

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
	:	
v.	:	
	:	
The Real Property and Improvements	:	
Known as 5447 Westminster Ave.,	:	
Philadelphia, PA	:	
	:	
Appeal Of: Peggy Moses and the	:	No. 2611 C.D. 2010
Estate of Larry Ulmer	:	Argued: October 17, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE JOHNNY J. BUTLER, Judge  
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE BUTLER

FILED: November 17, 2011

Peggy Moses and the Estate of Larry Ulmer<sup>1</sup> (collectively Moses) appeal from the November 15, 2010 order of the Court of Common Pleas of Philadelphia County (trial court) granting the Petition for Forfeiture filed by the Commonwealth of Pennsylvania (Commonwealth). There are four issues before the Court: (1) whether the Commonwealth presented sufficient evidence to prove a nexus between the property located at 5447 Westminster Avenue (Property) and certain alleged criminal activity, (2) whether the trial court erred in precluding Moses from asserting an innocent owner defense, (3) whether the Commonwealth presented sufficient evidence to prove that Moses had knowledge or had consented to the criminal

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<sup>1</sup> Larry Ulmer is Peggy Moses' deceased common law husband.

activity, and (4) whether forfeiture was an excessive penalty. For the reasons set forth below, we affirm the trial court's order.

On January 8, 2008, Philadelphia Police received information regarding drug sales inside the Property, in the city and county of Philadelphia, by a black male named Martin. Martin was subsequently identified as Martin Moses, the son of Peggy Moses. On that same date, at approximately 8:45 p.m., a confidential informant (CI) knocked on the door of the Property. A female, subsequently identified as Peggy Moses, answered the door and let the CI enter. Both of them came back out after five minutes. At approximately 8:55 p.m. a black male, subsequently identified as Martin Moses arrived in a gray vehicle and had a conversation with the CI and Peggy Moses. The CI and Martin Moses walked to the corner of 55th and Westminster Avenue. The CI handed Martin Moses pre-recorded buy money (PRBM). Martin Moses entered the Property, came out five minutes later, and handed the CI four clear zip-lock packets containing cocaine.

On January 9, 2008, Police Officer Weaver met with the CI and listened in while the CI dialed 267-973-1332, and engaged in drug-related conversation. Based on the conversation, the CI went to 300 N. 56th Street. At that same time, another police officer watched Martin Moses exit the Property and drive to 300 N. 56th Street. A third police officer observed Martin Moses meeting with the CI. The CI handed Martin Moses the PRBM, and Martin Moses handed him a clear zip-lock packet containing cocaine. A police officer followed Martin Moses and arrested him. A cell phone with the number 267-973-1332 and the PRBM were recovered from Martin Moses. That same date, a search warrant was executed at the Property. Four letters addressed to Martin Moses at the Property were confiscated. A Pyrex measuring cup coated with cocaine residue, and a clear sandwich bag containing approximately 24.8 grams of cocaine were confiscated from a shelf over the

basement steps. A digital scale, a white bowl, a single edged razor blade and a spoon, all coated with cocaine residue, were confiscated from the rear bedroom. Three clear zip-lock packets containing numerous new, smaller zip-lock packets were also confiscated.

The Commonwealth initiated forfeiture proceedings against the property pursuant to Sections 6801-6802 of the Judicial Code, 42 Pa.C.S. §§ 6801-6802, commonly referred to as the Controlled Substances Forfeitures Act (Forfeiture Act). An order sealing the Property was entered on April 14, 2008. On May 8, 2008, the Property was unsealed and Peggy Moses was permitted inside the Property subject to the following conditions: (1) Martin Moses was not permitted to enter, (2) the locks were to be immediately changed, and (3) he was required to renounce his beneficial interest in the Property. The order also stipulated that if Peggy Moses violated any of these conditions, she would lose the right to assert an “innocent owner” defense.

On April 23, 2010, police officers executed a warrant for Martin Moses at the Property. Upon entry into the Property, officers found him sitting in a chair in the living room. When the officers instructed him to stand they observed a clear plastic sandwich bag containing a large chunk of crack cocaine at his feet. He was placed under arrest. On November 15, 2010, the trial court ordered forfeiture of the Property. Moses appealed to this Court.<sup>2</sup>

Moses first argues that the trial court erred when it ordered forfeiture of the Property notwithstanding the Commonwealth’s failure to present evidence

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<sup>2</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. 5444 Spruce St.*, 890 A.2d 35, 38 (Pa. Cmwlth. 2006).

establishing a specific and substantial nexus between the Property and the alleged criminal activity. We disagree.

“Real property used or intended to be used to facilitate any violation of The Controlled Substance, Drug, Device and Cosmetic Act [(Controlled Substance Act)<sup>3</sup>]” is subject to forfeiture under the Forfeiture Act. 42 Pa.C.S. § 6801(a)(6)(i)(C). The Commonwealth has the burden of proving that forfeiture is appropriate. *Commonwealth v. \$6,425.00 Seized From Esquilin*, 583 Pa. 544, 880 A.2d 523 (2005).

To meet its burden, the Commonwealth must establish, by a preponderance of the evidence, that a nexus exists between the money and a violation of the Controlled Substance Act. A preponderance of the evidence is tantamount to a ‘more likely than not’ standard. Moreover, 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 drugs be present; instead, circumstantial evidence may suffice to establish a party’s involvement in drug activity. Furthermore, for property to be deemed forfeitable, neither a criminal prosecution nor a conviction is required.

*Esquilin*, 583 Pa. at 555-56, 880 A.2d at 529-30 (footnote and citations omitted).

Here, the parties stipulated to the police reports at the hearing. The information contained in the police reports establishes that during the first drug transaction, although Martin Moses was outside the Property when he received the PRBM, he went inside the Property before handing the CI four zip-lock packets containing cocaine. In addition, during the second drug transaction, Martin Moses received a phone call and exited the Property before meeting the CI at another location and handing him a zip-lock packet containing cocaine. Moreover, when the

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<sup>3</sup> Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. §§ 780-101 - 780-144.

Property was searched, drugs and drug paraphernalia were confiscated from inside the Property. Clearly, it is more likely than not that the Property was used to facilitate violations of the Controlled Substance Act. Accordingly, the trial court did not err when it ordered forfeiture of the Property because the Commonwealth presented sufficient evidence establishing a specific and substantial nexus between the Property and the alleged criminal activity.

Moses next argues that the trial court erred in precluding Moses from asserting an innocent owner defense. Specifically, Moses contends that precluding Moses from presenting an innocent owner defense violated Moses' due process rights because Peggy Moses was unaware that the Commonwealth inserted that condition into the agreement, and she was never instructed as to the meaning of it. We disagree.

The trial court's unsealing order was entered in lieu of trial and Moses' attorney agreed to the terms therein. Moses formally agreed through counsel and before the trial court that if she violated the unsealing agreement, she would waive the innocent owner defense. There is no reason why the trial court cannot enforce said terms. In fact, one of the conditions included in the order was for Moses to immediately lose possession of the Property if Martin Moses entered the Property. Moses' attorney requested a hearing on whether she could again regain possession of the Property, and the trial court stated it had no choice but to deny the request based on the wording of the order. Moses' attorney agreed. *See* Reproduced Record at 71a-76a. The same holds true here. The order very clearly states that if Martin Moses enters the Property, Moses loses the right to present an innocent owner defense. Martin Moses was arrested on the Property; thus the innocent owner defense is waived. Accordingly, Moses' due process rights were not violated.

Moses next argues that the trial court erred when it ordered forfeiture of the Property notwithstanding the Commonwealth's failure to present evidence establishing that Peggy Moses had knowledge or had consented to the criminal activity on January 8-9, 2008 or on April 23, 2010. We disagree.

The Commonwealth was not required to present evidence establishing lack of knowledge or consent on the part of Peggy Moses on January 8-9, 2008, because, as established above, she was precluded from presenting an innocent owner defense for violating the May 8, 2008 order. Even assuming arguendo that she was not precluded from making said argument, it would have been her burden to prove lack of knowledge and consent, not the Commonwealth's burden to prove otherwise. *Commonwealth v. 648 W. Mayfield St.*, 819 A.2d 1226 (Pa. Cmwlth. 2003). Nevertheless, because of the preclusion, Moses was not permitted to present any such evidence.

Similarly, knowledge or consent of Martin Moses's presence at the Property on April 23, 2010, was not required to establish waiver of the innocent owner defense. One of the conditions for unsealing the Property was that he could not enter the Property. As Martin Moses was arrested at the Property, the Commonwealth was not required to present any further evidence. Accordingly, the trial court properly ordered forfeiture of the Property.

Lastly, Moses argues that the forfeiture was grossly disproportionate to the gravity of the offense. Specifically, Moses contends that forfeiture under the Forfeiture Act is a fine and thus subject to the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

Claims raised for the first time on appeal are waived. *Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385 (2003). Issues must be raised in the trial court to be reviewed on appeal. *Id.* Here, Moses raised this issue for the first time in her

Statement of Errors filed pursuant to Pa. R.A.P. 1925(b). In addition, under the Excessive Fines Clause, the constitutionality of forfeiture cannot be determined without evidence of the value of the property at issue. *Commonwealth v. 5444 Spruce St.*, 574 Pa. 423, 832 A.2d 396 (2003). There was no evidence of the Property's value submitted into evidence at the trial court level because the issue was not raised. Because the issue was not raised below, and no evidence was presented concerning said issue, the issue is, therefore, waived.

For all of the above reasons, we affirm the trial court's order.

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JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 17<sup>th</sup> day of November, 2011, the November 15, 2010  
order of the Court of Common Pleas of Philadelphia County is affirmed.

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JOHNNY J. BUTLER, Judge