax returns, numerous items of personal property, and the equipment and furniture from the barbershop.²

¹ The “buy money” was photocopied, and the serial numbers of the bills cataloged, prior to the Task Force providing the money to the confidential informant.

² The inventory of seized items is as follows:

1. \$50,1[4]0 U.S. Currency. Det. Nadzom and FBI Nawrocki located \$3690 of official buy money in this money. This item was located by Det. Nadzom.
2. Digital scale (working) no obtainable prints. Nadzom
3. Bottle Inositol (unopened) no obtainable prints. Nadzom
4. 1 large bag (freezer bag) with 3 smaller bags (1 oz each) field tested positive/no obtainable prints/field tested positive/4 C Outside white plastic bag and plastic sandwich bags that were inside the bag, 7 bags were swabbed with positive result/swab was left in bag/ Nadzom
5. Plastic bags opened (5) opened/Nadzom

(Footnote continued on the next page . . .)

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6. \$141 US Currency/Wentz
7. Bag of assorted batteries/Wentz
8. Deed 36 E Princess St/Buschman
9. Title 2006 kawk/2003 suz/1999 Mazda/Shaffer
10. Coff. Maker/McBride
11. Emerson 20 inch TV/McBride
12. 8 new radios/3 flashlights/2 plastic flashlights/McBride
13. Box batteries/Wentz
14. 6 photo frames/3 audiovox DVD players/McBride
15. 17 Razors/McBride
16. 20 medal (sic) LED lights/McBride
17. Braun Razor/Remington razor/26 inch TV mount/2 leather cases/McBride
18. 20 leather jackets H.D./McBride
19. 5 leather H.D. Jackets/McBride
20. Philips DVD/McBride
21. RCA DVD/McBride
22. 2 Queen size bedsheets/McBride
23. 2 Wallace flatware sets/McBride
24. Dell computer w/ printer/Fenstermacher
25. 5 leather vests/6 leather jackets/1 chap/McBride
26. 2 denim jackets/McBride
27. 2 carhart overalls/3 jackets/McBride
28. Dale Jr. Jacket/McBride
29. Niga vision bino/Wentz
30. DVD recorder/Fen
31. 5 electric clippers/Wentz
32. 2 Emerson LCD TVs/Rock
33. Box Records/Wentz/Shaffer
34. Change Front room/Nadzom/Change was counted by Wentz at Commerce Bank for a total of \$3,120.84
35. 9 box tools/1 drill gun/Wentz
36. Frigidare dryer/Rock
37. Frigidare washer/Rock

(Footnote continued on the next page . . .)

After a jury trial, Fulton was convicted of delivery of a controlled substance; simple possession of cocaine; and possession with intent to deliver cocaine. Thereafter, on April 23, 2010, a forfeiture hearing was held regarding the items seized from Fulton's property. At the hearing the Commonwealth called two witnesses: Scott Nadzom, a York City Detective assigned to the Task Force, and Andrew Shaffer, the Task Force Supervisor. Nadzom confirmed that the cocaine and money was recovered from the bedroom and that the Task Force's "buy money" was among the cash seized.

Shaffer was qualified as an expert in the "use value, packaging of cocaine, and ... value [of cocaine] in York County." Notes of Testimony, April 23, 2010, at 23. He testified that most of the personal items seized, such as the bed sheet sets, coffee maker, and Harley Davidson jackets,³ were brand new and still in their original packaging. Shaffer opined that, in his experience, the quantity of

(continued . . .)

38. Koblenz buffer/Wentz
39. Storm buffer/Wentz
40. Sirius radio/Shaffer
41. 4 barber chairs/Shaffer
42. outdoor barber pole/Shaffer
43. 1 dolly/Wentz
44. Red lawn mower/Wentz
45. Mongoose bike/Wentz
46. Digital camera/Wentz
47. Video surveillance/Wentz
48. Water cooler/Wentz

Certified Record, Commonwealth's Exhibit 1. The only items Fulton did not contest at the hearing were the bottle of Inositol (Item 3), the cocaine (Item 4), the deed to the property (Item 8), and the floor buffers that Fulton had rented (Items 38, 39).

³ Price tags on the Harley Davidson jackets indicate retail prices of between \$300 and \$350 each.

new unopened items, and types of items seized, indicated that the items were traded for cocaine. He testified that this opinion was supported by Fulton's tax returns, which showed that from 2003 to 2006 Fulton's adjusted gross income was \$7,737, \$22,689, \$15,671, and \$10,133, respectively.⁴ Because the value of the items seized exceeded Fulton's financial means, Shaffer believed Fulton operated the barbershop business as a front for a cocaine trafficking operation.

After the Commonwealth concluded its case, Fulton chose not to offer any evidence or explanation regarding how or when he acquired the items that were seized. Fulton's attorney simply offered the legal argument that all of the items seized were items normally found in one's home and had accumulated over time.

The trial court held that all of the property seized was subject to forfeiture under the Forfeiture Act. The court agreed with Shaffer that Fulton's barbershop business was a front for his drug vending operation, subjecting the barbershop equipment and furniture to forfeiture. The trial court also found that all of the items seized from the residential portion of the property were either the proceeds of, or used to facilitate, the drug vending operation. Based upon the foregoing findings, the trial court concluded that the Commonwealth satisfied its burden of proving a nexus between the items seized and illegal drug activity. Because Fulton offered no evidence on how he obtained any of the items, the trial court held that he failed to rebut the presumption that they were subject to forfeiture. Fulton now appeals.

⁴ Fulton's business income for the years 2003 to 2006 was \$3,785, \$5,699, \$3,412, and \$8,214, respectively.

On appeal,⁵ Fulton argues that the trial court erred in finding that the items seized from the residential portion of the property were the proceeds of, or used to facilitate, the drug vending operation.⁶ He asserts that the Commonwealth did not present any evidence regarding how and when Fulton obtained the items, or how much he paid for them. We find no merit to Fulton's arguments, which are based upon a mischaracterization of the Commonwealth's burden in a forfeiture proceeding.

Section 6801(a)(6) of the Forfeiture Act, in relevant part, provides for the forfeiture of:

- (i) All of the following:
 - (A) Money, negotiable instruments, securities, or *other things of value* furnished or intended to be furnished by any person in exchange for a controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act, *and all proceeds traceable to such an exchange.*
 - (B) Money, negotiable instruments, securities or other things of value used or intended to be used to facilitate any violation of The Controlled Substance, Drug, Device and Cosmetic Act.

⁵ In an appeal from a forfeiture proceeding pursuant to the Forfeiture Act, our review is limited to determining whether the trial court's findings of fact are supported by substantial evidence, and whether the trial court abused its discretion or committed an error of law. *Commonwealth v. \$6,425.00 Seized from Esquilin*, 583 Pa. 544, 554, 880 A.2d 523, 529 (2005). We are mindful that clear findings of fact made by a judge in a bench trial are entitled to the same deference as a jury verdict and can be reversed on appeal only if the record lacks evidence to support those findings. *Commonwealth v. Fidelity Bank Accounts*, 631 A.2d 710, 714 (Pa. Cmwlth. 1993) (citation omitted). Moreover, a trial judge is permitted to draw any reasonable inferences from the evidence presented. *Commonwealth v. McJett*, 811 A.2d 104, 111 (Pa. Cmwlth. 2002).

⁶ Fulton does not challenge the forfeiture of the items seized from the barbershop.

(C) Real property used or intended to be used to facilitate any violation of The Controlled Substance, Drug, Device and Cosmetic Act, including structures or other improvements thereon, and including any right, title and interest in the whole or any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of The Controlled Substance, Drug, Device and Cosmetic Act, and things growing on, affixed to and found in the land.

(ii) 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 the owner to have been committed or omitted without the knowledge or consent of that owner. *Such money and negotiable instruments found in close proximity to controlled substances possessed in violation of The Controlled Substance, Drug, Device and Cosmetic Act shall be rebuttably presumed to be proceeds derived from the selling of a controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act.*

42 Pa. C.S. §6801(a)(6) (emphasis added).

In a forfeiture proceeding, the Commonwealth bears the initial burden of proving that property is subject to forfeiture under Section 6801. *Commonwealth v. \$6,425.00 Seized from Esquilin*, 583 Pa. 544, 555, 880 A.2d 523, 529 (2005). To meet this burden the Commonwealth must establish, by a preponderance of the evidence,⁷ that a nexus exists between the property subject to forfeiture and an unlawful activity in violation of The Controlled Substance, Drug,

⁷ “Preponderance of the evidence is tantamount to a ‘more likely than not’ standard.” *McJett*, 811 A.2d at 100. “Proof by a preponderance of the evidence is ‘often alluded to as a weighing of the evidence and a determination based upon which way the mythical scales are tipped.’” *Id.* (quoting *Commonwealth v. \$32,950 U.S. Currency*, 634 A.2d 697, 698 n. 9 (Pa. Cmwlth. 1993)).

Device and Cosmetic Act⁸ (Drug Act). *Id.* The Commonwealth does not need to produce evidence directly linking the seized property to illegal activity in order to establish the requisite nexus. *Id.* at 555, 880 A.2d at 529-30. It needs to show only that it is more likely than not that there was a nexus between the property and the drug trade. *Id.* at 555, 880 A.2d at 529.

Once the Commonwealth sustains its burden of establishing a nexus by a preponderance of the evidence, Section 6802 of the Forfeiture Act shifts the burden to the owner of the property to rebut the presumption that the property is forfeitable.⁹ 42 Pa. C.S. §6802(j). To do so, the property owner must establish that he: (1) owned the property; (2) lawfully acquired it; and (3) did not unlawfully use or possess it. *Id.*

Fulton's brief does not identify individual pieces of property that he believes are beyond forfeiture; rather, he appears to be contesting the forfeiture of all of the items seized from the residential portion of the structure. For purposes of our analysis, we will first consider the \$50,140 in cash seized from the bedroom, and then address the remaining personal property as a group, not item by item.

Section 6801(a)(6)(ii) of the Forfeiture Act expressly states that money found in close proximity to controlled substances possessed in violation of the Drug Act is rebuttably presumed to be proceeds derived from the sale of the

⁸ Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §§780-101 – 780-144.

⁹ Section 6802(j) provides in relevant part:

[I]f the Commonwealth produces evidence that the property in question was unlawfully used, possessed or otherwise subject to forfeiture under section 6801(a)..., the burden shall be upon the claimant to show:

- (1) That the claimant is the owner of the property ...
- (2) That the claimant lawfully acquired the property.
- (3) That it was not unlawfully used or possessed by him. ...

42 Pa. C.S. §6802(j).

controlled substance. 42 Pa. C.S. §6801(a)(6)(ii). Here, it is undisputed that the \$50,140 in cash was found in close proximity to the cocaine, Inositol, and digital scale in the second floor bedroom.¹⁰ Thus, even if the Commonwealth had offered no testimony regarding the cash, it would be presumed to be forfeitable and related to the drug trade. However, the Commonwealth bolstered this presumption with Nadzom’s testimony that \$3,690 of the seized cash was the Task Force’s “buy money.” Fulton offered no testimony that would rebut the presumption that this money was the product of the drug trade. As such, it was properly found to be forfeitable by the trial court.

We next consider the remaining personal property seized from the residential part of Fulton’s property. The trial court found that the Commonwealth met its burden of establishing, by a preponderance of evidence, a nexus between the property seized and the drug trade, and that Fulton failed to rebut that presumption.

The Commonwealth can prove a nexus between property seized and a violation of the Drug Act by showing a disparity between the value of the property and the legitimate income of the putative owner. For example, in *Commonwealth v. Fidelity Bank Accounts*, 631 A.2d 710 (Pa. Cmwlth. 1993), the appellants were accused of trafficking large quantities of drugs from their home. The Commonwealth petitioned for forfeiture of a variety of property appellants had accumulated over a four-year period, including four parcels of real estate, five vehicles, \$385,000 in liquid assets, jewelry, furs, camera equipment, and electronics. The Commonwealth’s evidence showed that appellants’ legitimate income for the same four-year period ranged from \$10,807 to \$27,141. In

¹⁰ As noted previously, the money was found on the bed, while the cocaine was located on the floor behind the headboard.

defending against forfeiture of the seized items, appellants presented no evidence but argued that the Commonwealth “was required to prove that [appellants] purchased each and every item of property with the ill-gotten gains from the drug trafficking operation and not with funds derived from legitimate sources.” *Id.* at 714. We rejected this argument and held that given the difference between the value of the seized property and appellants’ legitimate income, it was more likely than not that the items were the proceeds of illegal drug sales and, therefore, properly forfeited. *See also Commonwealth v. \$3,222.00 U.S. Currency*, 856 A.2d 288 (Pa. Cmwlth. 2004) (televisions, home audio equipment, entertainment center, personal computer, two Sony PlayStations and vacuum cleaner could be forfeited if purchased, at least in part, with money from the drug trade); *Commonwealth v. Wingait Farms*, 659 A.2d 584 (Pa. Cmwlth. 1995) (horse farm, horses, personal property, and household items forfeitable because drug trade was conducted on the farm).

Here, the Commonwealth demonstrated that Fulton earned little legitimate income. Furthermore, Shaffer, who has worked his whole career in drug enforcement, testified credibly that new consumer goods, whether purchased or stolen, are commonly traded for drugs. Therefore, given the number of new items seized, such as the five Harley Davidson jackets still in their original packaging, and the value of those items relative to Fulton’s legitimate income, the Commonwealth met its burden of proving that it was more likely than not that the items seized were either obtained in exchange for drugs or purchased using the proceeds of drug sales.

The burden then shifted to Fulton to prove that he: (1) owned the property; (2) lawfully acquired it; and (3) did not unlawfully use or possess the property. 42 Pa. C.S. §6802(j). Fulton did not meet this burden. In fact, as did the appellants in *Fidelity Bank Accounts*, Fulton did not testify at all, nor did he offer

any evidence to show he lawfully obtained any of the seized property. Instead, his attorney claimed that all of the items are what one normally accumulates over time. In rejecting this argument, the trial court reasoned that individuals rarely, if ever, accumulate so many brand new, nearly identical items. Such a conclusion is entirely reasonable and well within the discretion of the trial court, especially in light of this Court's rejection of a similar argument in *Fidelity Bank Accounts*. See *Fidelity Bank Accounts*, 631 A.2d at 718.

For all the foregoing reasons, we affirm the trial court's order.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 8th day of March, 2011, the order of the Court of Common Pleas of York County, dated April 23, 2010, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge