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Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000130-MR

ALISHA J. DOEBLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 17-CR-001411-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

JONES, JUDGE: This is a criminal appeal brought by the Appellant, Alisha J. Doeblor. Doeblor seeks review of an order of forfeiture for \$3,759 in cash that law enforcement officials seized from a hotel room the day Doeblor and her co-defendant, Jason Lankford, were arrested. Following a forfeiture hearing, at which

the Commonwealth elected not to introduce any evidence, the Jefferson Circuit Court found Doebler obtained the money at issue from her late father's estate the afternoon before its seizure by police. Nevertheless, the trial court concluded the nature of Doebler's conviction (possession of drug paraphernalia) and the money's proximity to illegal drugs justified its forfeiture. Having reviewed the record in conjunction with all applicable legal authority, we REVERSE.

I. BACKGROUND

Doebler and Lankford were indicted by the Jefferson County Grand Jury for trafficking in a controlled substance, first degree, schedule II methamphetamine two grams or more;¹ illegal possession of a controlled substance, first degree, schedule I heroin;² and illegal use or possession of drug paraphernalia.³ On the day of the arrest, police seized the suspected drugs as well as various cellular telephones, a digital scale, a "loaded syringe," and \$3,759 in cash from a hotel room where Doebler and Lankford were present.⁴

The discovery information tendered by the Commonwealth contains photographs that appear to be of the hotel room, the purse where the money was

¹ Kentucky Revised Statute ("KRS") 218A.1412.

² KRS 218A.1415.

³ KRS 218A.500.

⁴ There is no allegation that the room was in Doebler's name. Presumably, it was rented by Lankford or someone on his behalf.

located, and the money after it was removed from the banking envelope where it was stored.⁵ These photographs, however, were never authenticated and introduced as evidence by the Commonwealth.

Lankford eventually entered a guilty plea to trafficking methamphetamine, less than two grams; possession of heroin; and possession of drug paraphernalia.⁶ As part of his plea agreement, Lankford admitted to possessing two grams of methamphetamine packaged for sale, a baggie of heroin, and a digital scale at the time of his arrest. Doebler is not mentioned in the plea, and Lankford did not testify at the forfeiture hearing.

Thereafter, Doebler entered a guilty plea to the charge of possession of drug paraphernalia, the syringe found in Lankford's room. The trafficking and possession charges were dismissed pursuant to the Commonwealth's offer. Prior to entering her plea of guilt, the Commonwealth informed the trial court that the parties had not been able to agree on forfeiture of the cash found in Doebler's purse when she was arrested, and the issue would require a decision by the court. Doebler's testimony at the plea hearing consisted of her acknowledgment of her rights and agreement to the following facts:

⁵ The photographs indicate that the money consisted almost entirely of \$100s, but there were a handful of \$1s, \$5s, and \$10s.

⁶ Lankford was sentenced to five years' imprisonment, probated for five years.

On March 14, 2017, in Jefferson County, KY officers were dispatched on a fire alarm issue at a motel. While on scene a motel employee stated a female had been stealing clothes from tenants and was at Room 226. Upon contact, the officers found the defendant was in possession of a syringe.

(R. at 113). After these facts were read to Doebler by the trial court, she admitted their truth while under oath. The trial court accepted Doebler's plea and sentenced her to twelve months' imprisonment, conditionally discharged for two years, based on her plea of guilty to the charge of possession of drug paraphernalia.

After the trial court accepted Doebler's plea, it took a short recess and then reconvened to conduct the forfeiture hearing. For reasons that are not clear, the trial court began the hearing by directing Doebler's counsel to begin defendant's presentation of evidence.⁷ Defense counsel called Doebler to the stand. Doebler testified that on March 13, 2017, the day before she was arrested, she went with her brother to settle out their late father's PNC bank account. The two received approximately \$8,000, which they split. Doebler's attorney introduced evidence to support this testimony, including certified bank and probate records.

⁷ As discussed below, this was not the correct procedure. The Commonwealth bears the initial burden in a forfeiture hearing. While its burden is slight, it must produce at least some evidence to show that the currency was located in proximity to illegal drug trafficking activity.

Approximately \$200 of the total amount of money Doebler received was unaccounted for when it was seized by police. Doebler testified that she spent around \$200 of the money on jewelry shortly after she received it. She stored the rest of the money, which consisted mostly of \$100s, in a bank envelope inside her purse. She testified that the money had nothing to do with any drug trafficking activity.

The Commonwealth then proceeded to cross-examine Doebler. She reiterated that she received the money at issue from her late father's estate on the afternoon of March 13th, and that she used around \$200 of it to purchase jewelry later that evening, around eight or nine. The Commonwealth then asked Doebler about the nature and quantity of drugs discovered in the hotel room where she was arrested the next morning. Doebler denied any knowledge of the nature of the drugs or whether Lankford was packaging them for sale. She generally admitted that police found drugs in the room and a scale with residue on it. However, she stated she did not know whether the residue on the scale was from methamphetamine or heroin. She testified that it was not her room and not her drugs. Doebler admitted that she pleaded guilty to possession of drug paraphernalia with regard to a syringe found on a table in the room, but she denied that she was in Lankford's room to traffic drugs or that she planned to use the money to do so. When pressed why she was in the room, she explained that she

went to Lankford's room to purchase a cellular phone with some of the money and that she planned to go from there to her bank to deposit the rest.

The next witness to testify was Joshua, Doebler's brother. He testified that he remembered closing out the account with Doebler on or about March 13, 2017, and that the two received a check that they split. The Commonwealth did not cross-examine Joshua.

After Doebler and her brother testified, the trial court turned the hearing over to the Commonwealth. The Commonwealth did not call any witnesses or introduce any evidence. Instead, it argued that it was entitled to rely on a presumption of close proximity and that Doebler had failed to rebut the presumption by clear and convincing evidence. The Commonwealth cited the proximity of the cash to the drugs and other paraphernalia, and argued this was sufficient to justify forfeiture, notwithstanding the evidence that Doebler obtained it from her late father's estate. Defense counsel attempted to rebut this argument by pointing out that the Commonwealth had failed to proffer any evidence to establish that Doebler was using the currency to traffic drugs. He noted that the pleas did not mention any such facts and the Commonwealth had not called any witnesses such as the investigating officers or Lankford to support a connection between the money and drug trafficking activity.

Thereafter, both counsel and the trial court engaged in a discussion regarding how forfeiture operates with respect to the presumption and the burden of proof. At the end of this discussion, the Commonwealth reiterated its position that it did not have to put on any evidence because the discovery and the plea deals showed that the money was found in close proximity to drugs. The Commonwealth argued that the money's close proximity to the drugs was sufficient to prove that Doebler intended to use the money for drug trafficking purposes.

After the hearing, the court entered an order directing Doebler to forfeit the cash. The trial court's order states:

The matter came before the Court on December 14, 2018, for hearing on the [Commonwealth's] motion for forfeiture. . . . The Court heard proof and argument. The Court finds that the source of the disputed funds was [Doebler's] inheritance from her late father's estate. However, that is not the central inquiry here. KRS 218A.410 states that all proceeds intended to be used to facilitate a drug transaction are forfeitable and the burden of proof to rebut the presumption is on the [d]efendant. *Given the nature of [Doebler's] conviction herein and the proximity of the cash proceeds to the drugs at the time they were discovered by the police, the Court finds [Doebler] has not carried her burden of proof.*

IT IS HEREBY ORDERED that the cash proceeds in this matter are forfeited to the Commonwealth.

(R. at 117) (emphasis added).

This appeal by Doeblar followed in which she asserts that the Commonwealth adduced insufficient evidence to justify forfeiture.

II. ANALYSIS

The controlling statute with respect to the forfeiture of currency is KRS 218A.410(1)(j). It provides:

(1) The following are subject to forfeiture:

(j) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him or her to have been committed or omitted without his or her knowledge or consent. *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.* The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph[.]

Id. (emphasis added).

Evaluation of the propriety of a cash forfeiture pursuant to KRS 218A.410(1)(j) requires a multi-step analysis. The first step is rather simple. The

Commonwealth need only establish that the money at issue was “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” *Id.* With respect to this requirement, it is important to recognize that even though the burden is slight, it rests squarely on the Commonwealth’s shoulders. *Brewer v. Commonwealth*, 206 S.W.3d 343, 348 (Ky. 2006) (“The burden only shifts to the opponent of the forfeiture if the Commonwealth meets its initial tracing burden.”).

In this case, the Commonwealth’s actions and statements in closing arguments suggest that it believed that it was entitled to the presumption without having to put forward any actual evidence. The Commonwealth’s attorney mentioned the discovery packet it produced as well as other matters that it asserted were contained in the record. However, none of this information was properly introduced by the Commonwealth. The only fact of consequence that Doeblner admitted in open court was that she was in possession of a syringe, an item of drug paraphernalia. She did not admit that any drugs were seized from her or that she was involved in any trafficking activity. Moreover, the Commonwealth did not put on any evidence to establish how close the cash was to the syringe or any of the items (drugs, scales, and the like) it claims were seized. While we understand the burden is slight, the Commonwealth does have an obligation to put forward some

competent evidence to establish proximity and traceability. The Commonwealth did not put on any evidence in this case.

During the Commonwealth's cross-examination, Doeblner denied knowledge of any drug trafficking activity taking place in the room where her cash was found. However, she generally agreed that drugs and a digital scale were discovered in the room. Assuming this was sufficient to overcome the Commonwealth's failure to put forth this evidence in the first place, we will move on to evaluate whether Doeblner's evidence was sufficient to shift the burden back to the Commonwealth.

If the Commonwealth makes out a *prima facie* case, the burden shifts to the defendant "to rebut the presumption that the currency should not be forfeited." *Brewer v. Commonwealth*, 206 S.W.3d 313, 327 (Ky. 2006). Doeblner testified that the money at issue was not the product of drug trafficking activity. She produced ample evidence showing that she obtained the money less than twenty-four hours before her arrest when she and Joshua closed out a bank account that belonged to their late father. She also testified that she went to the hotel room to purchase a cellular telephone; she planned to deposit the remaining money in her bank account later that day.

The trial court believed Doeblner's testimony regarding how she obtained the money. Nevertheless, the trial court determined that forfeiture was

appropriate because of the money's proximity to the drugs and paraphernalia. The trial court did not make any findings regarding Doebler's intent to use the money in conjunction with some drug-related activity. Of course, this is not surprising because the Commonwealth did not put on any evidence to support such a finding.

Both parties rely on *Osborne v. Commonwealth*, 839 S.W.2d 281 (Ky. 1992), to support their respective positions.⁸ In *Osborne*, the Kentucky Supreme Court considered the construction and application of KRS 218A.410(1)(j) with respect to the forfeiture of currency. The Appellant, Arlene Osborne, and her husband were arrested and charged with trafficking in marijuana after police raided their property. During the raid, police seized: "about two pounds of marijuana packaged in quarter-pound bags, a sum in excess of \$6,000 in cash, one marijuana plant, and a sophisticated set of scales of the type used in the drug trade." The cash and packaged marijuana were found inside the trailer Osborne shared with her husband. The remaining items were located in a vehicle outside the home.

⁸ *Osborne* was decided by a badly fractured Court. Justice Joseph Lambert authored the opinion. As to the forfeiture of currency issue, only Justice Reynolds concurred in the opinion. Justice Combs and Justice Leibson concurred in result only. Chief Justice Stephens concurred in part and dissented in part by separate opinion. Justice Wintersheimer dissented by separate opinion, which Justice Spain joined. Plurality opinions are generally not regarded as being of any precedential value. See *Fugate v. Commonwealth*, 62 S.W.3d 15, 19 (Ky. 2001). Nevertheless, in the last several decades, Justice Lambert's main opinion in *Osborne* has been cited with favor (and agreement) numerous times by our Supreme Court with respect to the appropriate framework in which to analyze the propriety of a criminal forfeiture. See *Robbins v. Commonwealth*, 336 S.W.3d 60, 64 (Ky. 2011); *Gray v. Commonwealth*, 233 S.W.3d 715, 717 (Ky. 2007); *Brewer v. Commonwealth*, 206 S.W.3d at 326; *Harbin v. Commonwealth*, 121 S.W.3d 191, 196 (Ky. 2003).

Osborne's husband was convicted, but the charges against Osborne were dismissed. A large portion of the money was found in Osborne's purse inside the trailer. At the forfeiture hearing, Osborne testified that various family members loaned her the money found in her purse. Her testimony was corroborated by the parties who purported to have furnished the money to her. The trial court ordered forfeiture of the cash. On discretionary review, the Kentucky Supreme Court vacated and remanded for additional findings.

In so doing, the Court observed that notwithstanding the presumption in favor of the Commonwealth, "any property subject to forfeiture under (j) must be traceable to the exchange or intended violation." *Id.* at 284. The Court explained how the presumption operated in conjunction with traceability.

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.

Id. (emphasis added).

The Court then evaluated the evidence in light of the presumption. It held that the trial court failed to make sufficient findings regarding traceability and failed to determine whether Osborne's evidence as to the source of the currency was credible. *Id.* The Court ultimately vacated the order of forfeiture and remanded the matter to the trial court for additional findings. *Id.*

Nothing about the forfeiture hearing in this case went according to the procedure laid out in *Osborne*. The trial court and Commonwealth skipped the crucial first step: the Commonwealth's requirement to produce slight evidence of traceability in combination with close proximity. The Commonwealth made those arguments to the trial court through its counsel, but it did not call any witnesses or introduce any evidence to establish the allegations were in fact true. The investigating officers did not testify, the photographs were not authenticated and actually introduced, and no one testified that the substances located in the hotel room actually turned out to be illegal ones. The trial court placed the burden on Doeblner from the outset.

In that respect, the trial court found Doeblner's explanation that the currency at issue came from her late father's estate to be credible.⁹ There was no finding by the trial court that Doeblner intended to use the money to facilitate drug

⁹ The Commonwealth did not even truly dispute Doeblner's testimony about how she obtained the money.

trafficking or that she purchased any drugs with the money. Certainly, the trial court was able to consider the facts Doeblner admitted as part of her plea. However, the agreement was silent as to the nature or quantity of any drugs found in the hotel room. The only fact Doeblner admitted was the possession of a syringe. A syringe might be indicative of drug use, but without more evidence it is too speculative to assume that currency seized in close proximity to a single item of drug paraphernalia establishes that the currency was used in a drug transaction. This was the very point made by the Court in *Osborne*: proximity alone is insufficient.

Once Doeblner convinced the trial court the funds were not derived from drug trafficking activity, the Commonwealth needed to prove that Doeblner had some intent to use them in connection with trafficking. This case could have turned out differently had the Commonwealth attempted to actually introduce some evidence, however slight, to connect the cash found in Doeblner's purse to drug trafficking activity. Instead, it operated as if it had no burden whatsoever. It did have a burden, and its failure to call any witnesses or introduce any evidence kept it from being able to meet that burden. A quick perusal of recent appellate cases applying the forfeiture statute to currency shows how the Commonwealth could have easily established intent if it had only attempted to do so.

In *Robbins v. Commonwealth*, 336 S.W.3d at 65, the Court upheld the forfeiture of \$1,010 in cash that was seized from Robbins's person at the time he

was arrested. To justify forfeiture, the Commonwealth first called one of the arresting officers to the stand. The arresting officer testified that the cash was taken from Robbins's person, that cocaine was found in Robbins's car, and that Robbins attempted to dispose of a small bundle of cocaine from his pocket before police searched him. The Commonwealth then called the investigating officer to the stand. The investigating officer testified Robbins was unemployed at the time of his arrest, as part of a separate incident Robbins had recently been convicted of drug trafficking, and three separately wrapped packages of cocaine were found during the searches of his person and his vehicle. Robbins offered no evidence to convince the trial court that the currency was not being used in the drug trade. The Court held the testimony presented by the Commonwealth with respect to the nature of the drugs and how they were packaged, their proximity to the currency, and Robbins's failure to come forward with an explanation regarding the origin of the currency was sufficient to establish that the currency was being used in connection with drug trafficking.

In *Smith v. Commonwealth*, 339 S.W.3d 485, 487-88 (Ky. App. 2010), the trial court ordered the forfeiture of \$932 in cash. The Commonwealth presented evidence that the \$932 was seized from Smith's pocket at the time of his arrest at his home. Arresting officers testified that in addition to the cash, several other items were seized from Smith's home and linked to him, including: two

digital scales, a scanner and documentation of police radio frequencies, multiple cell phones, including two on Smith's person at the time of his arrest, a camera mounted for surveillance use, and the drugs which led to Smith's conviction. A detective also testified that the cash was comprised of various small denominations, which in his experience indicated use of the money in trafficking. The detective also testified that more than fifty zip-lock plastic bags were found in a Bud Light cooler bag belonging to Smith, and that such bags are often used for trafficking activities. Smith testified that a friend gave him the money to help with his child support payment; the friend did not testify, and Smith did not offer any other evidence to corroborate the loan. We affirmed the forfeiture even though Smith testified that its source was not drug trafficking. In so doing, we observed that the Commonwealth produced evidence linking the currency to the trafficking, such as its testimony that the denominations were consistent with drug trafficking activity.

In *Hill v. Commonwealth*, 308 S.W.3d 227, 229-30 (Ky. App. 2010), the trial court ordered forfeiture of \$2,175 in cash that was found on Hill's person along with cocaine when he was arrested. In addition to the proximity of the money to the drugs, the Commonwealth relied on Hill's recorded interview. When asked if he smoked crack, Hill replied, "No, I don't smoke no damn crack. Damn. I make money at this shit" Hill countered that he won the money gambling

but failed to produce any receipts to back up this claim. We held that Hill's account did not convince the trial court that the money was the product of gambling, meaning that the Commonwealth did not have to establish anything further.

Finally, in *Johnson v. Commonwealth*, 277 S.W.3d 635, 640-41 (Ky. App. 2009), the trial court ordered the forfeiture of over \$3,000 found hidden in Johnson's room notwithstanding testimony from Johnson and his uncle that the money was a personal loan from the uncle to Johnson to purchase a truck. We noted that the Commonwealth produced testimony showing that a large amount of crack cocaine was seized from the room along with drugs. One of the arresting officers testified that the money was hidden in a mattress in very close proximity to the drugs. Additionally, a detective testified that the cash was found in denominations typically used to buy crack cocaine. During his testimony, the detective explained how the denominations seized represented the sale of specific amounts of crack cocaine. We affirmed because even though Johnson came forward with some proof to rebut the presumption, the Commonwealth was able to connect the money with drug activity by demonstrating how it was concealed and tying the denominations to drug trafficking transactions.

While the facts in each of the four-above cases are somewhat different, they all share one thing that is strikingly absent in this case—some proof

by the Commonwealth beyond mere proximity to illegal drug activity. While the proof was not intricate, the Commonwealth put forth some evidence to establish how the currency linked to the trafficking—the denominations, the way it was stored, or the defendant’s inability to have earned it through legitimate means. In contrast, Doeblner convinced the trial court that she obtained the money from a legitimate source, but the court ordered it forfeited based solely on its proximity to items the trial court believed were used in trafficking. In doing so, the trial court committed reversible error.

Having determined that the trial court did not make sufficient findings to justify forfeiture, we must now decide whether to reverse or to vacate and remand for additional findings. In *Osborne*, the Court reversed and remanded for additional findings. However, it is notable that in *Osborne* the Commonwealth had presented evidence. The trial court erred in its application of the evidence insomuch as it did not make sufficient findings. In this case, the Commonwealth did not present any evidence or testimony. It explicitly asserted that it was not required to do so. Remand would serve no purpose in this case because there is no evidence of record on which the trial court could rely to make the required findings. As such, we are left with no choice but to reverse.

III. CONCLUSION

For the foregoing reasons, we REVERSE the December 17, 2018, forfeiture order of the Jefferson Circuit Court.

ALL CONCUR.

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