

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :
 :
 v. : No. 250 C.D. 2011
 :
 David Leroy Ross, Jr., : Argued: November 14, 2011
 Appellant :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: December 8, 2011

David Leroy Ross, Jr. appeals from the November 17, 2010 order of the Court of Common Pleas of Allegheny County (trial court) denying Ross' Petition for Return of Seized Property (Petition). We vacate and remand.

Ross filed his Petition with the trial court on or about October 27, 2010, alleging that a firearm and the accompanying magazine were seized on July 1, 2009, by the Allegheny County Police Department at the Pittsburgh International Airport. Petition for Return of Seized Property, Reproduced Record (R.R.) at 2.¹ Ross alleged further that: (1) the foregoing property is in the

¹ We note that Ross' Petition contains a verification declaring that the statements of fact set forth in the Petition were true and correct and were made subject to the penalties related to Unsworn Falsification to Authorities, 18 Pa. C.S. §4904. R.R. at 3.

possession of the Allegheny County Police Department; (2) he was found not guilty of “possession of weapon on Airport Property;” (3) he was entitled to lawful possession of the seized property; and (4) he was not aware of any reason the property should not be returned. Id.

A hearing was held before the trial court, criminal division, on the Petition on November 17, 2010. Ross appeared *pro se*. Ross explained to the trial court that: (1) he just wanted to get his firearm back; (2) he was acting lawful to begin with; (3) the police had no legal standing to charge him in the first place; and (4) he was found not guilty of “possession of a weapon on airport property.” Transcript of November 17, 2010 Hearing (Hr’g Tr.) at 2-3, R.R. at 8-9. The Assistant District Attorney (ADA) explained to the trial court that: (1) Ross arrived at the airport wearing an all-black commando type outfit; (2) while in the baggage area, Ross took out a handgun, put one bullet in the chamber, and then placed the gun into an exterior holster; and (3) Ross was arrested for a violation of an Allegheny County ordinance for possessing a gun on airport property and the weapon was confiscated. Hr’g Tr. at 3, R.R. at 9. Ross was ultimately found not guilty of the ordinance violation on appeal because the Allegheny County ordinance was invalid as having been superseded by the Uniform Firearms Act of 1995.² Hr’g Tr. at 4, R.R. at 10. The ADA further explained to the trial court that Ross was not arrested under the Uniform Firearms Act because he was licensed to carry a weapon in Alaska with which the Commonwealth has a reciprocity agreement. Id.

² 18 Pa.C.S. §§ 6101-6127.

Ross stated further to the trial court that he does not conceal his weapon when he carries it; however, the trial court stated that there was “a Pittsburgh ordinance preventing him from doing that.” Hr’g Tr. at 4-5, R.R. at 11-12. The ADA then stated to the trial court that if the judge was going to grant that, “I would ask for – I do have either a sale order, our Insta Check order.” Hr’g Tr. at 5, R.R. at 11. The trial court then stated “No. Motion’s denied. Take an appeal.” Id.

Accordingly, the trial court entered an order on November 17, 2010, denying Ross’ Petition. In an opinion in support of its order, the trial court stated that Ross appeared *pro se*, and simply made argument to the court. Trial Ct. Op. at 1-2. The trial court determined that Ross could not rely on the averments of his Petition and that he did not testify or offer evidence as to his lawful possession or ownership of the seized items. Id. at 2. Therefore, the trial court found that Ross failed to meet his burden of proving lawful possession of a firearm and magazine. Id. Ross now appeals to this Court.³

Before this Court, Ross raises the following issues: (1) Whether the trial court erred in denying the Petition; (2) Whether Ross’s firearm and accompanying magazine are contraband; and (3) Whether Ross is entitled to relief even if the trial court correctly determined that the firearm and magazine were derivative contraband.

³ Our review of a trial court's decision on a petition for return of property is limited to examining whether the findings of fact were supported by competent evidence and whether the trial court abused its discretion or committed legal error. Commonwealth v. Wintel, Inc., 829 A.2d 753 (Pa. Cmwlt. 2003).

A motion or petition for return of seized property is governed by Pa.R.Crim.P. 588, which provides in pertinent part:

(A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.

(B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property forfeited.

This Court has explained:

Proceedings for return of property are distinct from a forfeiture proceeding. *Petition of Koenig*, [] 663 A.2d 725 (Pa. Super. 1995). It is well settled that a proceeding seeking the return of property is quasi-criminal in character, but it is civil in form. *Commonwealth v. Reynolds*, 876 A.2d 1088 (Pa. Cmwlth. 2005). Unlike forfeiture actions, proceedings for the return of property arise under our Rules of Criminal Procedure. *Grossman v. Comm'r of Police*, [] 465 A.2d 1007 (Pa. Super. 1983). More specifically, motions to secure the return of property seized by police are initiated pursuant to Pa.R.Crim.P. 588. Under this rule, on any motion for return of property, the moving party must establish by a preponderance of the evidence entitlement to lawful possession. Once the moving party provides sufficient proof, the burden shifts to the Commonwealth to resist the return of property by proving the property is contraband. *Commonwealth v. Crespo*, 884 A.2d 960 (Pa. Cmwlth. 2005).

Johnson v. Commonwealth, 931 A.2d 781, 783-84 (Pa. Cmwlth. 2007) (footnote omitted). This Court further explained:

There is a dearth of case law addressing the question of whether a petitioner has met his initial burden of proving that he is the lawful owner of the items seized. *Commonwealth v. Younge*, [] 667 A.2d 739 (Pa. Super. 1995). This is because the only burden of persuasion placed on a petitioner under Rule 588(A) is entitlement to lawful possession or ownership of the subject property. *Commonwealth v. Stipetich*, [] 623 A.2d 360 (Pa. Super. 1993). In fact, a mere allegation of entitlement meets this burden. *Younge*, 667 A.2d at 741-42. However, a failure to meet even this minimal burden is fatal to a petition for return of property under Rule 588. *Id.*; see *Commonwealth v. Pomerantz*, [] 573 A.2d 1149 (Pa. Super. 1989) (*averment in motion for return of property insufficient to sustain burden of proof where motion not offered into evidence*); *Commonwealth v. Doranzo*, [] 529 A.2d 6 (Pa. Super. 1987) (*return of seized property improper where petitioner offered no testimony to establish lawful possession*).

Id. at 784.

In support of this appeal, Ross argues that he testified on the record before the trial court that the firearm was owned by him and he wanted it returned because his case “was cleared [and] [he] was acting lawful to begin with.” See Hr’g Tr. at 2, R.R. at 8. Ross contends that the Commonwealth did not dispute his ownership of the seized property and the ADA acknowledged that Ross was licensed in Alaska to own/possess the firearm. See Hr’g Tr. at 4, R.R. at 10. Ross argues that having met his burden, the burden shifted to the Commonwealth to prove that the seized property was either contraband *per se* or derivative contraband by establishing a nexus between the property and the alleged criminal

conduct.⁴ Ross asserts that seized property cannot be labeled derivative contraband merely to avoid the recurrence of criminal conduct. Ross points out that he was found not guilty of the summary offense that served as the basis for the seizure of his property. It is not unlawful for Ross to possess the property and it was not used in the perpetration of an unlawful act. Ross contends that the Commonwealth never asserted that the seized property was contraband *per se* or derivative contraband. Finally, Ross argues that he is entitled to relief even if it is determined that the seized property is derivative contraband because it was seized in violation of his constitutional rights under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.⁵

In response, the Commonwealth argues that Ross never met his burden of proving ownership of the seized property by a preponderance of the evidence. Ross failed to meet the minimum burden and presented only bare allegations of lawful possession. Ross never submitted his Petition into evidence and he offered no sworn testimony to establish ownership at the hearing. Thus, the

⁴ As explained by the Superior Court:

Contraband *per se* is property whose possession is unlawful; derivative contraband is property which is innocent in itself but which has been used in the perpetration of an unlawful act. Property is not derivative contraband, however, merely because it is owned or used by someone who has been engaged in criminal conduct. Rather, the Commonwealth must establish a specific nexus between the property and the alleged criminal activity.

Petition of Koenig, 663 A.2d 725, 726-27 (Pa. Super. 1995) (quoting Commonwealth v. Stipetich, 623 A.2d 360, 362 (Pa. Super. 1993) (citations omitted).

⁵ The Fourth Amendment to the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution similarly provide that the citizenry shall not be subject to unreasonable searches and seizures.

Commonwealth contends that it had no burden to prove that the seized property is derivative contraband.

Upon review of the transcript of the November 17, 2010 hearing before the trial court and the applicable law, we are constrained to vacate and remand this matter for a new hearing on the merits of Ross' Petition. It is axiomatic that a witness in a proceeding, such as a petition to secure the return of seized property, can be heard only upon oath or affirmation. See Johnson, 931 A.2d at 784 (“At a minimum, our rules and case law mandate Johnson properly allege, *under oath*, lawful possession. . .”).⁶ However, in the present case, the trial court failed to swear Ross in as a witness prior to specifically asking Ross what he wanted to say to the court at the beginning of the proceedings. Hr’g Tr. at 2, R.R. at 8. As such, the trial court cannot now justify its decision to deny Ross’ Petition by stating that Ross failed to present any sworn testimony that he lawfully possessed the seized property.

We recognize that Ross was proceeding *pro se* before the trial court; however, that fact did not eliminate the trial court’s duty to make sure that Ross was given every opportunity to be properly heard on his Petition. Ross clearly stated on the record before the trial court that the confiscated firearm belonged to

⁶ “Witnesses are required to take an oath, or an affirmation to tell the truth, before giving testimony at trial, and statements not made under oath ordinarily do not constitute testimonial evidence.” 81 Am. Jur. 2d Witnesses § 681 (footnotes omitted). It is well settled that “[t]he objects of the rule requiring that witnesses be sworn are, first, to affect the conscience of a witness and thus compel him to speak the truth and, second, to lay him open to punishment for perjury in case he testifies falsely.” DeWitt v. Oppel, 14 Pa. D. & C. 2d 23, 26 (1958). “Both of those reasons are so basic and fundamental to the administration of justice, that we have no difficulty in deciding that the requirement of swearing witnesses is not one that may be waived by a party.” Id.

him and the Commonwealth did not dispute Ross' statement of ownership. Hr'g Tr. at 2-5, R.R. at 8-11. Such statement, if sworn and found credible by the trial court, would be sufficient to establish lawful possession of the seized property. See Johnson, 931 A.2d at 784 (“[A] mere allegation of entitlement meets” a petitioner’s burden of establishing “lawful possession or ownership of the subject property.”). The burden would then shift to the Commonwealth to prove by a preponderance of the evidence that the seized property is contraband. Id. at 783-84. It is unclear from the hearing transcript as to whether the Commonwealth was prepared to meet this burden.

Accordingly, we conclude that the trial court abused its discretion by not swearing Ross in as a witness and erred by denying the Petition on the basis that Ross failed to present sworn testimony as to his lawful possession or ownership of the seized property.⁷ As such, we vacate the trial court’s order and remand this matter for a new hearing on the merits of Ross’ Petition.

JAMES R. KELLEY, Senior Judge

Judge McCullough did not participate in the decision in this case.

⁷ Moreover, after being informed that Ross was found not guilty of the underlying charge and that Ross could not be charged under the Uniform Firearms Act, the trial court implied that Ross had violated a Pittsburgh ordinance which prohibited the carrying of an unconcealed weapon. Hr’g Tr. at 5, R.R. at 11. However, it is undisputed that Ross was charged with, and found not guilty of, violating an Allegheny County ordinance not a City of Pittsburgh ordinance.

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ORDER

AND NOW, this 8th day of December, 2011, the order of the Court of Common Pleas of Allegheny County, dated November 17, 2010, at Criminal Division No. 2010-4435, is VACATED and this matter is REMANDED for proceedings consistent with the foregoing opinion.

Jurisdiction relinquished.

JAMES R. KELLEY, Senior Judge