

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
	:	
v.	:	No. 2079 C.D. 2009
	:	SUBMITTED: May 21, 2010
Dwayne R. Harvey,	:	
Appellant	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: September 28, 2010

Dwayne R. Harvey appeals *pro se* from the February 24, 2009 order of the Court of Common Pleas of Blair County that denied his motion for return of property, \$735 in cash, filed under Pennsylvania Rule of Criminal Procedure 588, and ordered forfeiture, finding the cash to be derivative contraband. We affirm that part of the court’s order denying the motion for return and vacate that part granting the Commonwealth’s motion to forfeit property.

In October 2008, Harvey filed a *pro se* motion for return of property. In pertinent part, he averred the following:

1. [Harvey] was charged with Robbery (F1), Terroristic Threats (F3), Simple Assault (M2), Receiving Stolen Property (F3), Recklessly Endangering Another Person 3 counts (M2), Theft by Unlawful Taking (F3), Criminal

Conspiracy to Theft (F3), Criminal Conspiracy Robbery (F1), Criminal Conspiracy Receiving Stolen Property (F3), Robbery (F2), Robbery (F3), Robbery (F1).

2. At the time of [Harvey's] arrest certain items of person [sic] property were seized from his hotel room, including United States currency totaling [\$735]. A receipt/inventory sheet of seized property indicating that five twenty dollar bills, thirty five one dollar bills, sixty five dollar bills and thirty ten dollar bills were seized in this matter is attached hereto as Exhibit A.

3. Following a two day trial by jury on September 10 and 11, 2007, [Harvey] was acquitted of all charges.

4. Following his acquittal, [Harvey] has not had the above[-]mentioned funds, specifically, the [\$735] returned to him. . . . [Harvey] asserts that he is entitled to the possession of the aforesaid [money] as he was acquitted of all charges following a trial by jury.

Motion for Return of Property; Original Record (“O.R.”), Item No. 18. Harvey also attached as Exhibit “A” a “receipt/inventory of seized property,” indicating a seizure date of August 23, 2006, a seizure location of 1617 Bellemeade Drive, Room 16, Altoona, Pennsylvania, and a list of items seized. These items included the cash, found under the heater board, specific items of clothing and possible drugs and/or drug-related items.¹ In his motion, Harvey sought return of the money only.

At a January 22, 2009 hearing on the motion, Harvey appeared on his own behalf and offered testimony. In addition to that testimony, the court relied upon the transcripts from Harvey's jury trial. Ultimately, the court concluded that

¹ The latter items included plastic bags of possible cocaine found under the bed and a brown container containing coke bags. There is no indication that the police brought any drug-related charges against Harvey based on the evidence seized from his hotel room.

Harvey “established the money confiscated in the robbery investigation as cash belonging to him”² and stated that the burden had shifted to the Commonwealth to prove that the money was derivative contraband.³ The court then proceeded to make the following findings of fact:

1. A bank robbery occurred and a jury convicted [Harvey’s] named co-defendant of such robbery.
2. Testimony of a witness, Ms. Cicero, established that she lent [Harvey] her automobile during the period of time the robbery occurred.
3. Testimony of Ms. Cicero also noted [Harvey] and the co-defendant returned with her car and began counting out money between them and changed clothes quickly as she prepared to get ready to go to work upon their return in Room 16 of the Cedar Grove Motel where the police located the cash in question.
4. [Harvey] made a statement to the police that he drove his co-defendant to the bank and returned him to the motel, Cedar Grove.
5. [Harvey] gave explanation that he had saved the money/cash through his working at the time which we find incredible in light of his stated income and expenditures and obligations at the time.

Accordingly, we find the nexus between the criminal activity and the cash to exist. . . .

² Common Pleas Court’s Memorandum and Order at 1.

³ Money can be considered to be derivative contraband because it is innocent in and of itself, but can be used in the perpetration of an unlawful act. *Commonwealth v. Reynolds*, 876 A.2d 1088 (Pa. Cmwlth. 2005). Heroin is an example of contraband *per se*. *Id.*

Common Pleas Court's Memorandum and Order at 2. Having rejected Harvey's testimony that he had saved the money, the trial court denied the motion for return of property and ordered forfeiture.

Harvey now appeals,⁴ raising three issues: 1) that the trial court erred in ordering forfeiture since no motion was made by the Commonwealth; 2) that the trial court based its findings of fact on an out-of-court investigation; and 3) that the Commonwealth failed to meet its burden of proof.

With regard to the first issue, the trial court record does not reflect that any motion for forfeiture, written or oral, was ever made by the Commonwealth, only Harvey's motion for return of property pursuant to Pennsylvania Rule of Criminal Procedure 588. Rule 588 provides, in pertinent part, as follows:

(A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.

(B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. *If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property be forfeited.*

Pa. R. Crim. P. 588(A) and (B) (emphasis added).

The plain text of Rule 588(B) suggests that forfeiture may be ordered when, in connection with a motion for return of property, the court finds those items to be contraband. That is precisely what occurred here. Nonetheless, our

⁴ Harvey filed his appeal with the Superior Court, which transferred the case to this Court in October 2009.

Supreme Court has stated: “Forfeiture does not, however, automatically ensue when a motion for return of property is denied. [*Commonwealth v. Pomerantz*, 573 A.2d 1149 (Pa. Super. 1989).] It is improper to award forfeiture, under the Controlled Substances Forfeiture Act, [42 Pa. C.S. §§ 6801-6802,] unless a request for forfeiture has been duly made.” *Commonwealth v. Mosley*, 549 Pa. 627, 631, 702 A.2d 857, 859 (1997). *See also In re \$10,680.00*, 728 A.2d 403 (Pa. Cmwlth. 1999). Accordingly, the order of forfeiture was premature. We must, therefore, vacate that portion of the order. If a motion is made by the Commonwealth in the future, the court can address it at that time.

Next, Harvey argues that the court erred in conducting its own out-of-court investigation and considering facts not in evidence in the motion for return case. He contends that, because the criminal trial transcripts were not introduced into evidence at the motion for return hearing, the court’s reliance on those transcripts compromised his legal rights. He maintains that the court’s order, therefore, should be reversed. We disagree.

First, we note that because Harvey filed his motion in the criminal case docket,⁵ the transcripts were part of the record before the trial judge, and part of the record certified to this Court. Moreover, it is often the case, although it did not occur here, that the judge hearing a motion for return was the same judge who presided at the criminal trial. A court may take judicial notice of its own records in the case before it, although ordinarily not of the records in another case in the same court. *See L. Packel & A.B. Poulin*, Pennsylvania Evidence §201-2 (2nd ed. 1999);

⁵ Harvey did not file his motion for return as a separate civil action. As a result, both the criminal case and the motion for return case are under common pleas court Docket No. CR 2013 - 2006.

24 P.L.E., Evidence §12 (2007). This rule has been applied to transcripts of proceedings, *Commonwealth v. Mutzabaugh*, 699 A.2d 1289, 1292 (Pa. Super. 1997), as well as to other factual matter disclosed in the record, *Public Opinion v. Chambersburg Area School District*, 654 A.2d 284, 286-87 (Pa. Cmwlth. 1995).

Since the motion for return should properly have been filed as a separate civil matter, this raises the interesting question whether the testimony in the criminal trial could be considered in such an ancillary civil proceeding. We need not address this issue, however, because Harvey did not preserve any objection to consideration of the trial testimony. At the hearing on his motion for return of property, the following occurred:

BY THE COURT:

No. What I'm explaining is, even though you filed it under the criminal matter, I'm going to treat it under the law what it is. It's a civil matter. You don't – I'm not kicking this out. I'm gonna decide it on the merits. But I just can't decide it off the bench today. I'm gonna have to do a little research. So there's nothing more you need to do. Now that I've conducted the hearing I will take this information back, study the law a little bit, I also intend to get the transcript of the David Houtz trial so that I can read that transcript to determine what evidence they produced at his trial.

BY MR. HARVEY:

Okay.

BY THE COURT:

And then based – based upon that public record of evidence and what I have received today in this hearing, I will issue an opinion and an order and you will get a copy of it when I do that. Okay?

BY MR. HARVEY:

Yes, Ma'am. Thank you very much.

January 22, 2009 Hearing, Notes of Testimony (“N.T.”) at 21. Since this issue was waived, we may not consider it further. *See* Pa. R.A.P. 302(a).

In his final argument, Harvey complains that the Commonwealth failed to meet its burden of proof. In a motion for return of property under Rule 588, “the moving party must establish by a preponderance of the evidence entitlement to lawful possession. Once the moving party provides sufficient proof, the burden shifts to the Commonwealth to resist the return of property by proving the property is contraband.” *Commonwealth v. Johnson*, 931 A.2d 781, 783-84 (Pa. Cmwlth. 2007).

Harvey’s argument that the Commonwealth failed to establish that the cash was contraband fails because it is predicated on his previous argument that the evidence from the criminal trial could not be considered. Since Harvey lodged no objection to the trial court’s use of those transcripts, they were considered and that evidence provided the primary basis for its findings of fact, which are not otherwise challenged. These findings fully support its legal conclusion that the cash was derivative contraband.⁶

Accordingly, we affirm that portion of the court’s order denying Harvey’s motion for return of property and vacate that portion of the order granting the Commonwealth’s motion for forfeiture.

BONNIE BRIGANCE LEADBETTER,
President Judge

⁶ Contrary to Harvey’s assertion, acquittal does not automatically confer upon him a right to regain the property that was the subject of the criminal proceeding. *Reynolds*, 876 A.2d 1088.

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ORDER

AND NOW, this 28th day of September, 2010, the order of the Court of Common Pleas of Blair County in the above-captioned matter is hereby AFFIRMED to the extent that it denied Harvey's motion for return of property and VACATED to the extent that it ordered forfeiture of that property.

Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge