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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001126-MR

JOSEPH COOPER

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 11-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: CLAYTON, KELLER AND MAZE, JUDGES.

MAZE, JUDGE: Joseph Cooper appeals from a post-conviction order of the Ballard Circuit Court which ordered forfeiture of a night-vision monocular seized following his arrest on drug charges. Cooper argues that the Commonwealth failed to present any evidence showing a relationship between the illegal activity and the monocular. We conclude that the connection in this case was too tenuous to support the Commonwealth's burden of proof on this issue. Hence, we reverse.

The relevant facts of this action are not in dispute. On April 15, 2011, Cooper entered a plea of guilty to one count each of first-degree trafficking in a controlled substance (methamphetamine), driving under the influence, operating a motor vehicle on a suspended license, unauthorized use of a motor vehicle, possession of marijuana, and possession of drug paraphernalia. In exchange for his guilty plea, the Commonwealth recommended a sentence of seven years' imprisonment, which the trial court imposed. Prior to his final sentencing, the Commonwealth filed a motion for forfeiture of property which was seized from Cooper at the time of his arrest. Specifically, the Commonwealth sought forfeiture of a Night Owl Night Vision Monocular, Series # 99253667.

A hearing was held on the motion on May 24, 2011. Officer Todd Cooper of the Ballard County Sherriff's Office testified about the circumstances surrounding Cooper's arrest on March 28, 2011. Earlier that day, Officer Cooper had conducted a controlled buy of methamphetamine from Cooper using a confidential informant. Shortly after that buy, at around 3:00 pm, Officer Cooper pulled over Cooper's vehicle and placed him under arrest. Upon searching the car, Officer Cooper found a black bag in the front seat which contained methamphetamine, rolling papers and marijuana. Sitting next to this bag, there was also a camouflage bag which contained the night-vision monocular.

Officer Cooper testified that he did not believe that the monocular had been used in the drug sale since the sale and the arrest took place during the daylight hours. But based on his experience in other cases, he added that other

people involved in the sale or manufacture of methamphetamine use night-vision equipment to conduct counter-surveillance on police or to observe areas where sales are planned. In response, Cooper testified that he had never used the monocular during drug sales. Rather, he stated that he had recently borrowed it from his brother-in-law and was in the process of returning it.

At the conclusion of the hearing, the trial court entered oral findings on the forfeiture motion. The court found no evidence that Cooper had used the monocular during the charge offense since that sale occurred during daylight hours. Nevertheless, the trial court concluded that the monocular was property which could be used to deliver, import or export controlled substances under KRS 218A.410(1)(f). The court also called Cooper's credibility into doubt and found that he had failed to provide a legitimate explanation for the presence of the monocular in his car. Consequently, the trial court granted the Commonwealth's motion for forfeiture of the monocular.

On appeal, we review a court's determination as to whether the parties have met their respective burdens regarding forfeiture of property for an abuse of discretion. *Hill v. Commonwealth*, 308 S.W.3d 227, 230 (Ky. App. 2010). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). A trial court abuses its discretion when its decision rests on an error of law (such as the application of an erroneous legal principle or a clearly erroneous factual finding), or when its

decision cannot be located within the range of permissible decisions allowed by a correct application of the facts to the law. *See Miller v. Eldridge*, 146 S.W.3d 909, 915 n. 11 (Ky. 2004).

In this case, the trial court's factual findings are not in dispute. The sole question on appeal is whether the Commonwealth met its burden to show that the monocular was subject to forfeiture. The Commonwealth sought forfeiture under KRS 218A.410(1)(f), which provides for forfeiture of:

All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter[.]

KRS 218A.410(1)(j) provides a presumption that all monies found in close proximity to controlled substances or activities or equipment related to drug manufacturing or distribution are subject to forfeiture. However, there is no similar presumption for other property seized under KRS 218A.410(1)(f). But in all forfeiture cases, the Commonwealth must prove a nexus between the property sought to be forfeited and its use to facilitate a violation of KRS 218A. *Osborne v. Commonwealth*, 839 S.W.2d 281, 284 (Ky. 1992). Furthermore, a criminal conviction for trafficking is not a prerequisite for forfeiture under KRS 218A.410. *See Smith v. Commonwealth*, 707 S.W.2d 342, 343 (Ky. 1986), *overruled on other grounds in Clay v. Commonwealth*, 818 S.W.2d 264 (Ky. 1991).

In this case, the trial court expressly found no evidence that Cooper had used the monocular as part of the drug transaction for which he was charged.

But based on Officer Cooper testimony, the trial court found that the monocular could be used for nighttime drug trafficking operations. The language of the statute is sufficiently broad to allow forfeiture of property which is intended to facilitate violations of KRS Chapter 218A, even if there is no evidence that it was actually used in the particular charged offense. However, it is not sufficient to show that the property could possibly be used in some way to facilitate violations of the chapter. Rather, the Commonwealth must present evidence that the property was “*intended for use, in ... delivering ... any controlled substance.*” (*Emphasis added*). Officer Cooper’s testimony that the monocular could be used for nighttime drug trafficking operations, based on his experience in other cases, was not sufficient to meet the Commonwealth’s burden in this case. The connection between Cooper’s possession of the monocular and his drug-trafficking activities was simply too tenuous to support the inference required under the statute. Consequently, we conclude that the trial court erred by finding that the monocular was subject to forfeiture.

After the prosecution produces evidence to show that the property was traceable to the exchange or used to facilitate a violation of Chapter 218A, the claimant of personal property has the burden to convince the trier of fact that the property was not being used in the drug trade. *Osborne*, 839 S.W.2d at 284; *Hinkle v. Commonwealth*, 104 S.W.3d 778, 781 (Ky. App. 2002). The trial court found that Cooper’s explanation of his possession of the monocular was not credible. But since the Commonwealth failed to meet its burden in this case,

Cooper was not required to rebut that evidence. As a result, the trial court's conclusions about his credibility were not controlling.

Accordingly, the order of the Ballard Circuit Court is reversed.

CLAYTON, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

KELLER, JUDGE, CONCURRING: I concur and write separately to note the Supreme Court of Kentucky's opinion in *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006). In *Brewer*, the Commonwealth seized marijuana and a number of firearms from Brewer, who was part of a major marijuana trafficking operation. The Commonwealth brought a forfeiture action against certain real and personal property belonging to Brewer, including the firearms. At the forfeiture hearing, a detective "testified on behalf of the Commonwealth that in his 'experience as a narcotics officer ... guns are often found and accompany ... drug trafficking.' However, [the detective] also testified that there was no evidence linking any of the firearms found at [Brewer's] home to narcotics." *Id.* at 347. The Supreme Court determined that this testimony was not sufficient to link the firearms to Brewer's marijuana trafficking enterprise.

I see little difference between Officer Cooper's testimony herein and the detective's testimony in *Brewer*. Although I am reluctant to reverse the trial court on a discretionary ruling, I am constrained to agree with the majority because the Commonwealth failed to meet its burden as set forth in *Brewer*.

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