

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :
 :
 v. : No. 327 C.D. 2008
 : Submitted: August 22, 2008
 \$3,770.00 and \$1,600.00 U.S. :
 Currency and Sony Playstation :
 with 19 Games and DVDs :
 :
 Appeal Of: James Mabry :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE McCLOSKEY

FILED: September 26, 2008

James Mabry (Mabry) appeals pro se from an order of the Court of Common Pleas of Lycoming County (trial court) that denied in part Mabry's petition to open judgment of an order directing the forfeiture of property. We affirm the trial court's decision.

Mabry was arrested on March 19, 2004, on charges of delivery of cocaine. At the time he was arrested, police officers searching Mabry discovered and took possession of a cell phone and \$3,700.00 in currency. Pursuant to search warrants for Mabry's car and the hotel room in which he was residing, the police also seized cocaine, \$1,600.00 in currency, a Sony Playstation console and nineteen video games and DVDs. Shortly after his arrest, the federal authorities took custody of Mabry and assumed responsibility for his prosecution on federal drug charges.

On April 15, 2004, the Commonwealth, under the authority of Sections 6801 and 6802 of the Judicial Code, 42 Pa. C.S. §6801, 6802, commonly referred to as the Controlled Substances Forfeiture Act, filed a petition for order of forfeiture regarding the above-noted items and currency. The petition noted Mabry as the reputed owner of the seized items with a last-known address at the time of seizure of 1015 Penn Street, Reading, Pennsylvania. The Commonwealth averred that the currency and property were procured from illegal drug transactions.

On April 19, 2004, the trial court issued a rule to show cause to Mabry directing a response as to why the Commonwealth's petition should not be granted. The Commonwealth, on September 28, 2004, filed a motion for order of forfeiture indicating that the Commonwealth had served Mabry with notice of its petition at his last-known address, that Mabry had not responded and that the time to answer the petition had expired. The motion included copies of the notice originally sent to Mabry, with a return-to-sender denotation indicating that the notice had not been claimed. The trial court granted the motion for order of forfeiture on the same day, authorizing the Pennsylvania State Police to destroy or dispose of certain of Mabry's property and declaring the currency, the Sony Playstation console and the games and DVDs forfeited to the Lycoming County District Attorney's Office. The trial court further directed that the seized currency be deposited in the Drug Investigative Fund of the District Attorney's Office.

On March 7, 2007, Mabry filed a motion to return claimant's property, seeking an order from the trial court directing the return of his property. In that motion, Mabry asserted that the trial court "did not have jurisdiction over [his] case at the time of filing forfeiture." Mabry asserted that the federal authorities had custody of him beginning on March 25, 2004, and that he never received notice of the forfeiture

proceedings. However, by order dated March 19, 2007, the trial court denied said motion without prejudice.

Mabry thereafter filed a document on April 13, 2007, entitled “Motion to File a Civil Law Suit Against the Court of Common Pleas of Lycoming County.” This document sought similar relief to the above-noted motion to return claimant property. The trial court issued an order indicating that it regarded the newly filed motion as a petition to open judgment with regard to the forfeiture judgment entered in favor of the Commonwealth. Consequently, the trial court directed the Commonwealth to file a response to the petition to open judgment and scheduled a hearing for June 12, 2007. At that hearing, Mabry testified that he had a job and that his income from that job was the source of the currency. The Commonwealth offered evidence concerning the location of the currency and the facts surrounding Mabry’s arrest.

At the end of the hearing, the trial court issued a decision from the bench. The trial court opined that the Commonwealth’s service and notice had been deficient, and that Mabry therefore had an excuse for his delay in seeking to open judgment and for his failure to respond to the Commonwealth’s forfeiture petition. The trial court also agreed with Mabry that he had a meritorious defense on the merits as to the property seized, with the exception of the currency. Accordingly, the trial court denied the petition to open judgment with regard to the currency, but granted the petition as to Mabry’s other property, including the Sony Playstation console, the video games and DVDs and other personal items that the Commonwealth had seized. On the same date, the trial court issued an order referencing the substance of this decision. The trial court directed further action on the part of the Commonwealth to determine a means to rectify the erroneous seizure of this property.

On June 25, 2007, Mabry filed a “Motion Request for a Appeal.” Pertinent to this Court’s review, Mabry asserted only the following arguments in support of his

appeal: that the seized items and currency were not the proceeds or instrumentalities of a crime prior to conviction and that the Commonwealth did not have the right or jurisdiction over the property once the Commonwealth dropped the state criminal charges and the federal authorities proceeded to prosecute Mabry under federal law. The trial court issued an order directing Mabry to submit a concise statement of matters complained of on appeal. In complying with the trial court's direction, Mabry identified several areas of alleged error, including the following: (1) that the insufficient notice of the petition for forfeiture by the District Attorney's office constituted a violation of his due process rights; (2) that the transfer of prosecution from the state to the federal authorities divested the Commonwealth of its power to seek forfeiture; and (3) that the Commonwealth failed to prove that the currency and personal items were proceeds or instrumentalities of a crime. In his opinion written in support of his order, the trial court reiterated his reasoning as expressed from the bench and in his follow-up order.

In his appeal to this Court,¹ Mabry raises two issues. First, Mabry questions whether the trial court placed an erroneous burden on him with regard to the question of whether the currency was associated with illegal drug activity. In this regard, Mabry appears to argue that, once the trial court concluded that the Commonwealth's evidence had created a rebuttable presumption of a nexus between the currency and the illegal drug activity, the trial court erred by not providing him with an opportunity to rebut the presumption with evidence as to a legal source of the money. Second, Mabry argues that the trial court erred in not opening the judgment once it determined that the Commonwealth did not provide sufficient notice to him of the forfeiture proceedings. For the reasons that follow, we disagree.

¹ "Our standard of review of a denial of a petition to open judgment is limited to determining whether the trial court abused its discretion or committed an error of law." Clayton v. City of Philadelphia, 910 A.2d 93, 97 (Pa. Cmwlth. 2006).

Mabry fails to focus his argument on the elements a party must establish in order to open a judgment. In a petition to open a default judgment, the party seeking to open said judgment must do the following: (1) file a timely motion; (2) demonstrate a reasonable excuse for failing to file a timely answer to the underlying complaint; and (3) establish a meritorious defense. See Pa. R.C.P. No. 237.3; PNC Bank, N.A. v. Unknown Heirs, 929 A.2d 219 (Pa. Super. 2007). The trial court concluded that Mabry had acted in a timely fashion under the circumstances and had offered a reasonable excuse for failing to file a timely response to the Commonwealth forfeiture Petition; hence, the only remaining issue the trial court had to resolve was whether Mabry could assert a meritorious defense to the forfeiture of the currency. Mabry's primary argument in this regard is that the trial court did not take the affirmative step of inquiring into Mabry's claim that he had a job and a 401(k) plan that, he asserts, would tend to rebut the presumption that the currency was related to the drug activity. However, the trial court never had a burden to advise Mabry before he conducted the hearing as to what evidence Mabry should present in his defense. This is simply not the role of a trial court in a hearing on a petition to open judgment.

Mabry has offered no other legal argument that would suggest that the trial court erred in concluding that he had not established a meritorious defense regarding the forfeiture of the currency. Accordingly, we affirm the decision and order of the trial court.

JOSEPH F. McCLOSKEY, Senior Judge

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ORDER

AND NOW, this 26th day of September, 2008, the order of the Court of Common Pleas of Lycoming County is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge