

On January 2, 2007, the Police returned. A confidential informant again went to the Property and purchased two blue tinted packets of crack cocaine for \$20 of pre-recorded buy money. Later that same day, the Police executed a search warrant for the premises. The Police arrested Strand while he held \$20 of the pre-recorded buy money and more than \$300 in cash. Police found documents at the Property which indicated it was Strand's residence. The Police also found a loaded .380 semi-automatic handgun and eight blue tinted packets of crack cocaine similar to those purchased by the confidential informant. The Police also found other baggies containing crack cocaine, marijuana, and ten barbiturate pills. The resale value of the drugs found at the Property totaled over \$1,000.00.

Strand was charged with possessing a controlled substance with intent to deliver, possessing a controlled substance, possessing a firearm though prohibited, possessing drug paraphernalia, and possessing an instrument of crime. On February 22, 2008, Strand entered a negotiated guilty plea to possessing a controlled substance with intent to deliver. Because of a prior conviction, Strand was subject to a sentence of three to six years. The Commonwealth agreed to nolle prosequere the other charges. Strand was sentenced to a term of three to six years with no fine imposed.

On March 5, 2008, the Commonwealth petitioned for the forfeiture of the Property because it was used to facilitate the sales of narcotics:

4. The real property at 3534 N Warnock St, Philadelphia, PA is subject to forfeiture pursuant to 42 Pa.C.S. §6801(a)(6)(i)(C) because it was used and/or continues to be used (or intended to be used) to commit, or to facilitate the commission of, violations of the Controlled

Substance, Drug, Device and Cosmetic Act, 35 Pa.C.S. §§780-101 et seq. These violations include, but are not limited to, conduct described in the Philadelphia Police Department Arrest Report(s) attached to this petition as (Exhibit A).

Petition for Forfeiture Pursuant to 42 Pa.C.S. §6801 Et Seq., March 5, 2008, Paragraph Four at 2; Reproduced Record (R.R.) at 8a.

On February 19, 2009, the trial court ordered the Property forfeited with ownership transferred to the Philadelphia District Attorney's Office.

On March 19, 2009, the trial court held a hearing to determine whether the forfeiture of the Property was an excessive fine under the United States and Pennsylvania Constitutions. The parties stipulated that the Property was valued at \$53,000.00 and to pertinent facts concerning the arrest and conviction of Strand. The parties further stipulated that the maximum fine for the crimes for which Strand was convicted was \$200,000.00. The attorney for the Property attempted to call Harold Strand, Jr. (Strand, Jr.) as a witness. The Commonwealth objected on the basis that Strand, Jr.'s testimony was irrelevant as equity factors could not be considered by the trial court. After hearing argument the trial court sustained the objection. The trial court determined that the forfeiture was not a constitutionally excessive fine.

On March 24, 2009, Strand moved for reconsideration. Strand argued that the Commonwealth failed to establish a pattern of misbehavior and failed to introduce evidence regarding the harm that resulted from Strand's drug sales. Strand further alleged:

13. Strand submits that under *Commonwealth v. Smothers*, 920 A.2d 922 (Pa. Cmwlth. 2007), the Commonwealth's evidence in the instant matter fails the Gross Disproportionality test. In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Supreme Court 'adopted the standard that a punitive forfeiture would violate the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense."'. . . . The court laid out similar factors as those stated in *5444 Spruce Street [Commonwealth v. The Real Property and Improvements Known as 5444 Spruce Street, Philadelphia]*, 890 A.2d 35 (Pa. Cmwlth. 2006)]. Comparing the gravity of Strand's offense, which Strand would submit was relatively minor, to the forfeiture of his family home that is worth over \$53,000, is grossly disproportionate.

14. Strand submits that the Commonwealth failed to meet their [sic] burden of clear and convincing evidence that forfeiture of 3534 Warnock Street, Philadelphia is not an excessive fine under the U.S. and Pennsylvania Constitution and therefore forfeiture must be denied. While Strand does not concede that the factors enumerated in *5444 Spruce Street* and *Smothers* are exhaustive, the Commonwealth was unable to prove by clear and convincing evidence two (2) of the three (3) factors suggested in the case law. That is, the Commonwealth did not prove that Strand's behavior was a pattern of misbehavior or that his acts resulted in any harm. (Citation omitted).

Motion for Reconsideration of Order for Forfeiture Pursuant to 42 Pa.C.S. §6801, ET SEQ., March 24, 2009, Paragraph Nos. 13-14 at 6-7; R.R. at 33a-34a.

On April 16, 2009, the trial court heard the motion for reconsideration. After some argument, the Commonwealth's attorney requested a "status date" in two weeks and would attempt to settle the case in that time. On April 29, 2009, the trial court again heard the matter. Strand Jr. testified that he

had lived at the Property “[a]ll my life basically.” Notes of Testimony, April 29, 2009, (N.T.) at 8; R.R. at 63a. Strand Jr. testified that his girlfriend, his one year old daughter, and his sixteen year old brother lived at the Property. N.T. at 8-9; R.R. at 63a-64a. Strand, Jr. testified that the Property had been in his family for sixty to seventy years. N.T. at 10; R.R. at 64a. Strand Jr. testified that he and his family had nowhere else to live. N.T. at 11-12; R.R. at 64a.

The Commonwealth argued that Strand had the burden to prove that the forfeiture was unconstitutional because the amount of the forfeiture was grossly disproportional to the gravity of the underlying offense. N.T. at 19-20; R.R. at 66a. Strand’s attorney argued that the Commonwealth had the burden to prove by clear and convincing evidence a pattern and practice of drug dealing at the Property and that a harm resulted, what the maximum penalty was for the offense, and the value of the Property. N.T. at 22-24; R.R. at 67a.

The trial court determined that the forfeiture of the Property constituted an excessive fine and granted Strand’s motion:

The Trial Court did not err in ruling that the forfeiture was an excessive fine within the meaning of the United States Constitution and the Pennsylvania Constitution because the evidence did not show that the amount or value of the forfeiture was proportional to the gravity of the offense underlying the petition to forfeit.

The analysis for determining if a fine is unconstitutionally excessive is the ‘gross disproportionality test’ set forth by the United States Supreme Court in *United States v. Bajakajian*, 524 U.S. 321 (1998). . . .

The Pennsylvania Supreme Court explicitly adopted the ‘gross disproportionality test’ set forth in *Bajakajian* to determine if a forfeiture amounts to an excessive fine. . . .

....

In the instant case, the value of the home is not in dispute, as the parties stipulated to the value being \$53,000. Because the maximum penalty Appellee [Strand] is subject to is \$200,000, the fact that the value of the property is \$53,000 weighs against Appellee [Strand]. However, the other factors related to the gravity of crime are not as clear cut. In the instant case, there were two drug sales made to a confidential informant and these sales occurred within five days of each other. Whether or not this constitutes a pattern of misbehavior for the purpose of this analysis needs to be determined based on the evidence. In the Commonwealth Court’s 5444 Spruce Street decision . . . the court relied on credible testimony to determine that there was ‘a continuous pattern and practice of selling drugs to minors.’ . . . In the instant case, in considering the culpability of this particular defendant [Strand], the two sales of crack cocaine to a confidential informant do not alone constitute a pattern of misbehavior for the purposes of weighing the gravity of the offense for the excessive fine analysis.

The same reasoning applies to the harm factor that is part of the analysis for determining the gravity of the offense. While the Appellant [Commonwealth] argued that it is a general contention that drugs are harmful, the excessive fines analysis requires that the court consider evidence pertaining to the particular conduct of the specific defendant property owner. A similar line of reasoning about the general ill effects of drugs was rejected by the Pennsylvania Supreme Court in 5444 Spruce Street. . . . In the instant case, Appellant [Commonwealth] did not call any witnesses to testify as to the harm Appellee’s [Strand] conduct caused to the neighborhood, rather there was simply the general contention that drugs are harmful. As stated above, this approach was explicitly rejected in the controlling case, 5444 Spruce Street.

....

Based on the facts of this case and the evidence presented, the forfeiture of 3534 Warnock Street would constitute an unconstitutionally excessive fine because the amount of the forfeiture outweighs the gravity of the Appellee's [Strand] offense.

Trial Court Opinion, August 5, 2009, at 4, 6-8.

The Commonwealth contends the trial court erred when it ruled that the forfeiture was unconstitutionally excessive where the value of the Property was \$53,000 and the maximum fine imposable was \$200,000 such that the amount of the forfeiture was clearly not grossly disproportional and because the trial court erroneously applied and then misconstrued the balancing test.¹

Initially, the Commonwealth contends that the trial court erred because it refused to deny Strand's motion for reconsideration on the grounds established in Commonwealth v. Real Property and Improvements Commonly Known as 5444 Spruce Street, Philadelphia, 890 A.2d 35 (Pa. Cmwlth. 2006).

5444 Spruce Street has a very complicated procedural history. On February 20, 1995, members of the Philadelphia Police Department working undercover purchased crack cocaine and marijuana on February 20, 1995, at 5444 Spruce Street in the City of Philadelphia. 5444 Spruce Street was owned by Elizabeth Lewis (Lewis). A search of 5444 Spruce Street led to the seizure of five packets of crack cocaine in Lewis's purse and eleven packets of marijuana in the

¹ In a forfeiture case, this Court's review is limited to determining whether the trial court abused its discretion or committed an error of law. Commonwealth v. 1997 Mitsubishi Diamante, 950 A.2d 1114 (Pa. Cmwlth. 2008).

kitchen. Lewis ultimately pleaded guilty to a single charge of possession with intent to deliver and received a sentence of two years probation and a fine of \$185. The Commonwealth petitioned for forfeiture of 5444 Spruce Street under the Controlled Substances Forfeitures Act, 42 Pa.C.S. §§6801-6802. On September 26, 1996, the Court of Common Pleas of Philadelphia County granted the petition. Lewis appealed to this Court which vacated and remanded because the Court of Common Pleas of Philadelphia County failed to apply the clear and convincing burden of proof then required when a forfeiture was challenged as an excessive fine. On remand, the Court of Common Pleas of Philadelphia County granted the forfeiture based upon the clear and convincing evidence of a pattern and practice of drug dealing at 5444 Spruce Street. Lewis again appealed and challenged the constitutionality of the forfeiture as an excessive fine in violation of the Eight Amendment of the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution. This Court affirmed and relied on United States v. Bajakajian, 524 U.S. 321 (1998). 5444 Spruce Street, 890 A.2d at 36-37.

Lewis appealed to our Pennsylvania Supreme Court which reversed and remanded to the Court of Common Pleas of Philadelphia County for a determination of the value of 5444 Spruce Street and instructed that value had to be weighed against the gravity of the offense:

The Commonwealth Court appears to have used the analytical framework which became the dissent in Bajakajian: that the excessiveness of the fine may be weighed against the cost to society of the traffic in illegal drugs.

The majority in Bajakajian, however, requires that, in cases where a punitive forfeiture is involved, the court

‘compare the amount of the forfeiture to the gravity of the defendant’s offense. If the amount of the forfeiture is grossly disproportional to the gravity to the defendant’s offense, it is unconstitutional.’ *Bajakajian*, 524 U.S. at 336-337.

The Court enumerated factors by which a court may measure the gravity of the offense, each of which is limited to the conduct of the defendant: the penalty imposed as compared to the maximum penalty available; whether the violation was isolated or part of a pattern of misbehavior; and, the harm resulting from the crime charged. *Id.* at 338-339. . . .

In this case, the Commonwealth Court in its analysis gave lip service to the requirements of *Bajakajian* but could not measure the gravity of the defendant’s offense against the value of the property forfeited because the record contained no information about the value of the forfeit property. In this case, no testimony was offered regarding the value of 5444 Spruce Street. Unless and until the value of 5444 Spruce Street is established, the proportionality of the fine to Lewis’s offense cannot be established. (Footnote omitted).

Commonwealth v. Real Property & Improvements Commonly Known as 5444 Spruce Street, 574 Pa. 423 433-434, 832 A.2d 396, 402-403 (2003).

On remand the Court of Common Pleas of Philadelphia County conducted a valuation hearing and determined the value of 5444 Spruce Street was \$25,000. The Court of Common Pleas of Philadelphia County ruled that the forfeiture was not grossly disproportional to the gravity of the offense because the maximum fine for selling crack was \$100,000.00, the maximum fine for selling cocaine to a minor was \$100,000.00, and the maximum fine for the sale of marijuana was \$15,000.00. The Court of Common Pleas of Philadelphia County also considered the fact that the violation was part of a pattern of misbehavior and

not an isolated incident and the obvious harm that resulted from the sale of drugs to neighborhood teenagers. Commonwealth v. Real Property & Improvements Commonly Known as 5444 Spruce Street, 890 A.2d 35, 38 (Pa. Cmwlth. 2006).

Lewis appealed to this Court and argued that the forfeiture of her home was an excessive fine given the small amount of drugs found in her home, that she received no jail time and only a small fine, and that the sale of drugs was an isolated incident. 5444 Spruce Street, 890 A.2d at 39.

This Court affirmed:

[I]n the present case, the trial court in assessing the gravity of the offense, did consider the amount of drugs found in Lewis's home and their value, the duration of the illegal activity, and the effect on the community. Although the trial court found that the amount of drugs and their value were comparatively small, it gave greater weight to the duration of the illegal activity, having found a continuous pattern and practice of selling drugs to minors based on the credited testimony of Tarik Chapman. The Court noted Chapman's testimony that Lewis's house was known as the neighborhood crack house. The court's finding that Lewis willfully and repeatedly sold drugs from the house, that she subjected her young grandchild to an unsafe and unhealthy environment, and that she purposely sold drugs to juveniles without consideration for the ill effects on her neighbors and her community. Those findings are supported by credited evidence. . . .

Finally, Lewis argues that the trial court should have considered the actual penalties imposed rather than the maximum possible penalties in evaluating the gravity of the defendant's [Lewis] offense. After considering the parties' arguments on this issue, we must conclude that the trial court properly adopted the more objective

approach and compared the penalty imposed to the maximum penalty available, an approach endorsed in 5444 Spruce Street. . . .

5444 Spruce Street, 890 A.2d at 39-40. The Supreme Court denied Lewis's petition for allowance of appeal. Commonwealth v. Real Property & Improvements Commonly Known as 5444 Spruce Street, 590 Pa. 662, 911 A.2d 937 (2006).

Very recently, in Commonwealth v. 542 Ontario Street, Bethlehem, PA. 18015, 989 A.2d 411 (Pa. Cmwlth. 2010), this Court addressed the gross disproportionality test in a forfeiture action. Freddie Blas (Blas) owned property located at 542 Ontario Street in Bethlehem, Northampton County, Pennsylvania. In 2005, the Bethlehem Police executed a search warrant of 542 Ontario Street. Controlled substances were found at the residence along with an occupant. Blas claimed he did not know the man. Blas was acquitted of the charges of possession of a controlled substance, possession with intent to deliver a controlled substance, conspiracy to possess cocaine with intent to deliver and possession of drug paraphernalia. Next, the Commonwealth petitioned for forfeiture of 542 Ontario Street. A jury decided that the Commonwealth was entitled to forfeiture. The Court of Common Pleas of Northampton County then was called upon to determine whether the forfeiture constituted an excessive fine. 542 Ontario Street, 989 A.2d at 413-414.

The parties stipulated that the value of 542 Ontario Street was \$65,000. The Court of Common Pleas of Northampton County noted that the maximum fine for the charges against Blas was \$100,000.00 and found the

forfeiture was not excessive even though Blas was not convicted. 542 Ontario Street, 989 A.2d at 415.

On appeal to this Court, one of the issues Blas raised was that the forfeiture constituted an excessive fine. 542 Ontario Street, 989 A.2d at 415. This Court determined:

First, we compare the penalty imposed by the forfeiture against the maximum penalty available for conspiracy to possess cocaine with intent to deliver. We discern no error in the trial court's determination that the value of the house, \$65,000, is not grossly disproportionate to the maximum penalty for the conspiracy, \$100,000.

We next consider whether Blas' violation was isolated or part of a pattern of misbehavior. The trial court accepted as credible evidence adduced at the criminal trial indicating the Bethlehem Police employed multiple resources and various countermeasures to combat illegal activity at Blas' property. These included numerous controlled purchases at the property. As Blas does not dispute that these findings are supported by substantial evidence, we perceive no error in the trial court's conclusion that Blas' violation was part of a pattern of misbehavior.

Finally, we evaluate the harm resulting from Blas' conduct. The trial court, quoting this Court, acknowledged that the harm caused to society by drug trafficking is self evident. Also, the trial court found that Blas' property exacted a heavy toll from government resources, including the countermeasures employed by the Bethlehem Police over a one year period. Further, relying on the civil jury's findings, the trial court found the harm resulting from Blas' property was widespread.

542 Ontario Street, 989 A.2d at 419.

From both 5442 Spruce Street and 542 Ontario Street, it is clear that in an excessive fines analysis a court does not stop after it makes a determination that a forfeiture is not grossly disproportionate based on a comparison of the value of the forfeiture and the amount of the possible penalty.

Next, the Commonwealth contends that the trial court erred in the manner in which it conducted the gross disproportionality test and that based on the proper factors the forfeiture was not grossly disproportional to Strand's repeated drug sales. The Commonwealth argues that the evidence presented established the forfeiture was not disproportional.

First, the value of the Property of \$53,000.00 was only 26.5% of the possible fine of \$200,000. Given that in 542 Ontario Street the value of the property seized was 65% of the possible maximum fine, this Court agrees with the Commonwealth that this factor weighs in favor of forfeiture. The trial court, in fact, agreed that this factor weighed against Strand.²

Second, the Commonwealth argues that the fact that Strand was sentenced to three to six years in prison points to the gravity of the offense. Also, the fact that there were two sales of crack cocaine in a five day period does the same. The trial court found that "the two sales of crack cocaine to a confidential informant do not alone constitute a pattern of misbehavior for the purposes of weighing the gravity of the offense for the excessive fine analysis." Opinion at 6. However, there were other drugs found at the Property and Strand had a prior

² This matter did not come before a jury.

conviction for drug trafficking. Also, the Police received complaints of drug sales at the Property which prompted the Police to set up the sales with the confidential informants. Because of the evidence of repeated sales within five days as in 5444 Spruce Street and in 542 Ontario Street, this Court agrees with the Commonwealth that this factor also weighs in favor of forfeiture. The trial court erred in this regard.

Third, the Commonwealth argues that the trial court erred when it determined during the hearing that it was obligated to present a neighbor to testify as to the harm caused by the illegal drug sales. Similarly, the Commonwealth argues that the trial court made the same error in its opinion when it stated that more proof of harm was needed than just a general statement that drugs were harmful. At the hearing, there was a lingering question regarding which party had the burden of proof. The party arguing that the forfeiture is an excessive fine and unconstitutional bears the burden of proof. See Brown v. Commonwealth, 940 A.2d 610 (Pa. Cmwlth. 2008).

Although there was no testimony regarding the specific harm as in 5444 Spruce Street and in 542 Ontario Street, this Court in 542 Ontario Street noted that the Court of Common Pleas of Northampton County stated that harm caused to society by drug trafficking was self-evident. Further, after weighing the factors here, the lack of testimony concerning specific harm would not outweigh the legislative determination of the gravity of the offense in terms of the maximum allowable fine. Also, Strand, Jr. unwittingly offered evidence of specific harm as Strand exposed his two children and one grandchild to the world of drug

trafficking. In 5444 Spruce Street, this Court deemed it relevant that Lewis exposed her young grandchild to an unsafe and unhealthy environment. 5444 Spruce Street, 890 A.2d at 40.

The evidence of record does not support a determination that the forfeiture was grossly disproportional to the offense committed.

Accordingly, this Court reverses.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: The Real Property and :
Improvements Known as :
3534 Warnock Street :
: :
Appeal of: The Commonwealth of : No. 2195 C.D. 2009
Pennsylvania :

ORDER

AND NOW, this 20th day of October, 2010, the order of the Court of
Common Pleas of Philadelphia County in the above-captioned matter is reversed.

BERNARD L. MCGINLEY, Judge

Commonwealth v. Real Property and Improvements Commonly Known as 5444 Spruce Street, Philadelphia, 890 A.2d 35, 38 (Pa. Cmwlth. 2006). On these two factors, the majority relies upon cases that do not support a reversal of the trial court but, in fact, the contrary result.

The first case is *5444 Spruce Street*. There, the evidence established that the house in question functioned as the neighborhood crack house and that the property owner sold drugs to minors there. This met the pattern and practice standard. The court also found that this constant drug activity caused substantial and specific harm to the neighborhood.

In the second case, *Commonwealth v. 542 Ontario Street, Bethlehem, PA.*, 989 A.2d 411 (Pa. Cmwlth. 2010), the property owner had made numerous sales over a long period of time. The notoriety of the use of the property for drugs had caused the Bethlehem Police to expend considerable efforts over a one-year period to shut down the operation. The trial court found that the community harm caused by the drug activity at the property was “widespread.” *Id.* at 419.

Here, the trial court found that Strand’s two sales of crack cocaine, within five days, did not establish a pattern and practice. The sales to undercover agents could have taken place anywhere. The trial court also found the Commonwealth’s evidence did not show that these two sales had a harmful effect on the neighborhood or community. It showed, at most, only the generalized harm that any drug trade has on society at large, which is not enough to justify a forfeiture.

The majority suggests that we can infer harm from the fact that Strand exposed his two children and one grandchild, who lived with him in the home at the time of the sales, to the world of drug trafficking. This is speculation. There

was no evidence that the children were present during either of the two transactions. In reality, the children and grandchild will suffer far greater harm when forced out of their home, which has been in the family for over 70 years.

Our standard of review requires us to determine whether the trial court committed an error of law or abused its discretion in weighing the Commonwealth's evidence and finding it deficient because it did not show a pattern and practice or specific harm. In effect, the majority is reweighing the evidence, which impermissibly expands the task of appellate review.

I would affirm on the basis of the trial court opinion. A forfeiture of Strand's home is grossly disproportionate to the offenses committed, and the Commonwealth's evidence was not sufficient to conclude otherwise.

MARY HANNAH LEAVITT, Judge