

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :
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 :
 v. : No. 2219 C.D. 2009
 : Submitted: January 22, 2010
 \$3,400.00 U.S. Currency; 2004 ASPT :
 Trike, Vin #FLA56036; 2001 GMC :
 Sierra Truck, Vin # :
 2GTEC19V411129527 and a 1986 :
 Honda Elite 2500CC Scooter, :
 Vin #JH2MF0106GK101449 :

Appeal of: Douglas Kemper

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE FLAHERTY

FILED: May 28, 2010

Douglas Kemper (Kemper) appeals, *pro se*, from an order of the Court of Common Pleas of York County (trial court) which granted the Commonwealth of Pennsylvania's (Commonwealth) petition for forfeiture of property in the form of \$3,400.00 in United States Currency and in a 2001 GMC Sierra truck pursuant to what is commonly known as the Controlled Substances Forfeiture Act (Forfeiture Act), 42 Pa. C.S. §§6801-6802. We affirm.

Agent Christopher C. Juba (Agent Juba) received information that Kemper was a source for supplying crack cocaine in the York area. On

September 5, 2006, a controlled purchase of 1.1 grams of cocaine was made from Kemper for a sum of \$100.00. Controlled purchases of crack cocaine were also made from Kemper on September 20, 2006, and October 17, 23 and 26 of 2006. Kemper arrived at the designated sale locations in a 2001 GMC Sierra truck.

On October 27, 2006, law enforcement executed a search warrant at Kemper's residence, 1185 Copenhaffer Road in York. Agents found and seized approximately ten and a half ounces of crack cocaine, \$3,400.00 in cash, packaging materials, and a scale.

On January 9, 2007, the Commonwealth filed a petition for forfeiture of the \$3,400.00 and the GMC Sierra truck pursuant to the Forfeiture Act.¹ A rule for Kemper to show cause why the petition should not be granted was entered. On June 29, 2009, a hearing was held, at which the Commonwealth presented the testimony of Agent Juba.

Agent Juba testified that he executed a search warrant at Kemper's residence on October 27, 2006. Agent Juba stated that he found 10 ounces of crack cocaine on the front seat of the GMC Sierra truck and \$2,000.00 above the driver-side visor. Agent Juba further testified that inside the house he found \$1,000.00 in a jacket that was hanging on top of a Trike motorcycle. Agent Juba also found three knotted plastic bags of cocaine and \$400.00 inside the pocket of a pair of jeans.

Kemper testified on his own behalf that the money seized was from rental properties. The \$2,000.00 was intended to be used to pay taxes.

¹ The Commonwealth also requested forfeiture of a 2004 ASPT Trike motorcycle and a 1986 Honda Elite 2500CC Scooter which was ultimately denied, and thus, not at issue in this case.

There was further testimony as to how Kemper purchased the Trike motorcycle and the Honda scooter. Kemper also testified that he purchased the GMC Sierra truck used in 2002 and made payments of \$416.00 per month on it. However, no lien was indicated or demonstrated on that vehicle to prioritize or secure the lender.

On June 29, 2009, the trial court granted the Commonwealth's forfeiture petition regarding the 2001 GMC Sierra truck and the \$3,400.00. The trial court denied the Commonwealth's forfeiture petition regarding the remaining two items, the Trike motorcycle and Honda scooter. Kemper now appeals to this court.²

Before this court, Kemper contends that the trial court erred in determining that the Commonwealth established that the GMC Sierra truck and the \$3,400.00 were contraband and that forfeiture of such would not violate the prohibition against excessive fines and further erred in failing to serve notice of the hearing upon Stephen Adams and Kemper.³

The record before our court reflects that Kemper was given notice of the petition, that a rule to show cause was issued, and that Kemper appeared at the forfeiture hearing and had a full and fair opportunity to

² 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. \$11,600.00 Cash, U.S. Currency, 858 A.2d 160, 163 (Pa. Cmwlth. 2004).

³ Kemper also addresses the forfeiture of a 1997 Buell S3 Thunderbolt motorcycle and other personal items. However, such items were not listed on the Commonwealth's petition for forfeiture, were not addressed by the trial court, and will not be addressed here. Further, notice to Stephen Adams, the owner of the Buell motorcycle, which was not forfeited under this proceeding, will not be addressed either, as such is not before this court.

present evidence to defeat the Commonwealth's claims. The trial court did not err in conducting the forfeiture hearing.

The Forfeiture Act provides that money used or intended to be used to facilitate any violations of The Controlled Substance, Drugs, Devises and Cosmetic Act (Controlled Substance Act), Act of April 14, 1972, P.L. 233, as amended, 35 P.S. §§780-1-1 – 780-144, “shall be subject to forfeiture to the Commonwealth and no property right shall exist in them.” 42 Pa. C.S. §6801(a) and (a)(6)(i)(B). The Forfeiture Act further provides for the forfeiture of a vehicle if it is “used or intended to be used to facilitate the transportation, sale, receipt, possession or concealment of” controlled substances in violation of the Controlled Substance Act. 42 Pa. C.S. §6801(a)(4). A forfeiture action is an action in rem, in which the Commonwealth is the plaintiff and the subject property is the defendant. 42 Pa. C.S. §6802(a).

In a forfeiture action, the Commonwealth has the initial burden of proof. Under the Forfeiture Act, the Commonwealth must show that the currency was “furnished or intended to be furnished...in exchange for a controlled substance...[or represents] proceeds traceable to such an exchange...” or that the currency or property “was used or intended to be used to facilitate any violations of the Controlled Substance...Act.” 42 Pa. C.S. §6801(a)(6)(i)(A) and (B). The Commonwealth must establish that a nexus exists between the cash and/or property seized and a violation of the Controlled Substance Act, and it does so under a preponderance of the evidence standard, which is tantamount to a “more likely than not” standard. Commonwealth v. \$6,425.00 Seized From Esquilin, 583 Pa. 544, 555, 880

A.2d 523, 529 (2005). The Commonwealth need not produce evidence directly linking seized cash or property to illegal activity in order to establish the requisite nexus; circumstantial evidence may suffice. Id. Once the Commonwealth establishes this nexus, the burden then shifts to the person claiming the cash and/or property to establish that he owns the cash and/or property, that he lawfully acquired it, and that it was not unlawfully used or possessed by him. 42 Pa. C.S. §6802(j).⁴

The Commonwealth presented Agent Juba who testified that Kemper arrived at numerous, prearranged drug buys in the 2001 GMC Sierra truck. Kemper, in driving the GMC Sierra truck to pre-arranged drug buys, clearly used the vehicle to facilitate trafficking of controlled

⁴ 42 Pa. C.S. §6802(j) provides that:

Owner's burden of proof.- At the time of the hearing, if the Commonwealth produces evidence that the property in question was unlawfully used, possessed or otherwise subject to forfeiture under section 6801(a) or 6801.1(a), the burden shall be upon the claimant to show:

(1) That the claimant is the owner of the property or the holder of a chattel mortgage or contract of conditional sale thereon.

(2) That the claimant lawfully acquired the property.

(3) That it was not unlawfully used or possessed by him. In the event that it shall appear that the property was unlawfully used or possessed by a person other than the claimant, then the claimant shall show that the unlawful use or possession was without his knowledge or consent. Such absence of knowledge or consent must be reasonable under the circumstances presented.

substances. Commonwealth v. Mitchell, 833 A.2d 1220 (Pa. Cmwlth. 2003).

Agent Juba further testified about the search warrant he executed at Kemper's residence. Agent Juba stated that he found crack cocaine and sizeable amounts of U.S. currency in near proximity to the drugs, in the GMC Sierra truck, as well as in Kemper's home. The Commonwealth met its burden of proof in establishing a nexus between the GMC Sierra truck, the cash and violations of the Controlled Substance Act. The burden then shifted to Kemper to establish that he owns the cash/property, that he lawfully acquired it, and that it was not unlawfully used or possessed by him. 42 Pa. C.S. §6802(j).

In attempting to meet his burden, Kemper testified on his own behalf that the money seized was from his rental properties and was to be used to pay his taxes. Kemper also testified that he was making payments on the GMC Sierra truck. Kemper failed to present any evidence in support of his contention. Further, none of Kemper's testimony would negate the fact that Kemper used the GMC Sierra truck when he was selling the crack cocaine in violation of the Controlled Substance Act. Thus, Kemper failed to meet his burden under 42 Pa. C.S. §6802(j).

Finally, Kemper argues for the first time on appeal that the forfeiture of the GMC Sierra truck and the currency would violate the prohibition against excessive fines contained in Article 1 Section 13 of the Pennsylvania Constitution and the Eighth Amendment of the United States Constitution.

This court in Commonwealth v. Smothers, 920 A.2d 922 (Pa. Cmwlth. 2007), addressed the trial court’s failure to consider Smothers’ excessive fines claim. However, we stated in that opinion that “Smothers raised an excessive fines claim in the trial court proceedings in his post-hearing brief....” Id. at 925, n. 3.

In the present controversy, Kemper does not raise this issue before the trial court. He raises it for the first time in his statement of matters complained of on appeal. We note that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pa. R.A.P. 302(a). The trial court did not err in forfeiting the property and cash to the Commonwealth.

Accordingly, we must affirm the order of the trial court.

JIM FLAHERTY, Senior Judge

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ORDER

AND NOW, this 28th day of May, 2010 the order of the Court of Common Pleas of York County in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge