

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

DEBBIE SCOTT, : C.A. No. 02M-11-015
Petitioner, :
v. :
STATE OF DELAWARE :
Respondent. :

O R D E R

On this 16th day of May, 2003, upon consideration of the Petition for Return of Property ("the petition") which petitioner Debbie Scott ("petitioner") has filed, the Commissioner's Proposed Findings of Fact and Recommendations dated April 24, 2003, and the record in this case, it appears that:

1) Petitioner filed the petition in this matter pursuant to 16 Del. C. § 4784(j) and Super. Ct. Civ. R. 71.3 seeking the return of \$4,821.00 in United States currency ("the property" or "the cash") which the State of Delaware ("the State") seized when petitioner's husband was arrested on drug-related charges.

2) The Court referred the petition to Superior Court Commissioner Alicia B. Howard pursuant to 10 Del. C. § 512(b) and Superior Court Civil Rule 132(a) (4) for purposes of making findings of fact and reaching conclusions of law. The Commissioner has filed Proposed Findings of Fact and Recommendations wherein she

recommends that the Superior Court conclude that the State established probable cause to have initiated the forfeiture proceeding; the Court conclude petitioner failed to rebut the presumption that the \$4,821.00 constituted proceeds from the sale of drugs; the Court deny the petition; and the Court enter an order ordering the forfeiture of the \$4,821.00 to the State;

(3) No objections to the Proposed Findings of Fact and Recommendations have been filed.

NOW, THEREFORE, after careful and de novo review of the record in this action, and for the reasons stated in the Commissioner's Proposed Findings of Fact and Recommendations dated April 24, 2003,

IT IS ORDERED that:

(1) The Court adopts the well-reasoned Commissioner's Proposed Findings of Fact and Recommendations;

(2) The Court concludes that the State established probable cause to have initiated the forfeiture proceeding;

(3) The Court concludes petitioner failed to rebut the presumption that the seized property constituted proceeds from the sale of drugs;

(4) The Court denies the petition; and

(5) The Court orders the forfeiture of the \$4,821.00 to the State.

JUDGE T. HENLEY GRAVES

cc: Debbie Scott
James Rambo, Esquire
The Honorable Alicia B. Howard

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On November 26, 2002, Debbie Scott ("petitioner") filed a petition pursuant to 16 Del. C. § 4784(j)¹ and Superior Court Civil Rule 71.3(c) ("Rule 71.3"),² seeking the return of \$4,821.00 in

¹In 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.

²In 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

United States currency ("the property" or "the cash") which the State of Delaware ("the State") seized when petitioner's husband was arrested on drug-related charges. A hearing was held in this matter before the Commissioner on April 1, 2003. This constitutes my proposed findings of fact and recommendations this 24th day of April, 2003.

SUMMARY OF EVIDENCE

On November 25, 2002, Damel K. Scott, petitioner's husband, was arrested on drug-related charges. The arresting officers seized the cash in connection with that arrest. The next day, petitioner filed the above-referenced petition. Therein, she verified the following information:

The 4,821.00 belongs to me Debbie Scott from a case regarding my father's case. I had it on my side of the mattress that I sleep on under neath [sic]. This money did not belong to Damel K. Scott.

I showed the officer's [sic] my documents that the money under the mattress was my fathers [sic] due to a case. By the way some of the money is missing.

The State and petitioner called a number of witnesses.³ A

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.

³At the time set for the April 1 hearing, four witnesses whom petitioner intended to call had not appeared due to an

summary of their testimony⁴ appears below.

The first witness to testify on behalf of the State was Corporal John McColgan. He testified to the following.

He has been a member of the Delaware State Police since July 1995. On November, 2002, he was a member of the Governor's Task Force ("GTF"). The GTF pairs police officers with probation officers, and they target Level 3 probationers who are repeat offenders and probationers in high crime areas.

The GTF went to the residence of Damel and Debbie Scott on November 25, 2002, at 3:42 p.m. because Damel Scott was wanted on a Justice of the Peace Court *capias* due to his failure to pay a fine. Accompanying Corporal McColgan was Eric Reuther, a probation officer, and Delaware State Police Officers Lineweaver and Haggerty. Corporal McColgan knocked on the front door. Petitioner's daughter, who was five, answered the door and opened it as far as it would go. Corporal McColgan detected a strong odor of marijuana. The officers asked the daughter if her mom or dad was there. She turned and ran upstairs, saying, "Daddy, they're here for you."

Damel Scott came down and paused on the steps. He was asked if

alleged emergency. The Court ruled it would allow the hearing to proceed; would provide petitioner with the opportunity to obtain documentation establishing the emergency; and if she established such, would allow these four to testify on another date. Petitioner informed the Court she would rather proceed without these four witnesses; i.e., she waived the right to call them.

⁴The witnesses were sequestered.

he was aware of the active capias and he replied he was. They asked him about the strong odor of marijuana; he denied a smell in the house.

Corporal McColgan and Probation Officer Reuther performed a search of the two-story home.

They announced they were coming up the stairs. Although the smell of marijuana was throughout the house, it was strongest in the bedroom where they located petitioner in bed. They identified themselves to her and asked her about the strong marijuana odor; she said she could not smell anything.

They took her downstairs. Officer Haggerty told the officers that Damel Scott had told him there was marijuana upstairs. Corporal McColgan, Probation Officer Reuther and Damel Scott went upstairs. Petitioner remained downstairs with Officer Haggerty and her children.

The officers checked the top drawer of a dresser and found thirty-six (36) clear bags containing marijuana.

Meanwhile, petitioner told Officer Haggerty there was a large amount of money upstairs that she wanted to retrieve. She and Officer Haggerty came upstairs and she opened a drawer of another dresser, took out a \$100.00 bill, and then went back downstairs.

During a further search of the bedroom, the officers located sandwich bags in another dresser drawer. Probation Officer Reuther lifted the mattress, and the officers located \$4,821.00 in cash.

The sum was made up of \$100 bills, \$50 bills, one \$20 bill and one \$1 bill.

Eventually, the officers told Damel and Debbie Scott they had found the money. Petitioner told them the money was given to them from parents. Later, she said the money was given to them by a lawyer and she had the paperwork to prove it.

The police officers then filled out the paperwork regarding the seized property. Petitioner looked at the paperwork, told the officers more than \$7,000.00 had been there, and accused the officers of taking some of the money.

Damel Scott told Corporal McColgan that he was not employed, he was disabled, and he was selling drugs.

The State called petitioner as its witness. She testified as follows.

She is twenty-seven years old. She disagrees there was a smell of marijuana. She did not know the drugs were there. Her husband does not sell marijuana or other drugs. Her husband did not make money by selling drugs. She does not believe her husband said he was selling drugs. She asked Damel and he told her he did not say that he sold drugs. She has not talked to her husband about the case since the November, 2002 incident. His charges have not yet been resolved, and she does not know what charges were brought against him. She did see what the officers found.

The money located under the mattress belonged to her. She

testified to the following history of the money.

She borrowed money for her father's defense fund because her father, who was incarcerated, asked her to collect it. The fund originally had \$12,500.00 in it. She contributed some \$900.00 to this fund. She had a written agreement with Carolyn Hickman to repay \$5,000.00 of it. Others gave her the balance of the money. If her father was released due to the success of postconviction filings, then her father was to repay the money. If he was not released, then petitioner was to repay the money.

She gave the money to an attorney to provide representation for her father on postconviction relief. They did not want to use this attorney anymore, so she, Damel Scott, and her grandfather went to Baltimore to see this attorney. He gave her a check dated October 15, 2002, in the amount of \$7,196.50, which was the balance of his retainer. By letter dated October 29, 2002, the attorney stated:

Please find an invoice for my firm's legal services regarding your father's case. I am sorry that your father changed his mind midstream and decided not to let us complete the work that you and he hired us to do. As you know, I refunded \$7,196.50 which represented the unused portion of the \$12,500.00 retainer to you personally on October 15, 2002. I wish you and your father the best.

Damel Scott did not know she received this money or cashed this check. It was her business, not Damel's. She cashed the check at the Sun Trust Bank in Baltimore. She put this money under the mattress. She had not checked the money under the mattress since

obtaining it from the attorney approximately a month before it was seized. She put it there because she was working seven to seven and she was looking for a less expensive lawyer to represent her father. However, she knows all of it was there and the police took some of her money.

In response to the question of why, when she went upstairs to retrieve the "large" sum of money, did she not retrieve this money, she replied that she was afraid they would take it, just like they did.

Lester Hickman, who is petitioner's father, testified as follows.

As far as he knows, the money taken from his daughter's house was money she collected from family and friends to obtain a lawyer for his postconviction relief motion. In January, 2000, she told him it was about \$7,000.00. His daughter was taking care of things for him. He was not really happy with the lawyer she obtained from Baltimore; he did not like the way he talked. He instructed petitioner to get rid of that lawyer.

The money that was under petitioner's mattress was money from friends and family. Petitioner never told him she borrowed any portions of it as a personal loan. If he was released, the money probably would not be paid back. There was no written agreement about paying the money back; no agreement about loans. His opinion is the money was a gift, given from the heart.

Corporal McColgan returned to the stand. He laid the foundation for a November 25, 2002 tape recording of Damel Scott's interview after his arrest. After being provided Miranda rights, Damel provided the following information.

He had smoked marijuana about one to one and a half hours before the police arrived. His wife had been working and had just arrived before the police arrived.

The marijuana in the top drawer in his bedroom belonged to him. He smoked it and he sold it at Christmas time to make ends meet. He had just gotten it that week and intended to sell it. He obtained a large amount and broke it down. It was in smaller bags, which were dime bags and weighed about two grams, and larger bags, which were quarter bags.

He only had disability income.

The \$4,000.00 was not his money; it might be his wife's money. He had no idea about that money.

The State rested at this point. Petitioner then presented her case.

Petitioner's first witness was Eva Parker, who testified as follows.

Eva Parker loaned petitioner \$500.00 for her father. She gave this money to petitioner in September, 2002. She understood that petitioner was having problems, and she did not care what the money was for. Petitioner told her the money was for her father and she

would repay Ms. Parker when she got it back. Ms. Parker trusted her. Petitioner also told Ms. Parker that she had collected money from some others. Ms. Parker did not have petitioner sign papers; she knew petitioner would repay her. Petitioner has not yet paid her back, and there was no special date for the repayment.

Lester Hickman, Jr., petitioner's brother, testified. His testimony is summarized below.

On September 18, 2002, he gave petitioner \$500.00 to help with her father. There was no agreement with his sister regarding the \$500.00. When she needed it, he gave it to her. She needed money for personal reasons; he never determined what the personal reasons were. She did tell him she borrowed money from others; she did not tell him whom or amounts. He just learned today that she borrowed money from her aunt Joyce, also. He also knows she borrowed \$5,000.00 from Carolyn Foreman, a/k/a Carolyn Hickman.

Finally, petitioner testified to the following.

She borrowed money for her father. She told the officers she had documents to show the seized money was legal. The \$5,000.00 she borrowed from Carolyn Hickman was cash. The written agreement for her to repay it provided:

I, Debbie Scott has acquired a loan in the amount of \$5,000.00 on intent to repay Carolyn Hickman. This loan was borrowed on November 7, 2001.

Petitioner's father forgot about the agreement she had to repay the money she borrowed on his behalf. Also, she did not tell

her father everything because she wanted to keep as much weight off him as possible.

PROPOSED FINDINGS OF FACT

In order to make findings of fact, credibility determinations must be made. I accept the police officer's testimony as credible. I do not accept petitioner's testimony as credible. For instance, it is not believable she did not smell the marijuana. It is not believable she has not talked with her husband about the case. Her testimony about having to repay the money to those who gave it to her is at odds with her father's testimony that he considered all of the money to be a gift. She originally told the police officers the source of the seized cash was parents; then, she told them that it was the fund for her father's postconviction representation. The most influential factor leading me to believe she has not been honest about the source of the cash is that she told the police officer she had a large amount of money upstairs she wanted to retrieve, she went upstairs, and she retrieved the \$100.00 bill, not the money under the mattress. I conclude that if she had known the \$4,821.00 was under the mattress and its source was legitimate, she would have taken it out at the time she went upstairs.

My findings of fact are as follows. Upon being provided legal entry to the home, the officers verified Damel Scott's identity and that he was aware of the capias out of Justice of the Peace Court. They smelled marijuana. They searched the premises. In petitioner

and Damel Scott's bedroom, they located thirty-six bags of marijuana, plastic baggies and \$4,821.00. While this search was taking place, petitioner told the police officer with her that she wished to go to her bedroom and retrieve a large sum of money that belonged to her, and she retrieved a \$100 bill. Petitioner either did not know about the \$4,821.00 or if she knew about it, she knew its source was from the sale of drugs.

Damel Scott was arrested on drug-related charges and confessed to selling drugs in order to make ends meet at Christmas time.

DISCUSSION

Delaware's drug forfeiture statute was enacted to "cripple the trafficking and sale of illegal drugs." In the Matter of One 1987 Toyota, Del. Super., 621 A.2d 796, 798 (1992). Statute, rule and case law have established procedures to follow in a forfeiture case, and these procedures are set forth below.

"[T]he State has an initial burden of proving probable cause [for the institution of a forfeiture] and ... if this is met, the petitioner has the burden of rebutting the presumption of forfeiture. [Citations and footnotes omitted.]" Brown v. State, Del. Supr., 721 A.2d 1263, 1265 (1998). 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." 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, 8th Cir., 869 F.2d 1093, 1095 (1989)).

In the case of Brown v. State, 721 A.2d at 1265, the Supreme Court, quoting from 16 Del. C. § 4784(a)(7)a., further states:

With regard to money, the Forfeiture Act states that "all moneys ... found in close proximity to forfeitable controlled substances ... are presumed to be forfeitable"

In In the Matter of \$5,662 United States Currency, 714 A.2d 106 (Del. Super. 1998), aff'd, Brown v. State, 721 A.2d 1263 (Del. 1998), money found in an upstairs bedroom safe was deemed to be in "close proximity" to drugs seized in the downstairs kitchen and living room.

The first issue in this case concerns whether the police could search the premises. "Without a warrant, the State has the burden of proving that both the entry and the subsequent search inside the home are lawful." Hardy v. State, Del. Supr., No. 434, 1996, Veasey, C.J. (July 9, 1997). In this case, petitioner was wanted on a capias issued out of Justice of the Peace Court. Thus, a warrant existed for his arrest, and the officers had a duty to arrest him. State v. Severin, Del. Super., Cr. A. No. IN-81-12-0102, et al.,

Balick, J. (March 23, 1982). Once the police officers smelled the marijuana, exigent circumstances required that they search the premises. Hardy v. State, supra.

I now examine whether the cash was in close proximity to the drugs. The money in this case was located under the mattress in the same bedroom where the drugs were found. This constitutes close proximity. In the Matter of \$5,662 United States Currency, 714 A.2d. The State has met its burden of establishing probable cause to seize the \$4,821.00 and that the cash was forfeitable.

The burden then shifted to petitioner to rebut the presumption the cash was forfeitable. 16 Del. C. § 4784(a)(7)a.; Brown v. State, 721 A.2d at 1265. This means the petitioner must have shown 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).

As the proposed findings of fact infer, I do not find that petitioner established she had a lawful possessory interest in the cash or that it was not related to the sale of drugs. To make such a finding would require that I accept petitioner's contention that the money seized was the money collected for her father's fund. Although I do not doubt that such a fund existed, I do not conclude that the money seized was the money from that fund. The main

reasons why I reach such a conclusion are because petitioner did not, when she returned upstairs, retrieve the money and identify its source to the officers and because, upon its discovery, she offered another source for the money (that it came from parents) before she said it was money for her father. Petitioner has not met her burden.

CONCLUSION

In light of the foregoing, I recommend the following:

- 1) The Court conclude that the State established probable cause to have initiated the forfeiture proceeding;
- 2) The Court conclude that petitioner has not rebutted the presumption that the \$4,821.00 constituted proceeds from the sale of drugs;
- 3) The Court deny petitioner's petition;
- 4) The Court enter an order ordering the forfeiture of the \$4,821.00 to the State.

COMMISSIONER

cc: Debbie Scott
James Rambo, Esquire