

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
	:	
v.	:	
	:	
\$11,999.00 in Cash	:	
One 2000 Dodge Durango	:	
VIN: 1B4HS28N1YF284351	:	
	:	
Appeal of: Commonwealth of Pennsylvania	:	No. 2382 C.D. 2009
	:	Argued: September 14, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE JOHNNY J. BUTLER, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE BUTLER

FILED: October 14, 2010

The Commonwealth of Pennsylvania (Commonwealth) appeals the October 5, 2009 order of the Court of Common Pleas of Cumberland County, Pennsylvania (trial court) directing that \$3,000.00 cash confiscated from Christopher A. Davis (Davis) be returned to Barbara Davis as rightful owner. The issues before this Court are: (1) whether the trial court misapplied the law and abused its discretion by ordering the \$3,000.00 returned to Barbara Davis; and, (2) whether the trial court abused its discretion by denying in part the Commonwealth’s petition for forfeiture. For the following reasons, we affirm the decision of the trial court.

On May 22, 2009 at 1:25 a.m., in response to a report of a suspicious person and vehicle at a car wash in the Borough of Carlisle, police encountered

Davis. Upon speaking to Davis, officers detected the odor of marijuana on his person and in his open vehicle. After officers observed a cigar filled with marijuana at Davis' feet, he was taken into custody. A search of Davis, incident to his arrest, revealed approximately \$11,900.00 in cash, several bottles of medication, a digital scale and counterfeit \$20.00 bills. At the hospital, a baggie containing 44 grams of powder cocaine and 6 grams of crack cocaine were found on Davis' person. A subsequent search of Davis' 2000 Dodge Durango, pursuant to a warrant, revealed additional cash, drug magazines, a loaded hand gun, and several baggies of marijuana.

On June 11, 2009, the Commonwealth filed a petition pursuant to Section 6801 of the Judicial Code, commonly referred to as the Controlled Substances Forfeiture Act (Forfeiture Act), 42 Pa.C.S. § 6801, seeking forfeiture of the \$11,999.00 in cash and the vehicle confiscated from Davis. On July 21, 2009, Davis filed an answer to the petition, in which it was admitted that Davis was the owner of the \$11,999.00. No motion for return of property was filed. At the forfeiture hearing held on October 5, 2009, however, Davis' mother, Barbara Davis, testified that she had won \$5,000.00 playing the Daily Number in April of 2009 (in increments of \$500.00, so they were not reported), and gave \$3,000.00 to Davis for safekeeping, since she has an addiction to the lottery and did not want to lose it. At the close of the hearing, the trial court granted the Commonwealth's petition for forfeiture, with the exception of the \$3,000.00 which was to be returned to Barbara Davis. The Commonwealth appealed to this Court.<sup>1</sup>

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<sup>1</sup> "Our review of a forfeiture appeal is limited to determining whether the trial court's findings of fact are supported by substantial evidence and whether it abused its discretion or committed an error of law." *Commonwealth v. Real Prop. & Improvements Commonly Known as 5444 Spruce St., Phila.*, 890 A.2d 35, 38 (Pa. Cmwlth. 2006). "The trial court has the discretion to grant or deny a petition for forfeiture, and this Court will not reverse the trial court's decision absent

The Commonwealth claims on appeal that the trial court misapplied the law and abused its discretion by ordering \$3,000.00 returned to Barbara Davis during this forfeiture proceeding under circumstances in which she was not a party to the forfeiture, she did not answer the Commonwealth's petition, and she did not file a motion for return of property. It may be true that the trial court abused its discretion by returning forfeited property to Barbara Davis without having before it a motion for return of property, since proceedings for return of property are distinct from forfeiture proceedings and require a separate motion filed with the trial court. *See* Pa.R.Crim.P. 588 (formerly Pa.R.Crim.P. 324);<sup>2</sup> *Commonwealth v. Johnson*, 931 A.2d 781 (Pa. Cmwlth. 2007). However, it was not until its appeal to this Court that the Commonwealth raised an issue with the trial court's order returning \$3,000.00 of the forfeited monies to Barbara Davis.

Pursuant to Pa.R.A.P. 302(a), "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." At the close of the

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its abuse of discretion." *Commonwealth v. One 2001 Toyota Camry*, 894 A.2d 207, 209 n.1 (Pa. Cmwlth. 2006). "Discretion is abused when, in reaching its conclusion, the trial court departs from or misapplies the law or the judgment it exercises is manifestly unreasonable as shown by the evidence of record." *SAS, Inc. v. Pennsylvania State Police, Bureau of Liquor Control Enforcement*, 638 A.2d 455, 458 n.6 (Pa. Cmwlth. 1994).

<sup>2</sup> Pa.R.Crim.P. 588(A) and (B), provide that the owner:

(A) . . . may move for the 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 to be forfeited.

forfeiture hearing, the Commonwealth objected to an oral request to have the contents of Davis' car (i.e., childrens' clothing) returned to Barbara Davis. Notes of Testimony, October 5, 2009 (N.T.) at 58-59. The Commonwealth made no similar objection to the trial court's *sua sponte* bench order returning \$3,000.00 of the forfeited monies to Barbara Davis. "Issues not preserved for appellate review cannot be considered by an appellate court even though the alleged error involves a basic or fundamental error. Requiring a litigant to make a timely, specific objection during trial ensures that the trial court has a chance to correct alleged trial errors." *Dennis v. Southeastern Pennsylvania Transp. Auth.*, 833 A.2d 348, 352 (Pa. Cmwlth. 2003) (citation omitted).<sup>3</sup> Since that did not happen in this case, we hold that the Commonwealth waived its objection to the trial court's order returning \$3,000.00 to Barbara Davis.

Even if this Court were to decide this appeal on the merits, the result would have been the same. If we had determined that the trial court erred by returning the money to Barbara Davis in the absence of a motion for return of property, there is nothing to prohibit her from now properly making such a motion. Moreover, she would prevail on such a motion, since the trial court deemed credible her testimony that she won \$5,000.00 in the lottery in \$500.00 increments in April of 2009, and that she had given Davis \$3,000.00 of it to keep for her. N.T. at 49-52; *Commonwealth v. \$11,999.00 In Cash One 2000 Dodge Durango VIN: 1B4HS28N1YF284351* (No. CP-21-MD-460-2009, filed January 4, 2010). Since, "[t]he credibility of witnesses and the weight to be accorded to the evidence produced are matters within the province of

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<sup>3</sup> *Dennis* involved a civil proceeding, but its principal is applicable here since forfeiture proceedings, although initiated under a criminal or quasi-criminal statute, are in rem and are, therefore, civil proceedings. *One 1988 Toyota Corolla (Blue Two-Door Sedan) Pa. License TPV 291*, 675 A.2d 1290 (Pa. Cmwlth. 1996).

the fact finder” in forfeiture cases, this Court will not disturb credibility determinations made by the trial court. *In re Return of Prop. Confiscated October 30, 1999 from 411 East Mac Dade Boulevard*, 856 A.2d 238, 249 (Pa. Cmwlth. 2004).

Based on the foregoing, the decision of the trial court must be affirmed.

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JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 14th day of October, 2010, the October 5, 2009 order of the Court of Common Pleas of Cumberland County is affirmed.

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JOHNNY J. BUTLER, Judge