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APPELLANT PRO SE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

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KENNETH D. PHOENIX,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 10A05-0606-CR-333

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APPEAL FROM THE CLARK SUPERIOR COURT  
The Honorable Cecile A. Blau, Judge  
Cause No. 10D02-0310-FA-501

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**November 28, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Kenneth D. Phoenix appeals the denial of his pro se motion for return of property, filed pursuant to Ind. Code Ann. § 35-33-5-5 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007), in which he sought the return of \$643 in cash that was seized from his person during a search. In this pro se appeal, Phoenix presents the following restated issue: Did the trial court err in denying the motion without a hearing when Phoenix should have been presumed to be the rightful owner of the cash?

We remand.

On April 3, 2003, Phoenix sold cocaine to a confidential informant during a controlled buy. When he was searched immediately following the controlled buy, police recovered the documented buy money from one of Phoenix's pockets. Police also seized \$643, which is the property at issue in this case, from one of his other pockets. Phoenix proceeded to acknowledge that he had sold cocaine to the confidential informant and, further, that he had more cocaine in his truck. In fact, 17.07 grams of cocaine were recovered from the truck. Phoenix was subsequently charged and, in February 2005, convicted of two counts of dealing cocaine, one as a class B felony and one as a class A felony. His convictions were affirmed on direct appeal, though his sentence was revised. *Phoenix v. State*, No. 10A05-0505-CR-273 (June 23, 2006).

On October 4, 2005, Phoenix filed his pro se motion for return of property seized by law enforcement officers. Though the motion is not included in the record before us,<sup>1</sup>

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<sup>1</sup> In his reply brief, Phoenix acknowledges he provided an appendix that did not include a copy of his motion. He claims, however, that his attempts to obtain a file-stamped copy of the motion from the trial

it appears undisputed that Phoenix sought the return of the \$643 seized from his pocket, which was separate from the buy money. On October 21, the trial court summarily denied the motion without a hearing and without any response from the State. Phoenix timely filed a notice of appeal on November 21, but the trial court denied the filing of said notice of appeal. Thereafter, Phoenix sought permission to file a belated appeal, which was granted by this court on June 29, 2006. After several delays caused by the trial court, the appeal is now before us.

Phoenix argues that the trial court erred in summarily denying his motion for return of property. Because he had sole possession of the cash at the time of its seizure, he contends a presumption arose that he was the owner of said property. Thus, Phoenix claims that he is entitled to either a hearing on his motion or return of the \$643 in light of the State's failure to rebut the presumption.

I.C. § 35-33-5-5 provides for the disposition of property seized by a law enforcement agency as a result of an arrest, search warrant, or warrantless search. The statute provides in relevant part:

- (c) Following the final disposition of the cause at trial level or any other final disposition the following shall be done:
  - (1) Property which may be lawfully possessed shall be returned to its rightful owner, if known. If ownership is unknown, a reasonable attempt shall be made by the law enforcement agency holding the property to ascertain ownership of the property....

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court were unsuccessful. In fact, the chronological case summary (the CCS) indicates Phoenix specifically requested a copy of the clerk's record from the trial court and the court responded, "[the CCS] is the Clerk's record and a copy is being sent to [Phoenix]". While a copy of the motion would have been helpful, we are confident that we can address the merits of this appeal without it.

Thus, once its need for the property has terminated, the trial court “has both the jurisdiction and the duty to return seized property.” *Sinn v. State*, 693 N.E.2d 78, 81 (Ind. Ct. App. 1998).

In the instant case, it cannot be disputed that police seized the cash at issue during a warrantless search of Phoenix’s person or that final disposition of the criminal cause has been made. Therefore, the issues that remain are whether Phoenix is the “rightful owner” of the cash and whether the cash “may be lawfully possessed”. I.C. § 35-33-5-5(c)(1).

We find that the trial court’s summary denial of the motion for return of property without holding an evidentiary hearing on the merits was improper. *See Anderson v. State*, 468 N.E.2d 569 (Ind. Ct. App. 1984) (denial of defendant’s claim for return of property without any evidentiary hearing denied him due process) (citing *Robbins v. State*, 124 Ind. 308, 24 N.E. 978 (1890)). Therefore, we remand with instructions to hold a hearing on Phoenix’s motion for return of property.

For purposes of remand, we are compelled to make some observations. With regard to the issue of whether Phoenix is the rightful owner of the cash, it is clear that he had possession of the property at the time it was recovered from his person by police. This raises a presumption that he is the owner of the cash. *See Merlington v. State*, 839 N.E.2d 260 (Ind. Ct. App. 2005); *State v. Poxon*, 514 N.E.2d 652 (Ind. Ct. App. 1987), *trans. denied*. Thus, it is incumbent upon the State to rebut this presumption, if possible, at the hearing on Phoenix’s motion.

The other issue that must be addressed on remand is whether the cash is property that may lawfully be possessed. Money itself, of course, is property that may be lawfully possessed. *Gore v. State*, 456 N.E.2d 1030 (Ind. Ct. App. 1983). Moreover, as we have previously observed with respect to the relevant statute, “the legislature has not stated that money, which is apparently derived from the sale of drugs, is property which may not be lawfully possessed”. *Merlington v. State*, 839 N.E.2d at 260 (quoting *Gore v. State*, 456 N.E.2d at 1033) (cash found on defendant at time of arrest when he also possessed 224 grams of methamphetamine with intent to deliver was property that could be lawfully possessed). Further, contrary to the State’s implication on appeal, the fact Phoenix was ultimately convicted of dealing cocaine does not necessarily establish that the cash (apparently unrelated to the controlled buy) was unlawfully possessed by him. *See Merlington v. State*, 839 N.E.2d 260 (cash returned to defendant despite his conviction for possession with intent to deliver).

Finally, we observe that the record before us does not reveal the State ever instigated civil forfeiture proceedings with respect to the money in question. To be sure, the cash in question would have almost certainly been subject to forfeiture if properly sought. *See* Ind. Code Ann. § 34-24-1-1(d) (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007); *Lipscomb v. State*, 857 N.E.2d 424, 428 (Ind. Ct. App. 2006) (“pursuant to I.C. § 34-24-1-1(d), ‘money found on or near a person who *is* committing, attempting to commit, or conspires to commit any of the specifically enumerated offenses, is presumed forfeitable -- period’”) (emphasis in original) (quoting *Caudill v. State*, 613 N.E.2d 433, 438 (Ind. Ct. App. 1993)). On remand, however, we

caution the trial court and the State against using I.C. § 35-33-5-5 to effectively accomplish an untimely civil forfeiture.

Remanded with instructions to hold a hearing on the motion for return of property or, in the alternative, to grant said motion.

MAY, J., and CRONE, J., concur.