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3-19-2009

DEPARTMENT OF SAFETY vs. \$512 in U.S.
Currency, Seized from: Camille L. Gavin, Date of
Seizure: November 5, 2008, Claimant: Camille L.
Gavin, Lienholder: N/A

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

IN THE MATTER OF:)	
)	
DEPARTMENT OF SAFETY)	
)	
v.)	Docket No. 19.01-102251J
)	Safety No. H8519
\$512 in U.S. Currency)	
Seized from: Camille L. Gavin)	
Date of Seizure: November 5, 2008)	
Claimant: Camille L. Gavin)	
Lienholder: N/A)	

INITIAL ORDER

This matter was heard on March 19, 2009, before Steve R. Darnell, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Safety. Attorney Lori Long represented the Department of Safety. Claimant was present and not represented by counsel.

The issue presented for review is whether the Oak Ridge Police Department properly seized the above reference currency from the Claimant on November 5, 2008. It is **DETERMINED** this property was improperly seized and the same should be returned to Claimant.

This conclusion is based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On November 5, 2008 Oar Ridge police officers were running stationary radar on Southern Illinois Avenue near Union Valley Road. Claimant's speed was detected as 67 mph in a 45 mph zone. She was stopped by officer Ray Steakley for speeding.

2. Claimant, who recently moved back to the area from Detroit, told Steakley that she was on her way to work and was late. She was not sure whether her employer was located in Oak Ridge or Knoxville since she was unfamiliar with the area. She has been living with friends and family members in both Knoxville and Oak Ridge. Claimant told Steakley that she resided in Oak Ridge at times and in Knoxville at times. She also gave conflicting statements about the location of her employer. Steakley believed Claimant appeared nervous.

3. Claimant did not have a valid driver's license, but did produce a Michigan identification card. Claimant was arrested and charged with speeding, being an unlicensed driver and violation of the financial responsibility law.

4. Claimant testimony was credible, and she adequately explained her confusion about the location of her work due to her lack of familiarity with the area. Further, she does reside in both Knoxville and Oak Ridge at time with different friends and family members. Her nervousness can adequately be explained by the fact that she was stopped by police and did not have a valid driver's license.

5. Based on his suspicions, officer Steakley called for a drug dog. The dog "responded" to a small purse inside the vehicle and also to an area of the back bumper of Claimant's car. The only proof in the record concerning the drug dog was that he "alerted" on the purse and bumper. The dog's handler was not present to testify as to the dog's training, abilities, reactions, or meaning of his reactions, etc. Although Steakley accepts the dog's conduct to be a result of drug detection, there is inadequate foundation in the record to draw this conclusion.

6. Claimant consented to a search of her vehicle and was cooperative with police. No drugs or paraphernalia was found in the car. Officers did find \$512, consisting of 1 \$100 bill,

1 \$50 dollar bill, 18 \$20 dollar bills, and 1 \$2 bill, in Claimant's purse. They also found a photograph of Claimant and a man holding U.S. currency, with the caption "CASH MONEY" on the photo.

7. This photograph, which was marked as exhibit 1, is a staged and likely commercially prepared photograph. Claimant is a member of a Rap music duo named "Cash Money" that performs in the Knoxville area. This photo was a promotional item prepared by the duo. It has no probative value of drug trafficking.

8. Claimant offered an adequate and credible explanation of why she was in possession of \$512 in cash. She recently moved from Detroit. Her employer requires that she maintain a bank account for payroll deposits. She previously lived in the area and had a banking account with the Y-12 Credit Union in Oak Ridge. She left the area owing Y-12 money related to the account, and because of this she has not able to open a new account with any local banks. She brings home approximately \$600 every two weeks, and this is deposited directly into a savings account in Detroit that she has maintained for years. She uses a debit card to access her money at local stores and ATM machines in the Knoxville area.

9. Her car payment is \$586 per month. There is a limit on the amount of money she can receive at one time from an ATM machine or by getting "cash back" at a store. So she accumulates money during the month by making withdrawal at stores and/or ATM machines until she has the total \$586. Then she takes the cash to Wal-Mart and purchases a "Money Gram" which is a direct payment to her car lender. This is why she was in possession of the \$512.

10. There is no proof that Claimant has a history of drug trafficking. The denomination of the currency, location of the money, and the amount of money are not unusual

and do not allow any legitimate inferences to be drawn. Claimant does have a legitimate source of income, and she has adequately and credibly explained why he had this money in her possession.

CONCLUSIONS OF LAW

1. The Department of Safety as the moving party in this case has the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in its favor. Rule 1360-4-1-.02.

2. The following are subject to forfeiture:

(1) All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4;

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

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

(4) All conveyances, including aircraft, vehicles or vessels, which 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 (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 parts 3 and 4 of this chapter 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 thereof to have been committed or omitted without such owner's knowledge or consent;

(C) A conveyance is not subject to forfeiture for a violation of § 39-17- 418(a) or (b) or § 39-17-425.

(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 which are used, or intended for use, in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4;

(6)(A) 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, as amended, compiled in parts 3 and 4 of this chapter and title 39, chapter 17, part 4, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act, compiled in parts 3 and 4 of this chapter and title 39, chapter 17, part 4;

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

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

(b) Property subject to forfeiture under parts 3 and 4 of this chapter or title 39, chapter 17, part 4, may be seized by the director of the Tennessee bureau of investigation or the director's authorized representative, agent or employee, the commissioner of safety or the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer or constable upon process issued by any circuit or criminal court having jurisdiction over the property. Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon parts 3 and 4 of this chapter or title 39, chapter 17, part 4;

(3) The director or the director's authorized representative, agent or employee, the commissioner or the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The director or the director's authorized representative, agent or employee, the commissioner or the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable has probable cause to believe that the property was used or is intended to be used in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4.

(c) In the event of seizure pursuant to subsection (b), proceedings under subsection (d) shall be instituted promptly.

(d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the director or the director's authorized representative, agent or employee, the commissioner or the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable, subject only to the orders and decrees of the circuit or criminal court. When property is seized under parts 3 and 4 of this chapter or title 39, chapter 17, part 4, the seizing authority may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the seizing authority;

(3) Require the director or the director's authorized representative, agent or employee, the commissioner or the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable to take custody of the property and remove it to an appropriate location for disposition in accordance with law; or

(4) Regardless of any other method of disposition of property contained in this chapter, use the property taken or detained, with permission of the court and under such terms and conditions as are approved by the court, for use in the drug enforcement program of the

county in which the goods are seized, and/or, with approval of the court having jurisdiction over the property, sell the property and utilize the proceeds for the drug enforcement program of the county in which the property was seized.

(A) In the case of property seized by the Tennessee bureau of investigation, the director of the bureau is authorized to designate in writing any part thereof for use by the bureau for any period of time, subject to inventory, management and disposition as provided by law.

(B) In the case of an aircraft seized by the bureau, the director is also authorized to designate in writing any such property for transfer to and use by the department of general services subject to inventory, management and disposition as provided by law. If an aircraft is not sold, but is to be transferred to another state governmental entity, such transfer shall be approved by the commissioner of finance and administration.

(C) The proceeds from any sale conducted under this chapter of forfeited property seized by the bureau and not designated for its use, or not transferred to the department of general services as provided above, shall be paid to the state treasurer to be used only as appropriated by the general assembly.

(e) When property is forfeited under parts 3 and 4 of this chapter or title 39, chapter 17, part 4, the director or the director's authorized representative, agent or employee, the commissioner of safety or the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable shall remove it for disposition in accordance with law.

(f) Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4, are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in Schedule I, which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

(g) Species of plants from which controlled substances in Schedules I, II and VI may be derived which have been planted or cultivated in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the state.

(h) The failure, upon demand by the commissioner of safety, the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that such person is the holder thereof, constitutes authority for the seizure and forfeiture of the plants.

(i) Confiscation proceedings under parts 3 and 4 of this chapter or title 39, chapter 17, part 4, shall be conducted in accordance with the provisions set forth in part 2 of this chapter.

(j) Any property of the type set forth in subdivisions (a) (1) and (7) which is in the custody and possession of a clerk of any court of this state by virtue of the property having been held as evidence or exhibits in any criminal prosecution where all appeals or potential appeals of a

judgment have ended, or when the case has been dismissed or otherwise brought to a conclusion, shall be disposed of as follows:

- (1) The clerk of the court having custody of the property to be disposed of shall, no less than once annually, inventory the same and prepare a list of the property proposed to be destroyed with references to the cases involved and the name of the case, the case number and date when such property was used;
- (2) The clerk shall submit the inventory list with a filed petition to the court and shall serve a copy of the petition upon the district attorney general. After determining that the listed property is not needed as evidence in any pending or potential judicial proceeding, the court shall order the property to be destroyed; and
- (3) The clerk, or such deputy clerk as the clerk may designate, shall completely destroy each item by cutting, crushing, burning or melting and shall file, together with the petition and order relating to the destroyed property, an affidavit concerning such destruction, showing a description of each item, the method of destruction, the date and place of destruction, and the names and addresses of all witnesses to the destruction.
T.C.A. § 53-11-451.

3. Although the admissibility of evidence is normally controlled by the Tennessee Rules of Evidence, the Administrative Procedures Act provides “when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. T.C.A. §4-5-313(1), Lettner vs. Plummer, 559 S.W.2d 785 (1977).
4. Carrying large sums of cash is strong evidence of some relationship with illegal drugs for purposes of forfeiture. U.S. v. \$67,220.00 in United States Currency, 957 F.2d 280 (6th Cir. 1992).
5. A drug trained dog’s detection of drugs on money is one element for consideration in forfeiture of potential drug money. Young vs. Department of Safety, 911 S.W.2d 729 (Tenn. Ct. App. 1995). However, this proof is only accepted as corroborative proof and must be introduced along with other evidence of drug trafficking. Fullenwider vs. Department of Safety, 1992 WL 319464 (Tenn.Ct.App. 1992).

6. In the Fullenwider case the Court of Appeals stated:

“Dog-tracking evidence is competent and admissible as corroborative evidence provided a proper preliminary foundation has been laid, and proof of acceptance by the scientific community is not required. To establish the requisite foundation, a person having personal knowledge of the facts must show that the dog is of a stock characterized by acuteness of scent and power of discrimination, and that the dog in question is possessed of these qualities; that the particular dog used was trained and tested, in the tracking of human beings and is reliable, and that the handler of the dog has expert qualifications. In addition, it must be shown that the dog was laid on the trail where the circumstances tended to show that the guilty party had been, or on a track which the circumstances indicated to have been made by him, that the trail had not become so stale or contaminated as to be beyond the dog’s tracking abilities, and that he followed such scent or track to, or toward, the location of accused. In any event, the pedigree of the dog is not indispensable to the admission of the evidence. (Citing 22A C.J.S. Criminal Law, § 755 with approval).

The above text is supported by authorities stating the rule that behavior of an animal, alone, is insufficient to support a finding of criminality, but is *corroborative*, i.e. it is admissible to support the weight of other evidence. Fullenwider at page 4.

7. Finally, in Fullenwider, a case with much stronger facts than presented here, the Court of Appeals stated:

“T.C.A. § 53-11-201(d)(2) provides: At each such hearing, the state shall have the burden of proving 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 under the provisions of this chapter, and failure to carry the burden of proof shall operate as a bar to any forfeiture hereunder.

The State did not prove by a preponderance of the evidence that the property seized was used in such a manner as to make it subject to forfeiture under the provisions of Title 53-Chapter 11, T.C.A., because there is no substantial and material evidence to establish such a preponderance.

There is no evidence in this record that the claimants have ever engaged in illegal drug traffic. Without such evidence **this Court is unwilling to impute criminal activity to claimants upon the sniff of a dog or arrangement of money or inconsistencies in statements.**” (Emphasis added) Fullenwider at page 5.

8. The Pennsylvania Supreme Court has addressed the issue of the presence of drug residue on currency in the case of Commissioner vs. Marshall, 698 A2d 576 (Penn. 1997) and stated as follows:

“The fact that the drug-sniffing dog alerted on the cash is also not dispositive of the issue. A completely innocent citizen of this Commonwealth could have in his or her possession, at any time, currency that happened to be involved in a drug transaction at some unknown time in the past. The fact that on August 10, 1993 Appellant found himself in the possession of one, or several, such bills of currency is insufficient to sustain the Commonwealth's clearly established burden to prove at the outset that the money seized has a nexus to some unlawful activity on the part of Appellant. Even when considered in conjunction with all the other facts relied upon by the trial court in this case, the residual presence of drugs on some part of the \$3,400.00 in question establishes only the possibility or the suspicion of a nexus between the money and some type of drug activity.

The trial court therefore erred in concluding that the Commonwealth had presented evidence sufficient to meet its burden....” Marshall at 500, 501.

There are a litany of similar cases where the presence of drug residue on currency has been rejected as proof of drug trafficking. See generally, American Law Reports, 116 A.L.R.5th 325 3(b).

DISCUSSION AND ANALYSIS

The Department offers the following evidence to connect the seized currency to drug trafficking: 1) Claimant was nervous and gave inconsistent statements when she was stopped. 2). The photograph admitted as exhibit 1. 3). The drug dog’s reaction at the rear bumper and towards the seized.

The photograph does not make the nexus between the seized money and drug trafficking more probable, and therefore, has no evidentiary value. Claimant’s nervousness is not inconsistent with being stopped by the police. Especially when she knew she did not have a valid driver’s license. She has adequately explained why she gave the officer inconsistent statements concerning her employment and residence. Her willingness to cooperate with police

and consent to a search of her vehicle must also be considered. These observations by the officer may have been sufficient to justify his suspicion and further inquiry, but do not prove any connection between the seized money and drug activities.

Finally, the Department relies on the actions of the drug sniffing dog. There is no proof as to the dogs training, abilities, normal reactions, typical reaction to certain drugs, etc. in the record. This lack of proof alone is enough to reject the dog's actions as probative. However, even if it is assumed he is properly trained and did detect the scent of drugs on the bumper and money, the Tennessee Court of Appeals has determined that this is only corroborative proof. In other words, it will support a finding of the nexus between drug trafficking and currency if there is other proof available, such as prior involvement in drugs, criminal conviction for drug activities, no other source of income, presence of drugs, presence of drug paraphernalia, etc.

No such proof is presented in this case. Claimant is employed, she has explained why she was in possession of the money, it was in typical denominations for the amount, it was located in her purse where one would expect to find money, etc. Standing alone the actions of the drug sniffing dog are insufficient.

When all of the proof is considered in its totality, it does not arise to substantial and material evidence that is necessary to support the forfeiture of the money. The Department has failed to carry its burden of proof.

IT IS THEREFORE ORDERED that the \$512 in U.S. currency is to be returned to Claimant.

This Initial Order entered and effective this 9th day of April, 2009.

Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 9th day of April, 2009.



Thomas G. Stovall, Director
Administrative Procedures Division