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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001684-MR

KELVIN COLLIER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 98-CR-000321

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: BARBER, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Kelvin Lamont Collier has appealed from an order entered on April 3, 2000, by the Jefferson Circuit Court which "overruled" his "motion for release of property" concerning \$2,380 in cash that was seized from him when he was arrested on drug charges following a search of his residence. Having concluded that the Commonwealth has failed to take the appropriate action to obtain the forfeiture of the cash under

KRS¹ 218A.410(j) and that the trial court has failed to make the required findings of fact, we vacate and remand.

On November 18, 1997, the Louisville Police Department executed a search warrant at an apartment in Louisville, Kentucky, where Collier lived with his girlfriend. During the search the police officers seized 114.53 grams of cocaine, 22.4 grams of marijuana and \$2,380 in cash -- \$2,000 was found in a pair of boots that belonged to Collier and \$380 was found on his person. On February 4, 1998, Collier was indicted by the Jefferson County grand jury for trafficking in a controlled substance in the first degree (cocaine),² for possession of marijuana,³ and for being a persistent felony offender in the second degree (PFO II).⁴ On September 30, 1998, Collier accepted the Commonwealth's offer and pled guilty to the amended charge of illegal possession of a controlled substance in the first degree (cocaine),⁵ possession of marijuana and PFO II. He was sentenced to prison for a term of five years on the possession of cocaine conviction and that sentence was "enhanced to five years by reason of PFO II." He was also sentenced to jail for 12 months

¹Kentucky Revised Statutes.

²KRS 218A.1412.

³KRS 218A.1422.

⁴KRS 532.080.

⁵KRS 218A.1415.

on the possession of marijuana conviction, with that sentence to run concurrently with the five-year sentence.⁶

No further action was taken in Collier's case until he filed a pro se "motion for release of property." The record is in poor order and it is not clear when this motion was filed. The certificate of service indicates that it was served on the trial judge on March 27, 2000. An order, which was apparently tendered with the motion, has written on it "overruled T. J. Knopf Judge 3/31/00." This order was entered on April 3, 2000. The record's index indicates that the motion was also filed on April 3, 2000. Another "motion for release of property" was filed on June 7, 2000. This "motion" was actually a letter to the circuit court clerk seeking information on the status of the first motion. On June 13, 2000, Judge Knopf wrote Collier a letter which stated in part: "This motion was overruled and a copy of said order should have been sent to you. In case it was not, I enclose a copy for your information." On June 26, 2000, Collier filed a "motion for reconsideration." On June 27, 2000, Judge Knopf summarily denied this motion by writing "overruled T. J. Knopf Judge 6/26/00" on the first page of the motion. This appeal followed.

Collier argues that he pled guilty to possession of a controlled substance, not trafficking, and that forfeiture of his money that was seized was not part of any plea bargain agreement.

⁶These sentences were to run consecutively with Collier's five-year sentence for possession of cocaine in case number 97-CR-00988, which had been probated.

Collier claims that for the money to be subject to forfeiture, the Commonwealth must produce some evidence that the seized money was used or was intended to be used in drug trafficking. He argues that for the seized money to be subject to forfeiture under Kentucky law, he must be convicted of trafficking and not merely possession.

In Osborne v. Commonwealth,⁷ the Supreme Court of Kentucky directly addressed the issue of forfeiture of currency in a drug case and stated:

At the outset, it should be observed that nothing in the forfeiture statute requires criminal conviction of the person whose property is sought to be forfeited. It is sufficient under KRS 218A.410(h) and (j) to show a nexus between the property sought to be forfeited and its use to facilitate violation of the Controlled Substances Act, KRS 218A. Smith v. Commonwealth, Ky., 707 S.W.2d 342 (1986). Thus, appellant can take little comfort here in the fact of the dismissal of charges against her. The inquiry is whether the evidence and law, including statutory presumptions, permit a finding that the subject property was used to facilitate violation of the Act.

. . .

A more difficult question is encountered with respect to forfeiture of the currency. The controlling statute is KRS 418A.410(j) [sic] which permits forfeiture of

"Everything of value furnished .
. . . in exchange for a controlled
substance in violation of this
chapter, all proceeds . . .
traceable to the exchange, and
all moneys . . . used, or

⁷Ky., 839 S.W.2d 281 (1992).

intended to be used to facilitate any violation of this chapter."

Subsection (j) further provides that

"It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence."

On examination of the foregoing statute, it is apparent that any property subject to forfeiture under (j) must be traceable to the exchange or intended violation. This requirement exists without regard to the presumption which appears later in the statute. Without such a requirement, the statute would mandate forfeiture of property which was without any relationship to the criminal act and would be of dubious constitutional validity under Sections 2, 11, 13, 26 and possibly other sections of the Constitution of Kentucky. With such a requirement, however, the General Assembly is entitled to great latitude to create presumptions.

Recognizing the difficulty of proof with respect to showing a connection between currency and drug transactions, the General Assembly created a presumption whereby currency found in close proximity to controlled substances was presumed to be forfeitable subject to the right of the owner to rebut the presumption. While the presumption would, at first blush, appear to dispense with the requirement of traceability, we believe the two must be construed harmoniously so as to give effect to the intention of the General Assembly.

The Commonwealth may meet its initial burden by producing slight evidence of traceability. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a prima facie case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade. Our view in this regard is consistent with Smith v. Commonwealth, supra, wherein the Court held that despite possession of \$2,000 cash, the defendant's acquittal of the trafficking charge and failure of the Commonwealth to prove a connection between the currency and the drug transaction was sufficient to require denial of forfeiture. The difference between Smith and this case is that in the former, the trafficking charge was the only link between the money and the drug transaction and on acquittal, the link was broken. Here, the money was found in close proximity, indeed in the dwelling, of Donald Kimberly, one who was convicted of trafficking.⁸

In Smith v. Commonwealth,⁹ the Supreme Court of Kentucky reversed the trial court's order that forfeited Smith's money that had been seized during his arrest. Smith was found innocent of trafficking in a controlled substance, but he was found guilty of the lesser charge of possession. After the conviction for possession, the trial court entered an order of

⁸Id. at 283-84.

⁹Ky., 707 S.W.2d 342, 343 (1986).

forfeiture of the cash found on Smith when he was arrested.

Reversing this order, the Court stated:

If he had been convicted of trafficking in a controlled substance, K.R.S. 218A.410(j) would have created a rebuttable presumption that money found on his person was forfeitable. The acquittal on the charge of trafficking is ample rebuttal of the presumption that the money was used or intended to be used in exchange for a controlled substance. There was no testimony that the money found on appellant's possession had been received by him in exchange for a controlled substance. The only direct testimony on this point was that he won the money gambling.

In the case sub judice, the Commonwealth's brief does not address the merits of Collier's arguments. Instead, the Commonwealth argues that Collier's motion for release of property was untimely. Although not specifically cited by the Commonwealth, it appears to be relying upon CR¹⁰ 59.05, which states:

A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.

The Commonwealth relies on Commonwealth v. Gross,¹¹ for its argument that Collier failed to timely file his motion for release of property. In Gross, the trial court amended Gross' sentence more than two years after the original sentence was imposed. The trial court reasoned that it retained "continuing jurisdiction" to alter or amend Gross' sentence until the time

¹⁰Kentucky Rules of Civil Procedure.

¹¹Ky., 936 S.W.2d 85 (1996).

had run to preclude shock probation. Relying on CR 59.05 and 60.02, the Supreme Court of Kentucky held that the trial court lost jurisdiction to alter, amend or vacate defendant's judgment of conviction after expiration of ten days of its entry.

We believe the present case can be distinguished from Gross and other cases that have applied the ten-day rule. CR 59.05 deals with amending or vacating judgments, and in the present case Collier did not ask the trial court to amend or vacate his sentence. Nor did Collier ask the trial court to amend or vacate his guilty plea. Nowhere in the guilty plea or in the trial court's sentencing order is there any reference to a forfeiture of Collier's seized property.¹² We have reviewed the video record in the present case and note that during Collier's

¹²The trial court's judgment of conviction stated:

This matter having come before the Court on September 30, 1998. The defendant, by counsel, withdrew his not guilty plea and entered a plea of guilty to Illegal Possession of Controlled Substance (amended from TICS I); Possession of Marijuana; and PFO II.

The Court having accepted the plea; the defendant expressed a desire to waive a Pre-Sentence Investigation Report; and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED that defendant is sentenced as follows:

IPCS - five years, enhanced to five years by reason of PFO II; POM - 12 months; concurrent for five years. This sentence to run consecutively with sentence under 97 CR 0988. Court costs and PD fee waived.

sentencing hearing the trial court did not address forfeiture. Moreover, the trial court never made any reference to the fact that money was seized at the time Collier was arrested. Furthermore, the Commonwealth failed to take any affirmative step to have Collier's property forfeited.

The first affirmative step was taken by Collier, when on or about March 27, 2000, he filed a motion to have his personal property released. This motion was "overruled" without opinion. On June 27, 2000, Collier filed a motion for reconsideration and findings of fact that was also "overruled" without opinion.

We hold that Collier's appeal is not barred by CR 59.05. The Commonwealth has simply failed to take the proper affirmative steps to have Collier's money forfeited. Pursuant to Osborne and Smith, supra, the fact that money was seized when Collier was arrested did not create an automatic forfeiture of the cash. According to Osborne and Smith, Collier would had to have been convicted of or pled guilty to the trafficking charge for the Commonwealth to have acquired the rebuttable presumption that the seized money was forfeitable pursuant to KRS 418A.410(j).

Osborne makes it clear that the Commonwealth has the initial burden of providing "slight evidence" of the traceability of the money seized to drug trafficking. In the case sub judice, the Commonwealth has failed to take the necessary steps to have Collier's money forfeited. As in Osborne, "the trial court

failed to make findings with respect to traceability and failed to determine whether appellant's evidence as to the source of the currency was credible." Of course, unlike Osborne, there was no evidence taken in the case sub judice.

For these reasons, we vacate the order of the Jefferson Circuit Court and remand this matter for further proceedings including an evidentiary hearing on the claimed forfeiture of the \$2,380 in cash.

ALL CONCUR.

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