

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :
 :
 Appellant :
 :
 v. : No. 1310 C.D. 2007
 :
 1990 Subaru SW, PA Reg. #GLP6267 : Submitted: February 29, 2008
 VIN # JF2BJ65C2LH911157 :
 :
 Re: Timothy Baker :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
 BY JUDGE COHN JUBELIRER**

FILED: June 5, 2008

The Commonwealth of Pennsylvania (Commonwealth) appeals the order of the Court of Common Pleas of York County (trial court) denying the Commonwealth's Petition for Forfeiture of Timothy Baker's (Baker) gold 1990 Subaru, VIN# JF2BJ65C2LH911157 (the Subaru). The Commonwealth argues that the trial court erred in sua sponte considering the issue of whether Baker's statement that he used the Subaru for transporting drugs should be suppressed and in determining that

the Commonwealth failed to show a nexus between the Subaru and illegal drug activity, thereby determining that forfeiture of the Subaru was not warranted under Section 6801 of the Judicial Code, commonly known as the Controlled Substances Forfeitures Act (Forfeitures Act), 42 Pa. C.S. § 6801.¹

On August 18, 2006, Baker's probation officer visited Baker's residence. During this routine visit the probation officer found marijuana and plastic baggies in Baker's residence. The probation officer called the Lower Windsor Township Police Department and Officer John Vitko (Officer Vitko) responded. The probation officer turned the marijuana and baggies over to Officer Vitko. Officer Vitko obtained a search warrant for the residence, out-buildings, and any vehicles on the property. Officer Vitko then searched the residence and found a scale. Officer Vitko spoke with Baker regarding the Subaru, which Baker had purchased from his uncle approximately one month earlier, but had used prior to that. Baker told Officer Vitko that he alone used the Subaru and that he sometimes used the Subaru to purchase marijuana, but at other times marijuana was delivered to him by others. Officer Vitko

¹ Section 6801 states in relevant part:

(a) Forfeitures generally.—The following shall be subject to forfeiture to the Commonwealth and no property right shall exist in them:

(1) All drug paraphernalia, controlled substances or other drugs which have been manufactured, distributed, dispensed or acquired in violation of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act.

....

(4) All conveyances, including aircraft, vehicles or vessels, which are used or intended for use to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of, property described in paragraph (1) or (2)

....

42 Pa. C.S. § 6801.

searched the Subaru, but did not find any drugs or paraphernalia. Baker subsequently pled *nolo contendere* to possession with intent to deliver.

Subsequently, the Commonwealth filed a petition for the forfeiture of the Subaru. The trial court denied this petition and the Commonwealth now appeals to this Court.²

The Commonwealth argues that the trial court erred in raising, on its own initiative, the issue of whether to suppress Baker's statement that the Subaru was used for drug trafficking.³ In the discussion accompanying its order, the trial court found that the warrant pursuant to which Officer Vitko searched the Subaru was tainted. The trial court also found that Baker's statement against interest that the Subaru was used for drug trafficking was inadmissible until the Commonwealth adduced independent evidence to corroborate this statement. The trial court cited no authority for these conclusions either in its order or in its Pa. R.A.P. 1925(b) opinion, which merely incorporated the arguments set forth in its order.

We agree with the Commonwealth that the trial court erred in raising the suppression issue sua sponte. Generally, a trial court should not raise a waivable issue on its own initiative and base its outcome on that issue. See Harrington v. Department of Transportation, Bureau of Driver Licensing, 784 A.2d 871, 874

² This Court's standard of review "in an appeal from a forfeiture proceeding . . . is limited to determining whether the findings of fact made by the trial court are supported by substantial evidence, and whether the trial court abused its discretion or committed an error of law." Commonwealth v. \$6,425.00 Seized from Esquilin, 583 Pa. 544, 554, 800 A.2d 523, 529 (2005).

³ The trial court raised this issue after each party had presented its case.

(Pa. Cmwlth. 2001) (holding that it is a reversible error for trial court to sua sponte raise the issue of whether the date reported for an out-of-state conviction was correct); Borough of Latrobe v. Pohland, 702 A.2d 1089, 1095 (Pa. Cmwlth. 1997) (holding that while a trial court may raise the issue of subject matter jurisdiction sua sponte, it is an error for trial court to sua sponte raise the issue of whether an agreement between the parties was *ultra vires* on the part of the municipality); Delaware County v. City of Philadelphia, 620 A.2d 666, 667 (Pa. Cmwlth. 1993) (holding that subject matter jurisdiction is not waivable and it is not error, therefore, for a court to raise it sua sponte). Whether a search warrant is valid or whether a search warrant should be suppressed are waivable issues. Commonwealth v. Whiting, 767 A.2d 1083, 1087-88 (Pa. Super. 2001) (error for trial court to raise issue regarding suppression of evidence where the defendant did not raise the issue himself); Pa. R. Crim. P. 581(B) (“If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.”). Therefore, we find that the trial court erred in sua sponte raising the issue of whether Baker’s admission should have been suppressed.

Next, the Commonwealth argues that it established a sufficient nexus between Baker’s illegal drug activity and the Subaru to permit forfeiture of the Subaru pursuant to the Forfeitures Act. Where the Commonwealth seeks forfeiture of property, it “must establish a nexus between unlawful activity and the property subject to forfeiture.” Commonwealth v. Nineteen Hundred and Twenty Dollars United States Currency, 612 A.2d 614, 618 (Pa. Cmwlth. 1992). Here, the trial court held that the Commonwealth failed to make this showing. Based on the trial court’s findings, we disagree. The trial court found that:

Officer Vitko thereafter focused upon the subject vehicle eliciting information from Baker that he had, on occasion and at unspecified times, used the vehicle when he purchased marijuana. On other occasions, marijuana was delivered to him by others. In addition Officer Vitko elicited from Baker that the vehicle in question was used exclusively by him.

(Trial Ct. Op. at 3.)⁴ The trial court also found that Officer Vitko found marijuana and drug paraphernalia, including a scale, in Baker's residence and that Baker pled *nolo contendere* to a charge of possession with intent to deliver. Despite these findings, however, the trial court declined to hold that the Commonwealth had proven a nexus between the Subaru and Baker's drug activity. The trial court stated that "[t]he search of the [Subaru] revealed no drugs or contraband and Baker's response that the vehicle had at some undisclosed time been used by him when he acquired marijuana does not support the Commonwealth's claim to forfeit the vehicle." (Trial Ct. Op. at 4-5.)

Although the trial court does not specifically articulate its reasoning, it appears that the trial court did not believe the Commonwealth adduced sufficient evidence to show that the Subaru was connected to the marijuana or drug paraphernalia found in Baker's residence. The issue of whether there was a nexus between the Subaru and the illegal activity is a question of law. We believe the facts found by the trial court are sufficient to show that the Subaru was used to "facilitate the transportation . . . receipt [or] possession" of marijuana. See 42 Pa. C.S. § 6801(a)(4). Baker admitted

⁴ Officer Vitko also testified that Baker told him that he was selling marijuana as well as purchasing it, most recently about an ounce a week, but as much as a quarter pound a week in the past. (Hr'g Tr. at 6-7.) However, the trial court made no finding in this regard and, therefore, we do not rely on this testimony.

to Officer Vitko that he used the Subaru to receive and transport marijuana.⁵ This admission alone is sufficient to establish a nexus between the Subaru and illegal activity: the transportation of marijuana.

While Baker's admission does not definitively connect the Subaru to the marijuana found in Baker's residence, it is not necessary for the Subaru to be connected to the marijuana found in the residence. See Commonwealth v. \$6,425.00 Seized from Esquilin, 583 Pa. 544, 880 A.2d 523 (2005). In Esquilin, police officers observed the defendant receiving approximately \$20 from each of three drug sales. When the officers searched Esquilin after his arrest, they found \$6,425.00 on his person. The Commonwealth filed a petition for forfeiture, arguing that the \$6,425.00 was the proceeds of sales similar to those observed by the officers. The trial court granted the petition. A panel of this Court overturned the trial court's decision on the grounds that, because the officers only observed three sales accounting for \$60.00 of the money seized, there was no evidence to show a nexus between the balance of the cash and any illegal activity. The Supreme Court overturned this Court's decision, holding that:

the Commonwealth need not produce evidence directly linking seized property to illegal activity in order to establish the requisite nexus between seized property and unlawful activity. Although illegal drugs are often present at the time of seizure, there is no requirement that such

⁵ The trial court found as a fact that Baker had used the Subaru to receive and transport drugs:

[W]e will make this finding of fact that the vehicle had been used by [Baker] in the past to pick up and make purchases of substances. It's not clear whether Mr. Baker, from the testimony, also used the vehicle to effect sales but at least—and we think it's—we'll make the finding of fact that at least Mr. Baker advised that the vehicle had been used in the past to acquire drugs.

(Hr'g Tr. at 23.)

drugs be present; instead, circumstantial evidence may suffice to establish a party's involvement in drug activity.

Id. at 555, 880 A.2d at 529-530 (citations omitted). In this case, Baker's admission that he used the Subaru to purchase and transport marijuana is more than circumstantial evidence, it is direct evidence connecting the Subaru to the transportation and purchase of illegal drugs. It is irrelevant that the admission does not necessarily connect the Subaru to the drugs found in Baker's residence. Esquilin. Therefore, the requirements of Section 6801 were satisfied, and the Commonwealth met its burden under Section 6801 of the Forfeitures Act.

For these reasons, we reverse the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, June 5, 2008, the Order of the Court of Common Pleas of York County in the above-captioned matter is hereby **REVERSED**.

RENÉE COHN JUBELIRER, Judge