

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

RENEE HACK, : C.A. No. S09M-03-021  
Petitioner, :  
v. :  
STATE OF DELAWARE, :  
Respondent. :

COMMISSIONER'S ORDER

Petitioner Renee Hack ("petitioner") has filed a petition pursuant to 16 Del. C. § 4784(j)<sup>1</sup> and Superior Court Civil Rule

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<sup>1</sup>In 16 Del. C. § 4784(j), it is provided as follows:

Property seized pursuant to this section that is not summarily forfeited pursuant to subsection (f) of this section shall be automatically forfeited to the State upon application to the Superior Court if, within 45 days of notification of seizure to all known parties having possessory interest in the seized property by registered or certified mail to the last known post-office address of the parties in interest and by publication in a newspaper of general circulation in this State, the person or persons claiming title to the seized property do not institute proceedings in the Superior Court to establish:

- (1) That they have the lawful possessory interest in the seized property; and
- (2) The property was unlawfully seized or not subject to forfeiture pursuant to this section.

71.3( c)<sup>2</sup> seeking the return of a 1997 Ford Explorer, VIN# 1FMDU34X2VUB20523 ("the vehicle"), which was seized from her son Antonio Hack ("Antonio") when he was arrested, on February 28, 2009, on charges of possession with intent to deliver a non-narcotic schedule I controlled substance; maintaining a vehicle for keeping controlled substances; criminal impersonation; possession of drug paraphernalia(14 counts); possession of marijuana; driving while suspended or revoked; failing to stop at a stop sign; and failing to give a turn signal.<sup>3</sup> Antonio entered into a plea of guilty to the charge of maintaining a vehicle for keeping or delivering controlled substances.

The petition was referred to the Commissioner. A hearing took place on October 22, 2009. This constitutes my decision and order which is rendered pursuant to Administrative Directive of

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<sup>2</sup>In Superior Court Civil Rule 71.3(c), it is provided in pertinent part as follows:

Petition for the return of property. An owner or interest holder may seek the return of property seized by the State pursuant to 16 Del. C., § 4784 by filing, costs prepaid, a civil petition, with the Superior Court sitting in the County in which the property was seized no later than 45 days after the date of the notice required by 16 Del. C., § 4784(j) measured from the date of mailing or the date of publication whichever shall be later.

<sup>3</sup>Some of the information set forth in this order is found in the file of *State v. Hack*, Del. Super., Def. ID# 0903000016, which contains the criminal charges arising from Hack's arrest. The Court may take judicial notice of the record in this criminal proceeding. Delaware Uniform Rules of Evidence, Rule 201.

the President Judge of the Superior Court, No. 2007-5.

#### SUMMARY OF THE EVIDENCE

The State of Delaware ("the State") called one witness to testify. That witness was Officer Mark J. Doughty, who has been a Millsboro Police Officer since September 13, 2004.

The pertinent events leading to the seizure are summarized as follows. On February 28, 2009, Officer Doughty observed Antonio's vehicle fail to stop at a stop sign; he pulled over Antonio; Antonio gave him an incorrect name; when asked about the discrepancy, Antonio told Officer Doughty he gave the wrong name because his license was not valid; the officer arrested Antonio for criminal impersonation; and a search of Antonio's person resulted in the recovery of \$115.66 in cash and a plastic bag containing 13 smaller bags of marijuana weighing a total of 21.8 grams. The drugs were divided up so that each bag contained approximately one quarter ounce of marijuana, thereby constituting what is known as a dime bag. In the officer's experience, this shows an intention to deliver drugs for sale.

Antonio had to have had the drugs in the vehicle because there was no opportunity for him to have obtained the drugs between the time he exited the vehicle and the time the officer found the drugs on his person. In any case, by entering the plea to the maintaining a vehicle charge, Antonio removed any ability

for petitioner to dispute that the drugs were in the vehicle.

The officer seized the vehicle because Antonio was in possession of marijuana with intent to distribute it and was maintaining a vehicle for the keeping of or delivering a controlled substance.

Officer Doughty also went over Antonio's substantial criminal history regarding drug charges. Antonio's history relating to drugs where a conviction occurred is summarized below.<sup>4</sup>

On or about November 4, 2005, Antonio was arrested on the following charges: possession with intent to deliver a narcotic Schedule II controlled substance (3 counts); possession with intent to deliver a non-narcotic Schedule I controlled substance; maintaining a vehicle for keeping controlled substances; drugs not in original container; and possession of drug paraphernalia (2 counts). Antonio pled guilty to a lesser-included offense of distribution, delivery or possession of a controlled substance within 300 feet of a park and the other charges were nolle prossed.

On June 16, 2007, Antonio was arrested on the following charges: trafficking in cocaine in an amount greater than 10 grams but less than 50 grams; maintaining a vehicle for keeping

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<sup>4</sup>Evidence was presented regarding a September 4, 2004, arrest on drug charges. However, the charges were nolle prossed. Since there was no conviction, I do not consider this arrest.

controlled substances; possession with intent to deliver a narcotic Schedule II controlled substance; possession of drug paraphernalia; and conspiracy in the second degree. These charges were fast-tracked with his violation of probation charge on a Track 1 Drug Court calendar. Antonio pled guilty to the charge of conspiracy in the second degree and the remaining charges were nolle prossed. Antonio also was found guilty of violating his probation on the charge of distribution, delivery or possession of a controlled substance within 300 feet of a park.

On November 11, 2007, Antonio was arrested on the following charges: possession with intent to deliver a narcotic Schedule I controlled substance; possession with intent to deliver a narcotic Schedule II controlled substance (2 counts); maintaining a vehicle for keeping controlled substances; and driving a vehicle under the influence of alcohol and/or drugs. Antonio pled guilty to the charge of driving under the influence and the remaining charges were dropped. This guilty plea was a part of a plea agreement which also encompassed charges he received on December 7, 2007.

On December 7, 2007, while out on bond on the above-described charges, Antonio was arrested on the following charges: possession with intent to deliver a narcotic Schedule II controlled substance (2 counts); maintaining a dwelling for keeping controlled substances; possession of drug paraphernalia;

and resisting arrest. Along with the driving under the influence charge noted above, Antonio pled guilty to one count of possession with intent to deliver a narcotic Schedule II controlled substance; maintaining a dwelling for keeping controlled substances; and resisting arrest. The remaining charges were nolle prossed.

The State rested and petitioner then had the burden of showing that she was an innocent owner of the seized vehicle.

Petitioner did not produce any evidence during the hearing to show that she owns the vehicle. In her petition, she notes she acquired the vehicle from Ishan Berry in January, 2009. Antonio's criminal file clarifies that Ishan Berry, as of January, 2009, had been his girlfriend for four years and was the mother of his child.

In the file is a copy of a duplicate title issued on June 17, 2009, which lists petitioner as owner of the vehicle. However, petitioner failed to present any documentation or evidence establishing she was the actual owner of the vehicle at the time it was seized.

Instead of establishing ownership, petitioner focused on the "innocent" portion of the case. To meet the burden of showing she was an innocent owner, she presented the following testimony.

She was well aware of each of Antonio's arrests and convictions; she accompanied him to his court proceedings.

However, she is not responsible for his actions. At one point, she said Antonio never promised her he would not deal drugs, and at another point, she said he told her he was not going to do drugs again. In any case, she always was surprised when he was arrested on drug charges.

She allowed Antonio to use her vehicle so that he could go see his sick son. She knew the baby and the baby's mother were sick so she believed that was the purpose of his using the vehicle. She did not know he did not have a driver's license when she allowed him to use the vehicle. Since he did not live with her, she did not know for sure whether he was working. She did not know he was dealing drugs when she allowed him to use her vehicle. However, she cannot control his actions.

She would let him use her vehicle again because he is her child.

#### FINDINGS OF FACT AND DISCUSSION

Delaware's drug forfeiture statute was enacted "to cripple the trafficking and sale of illegal drugs." *In the Matter of One 1987 Toyota*, 621 A.2d 796, 798 (Del. Super. 1992). The statute, rule, and case law have established a procedure to be followed in a forfeiture case. This procedure is outlined below.

The State first must establish that probable cause exists for the institution of a forfeiture. *In the Matter of: One 1985*

*Mercedes Benz Automobile*, 644 A.2d 423,428 (Del. Super. 1992).  
The State's burden of establishing probable cause applies to each act the police took in gaining possession of the property in question. *Righter v. State*, Del. Super., C.A. No. 95M-11-016 RRC, Reynolds, Commissioner (December 9, 1996) at 4, *aff'd*, Cooch, J. See also *In the Matter of: 1985 Pontiac Trans-Am*, Del. Super., C.A. No. 92M-02-014, Del Pesco, J. (November 24, 1992) at 1. Probable cause is "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *In the Matter of One 1987 Toyota*, 621 A.2d at 799 (quoting from *United States v. Premises Known as 3639-2nd St., N.E., Minneapolis, Minnesota*, 869 F.2d 1093, 1095 (8<sup>th</sup> Cir. 1989)).

The forfeiture statute does not allow for the forfeiture of vehicles used to transport controlled substances which are possessed but not intended to be sold or otherwise distributed. 16 Del. C. § 4784(a);<sup>5</sup> *In the Matter of: 1985 Pontiac Trans-Am*,

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<sup>5</sup>In 16 Del. C. § 4784(a), it is provided in pertinent part as follows:

The following shall be subject to forfeiture to the State and no property rights shall exist in them:

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(4) Any ... vehicles ... which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, trafficking in or possession with intent to deliver property described in paragraph (1) or (2) of this subsection except that:

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c. A vehicle is not subject to forfeiture for a



*supra* at 3. However, it does allow for the forfeiture of vehicles which are used to transport controlled substances intended to be sold. *Id.*

"Once the government has met its burden of showing probable cause, the burden shifts to the claimant to show by a preponderance of the evidence that the property was not subject to forfeiture." *In the Matter of One 1987 Toyota*, 621 A.2d at 799. This means petitioners must show by a preponderance of the evidence:

- (1) That they have the lawful possessory interest in the seized property; and
- (2) The property was unlawfully seized or not subject to forfeiture pursuant to ... [the forfeiture statute].

16 *Del. C.* § 4784(j).

The Delaware forfeiture statute provides that the property of innocent owners is not subject to forfeiture. 16 *Del. C.* § 4784(a)(4)b.<sup>6</sup> This is the "innocent owner defense". A person asserting this defense must prove by a preponderance of the evidence that she has an "ownership interest in the res with the

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violation of §§ 4753, 4754, 4757, and 4758 of this title....

<sup>6</sup>Therein, it is provided:

No vehicle is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent.

attendant characteristics of dominion and control." *In the Matter of: One 1985 Mercedes Benz Automobile*, 644 A.2d at 430. She also must show, by a preponderance of the evidence, that she "had no knowledge of, nor gave consent to, the illegal act." *Id.*

I now employ the law set forth above to the facts of this case.

There is no dispute regarding probable cause to arrest Antonio on the charges of possession with intent to deliver a non-narcotic schedule I controlled substance; maintaining a vehicle for keeping controlled substances; criminal impersonation; possession of drug paraphernalia(14 counts); possession of marijuana; driving while suspended or revoked; failing to stop at a stop sign; and failing to give a turn signal. There also is no dispute that Antonio was using the vehicle to facilitate the delivery of drugs which were to be sold.

Thus, the burden shifted to petitioner to show that she owned the vehicle and that the innocent owner defense applied.

I conclude petitioner has failed to establish she owned the vehicle when it was seized. It is common for drug dealers to put vehicles in others' names in order to make it more difficult to seize the vehicle. Thus, the fact that Antonio's girlfriend turned over the vehicle to petitioner makes the ownership issue suspect. Petitioner did not produce any documentation showing

when she actually acquired title to the vehicle and she did not present any evidence showing she exercised dominion and control over the vehicle. *In the Matter of: One 1985 Mercedes Benz Automobile*, 644 A.2d at 430-32. Thus, petitioner failed to show she was the actual owner of the vehicle.

Even if she was the actual owner of the vehicle, petitioner had to show she was an innocent owner. Consequently, the next question is whether, on these facts, she has established she did not have knowledge of, nor did she give consent to, Antonio transporting drugs to sell in the vehicle.

Petitioner argues she did not have actual knowledge of, nor did she actually consent to, Antonio transporting drugs for sale in her vehicle. If she were to be successful in this argument, the Court would have to conclude that the statute should be construed strictly to require that unless she had actual knowledge of, or actively consented to, the use of her vehicle in connection with drug trafficking, then she is entitled to the return of the property. Delaware and other states which have addressed this issue have rejected a strict construction and have concluded that actual knowledge and consent are not required; implied knowledge and consent will defeat the innocent owner defense. *In the Matter of: One 1984 Chevrolet Blazer*, 2000 WL 1211235 (Del. Super. June 30, 2000); *Oklahoma ex rel. McGehee v. 1987 Oldsmobile Cutlass*, 867 P.2d 1354 (Okla. Ct. App. 1993);

*McDorman v. Texas*, 757 S.W.2d 905 (Tex. Ct. App. 1988).

The question to ask is "whether an owner consented to or had guilty knowledge -- i.e., actual knowledge or reason to know -- of the improper use of the vehicle." *Oklahoma ex rel. McGehee v. 1987 Oldsmobile Cutlass*, 867 P.2d at 1356. In order to resolve the issue, the Court examines the owner's knowledge regarding a person's illegal drug activities and the action that owner takes to ensure that the owner's property is not used in connection with trafficking in drugs. *In the Matter of: One 1984 Chevrolet Blazer, supra; Oklahoma ex rel. McGehee v. 1987 Oldsmobile Cutlass, supra. Cf. Mitchell v. Texas*, 819 S.W.2d 659, 661 (Tex. Ct. App. 1991) ("Appellant testified that he never knew her to use drugs and that he did not use or deal in drugs. In addition, there was testimony that Appellant did not tolerate drug usage in his company.") In the case of *In the Matter of: One 1984 Chevrolet Blazer, supra*, the Court, in finding a mother had not established the "innocent owner" defense, stated:

Petitioner was "on notice" that her son was part of the drug sub culture. Proof of knowledge of illegal activity 'can imply consent in the appropriate circumstances.' Additionally, an innocent owner must do 'all that can reasonably be expected to prevent the proscribed use of his property. The evidence in this case demonstrates that the Petitioner failed to inquire, investigate or even warn Mr. Parker that drug possession, etc., would not be tolerated around the vehicle. In other words, she failed to take any reasonable steps, given her knowledge of her son's drug-related history, to prevent the illegal use of the Blazer. [Footnotes and citations omitted.]

Petitioner, by her own testimony, was well aware of Antonio's history of dealing drugs and using vehicles to transport the drugs he intended to sell. She admitted her attitude towards him was that he was responsible for his own actions and she could not control him. She did not ask if he was dealing drugs; she just hoped he was not. On the evening in question, she thought Antonio was using the vehicle to visit his sick son. However, her statement that she would loan him her vehicle again because he was her child clarifies that she was willing to let him use her vehicle whether he was dealing drugs and without directly addressing the issue with him. Thus, I conclude that petitioner impliedly knew that Antonio might be transporting drugs which he sold when he used her vehicle.

The next question is whether she consented to Antonio's transporting drugs in the vehicle. "[A]n innocent owner must do all that can reasonably be expected to prevent the proscribed use of his property.'" *In the Matter of: One 1984 Chevrolet Blazer*, 2000 WL 1211235, quoting *United States v. 6109 Grubb Road*, 886 F.2d 618, 627 (3d Cir. 1989). Petitioner did not testify to any steps she took to keep Antonio from transporting drugs in her vehicle. Absent her taking steps to prevent him from transporting drugs in her vehicle, her consent to such is implied. *In the Matter of: One 1984 Chevrolet Blazer, supra*. Frankly, in light of Antonio's immersion in drug trafficking, it

is most likely that the only way petitioner could have insured Antonio did not transport drugs in her vehicle would have been to not have allowed him to use it at all.

#### CONCLUSION

Based on the foregoing, I conclude as follows:

- 1) That the State established probable cause to have initiated the forfeiture proceeding;
- 2) That petitioner has not met her burden of proving she was the actual owner of the vehicle or alternatively, of proving the innocent owner defense;
- 3) That petitioner's petition for return of the 1997 Ford Explorer, VIN# 1FMDU34X2VUB20523 should be denied;
- 4) That the 1997 Ford Explorer, VIN# 1FMDU34X2VUB20523 should be forfeited to the Millsboro Police Department;
- 5) That the Division of Motor Vehicles should be instructed to transfer the title from the previous owner of the 1997 Ford Explorer, VIN# 1FMDU34X2VUB20523 into the name of the Millsboro Police Department;
- 6) If either party wishes to file an appeal from this decision pursuant to Superior Court Civil Rule 132, then that party must do so on or before **November 18, 2009**;
- 7) Absent an appeal, the decision in this matter shall become final on November 19, 2009, and the Court will enter an

order without further notice which shall:

i) Deny Petitioner her petition seeking the return of the 1997 Ford Explorer, VIN# 1FMDU34X2VUB20523;

ii) Order the 1997 Ford Explorer, VIN# 1FMDU34X2VUB20523 be forfeited to the Millsboro Police Department; and

iii) Order the Division of Motor Vehicles to transfer title from the pervious owner of the 1997 Ford Explorer, VIN# 1FMDU34X2VUB20523 into the name of the Millsboro Police Department.

**IT IS SO ORDERED THIS 3rd DAY OF NOVEMBER, 2009.**

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Commissioner

cc: Prothonotary's Office  
Renee Hack  
Robert J. O'Neill, Jr., Esquire