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11-9-2009

Tennessee Department of Safety, Petitioner, vs.  
\$16,610.00 in U.S. Currency, Seized From: Donnie  
Worrell, Seizure Date: May 21, 2008

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

**IN THE MATTER OF:**

**Tennessee Department of Safety,  
*Petitioner***

**v.**

**\$16,610.00 in U.S. Currency  
Seized From: Donnie Worrell  
Seizure Date: May 21, 2008**

**DOCKET NO: 19.01-105283J  
DOS NO: H3802**

**INITIAL ORDER**

This matter was heard on November 9, 2009, before Ann M. Johnson, Administrative Judge, assigned by the Secretary of State to sit for the Commissioner of the Tennessee Department of Safety in Nashville, Tennessee. Mr. Sean B. Duddy, Assistant District Attorney with the Twenty-First Judicial District Drug Task Force, and Mr. Orvil Orr, staff attorney, represented the Department of Safety (State or Department). The Claimant Donnie Worrell, was represented by Mr. George H. Thompson, III, of the Nashville bar.

The subject of this hearing was the proposed forfeiture of \$16,610.00 in U.S. currency for violation of the TENNESSEE DRUG CONTROL ACT. The issue is whether the subject currency was used, or intended for use, in a drug transaction. After consideration of the entire record and the arguments of the parties, it is determined that the property at issue should be forfeited to the seizing agency. This decision is based upon the following.

## **SUMMARY OF EVIDENCE**

Four witnesses were called by the State: Shane Daugherty, with the Judicial Drug Task Force; James Whitsett, with the Judicial Drug Task Force; Paul Radwanski, Product Specialist for Smith's Detection, and the Claimant Donnie Worrell.

Five exhibits were entered into evidence during the hearing:

EXHIBIT 1 – Consent to Search Form;  
COLLECTIVE EXHIBIT 2 – Physical Evidence;  
COLLECTIVE EXHIBIT 3 – Certified Conviction Records;  
EXHIBIT 4 – Certificate of Achievement; and  
EXHIBIT 5 – ION Scan Printouts.

## **FINDINGS OF FACT**

1. On May 21, 2008, the Claimant Donnie Worrell was a passenger in a vehicle stopped for a traffic violation by Agent Shane Daugherty of the 21<sup>st</sup> Judicial District Drug Task Force. The vehicle was titled in the name of the Claimant's girl friend or common law wife, who resided in North Carolina. Mr. George Best, who did not possess a valid driver's license, was the driver of the vehicle. Upon request, the Claimant produced a Pennsylvania driver's license for Agent Daugherty.

2. According to Agent Daugherty's training and experience with drug investigations, it is common for drug traffickers to use vehicles registered to other persons rather than to themselves.

3. During questioning, the Claimant told Agent Daugherty that the two men were traveling to Arizona to pick up his mother. The Claimant stated that they planned to stay for a "couple of days," probably with the Claimant's sister.

4. Mr. George Best, the driver, was questioned separately; he stated that the men were in route to Arizona for a vacation and would stay with Mr. Best's uncle.

5. After hearing the conflicting accounts, Agent Daugherty questioned the Claimant regarding his criminal history, to which the Claimant replied that he had been arrested “in the ‘70s” for a drug violation.

6. Although the Claimant told Agent Daugherty that he had not been arrested since 1974, a check of the Claimant’s criminal history revealed that there were other arrests and convictions since that time. The Claimant pled guilty to felony possession of cocaine in 2002. COLLECTIVE EXHIBIT 3. During his testimony, the Claimant admitted he has been arrested “four or five times” for drug-related charges. He admitted that he served federal jail time for drug trafficking in 1976, and was convicted of illegal drug activity in 1980. In 2004, \$19,000.00 was seized from him by New Mexico border patrol or DEA agents. TRANSCRIPT, pp. 122-123 and 129.

7. When asked if there were any illegal drugs in the vehicle, the Claimant admitted to a small amount of marijuana stored in the center console. Also after being questioned, the Claimant stated that he was carrying about \$16,000.00 in the glove compartment.

8. When asked about his finances, the Claimant stated that over the last two years his total earnings amounted to about \$40,000 to \$50,000. He also stated that he was not employed and had no income prior to 2007.

9. The Claimant admitted that the money in his glove compartment amounted to 30% of his total income for the past two years. He also stated that he normally retains large amounts of cash, even though he has two accounts at Bank of America, including direct deposit into those accounts, and could access his funds from any of the Bank of America branches throughout the country.

10. According to Agent Daugherty, Arizona is a source area for drugs since they can be purchased at a lower price in such places as Arizona and New Mexico. For example, a pound of marijuana may sell for \$360.00 in a place like Tucson, Arizona, but will cost \$800 to \$1,000 a pound in Nashville.

11. The Claimant stated that he was employed as a truck driver, in addition to owning a recording studio in Los Angeles.

12. Agent Daugherty requested and received consent to search the vehicle.

13. The search produced a small amount of marijuana from the center console and a burlap sack from the glove compartment. The burlap sack proved to contain various amounts of U.S. currency packaged in two different ways. The first grouping consisted of five bundles bound by rubber bands. The second group contained ten stacks bound by a paperclip. According to Agent Daugherty, this type of bundling is common with funds involved in drug transactions. There was some additional loose currency. No bank or other receipt was found during the search.

14. After discovering the money, Agent Daugherty read the Claimant his Miranda rights and asked him about the source of the funds. The Claimant refused to answer the question.

15. Based upon the suspicion that the currency was used or intended for use in a drug transaction, Agency Daugherty seized the funds. After sealing the currency in an evidence bag and transporting it to the 21<sup>st</sup> Drug Task Force office, Agent Daugherty took ion scan samples of the currency to determine whether drug molecules were present on the money. During this procedure, canvas-like swabs, provided by the ion manufacturer, are rubbed randomly over the currency. After each swab was utilized, it was sealed in an evidence bag and secured for testing.

16. The currency was then submitted to a canine test by a certified canine unit, Harky. In the absence of both Agent Daugherty and Harky, three plastic tubs were placed on the ground, two of which were empty and one of which contained shredded U.S. currency. When Harky was introduced to the tubs, he did not alert to any of them. Agent Daugherty and Harky then left the area again, and the seized currency was placed inside one of the empty tubs. When Harky was reintroduced to the three tubs, he alerted to the tub containing the seized currency.

17. The ion swabs were transported to the Nashville airport DEA office to be tested by an ion scan machine; the test was conducted by certified ion scan operator TFO James Whitsett.

18. In conducting the test, Officer Whitsett first ran calibration and verifisc tests to assure that the scanner was in good working order. He then tested the swabs, both of which indicated a detection of cocaine.

19. Paul Radwanski testified as an expert witness with regard to the interpretation and analysis of ion technology. Mr. Radwanski is a product specialist for Smith Detection, the manufacturer of the ion scanner used in this instance. Mr. Radwanski has been recognized by other courts as an expert in this area, and analyzed the results of the ion scan in this case.

20. Mr. Radwanski explained the science behind the use of the ion scanner, which uses ion mobility spectrometry to measure the speed of molecules. The ion scanner first electrically charges the molecules contained on the sample swab. The electrically charged molecules are then directed down a “drift chamber” towards a neutrally charged plate called the “faraday plate.” The speed of a molecule is determined by the time period in which it travels down the drift chamber and makes contact with faraday plate. Based on the measured speed of molecules, the machine is calibrated to identify the type of molecules contained on a swab.

21. According to Mr. Radwanski, ion scanners are used in multiple countries for drug interdiction, not only in law enforcement but also in prisons and for customs border patrol. The largest user of these machines is the Transportation Security Administration (TSA), which employs the technology in airports all over the world to detect explosives. The device is also used by pharmaceutical companies for “clean validation,” or verification that the equipment is clean of chemicals and pharmaceutical compounds, insuring against contamination.

22. Mr. Radwanski evaluated the results of the ion scans submitted as evidence in this case. He noted that scan printouts show the machine was calibrated and working properly. The first two samples were scanned “blank,” thereby assuring the machine was clean of any residual drug molecules. Following the two blanks, a verifics test was conducted to verify that the system was detecting compounds appropriately; after evaluating the results of the verifics test, Mr. Radwanski concluded that the machine was working properly.

23. In analyzing the swabs of the seized currency, Mr. Radwanski stated that the scan results indicated alerts for cocaine at an amplitude level of 454 digital units for sample one; sample two alerted for cocaine at an amplitude level of 554 digital units, with an additional “cocaine high”<sup>1</sup> amplitude of 659 digital units.

24. Mr. Radwanski stated that the levels of cocaine detected on the currency at issue here was much greater than that found on currency in general circulation. Mr. Radwanski described demonstrations he has conducted across the country using general circulation currency, often from the pocket of a bystander. In these tests the cocaine concentration typically measures in the 75 to 80 digital units range, although it may read as high as 100 to 150 units. Mr. Radwanski stated that even intentional contamination probably would not result in high readings such as those found here:

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<sup>1</sup> When a sufficiently large amount of cocaine is present, the machine detects these higher concentrations.

. . . I'm not talking about just casual contamination. There's been studies that have been done, you know, you grab a hold of a hot object, something with a lot of cocaine and you shake someone's hand, see how it progresses, and that kind of contamination you wouldn't necessarily see progress beyond two or three hundred.

TRANSCRIPT, pp. 116-117.

25. Casual contamination, such as shaking hands with a person who had just used cocaine, would result in much lower readings on the ion test; there could be some transfer, but Mr. Radwanski described it as "minimal."

26. Mr. Radwanski stated that he has never seen a reading in the 600 range, signifying that the currency came into close contact with a large amount of cocaine.

#### **APPLICABLE LAW**

1. The Department of Safety, as the party seeking to seize the currency, has the burden of proof under TENN. CODE ANN. § 40-33-210 to prove by a preponderance of the evidence that the seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture:

(a) In order to forfeit any property or any person's interest in such property pursuant to § . . . 53-11-451, . . . the state shall have the burden to prove by a preponderance of evidence that:

(1) The seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture under the sections set out in this subsection (a); and

(2) The owner or co-owner of the property knew that such property was of a nature making its possession illegal or was being used in a manner making it subject to forfeiture . . .

(b)(1) Failure to carry the burden of proof shall operate as a bar to any forfeiture and the property shall be immediately returned to the claimant.

2. Safety contends that the Claimant violated TENN. CODE ANN. § 53-11-451(a)(6)(A), which subjects the following to forfeiture:

Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of the Tennessee Drug Control Act of 1989, . . . all proceeds traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act.

### **ANALYSIS and CONCLUSIONS OF LAW**

In order to carry the burden of proof, the Department must show by a preponderance of the evidence that the seizure of the disputed funds was warranted under state law. It must show that the funds were, more likely than not, exchanged or intended to be exchanged for illegal drugs. In other words, the Department must show a connection between the seized funds and a drug transaction. In presenting proof, the Department may use both direct<sup>2</sup> and circumstantial<sup>3</sup> evidence, which are considered equally relevant and equally probative.<sup>4</sup> A combination of both direct and circumstantial evidence may be used, and in some cases circumstantial evidence may be more convincing than direct evidence.<sup>5</sup>

In this case, the Department argues that the totality of the circumstances, including both direct and circumstantial evidence, indicates that the funds at issue were exchanged or intended to be exchanged in an illegal drug transaction. As support for this contention, the State points out several factors: (1) conflicting stories regarding the trip given by the Claimant and the driver; (2) the bundling of the funds in a manner typical of money in drug transactions; (3) the K9 alert on the seized money; (4) the destination of Arizona as a common source area for drugs; (5) the absence of an explanation for the origin of the large amount of cash; (6) the Claimant's personal income; and (7) the Claimant's criminal history.

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<sup>2</sup> Direct evidence is evidence which, if believed, establishes the main fact at issue without inference or presumption. *State v. Phillips*, 138 S.W.3d 224, 321 (Tenn.Ct.App.2003).

<sup>3</sup> Circumstantial evidence is evidence of collateral facts and circumstances from which the trier-of-fact may infer that the main fact at issue is based on reason and common experience. *Id.*

<sup>4</sup> *McEwen v. Tennessee Department of Safety*, 173 S.W.3d 815, 825 (Tenn.Ct.App.2005) (additional citations omitted).

<sup>5</sup> *Id.*, citing *United States v. Robinson*, 177 F.3d 643, 648 (7<sup>th</sup> Cir. 1999) (additional citations omitted).

While these factors all point to a nexus between the currency at issue and an illegal drug transaction, this connection is firmly established by the results of the ion mobility spectrometry performed on the cash. The Tennessee courts have not considered the use of this technology, but courts in other states have done so, and have found the evidence reliable and persuasive. For example, there are a number of cases from Pennsylvania, a state with forfeiture law essentially similar to that in Tennessee. In one particular case, *Commonwealth of Pennsylvania v. Three Hundred Ten Thousand Twenty Dollars (\$310,020.00) in U.S. Currency*, 894 A.2d 154 (Pa. Commw. 2006), LEXIS 121, the Commonwealth Court of Pennsylvania upheld a forfeiture of money on facts very similar to the ones at issue here, relying in large part on the results of ion mobility spectrometry. In summing up the factors supporting the forfeiture, the court made the following statement:

The totality of the evidence, *i.e.*, the huge sums of cash involved, the way the cash was bundled, the scientific evidence of recent contact between the cash and controlled substances that cannot be explained by casual contact and the inability of [the claimants] to offer a credible explanation for their possession of the cash seized, all support the existence of a nexus between the currency seized and its involvement in drug trafficking.

The United States District Court has also relied upon ion spectrometry evidence, as well as the expert testimony of Mr. Paul Radwanski. In *Munoz v. United States of America*, 2008 U.S. Dist. LEXIS 57326, the U.S. District Court for the Eastern District of New York made the following statement regarding ion scan technology and Mr. Radwanski's analysis:

. . . Radwanski's thorough description of the scientific principles underlying the operation of the device and his summary of the studies examining the ion spectrometer's accuracy establish both the reliability of the test and the scientific significance of the results.

In *United States of America v. Hernandez-de la Rosa, et al.*, 606 F. Supp. 2d 175 (U.S. Dist. 2009), LEXIS 10858, the U.S. District Court for the District of Puerto Rico relied on the accuracy of this technology, stating the following:

There is no question that the ion scan technique . . . “has been subject to, and survived, the rigors of testing, publication, and peer review, and . . . won significant (if not universal acceptance with the scientific community.”

Citing *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F3d 77 (1<sup>st</sup> Cir. 1998).

In the present case, expert testimony reveals that the currency at issue contained cocaine amounts many times greater than that found in general circulation. Furthermore, expert testimony also established that the cash had come into close physical contact with cocaine; these high cocaine readings could not have resulted from casual contact. This evidence establishes a nexus between the money seized and illegal drug activity.

The totality of the circumstances compels the conclusion that funds at issue are, more likely than not, directly related to illicit drugs: the Claimant’s refusal to provide an explanation of the source or intended use of the large amount of cash; the bundling of the money in a manner common in drug transactions; the K9 alert on the seized money; the destination of Arizona as a common source area for drugs; the Claimant’s personal income; the Claimant’s criminal history; and the cocaine levels found through ion scan technology. All the evidence, and the reasonable inferences drawn therefrom, indicate that the seized currency was, more likely than not, used in drug trafficking operations and therefore subject to forfeiture.

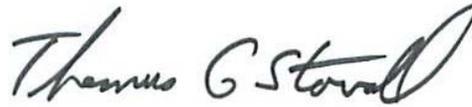
Accordingly, based upon the foregoing, it is hereby ORDERED that the \$16,610.00 seized from the Claimant Donnie Worrell is FORFEITED to the seizing agency for disposition as provided by law.

This Initial Order entered and effective this 14th day of July, 2011.

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Ann M. Johnson  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this  
14th day of July, 2011.



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Thomas G. Stovall, Director  
Administrative Procedures Division