

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :
 :
 v. :
 :
 \$25,483.00 U.S. Currency; :
 One 1996 Dodge Ram :
 VIN#3B7HF13Z2TG151441, : No. 1643 C.D. 2010
 Registration Plate PA YLX5455; : Submitted: December 10, 2010
 One 1997 Ford F350 Pickup Truck, :
 VIN #1FTJX35F8VEC35335, :
 Registration Plate No. OREGON :
 WAM650; One 2001 Wells Cargo Box :
 trailer, VIN #1WC200E1514043816; :
 and One 1995 Ford Mustang :
 VIN #FALP4042SF16395 :
 :
 Appeal of: Kevin Patrick Flood :
 (re: \$3,900.00 and One 1995 Ford :
 Mustang, VIN #1FALP4042SF16395) :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: June 1, 2011

Kevin Patrick Flood (Flood) appeals, *pro se*, from the portion of the July 7, 2010, order of the Court of Common Pleas of Blair County (trial court) that granted the Commonwealth of Pennsylvania’s (Commonwealth) petition for forfeiture of Flood’s claims of right, title, or interest in \$3,900.00 found in Flood’s

pocket¹ and one 1995 Ford Mustang, pursuant to what is commonly known as the Controlled Substances Forfeiture Act (Forfeiture Act), 42 Pa. C.S. §§ 6801-6802.² For the reasons that follow, we affirm the trial court.

The Commonwealth seized the property in question on April 11, 2004, when the Pennsylvania State Police (PSP) conducted a search of Flood's real estate. On September 11, 2009, the Attorney General of the Commonwealth of Pennsylvania, Thomas W. Corbett Jr., filed a petition for forfeiture with the trial court, alleging that the seized cash and vehicles should be condemned and forfeited to the Commonwealth because no legal right, title, or interest exists in it by any owners or possessors of it pursuant to Section 6801(a) of the Forfeiture Act, 42 Pa. C.S. § 6801(a). (C.R., Item No. 2, Petition for Forfeiture and Condemnation.) On September 15, 2009, the trial court issued a Rule to Show Cause, advising Flood that he was required to file an answer within thirty (30) days setting forth his title in and right to possession of the property. (*Id.*, Rule to Show Cause.) On November 13, 2009, Flood responded to the Commonwealth's petition for forfeiture, maintaining that the Commonwealth's petition should be denied because the Commonwealth failed to establish a substantial connection between any criminal activity and either the \$3,900.00 in his pocket or the 1995 Ford Mustang.

¹ (Certified Record (C.R.), Item No. 39, Transcript of Hearing conducted July 6, 2010, at 21.)

² The trial court conducted a status conference on January 8, 2010, and determined that Flood did not oppose forfeiture of all the items, rather, he only opposed forfeiture of the \$3,900.00 and the 1995 Ford Mustang. (C.R., Item No. 11, trial court order, dated January 12, 2010.) The other property named in the caption was property that was in the possession of either Kenneth Hamlin or Raymond Rabreau. The forfeiture of that other property was addressed in separate proceedings.

(C.R., Item No. 6, Flood's Response to the Commonwealth's Petition for Forfeiture.)

At the July 6, 2010 forfeiture hearing, the Commonwealth presented the testimony of Pennsylvania State Police Trooper Charles Schaefer in support of its petition for forfeiture. (C.R., Item No. 39, Transcript of Hearing conducted July 6, 2010.) Trooper Schaefer testified that he was involved with the investigation of a major marijuana distribution ring involving three named individuals, including Flood. (*Id.* at 4, 6.) Trooper Schaefer testified that there were two (2) controlled deliveries of U.S. currency involving Flood. (*Id.* at 20.) Trooper Schaefer testified that he was part of the execution of a search warrant on Flood's home. (*Id.*) The search of Flood's house resulted in the seizure of approximately 536 pounds of marijuana, with an approximate value of one-half (1/2) million dollars, and \$25,483.00 in U.S. currency, \$3,900.00 of which was obtained from Flood's pocket and the remainder from an upstairs bedroom where the marijuana was found. (*Id.* at 21.) Trooper Schaefer testified that Flood had no legitimate source of income and lacked any legitimate explanation as to the source of the money discovered within the home and on his person during the execution of the search warrant. (*Id.* at 22.) Trooper Schaefer testified that during the course of his investigation, Flood told him that the 1995 Ford Mustang was utilized by Flood to smuggle marijuana from California to Pennsylvania in the bumper during the earlier years when the amount of marijuana was smaller. (*Id.* at 26.) Trooper Schaefer also testified that, during the time of the investigation, the 1995 Ford Mustang was Flood's primary means of transportation. (*Id.*)

At the hearing, Flood appeared on his own behalf and testified that the \$3,900.00 discovered in his pocket was received from his father's estate and was

not linked to any drug activity. (*Id.* at 73.) Flood testified that he received over \$100,000.00 from his father's estate, and he purchased some items, including the 1995 Ford Mustang, with the money he received. (*Id.* at 76.) He kept money from his father's inheritance in the house. (*Id.* at 78.) Flood also testified that although the 1995 Ford Mustang was not used for drug activity, the vehicle was his primary means of transportation. (*Id.* at 82.) Flood testified that he let Wayne Vance borrow the car, and "he did damage to the bumper." (*Id.* at 79.) Flood testified that he used marijuana since his younger days, but he never used his father's inheritance money for the purchase of marijuana. (*Id.* at 86, 87.)

On July 7, 2010, the trial court granted the Commonwealth's petition for forfeiture. (*Id.*, Item No. 31, trial court order dated July 7, 2010.) Flood appealed the trial court's order to this Court. In its Pa. R.A.P. 1925(b) opinion, the trial court explained that the trial court accepted the testimony of Trooper Schaefer as credible regarding Flood's involvement in the operation of a marijuana distribution ring for approximately twenty (20) years. (C.R., Item No. 38, trial court's Rule 1925(b) opinion.) The trial court explained that it found that Trooper Schaefer's testimony established that controlled drug transactions were conducted with Flood involving the exchange of approximately \$27,000.00 in U.S. currency. (*Id.*) The trial court also found that Trooper Schaefer credibly testified that Flood had no legitimate source of income and lacked any legitimate explanation as to the source of money discovered within the home and on his person during the execution of the search warrant. (*Id.*) Further, the trial court explained that it found that Flood's 1995 Ford Mustang was used to smuggle marijuana from California to Pennsylvania. (*Id.*) The trial court determined that Flood's testimony was not credible regarding his claim that the \$3,900.00 discovered in his pocket

was received from his father's estate and that the 1995 Ford Mustang was not linked to any drug activity. (*Id.*) Finally, the trial court concluded that, as a result of Trooper Schaefer's testimony, the Commonwealth established a sufficient nexus between the \$3,900.00 seized from Flood's person and the 1995 Ford Mustang to the illegal drug activity engaged in by Flood to grant the Commonwealth's forfeiture petition. (*Id.*)

On appeal,³ Flood essentially argues that the trial court and the Commonwealth violated his due process rights under the Fourteenth Amendment to the United States Constitution by suppressing evidence in the form of audio tapes and a clear photograph (mugshot) of him. Further, Flood argues that the trial court abused its discretion by misconstruing material facts and by not considering other facts, which we interpret as an argument that the trial court's findings are not supported by substantial evidence and/or its decision is contrary to law because the Commonwealth failed to establish evidence of a nexus between the forfeited items and any illegal activity.

Section 6801(a) of the Forfeiture Act provides a list of property that "shall be subject to forfeiture," including controlled substances, drug paraphernalia, equipment, conveyances (vehicles and money). Section 6802(j) of the Forfeiture Act, 42 Pa. C.S. 6802(j), provides in pertinent part:

³ The Commonwealth Court's review of a forfeiture appeal is limited to determining whether the trial court's findings of fact are supported by substantial evidence and whether the trial court abused its discretion or committed an error of law. *Cmwlth. v. \$6,425.00 Seized from Esquilin*, 583 Pa. 544, 554, 880 A.2d 523, 529 (2005). The appropriate inquiry for reviewing any forfeiture proceedings is directed at whether due process was afforded to the forfeiting party through notice and an opportunity to be heard. *Cmwlth. v. Smith*, 562 Pa. 609, 617, 757 A.2d 354, 358 (2000).

At the time of the hearing, if the Commonwealth produces evidence that the property in question was unlawfully used, possessed or otherwise subject to forfeiture under section 6801(a) or 6801.1(a), the burden shall be upon the claimant to show:

(1) That the claimant is the owner of the property or the holder of a chattel mortgage or contract of conditional sale thereon.

(2) That the claimant lawfully acquired the property.

(3) That it was not unlawfully used or possessed by him. In the event that it shall appear that the property was unlawfully used or possessed by a person other than the claimant, then the claimant shall show that the unlawful use or possession was without his knowledge or consent. Such absence of knowledge or consent must be reasonable under the circumstances presented.

First, we address Flood's argument that he was deprived of his due process rights guaranteed by the Fourteenth Amendment. Our Supreme Court has held that a person facing forfeiture is entitled to a trial in a forfeiture proceeding in order to protect the person from excessive fines and to guarantee due process. *Cmwlth. v. One (1) 1984 Z-28 Camaro Coupe*, 530 Pa. 523, 610 A.2d 36 (1992). Moreover, "notice and opportunity to be heard are integral to forfeiture proceedings." *Cmwlth. v. \$425.00 U.S. Currency*, 722 A.2d 1163, 1165 (Pa. Cmwlth. 1999). Specifically, the notion of due process which is "at the core of our judicial system and guaranteed by the Fourteenth Amendment . . . requires that the deprivation of life, liberty, or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 1165.

Flood, relying on the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), argues that he did not have sufficient opportunity to defend against the Commonwealth's forfeiture because he was

denied access to exculpatory evidence or evidence otherwise favorable to him.⁴ Flood avers that he has consistently maintained his innocence throughout the underlying criminal matters, and that his own court-appointed lawyer(s) assisted the State and federal governments with their tampering of audio tape recordings of conversations between Flood and a confidential informant. Although the Commonwealth did not introduce the audio tapes as evidence in the subject forfeiture proceedings, Flood argues, nevertheless, that the trial court denied him due process in the forfeiture proceedings when it denied his request for an evidentiary hearing and appointment of expert witness to determine the authenticity and accuracy of the audio tape recordings.

Flood relies upon *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, for the proposition that both impeachment and exculpatory evidence are subject to disclosure, arguing that his due process rights were violated in the forfeiture proceeding before the trial court. Flood contends that expert examination and a hearing would have revealed that the audio tapes were altered and exculpatory portions of them were deleted. Had the trial court compelled the government to produce the original audio tapes for testing, Flood argues that he could have used them to impeach government witnesses whose credibility was central to the underlying criminal case. Essentially, Flood's position is that a reasonable probability exists that the disclosure of the audio tape evidence and forensic testing would have changed the outcome of the proceedings now before the Court and the outcome of the underlying criminal conviction. For those reasons, Flood asserts that the trial court erred in the forfeiture proceedings.

⁴ Flood does not assert that he lacked sufficient notice of the forfeiture proceedings.

Flood's reliance on *Brady* is misplaced. In *Brady*, a case in which a petitioner sought post-conviction relief from a criminal conviction, the United States Supreme Court determined that the prosecution's suppression before and at the petitioner's state trial (on a charge of murder committed in the course of a robbery) denied the petitioner due process of law pursuant to the Fourteenth Amendment because the withholding of the statement in which another individual admitted the actual homicide was prejudicial to the petitioner. *Brady*, 373 U.S. at 87. Specifically, the United States Supreme Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* The requirement in *Brady* that a prosecutor disclose to defense counsel certain evidence favorable to a criminal defendant, commonly referred to as the "*Brady* rule," generally is applicable to criminal proceedings only, not civil proceedings.⁵

⁵ See *U.S. v. Edwards*, ___ F. Supp. ___ (E.D.N.C., No. 5:08-HC-02095-BO, filed April 14, 2011) (holding that requirements of *Brady* rule may be extended to civil proceedings only under extreme circumstances where fundamental liberty interests, such as freedom from confinement as opposed to monetary interests, are threatened); *Carter v. Anderson*, 585 F.3d 1007 (6th Cir. 2009) (noting that *Brady* rule is applicable to criminal proceedings and declining to extend *Brady* rule to habeas corpus proceedings which are civil proceedings), *cert. denied*, 130 S. Ct. 3423 (2010); *Tandon v. C.I.R.*, 210 F.3d 372 (6th Cir. 2000) (declining to apply the *Brady* rule to a civil proceeding determining the amount of one's tax liability); *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) (extending application of *Brady* rule to civil proceedings in the nature of denaturalization or extradition based on alleged criminal activities where extradition sought for purpose of criminal prosecution for mass murder in another county and consequences, therefore, equaled or exceeded those of most criminal proceedings), *cert. denied, sub nom., Rison v. Demjanjuk*, 513 U.S. 914 (1986); *Turner v. State, Dep't of Motor Vehicles*, 14 Wash. App. 333, 541 P.2d 1005 (1975) (declining to extend *Brady* rule to license revocation matters because they are civil proceedings, not criminal proceedings to which the *Brady* rule is applicable).

In *Commonwealth v. 542 Ontario Street, Bethlehem, PA, 18015*, 989 A.2d 411 (Pa. Cmwlth. 2010), we explained that forfeiture proceedings are not criminal proceedings:

Civil forfeitures are the *in rem* consequence for wrongdoing prescribed by statute. Property is forfeited not as a result of the criminal conviction, but through a separate proceeding, civil in form but quasi-criminal in nature, in which the agency seeking the property must show, by a preponderance of the evidence, a nexus between the property sought and the possessor's illegal activity.

542 Ontario Street, 989 A.2d at 418. Moreover, in *Cmwlth. v. \$73,671.30 Cash, Currency*, 654 A.2d 93, 94 (Pa. Cmwlth. 1995), *appeal denied*, 541 Pa. 654, 664 A.2d 543 (1995), we explained that neither a criminal prosecution nor a criminal conviction are required for forfeiture of property under Section 6801 of the Forfeiture Act, 42 Pa. C.S. § 6801, because the property is forfeited in a civil proceeding. *Id.*

Because a forfeiture proceeding is not a criminal proceeding subject to the United States Supreme Court's decision in *Brady*, the trial court's failure to apply the *Brady* rule to Flood's forfeiture proceeding did not constitute a violation of Flood's due process rights.^{6, 7}

⁶ Flood also contends that the Commonwealth violated his due process rights by suppressing a clear photograph (mug shot) of him, but he does not develop this argument fully in his brief, and we do not perceive the significance of the photograph to the forfeiture matters now before the Court. To the extent that Flood contends that the Commonwealth was required to produce the photograph pursuant to the *Brady* rule, we disagree based upon our conclusion that the *Brady* rule does not apply to forfeiture proceedings.

⁷ Flood similarly argues that his due process rights under the Fourteenth Amendment were violated because the Commonwealth violated the Electronic Surveillance and Wiretap Control Act, 18 Pa. C.S. § 5701-5782, and similar federal laws regarding sealing requirements for audio tape evidence because the tapes were maintained by the PSP, not the Blair County
(Footnote continued on next page...)

Next, we address Flood's argument that the Commonwealth failed to establish evidence of a nexus between the \$3,900.00 in his pocket and any illegal activity. In forfeiture proceedings where money has been seized, the Commonwealth bears the initial burden of proving either (1) that the money was furnished in exchange for a controlled substance or represents the proceeds traceable to such an exchange, or (2) that the money was used or intended to be used to facilitate any violation of The Controlled Substance, Drug, Device and Cosmetic Act (Controlled Substance Act), Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §§ 780-101 to -144. The Commonwealth must show, by a preponderance of the evidence, that a nexus exists between the money and a violation of the Controlled Substance Act. *Cmwlth. v. One Thousand Two Hundred & Twenty Dollars Cash*, 749 A.2d 1013, 1016 (Pa. Cmwlth.), *appeal denied*, 563 Pa. 704, 761 A.2d 551 (2000.) Preponderance of the evidence is tantamount to a "more likely than not" standard. *Cmwlth. v. \$11,600.00 Cash, U.S. Currency*, 858 A.2d 160, 163-64 (Pa. Cmwlth. 2004). Circumstantial evidence can be used to establish a party's involvement in drug activity to support a forfeiture. *Cmwlth. v. McJett*, 811 A.2d 104, 110 (Pa. Cmwlth. 2002), *appeal denied*, 574 Pa. 749, 829 A.2d 1158 (2003). However, the Commonwealth need not produce evidence directly linking the seized property to illegal activity in order to show the requisite nexus. *Id.* If the Commonwealth proves by a preponderance of the

(Continued...)

Office of District Attorney. However, if true, such circumstances would weigh in favor of excluding the audio tapes from the forfeiture proceedings before the trial court. Any challenge to the admissibility of the tapes in the underlying criminal proceeding over the objection of Flood necessarily would be the subject of an appeal of the underlying criminal conviction and not the subject of an appeal of the forfeiture proceeding in which the tapes were not introduced.

evidence that the nexus exists between the money and illegal activity, the burden shifts to the claimant to establish that he owns the money, that he lawfully acquired it, and that it was not unlawfully used or possessed by him. Section 6802(j) of the Forfeiture Act. Moreover, a trial court's findings of fact are entitled to the same deference as those of a jury. *Cmwlth. v. \$23,320.00 U.S. Currency*, 733 A.2d 693, 696 (Pa. Cmwlth. 1999). As fact-finder, it is the trial court's function to decide what evidence is credible and to draw any reasonable inferences from the evidence. *Id.*

Here, the trial court found Flood's testimony was not credible regarding his explanation that the \$3,900.00 in his pocket was money he received from his father's estate three and one half (3½) years prior to the execution of the search warrant at Flood's home. (C.R., Item No. 38, trial court's Rule 1925(b) opinion.) Flood testified that he kept the money from his dad's inheritance in hundred dollar bills in a secret room in his house, and he was living off of his father's inheritance money. (C.R., Item No. 39, Transcript of Hearing, conducted July 6, 2010, at 78, 83.) Trooper Schaefer testified that during the course of the investigation a total of \$27,000.00 was delivered to Flood. (*Id.* at 8.) Trooper Schaefer testified that Flood did not have a job, and he had five hundred (500) pounds of marijuana in his house when the \$3,900.00 was discovered in Flood's pocket. (*Id.* at 61.) The trial court found Trooper Schaefer's testimony to be entirely credible, and, as a result, concluded that the Commonwealth established a sufficient nexus between the \$3,900.00 seized from Flood to illegal activity engaged in by him. (C.R., Item No. 38, trial court's Rule 1925(b) opinion.)

Because the Commonwealth met its burden, the burden then shifts to Flood to prove that he owned the money, he lawfully acquired it, and that it was

not unlawfully used or possessed by him. Section 6802(j) of the Forfeiture Act. Although there is no dispute that Flood owned the money in question, he failed to meet his burden of proving that the money was not unlawfully acquired or used by him, because the trial court did not credit his testimony that the money was from his father's inheritance, which he kept in one hundred dollar bills hidden in his house. We discern no error or abuse of discretion in the trial court's determination that the Commonwealth proved a sufficient nexus between the \$3,900.00 and Flood's illegal activity rendering the money subject to forfeiture.

Finally, we address Flood's argument that the Commonwealth failed to establish evidence of a nexus between the Ford Mustang and the illegal activity. When forfeiture of a vehicle is sought, there is no requirement that drugs must be found in the vehicle or on the driver of the vehicle or that the drug transaction must take place inside the vehicle. *Strand v. Chester Police Dep't*, 687 A.2d 872, 876 (Pa. Cmwlth. 1997). However, the Commonwealth must prove that a sufficient or substantial nexus exists between the property and the prohibited activity. *Cmwlth. v. \$2,523.48 U.S. Currency*, 538 Pa. 551, 555, 649 A.2d 658, 660 (1994). The Commonwealth need not produce evidence directly linking the seized property to the illegal activity in order to show the requisite nexus. *Id.* Indeed, forfeiture of a vehicle does not require that controlled substances actually be found in the vehicle. *Cmwlth. v. Nineteen Hundred and Twenty Dollars U.S. Currency*, 612 A.2d 614, 620 (Pa. Cmwlth. 1992).

Here, the trial court found that the Commonwealth established a sufficient nexus between the 1995 Ford Mustang and illegal drug activity engaged in by Flood to support the forfeiture petition. (C.R., Item No. 38, trial court's Pa. R.A.P. 1925(b) opinion.) Flood testified that he bought the 1995 Ford Mustang in

2002 right after he received the money from his father's estate. (*Id.* at 81.) Flood testified that the 1995 Ford Mustang was his primary vehicle used for transportation, but he did not use it for any illegal drug activities. (*Id.* at 82.) The trial court did not find Flood's testimony to be credible. (*Id.*) Trooper Schaefer testified Flood told him that the 1995 Ford Mustang was used to smuggle marijuana from California in the bumper of the vehicle. (*Id.* at 26.) Trooper Schaefer testified that the vehicle was Flood's primary means of transportation during the time of the investigation. (*Id.* at 26.) Trooper Schaefer testified there was no money or drugs found in the 1995 Ford Mustang. (*Id.* at 70.) The trial court found Trooper Schaefer's testimony to be credible. (*Id.*)

The Forfeiture Act broadly provides that a vehicle used "in any manner to facilitate" a drug transaction is subject to forfeiture. Section 6801(a) of the Forfeiture Act, 42 Pa. C.S. §6801(a)(4). The trial court did not err in ordering forfeiture of the vehicle because the trial court viewed the evidence in its entirety and found a link or connection between the Ford Mustang and Flood's illegal drug activity established by Trooper Schaefer's testimony. The burden then shifted to Flood to prove that he (1) owned the property, (2) lawfully acquired it, and (3) did not unlawfully use or possess the property. Section 6802(j) of the Forfeiture Act. Flood did not meet this burden. Flood only testified that he let Wayne Vance borrow the Ford Mustang and that Mr. Vance damaged the bumper. (C.R., Item No. 39, Transcript of Hearing conducted July 6, 2010, at 79.) We discern no error or abuse of discretion in the trial court's determination that the Commonwealth proved a sufficient nexus between the 1995 Ford Mustang and Flood's illegal activity rendering the vehicle subject to forfeiture.

Accordingly, we affirm.

P. KEVIN BROBSON, Judge

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 :
 Appeal of: Kevin Patrick Flood :
 (re: \$3,900.00 and One 1995 Ford :
 Mustang, VIN #1FALP4042SF16395) :

ORDER

AND NOW, this 1st day of June, 2011, the order of the Court of
Common Pleas of Blair County, dated July 7, 2010, is hereby AFFIRMED.

P. KEVIN BROBSON, Judge