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Allison M. Powell vs. Safety

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**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF SAFETY**

In the matter of:

**TENNESSEE DEPARTMENT
OF SAFETY,**

)
)
)
) **Docket No. 19.01-122860J**
)
) **Department of Safety**
) **Case No. N5807**
)
)

v.

**one Toshiba Laptop Computer #9B085256W
one iPod Touch # DX90414814N and
\$446.00 in U.S. CURRENCY
SEIZED FROM: ALLISON POWELL
SEIZURE DATE: MARCH 1, 2013
CLAIMANT: ALLISON POWELL
LIENHOLDER: N/A**

INITIAL ORDER

This matter came on to be heard on July 15, 2014 in Lawrenceburg, Tennessee before Joyce Grimes Safley, Administrative Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Safety. Ms. Karen Litwin, attorney for the Department of Safety, represented the State. Claimant was present at the hearing via telephone¹ Claimant's mother, Ms. Patti Cole, was also present at the hearing on behalf of Claimant.² The subject of this hearing was the proposed forfeiture of the above listed property (Toshiba laptop, iPod, and currency) for alleged violations of the Tennessee Drug Control Act, T.C.A. §53-11-451 and 40-33-201, et seq.

¹ Claimant is currently incarcerated and was given permission to participate in the hearing by telephone.

² Ms. Cole holds Claimant's durable power of attorney.

After consideration of the evidence offered, the arguments of counsel, and the entire record in this matter, it is **ORDERED** that the seized property be immediately **FORFEITED** to the seizing agency.

This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Detective Robert Wagonschutz, Maury County, Tennessee, Sheriff's Department (MCSD), testified on behalf of the State.
2. Detective Wagonschutz's testimony is deemed credible.
3. Detective Wagonschutz was assigned to the MCSD's Drug Task Force. Claimant was the subject of an investigation by the MCSD in the weeks preceding her arrest and the forfeiture of the above referenced property.
4. The MCSD learned that Claimant was allegedly selling methamphetamine. Thereafter, the MCSD set up "controlled drug buys" by a Confidential Informant. Immediately prior to both "drug buys" described below, the Confidential Informant was searched for money and contraband, and was found to have neither in the CI's possession. The CI was then fitted with a GPS device and an audio/video recording device that allowed Drug Task Force personnel to record the "drug deal" or "drug buy" and monitor the CI's movements to the location of the "controlled drug buy" and to A/V record the drug transaction. The CI was given marked money to make the "buys."
5. On February 22, 2013, Claimant sold ½ ounce (approximately 3 grams of methamphetamine to the CI.

6. On February 27, 2013, a Confidential Informant (CI) for the MCSD contacted Claimant and arranged to buy Methamphetamine (Crystal Meth) from Claimant. The CI purchased an “8 ball” or 3 grams of crystal methamphetamine from Claimant for \$300.00.

7. On February 28, 2013, the CI made a third purchase of methamphetamine (.5 ounces) from Claimant using the pretext that the second purchase of methamphetamine wasn’t “good quality.”

8. At the time of the CI’s “drug buys” of methamphetamine from Claimant, Claimant was on probation for a previous methamphetamine arrest and charges³.

9. Based upon the AV recordings with the CI, Detective Wagonschutz obtained a felony arrest warrant, and accompanied by other drug task force agents, went to Claimant’s residence and arrested her.

10. When Detective Wagonschutz arrived at Claimant’s residence to arrest her, Claimant flushed evidence down the toilet. A glass pipe used to smoke methamphetamine was recovered from the toilet.

11. When Detective Wagonschutz and the other drug task force agents searched Claimant’s residence pursuant to a search warrant, they found \$446.00 in U.S. Currency, with the currency consisting of “drug buy marked currency” intermingled with other currency.

12. At that time, the MCSD (the seizing agency) seized Claimant’s laptop computer, her iPod, and the \$446 in U.S. Currency as proceeds from drugs sales or items purchased with drug proceeds.

³ Petitioner had July 7, 2011 charges for possession and sales of methamphetamine.

13. Claimant filed a timely appeal of the forfeiture. Claimant does not dispute that she sold methamphetamine, as described above. Rather, Claimant asserts that she purchased the Toshiba Laptop Computer with \$498.00 of money that she had made while working as a waitress in a restaurant, rather than purchasing the laptop computer with illegal drug sale proceeds.

14. Claimant also testified that she “stayed clean” until August 2012, and purchased the computer at issue on January 4, 2012 with “Christmas money.”

15. Claimant stated that she wished for her computer to “go to her 8 year old son” or to be “donated” to an elementary school for use by children, rather than being forfeited to the seizing agency.

16. The technical record, which was made a collective exhibit at the contested case hearing, contains a letter dated June 6, 2013 from Patti Cole, Claimant’s mother. The letter states, in pertinent part:

She [claimant] has not been employed since 2012...She was living in my house by herself. She paid no rent due to not being employed.

17. Claimant made no argument that the iPod or the currency should not have been seized, or was not subject to Tennessee’s forfeiture statutes.

18. Claimant’s testimony regarding the purchase of the Toshiba laptop computer with money made from waitressing and/or Christmas money, is deemed not credible or convincing, particularly in light of Ms. Cole’s letter to the Department of Safety regarding Claimant’s proceeding in this matter as a pauper.

CONCLUSIONS OF LAW

1. The State has the burden of proving, by a preponderance of the evidence, that the seized property was subject to forfeiture because it was being used or was intended to be used to violate the Tennessee Drug Control Act, T.C.A. §39-17-401, *et seq.*, See T.C.A. §40-33-210 and T.C.A. §53-11-201(d) (2).

2. Failure to carry the burden of proof operates as a bar to any forfeiture and the property shall be immediately returned to the Claimant. T.C.A. §40-33-210(b) (1).

3. T.C.A. §39-17-417 sets forth the following criminal offense in pertinent part:

Criminal offenses and penalties.---(a) It is an offense for a defendant to knowingly:

- (1) Manufacture a controlled substance;
- (2) Deliver a controlled substance;
- (3) Sell a controlled substance; or
- (4) Possess a controlled substance with intent to manufacture, deliver or sell the controlled substance.

(c) A violation of subsection (a) with respect to:

- (1) Cocaine or methamphetamine is a Class B felony if the amount involved is point five (.5) grams or more of any substance containing cocaine or methamphetamine [...].
- (2)(A) Any other schedule II controlled substance, including cocaine or methamphetamine and, in an amount less

4. Pursuant to T. C. A. § 39-17-408, methamphetamine is a Schedule II controlled substance

5. T.C.A. §53-11-451 provides as follows:

Goods subject to forfeiture---Seizure

(a) The following are subject to forfeiture:

- (1) **All controlled substances or controlled substance analogues that have been manufactured, distributed, dispensed or acquired in**

violation of part 3 of this chapter and this part, or title 39, chapter 17, part 4;

(2) All raw materials, products and equipment of any kind that are used, or intended for use, in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance or controlled substance analogue in violation of part 3 of this chapter and this part, or title 39, chapter 17, part 4;

(3) All property that is used, or intended for use, as a container for property described in subdivision (a)(1) or (a)(2);

(4) All conveyances, including aircraft, vehicles or vessels that are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt of property described in subdivision (a)(1) or (a)(2), but:

(A) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section, unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of part 3 of this chapter and this part, or title 39, chapter 17, part 4;

(B) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without the owner's knowledge or consent;

(C) A conveyance is not subject to forfeiture for a violation of § 39-17-418(a)⁴ or (b) or § 39-17-425⁵; and

(D) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission;

(5) All books, records, and research products and materials, including formulas, microfilm, tapes and data that are used, or intended for use, in violation of part 3 of this chapter and this part, or title 39, chapter 17, part 4;

(6)(A) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance or controlled substance analogue in violation of the Tennessee Drug Control Act of 1989, compiled in part 3 of this chapter, this part and title 39, chapter 17, part 4, all proceeds traceable to the exchange, **and all**

⁴ Simple possession or casual usage.

⁵ Use or possession with the intent to a person authorized to dispense, prescribe, manufacture or possess a controlled substance is the exception contained in T.C.A. § 39-17-425.

moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act;

(B) No property shall be forfeited under subdivision (a)(6)(A), to the extent of the interest of an owner, by reason of any act or omission established by the owner to have been committed or omitted without the owner's knowledge or consent; and

(7) All drug paraphernalia as defined by [§ 39-17-402](#).

6. The State has presented a *prima facie* case for forfeiture, i.e., that the seized currency was proceeds from illegal methamphetamine sales by Claimant, and further showed, by a preponderance of the evidence, that Claimant used the profits of illegal drug sales to purchase the iPod and Laptop Computer.

7. After the state presents a *prima facie* case for forfeiture, the burden of going forward with the evidence shifts to the claimant to prove either that the vehicle/property is not subject to forfeiture or that claimant has a good faith interest in the vehicle/property and that he or she did not know or have reason to know that the property was being used to facilitate a violation of the drug laws. T.C.A. § 53-11-201(f)(1). *See also, Urquhart v. Department of Safety*, 2008 WL 2019458 (Tenn. Ct. App. 2008).

8. Claimant did not disagree that the iPod and the currency came from the proceeds from illegal drug sales. Consequently, the iPod and the currency are **FORFEITED** to the Seizing Agency (MCSD).

9. Claimant testified, unconvincingly, that she purchased the seized laptop computer with money that she had made working as a waitress and from “Christmas money.” The evidence preponderates that Claimant used drug proceeds

to purchase the seized laptop computer, particularly in light of Ms. Cole's letter to the Department of Safety (regarding Claimant's proceeding in this matter as a pauper.)

10. The evidence preponderates that all of the above styled property was purchased with illegal drug sale proceeds or was illegal drug sales proceeds.

11. Claimant requests that the seized laptop be given to school children or her son. T.C.A. §40-33-211 addresses the disposition of property from all seizures, confiscations, and sales made by the State pursuant to T.C.A. §§ 39-14-307, 53-11-451, etc. It states: "All such seizures, confiscations and sales derived from the activities of a judicial district task force shall be paid to an expendable trust fund maintained by the county mayor in a county designated by the district attorney general, and shall be used exclusively in the drug enforcement or drug education program of the district[...]."

12. Accordingly, the seized property must be forfeited to the seizing agency pursuant to T.C.A. §40-33-211. The undersigned has no discretion or authority to order other disposition of the property subject to forfeiture.

Accordingly, it is **ORDERED** that the above captioned property be immediately **FORFEITED** to seizing agency.

It is so ordered.

This Order entered and effective this _____ day of September, 2014.

Joyce Grimes Safley
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this _____ day of _____ 2014.

A handwritten signature in black ink that reads "J. Richard Collier". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

J. Richard Collier, Director
Administrative Procedures Division