

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

THE REAL PROPERTY AND
IMPROVEMENTS KNOWN AS
155 WEST SEYMOUR STREET
PHILADELPHIA, PA 19144

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1066 EDA 2012

Appeal from the Order March 2, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-MD-0001793-2010

BEFORE: GANTMAN, J., ALLEN, J., and OTT, J.

MEMORANDUM BY GANTMAN, J.:

FILED MAY 14, 2013

Appellant, Donya Allen as owner, appeals from the order entered in the Philadelphia County Court of Common Pleas, granting the Commonwealth's motion for forfeiture of her real property at 155 West Seymour Street ("the Property"). We affirm.

The relevant facts and procedural history of this case are as follows. Appellant was the owner of the Property and lived there with her children. Appellant dated James Hopkins, and Mr. Hopkins would often stay at the Property. Sometime in 2009, police began a narcotics investigation of Mr. Hopkins and Derrell Slaughter after receiving tips about drug dealing at 5911 Kemble Avenue. Appellant pays a mortgage on the Kemble Avenue house,

although she does not live there. Using undercover officers and confidential informants, law enforcement made several controlled buys of Percocet from Mr. Slaughter. During one purchase, Mr. Slaughter told the undercover officer to wait while Mr. Slaughter and his supplier retrieved more Percocet. Mr. Slaughter went inside 5911 Kemble and returned with Mr. Hopkins. The men entered a silver Dodge, drove to the Property, and walked inside. Police checked the registration on the Dodge and learned the vehicle was registered in Appellant's name.

Believing the Property was a stash house for drugs, police obtained a search warrant. On December 17, 2009, police executed the warrant and uncovered crack cocaine and other drug-related items, including vials of crack cocaine in a kitchen cabinet, as well as several objects containing white residue—straws, a razor blade, and a plate. The white substance from the razor blade tested positive for cocaine. Police searched the third floor bedroom where Appellant slept and discovered packaging materials in a footrest and a digital scale covered with white residue in the closet. Approximately 30 grams of marijuana were inside a closet in a second floor bedroom. Police arrested Mr. Hopkins and Mr. Slaughter and charged them with drug offenses.

Appellant was not arrested, but the Commonwealth instituted civil forfeiture proceedings against the Property. The court held hearings, where Appellant stipulated that a nexus existed between the drug activity and the

Property. She denied, however, having any knowledge about drug activity inside her home and presented herself as an innocent owner. A police officer testified as to the location of the drugs and paraphernalia within the Property. On January 31, 2012, the court granted the Commonwealth's petition.¹ Appellant timely filed a motion for reconsideration, which the court denied on March 2, 2012. On March 19, 2012, Appellant timely filed a notice of appeal. On April 2, 2012, the court ordered Appellant to file a concise statement of errors complained on appeal pursuant to Pa.R.A.P. 1925(b). Appellant filed her statement on April 25, 2012. The court issued an opinion concluding Appellant's Rule 1925(b) statement was untimely so her issues were waived. The court alternatively addressed the merits of Appellant's claim.

Appellant raises two issues for our review:

DID APPELLANT FAIL TO FILE TIMELY A CONCISE STATEMENT OF ERRORS COMPLAINED ON APPEAL PURSUANT TO PA.R.A.P. 1925(B)?

DID THE EVIDENCE SHOW THAT APPELLANT WAS AN INNOCENT OWNER WHO DID NOT TURN A BLIND EYE?

(Appellant's Brief at 4).

¹ The Commonwealth has filed forfeiture proceedings against a separate property Appellant owned at 1640 North 27th Street. Appellant's ex-husband was using the house to sell drugs. Appellant has claimed ignorance of the drug operations connected to that residence as well.

In her first issue, Appellant argues the order instructing her to file a Rule 1925(b) statement was not properly entered on the docket until sometime after Appellant filed her concise statement. Appellant claims the absence of a docket entry made her unaware of the court's Rule 1925(b) order and effectively excused her obligation to file her statement in a timely manner. For those reasons, Appellant concludes the court erred in finding her issues waived due to an untimely Rule 1925(b) statement. We agree with Appellant's ultimate conclusion that her late Rule 1925(b) statement does not result in waiver of her issue on appeal.

The failure to file a Rule 1925(b) statement generally constitutes a waiver of all issues. ***Commonwealth v. Lord***, 553 Pa. 415, 719 A.2d 306 (1998). Our Supreme Court, however, has revised Rule 1925 and relaxed the waiver rule in certain circumstances. ***See*** Pa.R.A.P. 1925²; ***Commonwealth v. McBride***, 957 A.2d 752, 755 (Pa.Super. 2008). Under the revisions to Rule 1925(b), we can address issues presented in an untimely Rule 1925(b) statement, when the trial court has addressed those issues on the merits. ***Commonwealth v. Thompson***, 39 A.3d 335, 340 (Pa.Super. 2012).

Instantly, the record belies Appellant's claim that the court's order directing her to file a Rule 1925(b) statement was not entered on the

² Rule 1925 was amended on May 10, 2007, and again on January 13, 2009.

docket. The docket entries show the court issued its order on April 2, 2012, directing Appellant to file her concise statement within 21 days. The order was both entered on the docket and served on counsel on the same day. The statement was due on Monday, April 23, 2012. Nevertheless, waiver is inappropriate in these circumstances because Appellant filed her Rule 1925(b) statement on Wednesday, April 25, 2012, and the trial court addressed the merits of her claim. ***See id.***

In Appellant's second issue, she argues the evidence was insufficient to establish she turned a blind eye to the drug operations taking place in her home. In Appellant's view, the Commonwealth did not present enough facts showing she had any knowledge of drug activity. Appellant appears to assert the discovery of drug-related items in her kitchen cabinet and bedroom was not enough to support the court's finding that Appellant was willfully ignorant of Mr. Hopkins's drug activities. Appellant concludes she met her burden to prove her "innocent owner" defense, and the court erred when it granted the Commonwealth's forfeiture petition. We disagree.

"An appellate court's scope of review in an appeal from a forfeiture proceeding is limited to examining whether findings of fact made by the trial court are supported by substantial evidence, and whether the trial court abused its discretion or committed an error of law." ***Commonwealth v. Real Property and Improvements Commonly Known As 5444 Spruce Street, Philadelphia***, 574 Pa. 423, 427, 832 A.2d 396, 398 (2003).

Proceedings brought under the Drug Forfeiture Act are civil in nature. ***Commonwealth v. Wingat Farms***, 547 Pa. 332, 340, 690 A.2d 222, 226 (1997), *cert. denied*, 522 U.S. 831, 118 S.Ct. 98, 139 L.Ed.2d 53 (1997). The Commonwealth must establish, by a preponderance of the evidence, a nexus between the property and a violation of the Controlled Substances Act. ***Commonwealth v. Marshall***, 548 Pa. 495, 499, 698 A.2d 576, 578 (1997). If the Commonwealth establishes this nexus, the burden shifts to the claimant to disprove the Commonwealth's evidence or establish a statutory defense. 42 Pa.C.S.A. § 6802(j); ***Commonwealth v. 5900 Market Street***, 732 A.2d 659, 662 (Pa.Cmwlt. 1999). To prove the "innocent owner" defense, the claimant must show: (1) she is the lawful owner of the property; (2) she lawfully acquired the property; and (3) she was unaware of the illegal activity, did not consent to the activity, and her lack of knowledge or consent was reasonable under the circumstances. 42 Pa.C.S.A. § 6802(j). A property owner cannot turn a blind eye to illegal activity within her home and then rely on that willful blindness to disclaim any knowledge of the illegal activity. ***Commonwealth v. 648 West Mayfield Street***, 819 A.2d 1226, 1229 (Pa.Cmwlt. 2003).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Frank J. Palumbo, we conclude Appellant's claim merits no relief. The trial court opinion properly disposes of the question presented. (**See** Trial Court

Opinion, dated July 19, 2012, at 6-9) (finding: Appellant stipulated that Commonwealth established nexus between Property and illegal activity; only issue before court was whether Appellant could establish "innocent owner" defense; facts and circumstances showed Appellant willfully blind to existence of drug activity; police uncovered digital scale with white residue and packaging materials in Appellant's bedroom; additional drug materials, including vials of cocaine, were stored in kitchen cabinet; it was unreasonable for Appellant not to know about drugs and paraphernalia within her own bedroom and kitchen, and her professed ignorance of these materials was incredible). Accordingly, we affirm the order granting the Commonwealth's motion for forfeiture.

Order affirmed.

Judgment Entered.

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Prothonotary

Date: 5/14/2013

FILED

JUL 19 2012

Criminal Appeals Unit
First Judicial District of PA

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NO.: CP-51-MD-0001793-2010
	:	
v.	:	
	:	
THE REAL PROPERTY AND	:	1066 EDA 2012
IMPROVEMENTS KNOWN AS	:	
155 WEST SEYMOUR STREET	:	
PHILADELPHIA, PA 19144	:	

SUPPLEMENTAL OPINION

PALUMBO, J.

Donya Allen (hereinafter appellant) appeals this court’s decision ordering the 155 West Seymour Street (hereinafter the Property) forfeited pursuant to the Controlled Substances Forfeiture Act, 42 Pa.C.S. § 6801, *et seq.* Having received all necessary notes of testimony, the court now submits the following Supplemental Opinion, in order to comply with Pa. R.A.P. 1931. For reasons set forth herein, the decision of this court should be affirmed.

PROCEDURAL HISTORY

The Commonwealth petitioned to forfeit the Property on February 01, 2010. After numerous continuances, a hearing was held on January 31, 2012, where this court granted the Commonwealth’s petition. The appellant filed a timely motion of reconsideration on February 10, 2012 which this court denied after a hearing on March 02, 2012. On March 19, 2012, the appellant filed a timely notice of appeal. This court ordered the appellant to file a concise statement of errors complained of on appeal (hereinafter Statement) pursuant to Pa. R.A.P. 1925(b) on April 02, 2012. The filing of a Rule 1925 Statement, when ordered to do so, is a “prerequisite to appellate merits review” and is “elemental to an effective perfection of appeal.”



Commonwealth v. Burton, 973 A.2d 428 (Pa. Super. 2009), citing *Commonwealth v. Halley*, 582 Pa. 164 (2005). Thus, the Supreme Court of Pennsylvania has established a bright-line rule for Rule 1925 compliance, mandating a finding of waiver of all issues on appeal in the event of non-compliance with Rule 1925. See *Commonwealth v. Lord*, 553 Pa. 415 (1998); *Commonwealth v. Butler*, 571 Pa. 441 (2002). The appellant filed an untimely Statement on April 25, 2012 and avers the following:

1. The evidence was insufficient to sustain the verdict.
2. The verdict was against the weight of the evidence.
3. The evidence showed that the appellant was an innocent owner and did not turn a blind eye to the alleged illegal drug activity.
4. The property forfeited was not significantly related to the criminal activity.

Statement of Matters Complained of on Appeal, In Re: 155 W. Seymour Street, 04/25/12.

Although the appellant has effectively waived all issues on appeal by filing an untimely 1925(b) statement, this court, in the interest of judicial economy, will address the merits of appellant's appeal.

STATEMENT OF THE FACTS

The appellant has owned and lived in the house at 155 West Seymour Street in the city of Philadelphia (hereinafter "the Property") since 2007.¹ Notes of Testimony, September 27, 2011, p. 10. During the month of December 2009, the appellant was living in the house with her two children² and had been dating Mr. James Hopkins for about one year. *Id.* at 10, 12. The

¹ Prior to moving into the house on Seymour Street the appellant lived at 1640 N. 27th Street in Philadelphia with her ex-husband. That property, which the appellant still owns, is also subject to a forfeiture action by the Philadelphia District Attorney's Office based upon the drug dealing activity of the appellant's ex-husband. The appellant denies any knowledge of her ex-husband's drug dealing activity or the fact that he had a criminal record. Notes of Testimony, September 27, 2011, p. 19-20, 23-24.

² Daughter Jameka Allen, age 17 and son Michael Upchurch, age 16. On the day in question the appellant's niece, Janyea Allen, age seven or six, was present in the Property along with Jameka and Michael. *Id.* at 12.

appellant's bedroom was on the third floor and was shared with Mr. Hopkins when he stayed over. *Id.* at 15-16, 18. There were two bedrooms on the second floor; her daughter lived in the front bedroom and her son lived in the back bedroom. *Id.* at 15. During the timeframe in question the appellant routinely worked at the University of Pennsylvania Hospital between the hours of 7 a.m. and 3 p.m. *Id.* at 11. Mr. Hopkins was not allowed in the Property if no family member was present and Mr. Hopkins did not have keys to the Property. *Id.* at 10, 16. However, the appellant's children were permitted to allow Mr. Hopkins into the Property when they were home. *Id.* at 16. The Philadelphia Police searched the Property in December 2009 as a result of Mr. Hopkins connection to the Property.

The execution of the search and seizure warrant at the Property was the result of a narcotics investigation that began at 5911 Kemble Avenue in Philadelphia.³ Notes of Testimony, January 31, 2012, p. 17. Due to numerous complaints of narcotics sales coming from that location, Philadelphia Police Officer Myra Hawkins set up surveillance of the property with the target of the investigation being Mr. Derrell Slaughter.⁴ Probable Cause for Search and Seizure Warrants #146495, 146496 & 146497, December 16, 2009. On two occasions the police observed Mr. Slaughter engage in hand to hand narcotics sales with undercover police officers. *Id.* Also on both occasions, Mr. Slaughter got into a silver Dodge truck with PA license plate YSN9123 and was driven to the Property by a then unknown black male. *Id.* On each occasion both individuals entered the Property sometime after 5:00 p.m. *Id.* The silver truck in question was driven by James Hopkins and was owned by the appellant. Philadelphia Police Department

³ The specifics of this investigation were not elicited by police testimony because there was a stipulation by and between counsel that the search warrant for 5911 Kemble Avenue and the accompanying affidavit of Probable Cause be admitted into the record. See, Notes of Testimony, September 27, 2011, p. 2-3, 27; Notes of Testimony, January 31, 2012, p. 3-4, 21-22.

⁴ Prior to these occasions the Philadelphia Police Officers observing 5911 Kemble Avenue stopped and arrested two men seen coming out of the property. Recovered from Andrew Sanders were 35 white pills, totaling 15.13 grams, of Oxycodone. Chemistry Laboratory Report of Property Receipt #2890779. Recovered from Andrew Pottison were 2 pills of Amphetamine and 2 pills of Oxycodone. Chemistry Laboratory Report of Property Receipt #2890778.

Arrest Report of Derrell Slaughter; see also, Notes of Testimony, January 31, 2012, p. 21-22.

The appellant denies recognizing the name Derrell Slaughter. Notes of Testimony, September 27, 2011, p. 14. The appellant, however, does admit to paying the mortgage for 5911 Kemble Avenue faithfully each month.⁵ *Id.*

Believing the Property to be a storehouse for the drugs sold at Kemble Avenue, on December 17, 2009 Philadelphia Police Officer Maureen Snyder executed a search and seizure warrant at the Property.⁶ Notes of Testimony, January 31, 2012, p. 6. Inside a kitchen cabinet officers found straws, a razor blade and a plate all with white residue on them.⁷ *Id.* at 7. Also found in the same cabinet were two vials containing less than 2 grams of crack cocaine. *Id.* at 7, 12. In the appellant's third floor bedroom new and unused drug packaging were found in a storage footrest and a digital scale with white powdery residue on it was found in the closet.⁸ *Id.* at 8. Inside a closet in the middle second floor bedroom officers found a plastic bag containing two red, two blue and one yellow packet of marijuana. *Id.* The total amount of marijuana recovered from the house was less than 30 grams. *Id.* at 12. Mr. Hopkins was arrested as part of this investigation. *Id.* at 16. Police officers, however, never saw a drug sale conducted from the Property in connection with this investigation. *Id.*

⁵ Previously appellant's attorney asserted that appellant had no connection to the Kemble Avenue property. See, Notes of Testimony, September 27, 2011, p. 4-5. The appellant's testimony, however, proves otherwise. When asked by her own attorney if she had any connection with 5911 Kemble Avenue the appellant answered no. *Id.* at 14. Directly afterwards when asked by her attorney if she had a mortgage with *that* house the appellant answered yes and that she has paid the mortgage faithfully every month. *Id.* The testimony of the appellant and the progression of the questioning convinced this court that the appellant pays the mortgage for the Kemble Avenue property.

⁶ Officer Snyder identified the Property as 155 East Seymour Street on direct examination. Notes of Testimony, January 31, 2012, p. 6, line 10. However, the Officer subsequently identified the Property as being on West Seymour Street on cross-examination. *Id.* at 10, line 17-19. The property in question is 155 West Seymour Street and this court believes the officer simply misspoke on direct.

⁷ The residue on the straw and plate was not tested to determine its identity. *Id.* at 11. The razor blade was tested and it was determined that the white residue had a cocaine base. *Id.* at 12.

⁸ The residue on the scale was not tested to determine its identity. *Id.* at 13.

After learning from her niece that her home was being searched, the appellant left work and promptly returned home. Notes of Testimony, September 27, 2011, p. 11-12. The appellant denies giving Mr. Hopkins or any members of her family permission to bring drugs into the house. *Id.* at 12, 14. She also testified that she was unaware that Mr. Hopkins was selling, storing or using drugs from or within the Property. *Id.* at 12, 13. Moreover, she denies any knowledge of the existence of the drugs or paraphernalia recovered by the police that day or where the recovered items came from. *Id.* at 13, 16-19. The appellant denies going into the kitchen that often and specifically denies going into her kitchen the day before the Property was searched. *Id.* at 13. Neither the appellant nor her children were arrested in connection to the Property being searched. *Id.* at 12.

DISCUSSION

In a proceeding brought under the Drug Forfeiture Act, the Commonwealth bears the burden of establishing a nexus between the property and a violation of the Controlled Substances Act by a preponderance of the evidence. 42 Pa.C.S.A. § 6801(5)(i)(c); *Commonwealth v. Marshall*, 698 A.2d 576, 578 (1997); *Commonwealth v. \$9,311.00 U.S. Currency*, 638 A.2d 480, 482 (Pa. Cmwlth. 1994); *Commonwealth v. \$1,920.00 U.S. Currency*, 612 A.2d 614, 618 (Pa. Cmwlth. 1992).

Here, the appellant stipulated to all of the police reports and agreed that the Commonwealth had proven a nexus to the property. Notes of Testimony, September 27, 2011, p. 2-3, 6, 27; Notes of Testimony, January 31, 2012, p. 3-4, 22. In doing so, the appellant conceded that the Commonwealth had met its burden of proof and agreed to argue the available statutory defenses only. Therefore, the existence of a stipulation that the Commonwealth established a nexus between the Property and unlawful drug means that appellant's 1925(b) claims numbers

one, two and four must fail in so far as this court interprets them as legal challenges to the sufficiency of the evidence concerning the forfeiture of the Property.

Because the Commonwealth met their burden of proof concerning the nexus to the Property, the burden shifts to the appellant as property owner to establish an innocent owner defense. 42 Pa.C.S. § 6802(j); *Commonwealth v. \$6,425 seized from Esquilin*, 880 A.2d 523, 530 (2005); *\$1,920.00 USC*, 612 A.2d at 618. Accordingly, the appellant must prove that she is the owner of the Property, that she lawfully acquired the Property and, if the Property was being unlawfully used or possessed by another person, that the appellant either did not know or consent to the unlawful activity. 42 Pa. C.S.A § 6802(j); *Commonwealth v. 5900 Market Street*, 732 A.2d 659, 662 (Pa. Cmwlth. 1999).

The appellant testified that she had no knowledge that the Property was being used for selling, storing or the usage of drugs and that she does not consent to such activity.

The applicable standard is one of reasonableness; the appellant must show that her absence of knowledge or lack of consent was reasonable under the circumstances presented. 42 Pa. C.S.A § 6802(j)(3); *5900 Market St.*, 732 A.2d at 662. All the circumstances surrounding the appellant's knowledge or consent may be considered and all reasonable inferences may be drawn from the evidence presented. *Esquilin*, 880 A.2d at 532-33; *5400 Market St.*, 732 A.2d at 663. Moreover, the law does not allow a property owner to turn a blind eye "to facts which should put [the owner] on notice of illegal use." *Commonwealth v. Two Electronic Poker Game Machine*, 465 A.2d 973, 980 (1983); *Commonwealth v. Gloria Alexander*, 2010 Pa. Commw. Unpub. LEXIS 357, No. 2111 C.D. 2009 (Pa. Cmwlth. 2010) ("There was substantial evidence for the trial court to interpret [the defendant's] lack of knowledge as her turning a blind eye to it"...and that is not a defense under the Forfeiture Act); *Commonwealth v. 648 West Mayfield Street*, 819

A.2d 1226, 1229 (Pa. Cmwlth. 2003) (Statements given by the defendant “amount to the owner of a property turning a blind eye to illegal activity and can not be condoned by this court”).

Therefore, when a property owner claims they had no knowledge about the illegal activity, the court may infer knowledge when faced with a clear instance of willful blindness. Considering all the circumstances presented this court finds the appellant’s lack of knowledge unreasonable because she willfully closed her eyes to the illegal activity going on around her.

Mr. Hopkins, who was observed using the appellant’s vehicle to transport Mr. Slaughter from the drug sales to the Property, was allowed to stay in the Property, albeit only when others were present, and stayed with the appellant in her third floor bedroom. Found in the appellant’s bedroom was a digital scale covered in white residue and new and used drug packaging.

Although these items may have been concealed in a closet and a footrest, respectively, this court finds it unreasonable that the appellant would not have knowledge of their existence within her own bedroom, a room where she routinely resides. The appellant arguably is looking inside the closet everyday as she prepares for work and when she comes home in the evening.

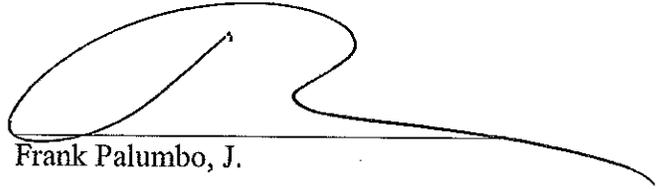
Furthermore, the appellant’s testimony is devoid of any attempt to explain how her averred lack of knowledge was reasonable in light of the evidence recovered and the location, especially the closet, in which this evidence was found. Counsel for the appellant argued that the closet may have been one that was not used often and that the footrest was a mobile object that could have been brought in that day while the appellant was at work. Notes of Testimony, January 31, 2012, p. 26. The appellant, however, was not asked about these aspects on direct examination by her attorney.

The recoveries inside the appellant's bedroom were not the only recoveries made inside the Property.⁹ The officers also found straws, a razor blade and a plate all with the same white residue on them. The razor blade was found to have a cocaine base. Also recovered were two vials which were confirmed to contain crack cocaine. These items were found in the kitchen, a common area of the house accessible to everyone including the appellant, stored inside a cabinet therein. As evidence of her lack of knowledge the appellant testified that she hardly ever goes into the kitchen and was not in the kitchen the day the house was searched. Viewed in connection with her supposed lack of knowledge of items found within her own bedroom, this court finds the appellant's testimony that she hardly uses the kitchen at all, even supposedly to get a glass out of the cabinet, unreasonable given the circumstances. The court does not find the appellant's implied assertion that she has no knowledge of items or activities going on in both her bedroom and the kitchen to be credible.

In sum, the police found a scale with white residue and drug packaging in the appellant's bedroom, a room she routinely uses, and a plate, razor blade and straws covered in white residue as well as two vials of crack cocaine in the kitchen, a room most people routinely use even when not cooking. In light of the locations where the drugs and paraphernalia were found and the fact that the appellant lived in the Property on a daily basis, this court concludes that the appellant turned a blind eye to the illegal activity going on around her in her own home. Therefore this court's decision should be affirmed.

⁹ Inside a closet in Michael Upchurch's second floor bedroom, officers found a plastic bag containing two red, two blue and one yellow packet of marijuana totaling less than 30 grams. Notes of Testimony, January 31, 2012, p. 8, 12. Given that this room was not a common room and there was not testimony one way or the other as to whether the appellant routinely went into her son's room, this court has no argument as to the appellant's knowledge of the drugs found within that room.

BY THE COURT:

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Frank Palumbo, J.

Dated: 7-19-12