

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :
 :
 v. :
 :
 1931 E. Arizona Street :
 : No. 406 C.D. 2010
 Appeal of: Militza Bonet : Submitted: February 7, 2011

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
 HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE McGINLEY

FILED: April 21, 2011

Militza Bonet (Bonet) appeals the order of the Court of Common Pleas of Philadelphia County (trial court) that granted the forfeiture petition of the Commonwealth of Pennsylvania (Commonwealth) for the real property and improvements known as 1931 E. Arizona Street, Philadelphia, PA 19125 (Property).

Bonet is the owner of the Property. On February 25, 2008, Officer Jeffrey Walker (Officer Walker) of the City of Philadelphia Police Department (Department) met with a confidential informant and with Officer Liciardello of the Department. Officer Walker gave the confidential informant \$20 in pre-recorded buy money. The confidential informant went to the Property, knocked on the door and Bonet answered. Officer Walker observed the confidential informant give Bonet the \$20. Bonet walked back into the house and returned with two clear packets of crack cocaine for the confidential informant. Officer Walker then obtained a search warrant for the Property dated February 26, 2008.

On February 26, 2008, at 7:15 p.m., Officer Liciardello knocked on the door of the Property, and again Bonet answered. She turned around, went back inside, and threw six clear packets of crack cocaine onto the floor. The packets were recovered and Bonet was arrested. Louis Montos was also observed at the Property. He threw two packets of heroin on the ground. The packets were recovered and he was taken into custody. A search of the Property uncovered three bills, in Bonet's name, addressed to the Property and \$64 in currency.

On May 1, 2008, Officer Stan Davis (Officer Davis) and Officer Fernandez of the Department went to the block where the Property was located and brought a confidential informant with them. The confidential informant was given \$20 in pre-recorded buy money and was instructed to approach the Property and attempt to purchase narcotics. Bonet answered the door and had a short conversation with the confidential informant. While Bonet conversed with the informant a young male exited the Property and the two walked away from the Property to a Ford Expedition on the street. It was later determined that the Ford Expedition was owned by Annabell Marcado who lived at 1927 E. Arizona Street. The confidential informant gave the man the \$20 in exchange for two clear plastic bags of cocaine.

A search warrant was obtained for the Property. On May 2, 2008, Officer Davis, Officer Fernandez, and the confidential informant returned to the Property. The confidential informant was given \$40 in pre-recorded buy money and knocked on the door of the Property. Marcus Rivera (Rivera), Bonet's son, answered the door. Rivera and the informant walked away from the Property. The informant gave Rivera the \$40

in exchange for four bags of cocaine. Rivera was then arrested. The Officers searched the Property but found no drugs.

The Commonwealth petitioned for forfeiture:

7. The Property located at 1931 E. Arizona Street, Philadelphia, PA 19125 is subject to forfeiture pursuant to 42 Pa.C.S. §6801(a)(6)(i)(C) because it was used, continues to be used, and/or is intended to be used to commit, or to facilitate the commission of violations of the Controlled Substance, Drug, Device and Cosmetic Act

Petition for Forfeiture Pursuant to 42 Pa.C.S. §6801 et seq., May 1, 2008, Paragraph Number 7 at 2. The Commonwealth subsequently filed an amended petition for forfeiture and included the additional drug activity during May 2008.

At the hearing before the trial court on February 17, 2010, Officer Walker and Officer Davis testified regarding the drug purchases at or near the property. Officer Davis testified that he went to the “block specifically” based on a number of complaints. Notes of Testimony, February 17, 2010, (N.T.) at 18. Bonet’s attorney voiced a hearsay objection when Officer Davis attempted to elaborate on the complaints. The trial court did not allow further questioning on hearsay grounds but did not rule on the objection. N.T. at 19. The parties agreed that Bonet was convicted of possession with intent to deliver and that Rivera was also convicted of a drug offense. N.T. at 33. The parties stipulated that the value of the Property was \$92,000 and that Bonet owned the Property. N.T. at 11 and 43. The Commonwealth’s counsel submitted evidence that Bonet was convicted of selling heroin in 2003. N.T. at 47. At hearing, the trial court found a pattern of the presence of drugs at the Property. N.T. at 48. As to harm, the Commonwealth’s counsel indicated that the police officers were ready to testify to

complaints in the community concerning the Property. N.T. at 49. Officer Kelly was called to testify. N.T. at 52. However, Bonet's counsel admitted there was harm to the community, and Officer Kelly did not testify. N.T. at 52-53. The trial court stated, "I got enough here." N.T. at 55. The trial court interpreted the amount of the maximum fine as \$205,000, with \$200,000 for Bonet's second drug conviction and \$5,000 for possession of the heroin that Montos threw to the floor of the Property. N.T. at 71. The trial court granted the petition and explained: "I am also comparing the gravity of offense by comparing the penalty imposed to the maximum penalty, the violation whether it's isolated or part of a pattern, and the harm that resulted. I don't have any leeway here. It has to be strictly construed. I can't help you [Bonet] today." N.T. at 72-73.

In its opinion, the trial court reasoned:

According to the Appellant's [Bonet] 1925(b) Statement, the maximum fine for the conduct at the Property was \$100,000. The property's stipulated value is \$92,000. The Commonwealth Court has stated that a penalty is not grossly disproportional if it does not exceed the statutory sanctions for that conduct. Thus, where the property's value does not exceed the statutory sanctions for the conduct, it is not exactly clear whether a court is required to examine other factors. In any event, at the forfeiture hearing on February 17, 2010, this court did indeed carefully consider the remaining factors noted by the Pennsylvania Supreme Court in 5444 Spruce Street [Commonwealth v. 5444 Spruce Street, 574 Pa. 423, 832 A.2d 896 (2003)], including whether the conduct was isolated or part of a pattern, as well as the harm caused to the community. Accordingly, the appellant [Bonet] is entitled to no relief on appeal.

Trial Court Opinion, May 14, 2010, at 3.

Bonet appealed to this Court.

Bonet contends that the trial court erred when it granted the Commonwealth's forfeiture motion without a full weighing of the factors enumerated in Commonwealth v. Real Property and Improvements Commonly Known as 5444 Spruce Street, Philadelphia, 890 A.2d 35 (Pa. Cmwlth. 2006), in violation of the Excessive Fines Clause of the 8th Amendment to the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution and that the trial court erred when it determined that once the value of a property was determined to be below the statutory maximum penalty imposed for the criminal activity tied to the property a court must forfeit the property despite a consideration of the factors.¹

Initially, Bonet contends that the trial court erred when it failed to determine that the forfeiture of the Property was a violation of the Excessive Fines Clause of the Eighth Amendment because the trial court failed to weigh the factors necessary in an excessive fines challenge.

In 5444 Spruce Street, 890 A.2d 35 (Pa. Cmwlth. 2006), this Court weighed the relevant factors to determine if a forfeiture is excessive. 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.

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).

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 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 after 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 in reliance 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. The obvious harm that resulted from the sale of drugs to neighborhood teenagers was also weighed.

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).

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 known as 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 property was subject 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 had not been 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 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.

Bonet asserts that the trial court did not reach a dollar amount of the maximum fine possible. There was some confusion on this issue at the hearing. Bonet argued that the maximum statutory fine was \$100,000 for her drug offense. The Commonwealth argued that the maximum statutory fine was \$200,000 because it was Bonet's second drug offense plus \$5,000 for possession of heroin for Montos for a total of \$205,000. It appeared at the hearing that the trial court agreed with the Commonwealth. Bonet, however, does not take issue with the amount of the maximum fine. Rather, she argues that because the value of the crack cocaine recovered from Bonet was less than \$100, the forfeiture of the Property which was valued at \$92,000 was excessive. In both 5444 Spruce and 542 Ontario Street, this Court measured the value of the forfeiture against the maximum fine and not the value of the contraband recovered. There was no error.

Bonet next argues that there was not a pattern of misbehavior at the Property. She asserts that there was only one drug transaction there. She submits that there was only one drug transaction and then, the next day, crack and heroin were found at the property. She discounts the events of May 1, and May 2, 2008 because the drug transactions did not take place at the Property. This Court does not agree. The confidential informant knocked on the door of the Property and moments later purchased drugs. The fact that the actual transactions occurred steps away from the Property, and not on the Property itself, is of no moment.

The third factor set forth in 5444 Spruce Street is the harm resulting from the criminal activity. Bonet argues that there was no testimony or evidence presented which indicated that she or anyone else was engaged in narcotics activity involving

juveniles. This argument is false. Bonet’s fifteen year old son was arrested for selling drugs at the Property. Further, another transaction involved a young male at the Property. Also, the May 2008, drug transactions took place on the street which certainly creates a less safe environment. Bonet’s attorney admitted at the hearing that there was harm to the community. Bonet also argues that she was not engaged in “trafficking illegal drugs from the Property.” This statement flies in the face of the record when she was convicted of possession with intent to deliver and sold crack cocaine to a police informant. At the hearing the trial court undertook the proper analysis and did not err.²

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

² Bonet also contends that the trial court erred when it stated in its opinion that if the value of the home is less than the maximum statutory penalty, then there is no consideration other than to forfeit the Property. Based on 5444 Spruce Street and 542 Ontario Street, it is clear that in an excessive fines analysis a court does not stop after 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. The trial court erred when it opined that its analysis was limited to the comparison of the amount of the forfeiture and the possible penalty. However, the trial court also stated in its opinion that it did carefully consider the factors set forth in 5442 Spruce Street. Because the trial court followed the guidelines of 5444 Spruce Street and 542 Ontario Street when it made its analysis, this error was harmless.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
	:	
v.	:	
	:	
1931 E. Arizona Street	:	
	:	No. 406 C.D. 2010
Appeal of: Militza Bonet	:	

ORDER

AND NOW, this 21st day of April, 2011, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge