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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000135-MR

RICHARD MYER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 16-CR-003131

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

CLAYTON, CHIEF JUDGE: Richard Myer appeals from a Jefferson Circuit Court order of forfeiture and an opinion and order denying his subsequent Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate that order. Myer raises numerous arguments relating to the forfeiture of almost \$500,000 in cash

seized from his safe by the police. We affirm because Myer lacks standing to contest the forfeiture.

On May 26, 2016, the police visited Myer at his residence in Jefferson County after receiving complaints that someone was smoking marijuana outside the house. Detective Joseph Tapp of the Louisville Metro Police Department testified at the forfeiture hearing that he could smell fresh marijuana while standing by Myer's front door. Myer admitted to the police he had a small amount of marijuana for personal use and voluntarily led them to a safe in an upstairs bedroom. A security camera in the room was trained on the safe. Myer warned Tapp that there was a broken gun in the safe. Inside the safe, Tapp found a small amount of marijuana, the gun, and a black computer-type bag containing vacuum-sealed plastic bags of cash. Myer initially told the police the bag contained \$50,000, then raised that amount to \$100,000. Ultimately, the amount of packaged cash in the bag was found to total almost \$500,000.

According to Detective Tapp, in his experience large quantities of packaged and bundled cash are indicative of drug trafficking. Specifically, he suspected a connection between Myer and Joseph Lanham, a large-scale marijuana dealer known to police. Tapp had been conducting surveillance of Lanham for some time and had observed Myer visit Lanham's address several times. Tapp had

pulled over several people who had visited Lanham's residence and almost all of them had guns or drugs or both.

Upon questioning by detectives from the narcotics division, Myer denied the cash was his and said it belonged to Lanham. Sergeant William Young of the Asset Forfeiture Division testified Myer told him the cash was not his and that he was holding it for Joseph Lanham. Myer signed a currency seizure form disclaiming ownership of funds totaling \$499,800. He signed another currency seizure form claiming ownership of \$560 in cash, described on the form as "personal money." The currency was placed in tamper proof bags and Sergeant Young told Myer to give Lanham the receipts. A search of the rest of the house uncovered an assault rifle, more small amounts of marijuana, a digital scale, and another handgun.

Later the same day, the police executed a search of Lanham's residence and found \$37,000 and several pounds of marijuana. Several weeks later, the officers found \$300,000 buried in Lanham's back yard, with a surveillance camera trained on it.

Myer was initially charged by citation with possession of marijuana. His charge was pending in district court until August 3, 2016, when it was dismissed without prejudice. Myer was thereafter indicted on November 28, 2016,

for one count of trafficking in marijuana (less than 8 ounces) while in possession of a firearm (complicity).

The Commonwealth filed a motion pursuant to Kentucky Revised Statutes (KRS) 218A.410 for the forfeiture of the \$499,800 in cash seized from Myer's house. Following a hearing on the motion, the circuit court entered the Commonwealth's tendered order on November 22, 2017, directing the funds to be forfeited. The indictment against Myer was dismissed without prejudice on January 3, 2018. Myer filed an appeal of the forfeiture order which was delayed by his attorney's failure to timely file a brief and by Myer ultimately having to retain new counsel.

On April 2, 2019, Myer's new counsel filed a motion pursuant to CR 60.02(e) and (f) to vacate the forfeiture order, and seeking the return of the currency or for a new forfeiture hearing. The motion argued that the forfeiture violated Myer's due process rights, constituted an excessively disproportionate fine, and that he received ineffective assistance of counsel at the trial and appellate stages. The earlier appeal was held in abeyance pending the circuit court's ruling on the CR 60.02 motion. On August 21, 2019, the circuit court entered an opinion and order denying the motion. The appeal was thereafter returned to the active docket.

In denying the CR 60.02 motion, the circuit court explained that its decision to order forfeiture of the \$499,800 was based primarily on Myer’s lack of standing to object to the forfeiture of money he had expressly disclaimed and stated belonged to Lanham.

“[T]he existence of a plaintiff’s standing is a constitutional requirement to prosecute any action in the courts of this Commonwealth[.]”

Commonwealth Cabinet for Health and Family Services, Department for Medicaid Services v. Sexton by and through Appalachian Regional Healthcare, Inc., 566 S.W.3d 185, 188 (Ky. 2018), *reh’g denied* (Feb. 14, 2019), *cert. denied sub nom. Sexton ex rel. Appalachian Regional Healthcare, Inc. v. Kentucky Cabinet for Health and Family Services*, 140 S. Ct. 448, 205 L. Ed. 2d 252 (2019).

“[A]ll Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only *justiciable causes* proceed in court, because the issue of constitutional standing is not waivable.” *Id.* at 192 (emphasis in original) (footnote omitted).

“The trial court’s ultimate determination on the standing issue is a pure legal question. Therefore, our review of that issue is *de novo*. Under *de novo* review, we owe no deference to the trial court’s application of the law to the established facts.” *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 111 (Ky. App. 2014) (citations omitted). On the other hand, any

“preliminary, factual determinations” made by the trial court “are entitled to deference.” *Id.* (citation omitted). “We cannot reverse factual findings that are supported by substantial evidence.” *Id.* (citation omitted). “Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* at 111-12 (citation and internal quotation marks omitted).

“Kentucky’s forfeiture statute was intended by the legislature to be a civil, *in rem* proceeding. Forfeitures pursuant to the statute are specifically structured to be impersonal by targeting the property itself. Personal property may be seized without process preparatory to forfeiture under KRS 218A.415(1). Nor does the Fourth Amendment apply to suppress evidence at a seizure hearing. [See KRS 218A.415(3)(a)(3).]” *Smith v. Commonwealth*, 205 S.W.3d 217, 221 (Ky. App. 2006) (citation omitted). “KRS 218A.410(1)(j), which describes the types of property which may be seized for forfeiture, places the burden on the claimant to rebut by clear and convincing evidence the 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 . . . forfeitable[.]’ The Commonwealth need only produce ‘slight evidence of traceability’ plus ‘proof of close proximity’ in order ‘to sustain the forfeiture in the absence of clear and convincing evidence

to the contrary.” *Id.* (quoting *Osborne v. Commonwealth*, 839 S.W.2d 281, 284 (Ky. 1992)).

As the factual basis for its finding that Myer lacked standing to challenge the forfeiture, the circuit court relied on the testimony of three police officers at the forfeiture hearing that Myer stated the \$499,800 in cash was not his, and on his written disclaimer to that effect. The circuit court also noted that Myer did not directly state an interest in the funds during that hearing, arguing instead that the presence of the cash was not associated with his alleged crime of possession of a small amount of marijuana and a handgun. The court also ruled that Myer did not have standing to object to the forfeiture on behalf of another, presumably Lanham.

The testimony at the forfeiture hearing fully supports the circuit court’s findings, and its conclusion that Myer lacked standing or failed to assert any grounds for standing is well-founded.

Under the sections of CR 60.02 relied upon by Myer, a court “may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other

reason of an extraordinary nature justifying relief.” CR 60.02. The denial of such a motion is reviewed for abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). The test for abuse of discretion is whether the trial court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

In his statement of the facts, Myer alleges that the police employed coercive techniques in questioning him at his home, threatening to “lock up Myer and his girlfriend” and take her children to a shelter, apparently to force him to incriminate Lanham. The circuit court rejected this argument as grounds for relief pursuant to CR 60.02 because Myer was afforded an opportunity at the forfeiture hearing to raise any claims he was improperly pressured by the law enforcement officers. “The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court.” *Young v. Edward Technology Group, Inc.*, 918 S.W.2d 229, 231 (Ky. App. 1995) (citation omitted). Myer does not explain why the claim of police coercion could not have been raised at the forfeiture hearing.

“KRS 218A.410(1)(j) [places] the burden on a claimant to rebut by clear and convincing evidence the presumption that the property, in this case money, is forfeitable.” *Harbin v. Commonwealth*, 121 S.W.3d 191, 196 (Ky. 2003), *as modified* (Dec. 18, 2003). Myer also does not explain why he did not seek to rebut this presumption at the hearing, which afforded him an opportunity to claim ownership of the funds and to identify their source.

On appeal, Myer does not unambiguously claim ownership or other interest in the funds sufficient to provide him with standing to rebut the presumption that the funds are forfeitable. His argument on appeal as to standing relates solely to the Commonwealth’s alleged failure to notify Lanham, whom he characterizes as an “alleged alternative owner” of the funds and a necessary party to the forfeiture proceedings. At the hearing on the CR 60.02 motion, Myer’s counsel accused the Commonwealth of never joining as a party the person to whom the disputed funds do belong, *i.e.*, Lanham. “[T]he principle ‘that some substantial claim to a personal right must be alleged’ by a party is part of the basic law of standing.” *Bell v. Commonwealth, Cabinet for Health and Family Services, Dep’t for Community Based Services*, 423 S.W.3d 742, 750 (Ky. 2014) (quoting *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978)). Myer has failed to assert such a personal right. At no point does he renounce his signed disclaimer form, or expressly claim ownership or some other substantial personal interest in

the \$499,800 cash recovered from his safe. Under the circumstances, the circuit court did not abuse its discretion in denying his CR 60.02 motion.

For the foregoing reasons, the Jefferson Circuit Court's order of forfeiture and its opinion and order denying the CR 60.02 motion are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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