

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
	:	
v.	:	No. 795 C.D. 2009
	:	SUBMITTED: December 4, 2009
Nelson Penalver,	:	
Appellant	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: February 26, 2010

Nelson Penalver appeals *pro se* from the December 9, 2008 order of the Court of Common Pleas of Berks County that granted a petition for forfeiture to the Berks County District Attorney’s Office on behalf of the Commonwealth of Pennsylvania pursuant to Section 6801(a) of the Judicial Code, *as amended*, 42 Pa. C.S. § 6801(a), part of the Act commonly known as the Controlled Substances Forfeiture Act (Forfeiture Act), 42 Pa. C.S. §§ 6801 – 6802. The common pleas court also denied Penalver’s request to return the property, consisting of \$577 and a cell phone. For the reasons that follow, we affirm.¹

¹ Penalver improperly filed his appeal with the Superior Court, which transferred the case to this Court on April 28, 2009.

The background of this case is as follows. Penalver sold two packets of cocaine to an undercover police officer on October 17, 2007. On November 16, 2007, police arrested him at his home for this offense and seized \$577 and a cell phone. The District Attorney's Office filed a September 17, 2008 petition for forfeiture of property, therein averring that, at the time of the seizure, Penalver was actively involved in the illegal possession and/or distribution of controlled substances and that the police seized the property at issue in close proximity to such substances. It further averred that "[t]he Defendant/Property was furnished or intended to be furnished by any person in exchange for a controlled substance, in violation of the Drug Act,^[2] or are proceeds traceable to such an exchange, or was used or intended to be used to facilitate a violation under the Drug Act." District Attorney's Petition, Paragraph 8. Finally, it averred that the property was subject to forfeiture and that there was no legal right, title or interest in them by any owner or possessor pursuant to Section 6801(a) of the Judicial Code.

Penalver filed an answer to the petition, therein admitting that he made a sale to an undercover police officer on October 17, 2007. He alleged, however, that the property that the police seized approximately one month later was S.S.I. money and not attained as the result of any illegal activity.³ Further, he averred:

There was not a search warrant to search and seize any property but a warrant for the arrest of the defendant. The fasct [sic] that there is no proof that the defendant committed any crime on the day of his arrest show [sic] that the property seized was seized illegally.

² The Controlled Substance, Drug, Device and Cosmetic Act (Drug Act), Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §§ 780-101 - 780-144.

³ Presumably, Penalver was referring to supplemental security income.

Penalver's Answer to Petition, Paragraph 7. Accordingly, Penalver requested that the common pleas court order the immediate return of the property.

The common pleas court held a hearing on the forfeiture petition and Penalver's request to return the property, which Penalver attended via video conference. About a week after the hearing, the court in a succinct order granted the District Attorney's petition and denied Penalver's request for return of the property.⁴ Penalver appealed and, at the court's direction, filed an April 13, 2009 statement of matters complained of on appeal.⁵ He did not, however, request a transcript of the hearing as required by Pennsylvania Rule of Appellate Procedure 1911(a).⁶ Noting that it could not refer to the evidence produced at the hearing due to the lack of a transcript, the court in its subsequent opinion stated that it was

⁴ The Commonwealth in a forfeiture case "bears the burden of establishing by a preponderance of the evidence that a nexus exists between the pertinent unlawful activity and the property subject to forfeiture." *Commonwealth v. \$11,600.00 Cash, U.S. Currency*, 858 A.2d 160, 164 (Pa. Cmwlth. 2004). Further, "[o]nce the Commonwealth has sustained its burden, the burden of proof shifts to the property owner to prove (1) that he is the owner of the money; (2) that he lawfully acquired the money; and (3) that the money was not unlawfully used or possessed by him." *Id.*

⁵ Penalver's original April 2009 statement differs from the one he attached to his brief to this Court. Only the original statement is relevant.

⁶ Rule 1911(a) provides as follows:

(a) General rule. The appellant shall request any transcript required under this chapter in the manner and make any necessary payment or deposit therefore in the amount and within the time prescribed by Rules 5000.1 et seq. of the Pennsylvania Rules of Judicial Administration (court reporters).

When an appellant fails to comply with Rule 1911(a), "the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal." Pa. R.A.P. 1911(d). We note that there have been instances where courts have addressed legal issues in the absence of a transcript. *See, e.g. City of Philadelphia v. Fraternal Order of Police (Mazzo)*, 525 A.2d 460 (Pa. Cmwlth. 1987) (where original record of proceeding before an arbitrator was not certified to either the common pleas or the appellate court, court considered purely legal issue despite the limited scope of the record.)

nonetheless convinced at the conclusion of the hearing that the property was properly the subject of seizure. It characterized Penalver's issues on appeal, however, as being somewhat incoherent and germane only to his criminal case. Accordingly, it suggested that Penalver's appeal be dismissed for failure to raise any issues pertinent to the forfeiture case. We turn now to consideration of that appeal.

Penalver essentially maintains that the seizure was improper because the police illegally entered his home without a "knock and announce,"⁷ without consent and without identifying themselves or their purpose. Further, he argues that, at the time of his arrest, the police found no other evidence on his person or in his home connecting him to anything illegal so as to warrant activation of the Forfeiture Act. Finally, he contends that the \$577 and cell phone do not constitute illegal proceeds under Pennsylvania Rule of Criminal Procedure 588,⁸ instead reiterating his argument that the money was S.S.I. money.

⁷ Pennsylvania Rule of Criminal Procedure 207(A) embodies the "knock and announce" rule:

(A) A law enforcement officer executing a search warrant shall, before entry, give, or make reasonable effort to give, notice of the officer's identity, authority, and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require the officer's immediate forcible entry.

⁸ In pertinent part, Rule 588(A) and (B) provides as follows:

(A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for return of the property on the ground that he or she is entitled to lawful possession thereof. . . .

(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 returned unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

In response, the District Attorney argues that this Court should quash Penalver's appeal due to his substantial failure to comply with the Pennsylvania Rules of Appellate Procedure. It cites, *inter alia*, Penalver's failure to obtain a hearing transcript, which left the common pleas court unable to address the merits of his claims. Further, it notes that Penalver attached to his brief a different statement of matters complained of on appeal than the original one which the court characterized as incomprehensible. It maintains that Penalver briefed issues based on that subsequent statement and that, accordingly, he waived appellate review of all of his claims.

In the alternative, the District Attorney requests that we affirm the common pleas court's order because the forfeiture appears to be based on a finding that the money was the proceeds from illegal drug activity, and Penalver has not provided any basis to overcome such a finding nor established that the evidence submitted at the hearing was based on illegally seized evidence.

We first address the District Attorney's argument that this Court should quash the appeal, in large part, due to the absence of a hearing transcript. Notwithstanding the fact that the common pleas court entered only an order at the conclusion of the hearing and that it had no transcript for reference in order to create an opinion in support of that order, it declared its continued belief that the property was properly the subject of seizure. Indeed, it is clear from the outcome of the hearing that the court implicitly rejected Penalver's assertion that the \$577 was from a disability payment. Instead, it accepted the District Attorney's position that the money was sufficiently related to pertinent unlawful activity such that the forfeiture was warranted under the Drug Act. In light of the lack of a transcript, however, we conclude that any examination of factual issues is impossible.

Nonetheless, we can consider legal issues as long as Penalver raised and preserved any issues pertinent to the forfeiture case. *See Mazzo*.

After review of Penalver's April 2009 statement of matters complained of on appeal, we disagree with the common pleas court that he failed to raise any issues germane to the forfeiture case and with the District Attorney that he waived appellate review of all of his claims. While it is true that Penalver's original statement is somewhat difficult to interpret, he did raise various constitutional issues relating to search and seizure and suppression of evidence. Further, after comparing the April 2009 statement and the issues that Penalver raised in his appellate brief,⁹ we conclude that he preserved the issue of whether the forfeiture was proper in light of the police's seizure of the property without a search warrant and without a so-called "knock and announce." We turn, therefore, to consideration of that issue.

Sections 6801(b)(1) and (4) of the Judicial Code, *as amended*, 42 Pa. C.S. §§ 6801(b)(1) and (4), provide that seizure without process may be made if "the seizure is incident to arrest" *or* "there is probable cause to believe that the property has been used or is intended to be used in violation of [the Drug Act]." These were essentially the contentions that the District Attorney set forth in its

⁹ Penalver raised the following issues in his brief: 1) whether the police had a valid search warrant when they entered his home without a "knock and announce;" 2) whether the common pleas court abused its discretion when it denied his motion for return of property; and 3) whether the police improperly took items from his home without a valid search warrant and improperly confiscated these items without giving him a property receipt. In the petition for forfeiture, the District Attorney's Office did not allege that the police had a search warrant. Instead, it averred that, at the time of the seizure, the police were engaged in arresting Penalver for the offense of selling drugs to an undercover police officer. The first issue, therefore, is irrelevant. Further, it is clear after reviewing the April 2009 statement that he failed to preserve any issue concerning the police's failure to issue a property receipt.

petition and there is no factual dispute that the police seized the property during the course of arresting Penalver. In addition, even though the common pleas court was unable to reference the transcript in order to augment its opinion, it remained steadfast in its decision that the property was properly subject to seizure under the Drug Act. In light of the common pleas court's order and the fact that Penalver had the burden to prove lawful possession of the property, *Commonwealth v. Reynolds*, 876 A.2d 1088 (Pa. Cmwlth. 2005), we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 26th day of February, 2010, the order of the Court of Common Pleas of Berks County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge